NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT)(Insolvency) No. 247 of 2021

[Arising out of Order dated 4th January, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Mumbai) in I.A. No.1339 of 2019 & I.A. No.3967 of 2019 in Company Petition (IB) No. 1792/(MB)/2017]

IN THE MATTER OF:

The Cosmos Co-op Bank Limited
Having its registered office at:
Cosmos Tower, Plot No.6,
S. No. 132/B, ICS Colony
Ganeshkhind Road, Pune – 411007
Maharashtra, India **...Appellant**

Versus

M/s Crystal Clear Veg Oil Refinery Private Ltd.
Having its registered office at:
S. No. 48/1A Taluka Nandgaon
Khaneshwar, Post Dabha,
Maharashtra – 444701 **...Respondent**

Present:

For Appellant	**:**	**Mr. Ninad Laud, Mr. Ivo D'Costa, Mr. Avinash Mathews and Mr. Swapan Pradhan, Advocates**
For Respondents	**:**	**Mr. Sandeep Bajaj, Mr. Devansh Jain, Mr. Ajay Sharma and Ms. Aakanksha Nehra, Advocates**

J U D G M E N T
(17th November, 2022)

KANTHI NARAHARI, MEMBER (TECHNICAL)

Preamble:

The Present Appeal is filed against the Order dated 4th January, 2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Mumbai) in I.A. No.1339 of 2019 & I.A. No.3967 of 2019 in Company Petition (IB) No. 1792/(MB)/2017, whereby the Adjudicating

Authority referred the matter to Reserve Bank of India to take an appropriate decision in the facts and circumstances as narrated in I.A. No. 1339 of 2019.

Brief Facts:

Appellant's Submissions:

2. Aggrieved by the aforesaid order, the Appellant preferred by the present Appeal. The Learned Counsel for the Appellant submitted that the Appellant initiated proceedings under Section 7 of the I&B Code, 2016 against the Respondent / Corporate Debtor before the Adjudicating Authority (NCLT, Mumbai). The Learned Adjudicating Authority admitted the Application vide order dated 16.04.2018 and initiated Corporate Insolvency Resolution Process (in short 'CIRP') and appointed IRP. The IRP taken over the charge on 24.04.2018 and initiated the process as contemplated under law, by preparing the list of creditors and constituted the CoC and convened the meetings of CoC from time to time.

3. The Learned Counsel submitted that the Appellant who initiated CIRP proceedings against the Respondent / Corporate Debtor is a Financial Creditor who constitutes 93.2% voting share in the CoC, decided to withdraw the CIRP proceedings against the Respondent / Corporate Debtor. Accordingly, the Appellant issued Form-A dated 03.03.2019 seeking withdrawal of application against the Corporate Debtor. The matter has been discussed in the 15th CoC held on 04.04.2019 and the IRP was requested to file an Application for withdrawal under Section 12A of the Code before the Adjudicating Authority.

4. It is submitted that as per the decision taken in the CoC, the RP filed an application being I.A. No. 1339 of 2019 before the Adjudicating Authority

seeking withdrawal of application against the Respondent / Corporate Debtor. However, the Learned Adjudicating Authority passed the impugned order without appreciating the fact that the Appellant being the Financial Creditor who constitutes 93.2% of the voting share intend to withdraw the application against the Corporate Debtor, on the ground that the Resolution plan submitted by Prospective Resolution Applicant is not viable and lower than the dues of all secured creditors. The IRP submitted its report with regard to the viability of the plan. Apart from the above the CoC in its 15th meeting taken a decision to withdraw the application filed against the Corporate Debtor under Section 7 of the I&B Code, 2016. The learned Counsel submitted that the wisdom of CoC is paramount and cannot be interfered with by the Tribunals as held by the Hon'ble Supreme Court in "***Vallal RCK Vs. Siva Industries and Holdings Ltd. reported in (2022) SCC Online SC 717***.

5. In view of the reasons as stated above the Learned Counsel prayed this Bench to allow the Appeal as prayed for.

Respondent's Submissions:

6. The Respondent represented by RP filed its Reply. Prima facie the RP expressed no objection in allowing the Appeal. However, it is submitted that the payment of fee of the IRP/RP and expenses incurred thereat may be considered.

Analysis/Appraisal

7. Heard the Learned Counsel for the respective parties, perused the pleadings and documents. It is an admitted fact that CIRP was initiated against the Corporate Debtor and the Adjudicating Authority vide its order

dated 16.04.2018 admitted the application and appointed IRP. The IRP took charge and proceeded in accordance with law, namely making public announcement regarding initiation of CIRP against the Corporate Debtor in Form-A, preparation of list of creditors, and convening the Meetings of the Committee of Creditors and calling the Expression of Interest (EoI) etc. It is seen that one of the Prospective Resolution Applicant viz. namely Paras Agarwal submitted its plan for CD. It is also on record that the RP submitted its report on the Resolution Plan submitted by M/s Paras Agarwal to the CoC wherein the RP with regard to Repayment of the Debts of Operational Creditors is concerned, it was observed as under:

> (ii) the Resolution Plan offered by RA is of Rs. 65.00 Lacs to all the Creditors is lower than dues to secure creditors.

8. From the Minutes of CoC Meeting it is evident that the Resolution Applicant was invited in the 14th CoC Meeting held on 19.03.2019, however, no decision taken by the CoC members with regard to approval of Resolution Plan. However, the Appellant being Applicant who initiated CIRP Proceedings against the Corporate Debtor submitted the withdrawal application in Form FA dated 03.03.2019 seeking withdrawal of application against the Corporate Debtor. In the 14th CoC Meeting itself the withdrawal of application was discussed.

9. Whilst, in the 15th CoC Meeting held on 04.04.2019 after deliberations with the Members, a decision was taken to withdraw the CIRP Proceedings against the Corporate Debtor. It is an admitted fact that the Appellant has the requisite voting share for withdrawal of application against the Corporate Debtor as contemplated under law. As per the decision of the CoC, the

Respondent / RP filed the Application before the Adjudicating Authority seeking withdrawal of CIRP Proceeding against the Corporate Debtor. This Tribunal is of the view that the impugned order passed by the Adjudicating Authority is a cryptic order without assigning any reasons. So far as law is concerned Section 12A of the I&B Code, 2016 empowers withdrawal of Application admitted under Section 7, 9 or 10, which reads as under:

> *"The Adjudicating Authority may allow the withdrawal of Application admitted under Section 7 or Section 9 or Section 10, on an Application made by the Applicant with the approval of 90% voting share of the Committee of Creditors, in such manner as may be specified."*

10. The said provision has been inserted by Act 26 of 2018 w.e.f. 06.06.2018. In this regard, the Regulation 30A of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, is relevant. Sub-regulation (1) of Regulation 30A states as under:

> "An application for withdrawal under Section 12-A may be made to the Adjudicating Authority
>
> (a) before the Constitution of the Committee, by the Applicant through the Interim Resolution Professional,
>
> (b) after Constitution of the Committee, by the Applicant though the Interim Resolution Professional or the Resolution Professional, as the case may be
>
> Provided that where the application is made under Clause (b) after the issue of invitation for Expression of Interest under Regulation 36-A, the

applicant shall state the reasons justifying withdrawal after issue of such invitation.

11. From the above provisions of law, the law permits the Applicant through IRP/RP to file an Application under Form-FA seeking withdrawal of proceedings initiated against the Corporate Debtor either under Section 7, 9 or 10 of the I&B Code, 2016. In the present case, the Sub-regulation (1)(b) of Regulation 30-A is applicable, since the Adjudicating Authority admitted the Application under Section 7 and initiated CIRP and the IRP constituted the Committee of Creditors. Once the CIRP proceedings initiated and the Committee of Creditors constituted, the Adjudicating Authority under Section 12-A of the Code, may allow withdrawal of application made by the Applicant i.e. IRP/RP where the Committee of Creditors approves with 90% voting share. In the present case, the CoC in its 15th Meeting approved withdrawal of application against the Corporate Debtor by more than 93% voting share and issued Form-FA which is a statutory requirement.

12. The Respondent in its application filed before the Adjudicating Authority detailed out the sequence of events and the Resolutions passed in the crucial CoC Meetings. However, the Adjudicating Authority failed to consider the Application on its merit and passed the following order:

> *"In IA-1339/2019- The Ld. PCS submitted that the present application is filed seeking Withdrawal of the Petition. The Bench is not satisfied with the Reply. It appears that a single money from the amount of Rupees Thirteen Cores has ben paid by the Corporate Debtor. This is an Application filed under section 12-A of the I&B Code. The Cosmos Co-operative Bank Limited is having 93% voting percentage in the Committee of*

Creditors. Since the submission of the Financial Creditor is not convincing nor satisfactory this Bench has decided to refer the matter to the RBI who can take appropriate decision on proper action to be taken in the present matter. In view of the above in the facts and circumstances narrated in the Application this I.A. 1339/2019 is dealt with."

13. The Hon'ble Supreme Court in ***Vallal RCK Vs. Siva Industries and Holdings Ltd. reported in (2022) SCC Online SC 717,*** while dealing with Section 12-A of the Code held at para 17, 18, 21 and 24 held as under:

"17. It is further to be noted that after Section 12A of the IBC was brought in the statute book, Regulation 30A of the 2016 Regulations came to be inserted vide notification dated 3rd July 2018. The same came to be substituted vide notification dated 25th July 2019. Regulation 30A of the 2016 Regulations reads thus:

*"**30-A. Withdrawal of application**.—(1) An application for withdrawal under Section 12A may be made to the Adjudicating Authority—*

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under Regulation 36-A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee—

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of Regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or

(b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of Regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing

which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code."

18. A perusal of the said Regulation would reveal that where an application for withdrawal under Section 12A of the IBC is made after the constitution of the Committee, the same has to be made through the interim resolution professional or the resolution professional, as the case may be. The application has to be made in Form-FA. It further provides that when an application is made after the issue of invitation for expression of interest under Regulation 36A, the applicant is required to state the reasons justifying withdrawal of the same. The RP is required to place such an application for consideration before the Committee. Only after such an application is approved by the Committee with 90% voting share, the RP shall submit the same along with the approval of the Committee to the adjudicating authority. It could thus be seen that a detailed procedure is prescribed under Regulation 30A of the 2016 Regulations as well.

21. This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. A reference in this respect could be made to the judgments of this Court in the cases of K. Sashidhar v. Indian Overseas Bank and Others, Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Others, Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others, *Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another5, and Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others.*

24. When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP, in our view, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules."

14. In view of the judgment of the Hon'ble Supreme Court on the law and the reasons as stated above, this Tribunal is of the view that the order passed by the Adjudicating Authority is a non-speaking and without assigning any reasons is per se illegal. Accordingly, the order passed by the Adjudicating Authority in I.A. No.1339 of 2019 & I.A. No.3967 of 2019 in Company Petition (IB) No. 1792/(MB)/2017 dated 04.01.2021 is set aside and the matter is remitted back with the following directions:

(i) The Adjudicating Authority is directed to reconsider the Application on its merit and pass a reasoned order in accordance with law within a period of 45 days from receipt of copy of this order.

(ii) The period spent before this Tribunal from the date of filing of this Appeal and till this date is excluded for the purpose of CIRP.

15. With the above directions the Appeal is disposed of. However, no order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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