NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) 295(ND)/2019
IA/4639/2020
IA/5317/2020

IA/4639/2020

IN THE MATTER OF:

PVM INNVENSYS PRIVATE LIMITED ...**OPERATIONAL CREDITOR**

VERSUS

C-TEL INFOSYSTEMSPRIVATE LIMITED ...**CORPORATE DEBTOR**

AND IN THE MATTER OF:-
SHYAM ARORA
INTERIM RESOLUTION PROFESSIONAL
OF THE CORPORATE DEBTOR
96, ARAVALI APARTMENT, ALAKNANDA,
NEWDELHI-110019

...**APPLICANT/ INTERIM RESOLUTION PROFESSIONAL**

VERSUS

1. **STATE BANK OF INDIA**
   HITECH CITY BRANCH,
   QUADRANT -1, FIRST FLOOR, CYBER TOWER,
   MADHAPUR. HYDRABAD-500081

2. **MR. K. SRINIVAS KRISHNA**
   SUSPENDED DIRECTOR
   M/S C-TEL INFOSYSTEMS (P) LTD.
   DSM361-362, DLF TOWER, SHIVAJI MARG
   NEW DELHI-1 10015 ...**NON APPLICANTS**

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3. **PVM INNVENSYS PRIVATE LIMITE**
   Plot No. C-5, Road No.-2 Vikrampuri Colony
   Kakaguda, Secunderabad
   Hyderabad – 500001 **---NON APPLICANTS**

SECTION: U/S 12A of IBC, 2016

Order delivered on: 18.02.2021

CORAM:
MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)
MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant: CS Aishwarya Mohan Gahrana and Adv. Nagraj Kumar
For the Respondent: Mr. Rakesh Kumar, Ms. Preeti Kashyap Adv. Mr. Joydip Bhattacharya IRP.

ORDER

Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)

1. By filing IA/5317/2020, the IRP has filed the response in respect of the objections raised by the Operational Creditor in application i.e. IA/4639/2020, therefore, we would like to dispose of both these IAs by this common order.
2. The present application is filed by the Interim Resolution Professional Mr. Shyam Arora under Section 12A of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") read

with Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

3. The facts mentioned in the application in short are as under:

i. That vide order dated 23.01.2020 this Adjudicating Authority has initiated CIRP against the Corporate Debtor and the applicant Shyam Arora was appointed as the Interim Resolution Professional ("IRP").

ii. Further, against the aforesaid order an appeal was filed by Mr. K. Srinivas Krishna (Suspended Director) before the Hon'ble NCLAT under Company Appeal No. 205 of 2020.

iii. That on 03.02.2020 the Hon'ble NCLAT granted an interim stay on the constitution of CoC and advised the Appellant and Operational Creditor to settle the matter.

iv. That the Hon'ble NCLAT in that appeal on 25.09.2020passed an order and in Para No. 20 of the order stated that it is not found and tenable the claim of Rs. 50,32,028/- filed by the Operational Creditor in terms of Section 8 and 9 of the Code. In addition, in para 23 of the said order an amount of Rs. 3,67,200/- has been paid by the Operational Creditor which settles the claim amount of the Operational Creditor fully and there are no dues to the Operational Creditor, therefore, disposing of the appeal and also the claim of the Operational Creditor and the interim stay passed by the Hon'ble NCLAT was vacated and the IRP was directed to take further action with regard to CIRP.

v. That in pursuance to the NCLAT order, CoC was constituted by the IRP on 05.10.2020 with the sole claim of a Financial Creditor namely State Bank of India for Rs. 12,66,000/- and the report of Constitution of CoC in accordance with Regulation 17 was filed with this Adjudicating Authority on 05.10.2020,

vi. That the First meeting of Committee of Creditors was called on 07.10.2020 through Video Conferencing.

vii. That as per Item No. 9.1 of the Agenda of the First CoC the Suspended Director of the Corporate Debtor sought approval for settlement of the claim amount of State Bank of India, Hitech City Branch, wherein the Loan taken for financing of Motor Vehicles was fully paid by the Suspended Director. The matter for clearing of Loan amount and closure of Loan Account was put to vote and passed by 100 % voting share in favour of the matter.

viii. That in Item No. 9.2 of the Agenda of the COC, the matter of approval of withdrawal of the case under Section 12A of IBC 2016 read with Regulation 30 A of the IBBI (IRCPC) Regulations 2016 was discussed and it was stated in the CoC that as the claim amount of Operational Creditor has already been settled and the claim of sole creditor member of the CoC was also cleared, therefore, the matter was put to vote and it was approved by 100 % vote and the IRP was authorised to do necessary acts in this regard.

ix. That as per the facts and circumstances as shown above there are no dues remaining to be paid by the Corporate Debtor and no other claim is also left. Further as per the Resolution passed by the CoC in its first meeting, the present application is filed to withdraw the Company Petition (IB) 295/ND/2019.

4. The Applicant has filed its response for the objections raised by the Operational Creditor in application 4639/2020 filed by IRP for withdrawal of CIRP under Section 12 A of the Code and asserted the following: -

i. That the IRP submits that the Operational Creditor has taken following objections against the present application filed by the IRP under Section 12A read with Regulation 30 A of the Code: -

A. The IRP has not considered the claim of the Operational Creditor's claim in entirety.

B. The present application has been filed in contravention of the Section 12 A read with Regulation 30A of the IBC 2016.

C. The Form FA has been filed wrongly by the IRP.

D. The IRP has not taken into consideration the claim of the Axis Bank while constituting the COC

ii. That the IRP submits the response to the aforesaid objections in the following manner:

A. That as far as the claim of the Operational Creditor is concerned, the Operational Creditor had two claims. One is of Rs. 50,32,028/- and the other for Rs. 3,67,200/-. the Adjudicating Authority vide order dated 23.01.2020 while allowing CIRP order of the Corporate Debtor vide para 31 and para 37 had accepted only one claim of the Operational Creditor for Rs. 3,67,200 and directed that the other claim to be examined by the IRP vide para 33. The IRP had examined the claim and found the claim not to be in order.

Further, that in the appeal before the Hon'ble NCLAT, the said issue was discussed and in para 20 observed that the Operational Creditor's claim of Rs.50,32,028/-is not maintainable under Section 8 and Section 9 of the Code. As per the information of the IRP the said order of Hon'ble NCLAT has not been challenged by the Operational Creditor. It is submitted that the Operational Creditor has no interest in the CIRP process, the contention of the Operational Creditor is devoid of any merit.

B. That the present application has been filed by the IRP in the interest of Corporate Debtor to run it as a going concern in terms of concluding part of para 23 of the order dated 25.09.2020 passed by Hon'ble NCLAT in the Company Appeal No. 295/2020 which is reproduced herein below:

"We also hope that the stakeholders as well as the IRP and COC shall keep in mind that IBC is a beneficial legislation which is not meant to put going concern/entities in resolution for small acts of commission or omission which can be rectified"

C. That, the IRP further submits that the form FA has been filed for the purpose of the withdrawal of CIRP process. As per the format, the FA form should be signed by the applicant, the IRP had sent the email dated 17.10.2020 to Operational Creditor for his signing the Form FA. But No response was received by the RP for the said mail dated 17.10.2020, even verbal telecommunication had also taken place between IRP and Operational Creditor on that issue on 18.10.2020. The Operational Creditor, since had grievances with respect to his claim, would never sign the Form FA. In the interest of running Corporate Debtor as a going concern, in terms of the direction given by the Hon'ble NCLAT, IRP has filed the Form FA having been consented by the COC.

D. That with respect to the objections of the non- inclusion of the Axis Bank in the COC, it is submitted that the Axis Bank has filed its claim with the IRP on 23.09.2020 .the said claim form was defective, which was communicated to Axis Bank vide mail dated 01.10.2020 by the IRP.

   The COC was constituted on 05.10.2020 by that time the response of the Axis Bank was not received. The Axis Bank was informed about the constitution of COC.

The suspended Board of the Corporate Debtor informed that the claim of the Axis Bank was against the Fixed Deposit maintained with the Axis Bank. The status of the claim of the Axis Bank was duly referred by the IRP in the first COC held on 07.10.2020 wherein the withdrawal of the present application was considered by the COC.

5. That the Respondent No. 2 (Suspended Director of the Corporate Debtor) has filed written submissions and asserted the following:

   i. That the following observations/ objections has been raised to the present Application by the Operational Creditor:

      a) That the present application could not be filed by RP through Form-FA as it could be only filed by OC.

      b) The constitution of CoC was not correct.

      c) The determination of the claim of OC was still pending.

   ii. That it was submitted that though the Form of the FA requires the submission through applicant, but due to peculiar facts and circumstances in this case, the RP has rightly moved the Form-FA. The Applicant/ Operational Creditor will never sign the Form-FA as he is continuing having grievances of non-payment against the Corporate Debtor.

   iii. That it has been contended that the Section 12-A of the Code and Regulation 30-A of the CIRP Regulation may be considered with the purposive interpretation, due to the peculiar facts and circumstances of the present matter for the following reasons:

      a) There were two claims of Operational Creditor. One claim of Rs. 3,67,200/- and the other claim of Rs. 50,32,028/-. On the basis of first claim of Rs. 3,67,200/- CIRP order dated 23.01.2020 was passed. With respect to the other claim of Rs. 50,32,028/- the Hon'ble NCLAT in para 20 of the order has already observed that the second claim of the Operational Creditor of Rs. 50,32,028/- may not qualify under Section 8 and 9 of the Code.

      b) The Operational Creditor cannot be part of the CoC. There was only one financial creditor in the CoC namely State Bank of India. The CoC with 100% majority approved the withdrawal.

      c) The NCLAT in para 23 has also observed that CoC while considering everything will take note of the Corporate Debtor as a going concern.

iv. **At the early stages of the Code, when the settlement was taken place after the admission between Operational Creditor and Corporate Debtor, there was no power vested with the NCLT to take on record such settlement. It is the Hon'ble Supreme Court under Article 142 of the Constitution of India were allowing the settlement between the Operational Creditor and Corporate Debtor by passing appropriate orders (*Mother Pride Dairy India Pvt. Ltd Vs. Portrait Advertisement and Marketing Pvt. Ltd. - Civil Appeal No. 9286 of 2017*).**

v. Later on, under Rule 11 of the NCLT Rules, 2016, the NCLT and Hon'ble NCLAT had started recorded the settlement between the parties. However, in the matter of ***Lokhanwala Kataria Construction (P) Ltd. Vs. Nisus Finance and Investment Manager LLP***, the Hon'ble Supreme Court had observed that Rule 11 cannot be accepted for such settlement. Thereafter, the amendment came in Regulation as 30A, whereby the withdrawal could take place before the constitution of CoC.

vi. That the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. Vs. Union of India*** had observed that the NCLT can record the settlement after passing CIRP order before constitution of CoC.

vii. Thereafter, the circumstances had arisen, whereby the settlement had started taking place after constitution of CoC and after even passing of the resolution plan. **The Supreme Court in the matter of *Brilliant Alloys Pvt. Ltd. Vs. Mr. S. Rajagopal* had observed that Regulation 30A is not mandatory. The settlement could take place even after receiving of the resolution plan. Thereafter, again the amendment came in Regulation 30A which provides that the CIRP process can be withdrawn even after constitution of CoC.**

viii. That even the NCLT Mumbai Bench in the matter of SDM Paper Mills Ltd. had observed that the settlement can even take place after passing of the Resolution Plan. The Hon'ble NCLAT in the matter of ***Shweta Vishwanath Shriki & Ors. Vs. the Committee of Creditors Company Appeal (AT) (Insolvency No. 601 of 2019)*** **even after the liquidation the CIRP order can be set aside on the basis of settlement.**

ix. That in view of the above, the petition with respect to the Section 12A read with Regulation 30A of IBBI(Insolvency Resolution Process For Corporate Persons)this petition may be considered under the peculiar facts and circumstances of the matter.

x. That with respect to constitution of CoC, the Operational Creditor is unnecessary raising the point of Axis Bank. The Corporate Debtor has a FD of Rs. 11,66,87,311/- with the Axis Bank against which there is a SBB Overdraft limit of 7.30 Cr. and Axis Bank guarantees of Rs. 3, 36, 53, 114. The Axis Bank had raised the claim for Rs. 4.47 crores towards overdraft limit & Rs. 3.36 crores towards Bank Guarantees.

6. We have heard the ld. Counsels for the applicant, Operational Creditor and Suspended Board of Director.

7. Ld. Counsel for the applicant/IRP submitted that in pursuant of the order passed by the Hon'ble NCLAT in Company Appeal No. 205 of 2020, the CoC considered the withdrawal application and by 100% voting resolved to file an application for withdrawal under Section 12A of the IBC, 2016. He further submitted that in pursuant of that resolution, which is at page 76 of the paper book as Item No. 9.2 approved the resolution for the withdrawal of the case pending before the NCLT. He further submitted that and in pursuant of that Resolution the present application is filed.

8. He further submitted that so far the objection raised by the Operational Creditor is concerned, the claim of the Operational Creditor in respect of Rs. 367200/- has been accepted but so far the claim of the Operational Creditor in respect of Rs. 5032028/- is concerned that claim is not accepted. He further submitted that since the Hon'ble NCLAT in para 23 of the judgment observed that IRP should protect the interest of the Corporate Debtor to run it as a going concern therefore,

the CoC consider the same and approved the withdrawal after the matter was settled by the Sole Financial Creditor.

9. He further submitted that signature on Form FA is a procedural aspect and the **Operational Creditor was requested by the applicant to sign the Form FA but he refused** to sign the same, therefore, the said Form FA is signed by the RP.

10. He further submitted that so far the objection regarding the non-inclusion of the Axis Bank in the CoC is concerned, since, the Axis Bank has filed its claim with the IRP on 23.09.2020, whereas the CoC was constituted prior to that and the claim form of the Axis Bank was also defective, therefore, they had not added as a member of the CoC.

11. He further submitted that Suspended Board of Corporate Debtor has also informed us that the claim of the Axis Bank was against the Fixed Deposit maintained with the Axis Bank.He further submitted that the status of the claim of the Axis Bank was duly referred by the IRP in the first CoC held on 07.10.2020 wherein the withdrawal of the present application was considered by the CoC. He further submitted that under such circumstances the IRP may permitted to withdraw the present application.

12. The contention of the IRP has also been supported by the Corporate Debtor/Suspended Board of Directors, who filed their written submissions and same has been referred in the aforementioned paras.

13. Ld. Counsel for the Suspended Board of Directors submitted that Regulation 30A is not mandatory, therefore, even if the Form FA is not signed by the applicant and after the approval of the CoC the IRP filed an application for withdrawal then the Adjudicating Authority may accept the application filed by the IRP.

14. On the other hand, Ld. Counsel for the Operational Creditor submitted that the appeal filed by the Corporate Debtor is dismissed because the Hon'ble NCLAT in para 25 of the Judgment held that there is no infirmity in the order of the Adjudicating Authority and also vacate the stay order and he further submitted that the IRP was directed to take further action with regard to the CIRP.

15. He further submitted that there is no specific direction in the order by which the IRP claimed that Hon'ble NCLAT directed the IRP and the CoC to withdraw the CIRP even the claim has not been satisfied and he further submitted that the claim of the Axis Bank has not been considered and it has also admitted by the IRP.

16. He further submitted that since his claim has not been accepted, therefore, he has not given his consent to file the withdrawal application. He further submitted that only the applicant shall file Form FA and application for withdrawal under Section 12A and the IRP is not empowered to sign an withdrawal application without the consent of the applicant.

17. Now, in the light of the submissions raised on behalf of the parties, now we consider the maintainability of the application filed by the IRP, it is admitted fact that the Operational Creditor had filed an application for initiation of the CIRP against the Corporate Debtor and on his application, the CIRP was initiated and subsequently, the CoC was constituted in which State Bank of India being the sole financial creditor is the sole member of the CoC and it is also admitted that the State Bank of India has approved the withdrawal by 100% voting.

18. Before considering the merits of the submissions, we would like to refer Section 12A and Regulation 30A and the same are quoted below: -

Section 12A: Withdrawal of application admitted under section 7, 9 or 10.

12A. 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 ninety per cent. voting share of the committee of creditors, in such manner as may be prescribed.]

Regulation 30A IBBI (Corporate Insolvency Resolution) Regulations 2016. 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 36A, 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 subregulation (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. ".

19. Mere plain reading of Section 12A shows that the Adjudicating Authority may allow the withdrawal application admitted under Section 7, 9 or 10 on an application made by the applicant with the approval of the 90% of the voting share of the CoC. Therefore, to file an application under Section 12A, the applicant is required to establish two elements i.e. first, the application must be filed by the applicant on whose prayer application under Section 7, 9 or 10 is admitted and secondly, it must be approved by 90% voting share of the CoC but herein the case in hand, it is admitted fact that the CoC which constitute the sole member of SBI by 100% voting approved the withdrawal. But so far the first element is concerned i.e. the application must be filed by the person on whose prayer application is admitted under Section 7, 9 or 10 is not established by the IRP/applicant of this present application and it is admitted fact that the present application has been filed by the IRP and not by the applicant.

20. At this juncture, we would also like to refer Regulation 30A of the IBBI(Corporate Insolvency Resolution) Regulations 2016 under which the IRP claimed that the present application has been filed and this Regulation says that an application for withdrawal under section 12A may be made to the Adjudicating Authority before the constitution of the committee, by the applicant through the interim resolution professional and after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be and the proviso says that if the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation and Regulation 30A Sub Regulation 2 says that application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33 and the Form FA shows that it is the applicant who file an application shall filled

up this application mentioning the particulars of the application, case number etc.

21. At this juncture, we would like to refer the arguments advanced on behalf of the Suspended Board of Directors, who in course of his arguments submitted that the Regulation 30A is not mandatory. Even if we accept the submission raised on behalf of Ld. Counsel for the Suspended Board of Directors then we are of the considered in view of Section 12A the application must be filed by the applicant whose application is admitted u/s 7or 9 or 10 IBC and nowhere either in the IBC or the in the Regulations, it is mentioned that any person other than applicant, whose application is admitted is empowered to file an application. Of course, under the Regulations it is mentioned that the application must be filed through the IRP or the RP the case may be but it never says that the application will be filed at the instance of the Corporate Debtor or the member of the CoC if it is not duly signed or filled by the applicant, therefore, we are unable to accept the contention of the IRP that in view of the directions given by the Hon'ble NCLAT, the IRP has filed the application.

22. At this juncture, we have again gone through the decision of the Hon'ble NCLAT in Civil Appeal No. (IB) 205 of 2020 and we notice that the paragraph which the IRP has referred, no where any direction was given by the Hon'ble NCLAT to the IRP or the CoC to consider the withdrawal of the CIRP rather there is specific direction given to the IRP, in the concluding portion of the order, to take further action with regard to the CIRP. In our considered view it does not mean that any direction was given to the IRP to withdraw the CIRP unless an application is filed by the applicant.

23. For the reasons discussed above, in our considered view since the application is not filed by the applicant, on whose application CIRP is initiated therefore, the present application filed by the IRP even after the approval by the CoC by 100% voting, is not maintainable and liable to be dismissed.

24. ***Accordingly, we find no merit in the application. Hence, we hereby reject the prayer of the IRP to allow him for the withdrawal of Company Petition No. 295/2019 titled as PVM INNVENSYS PRIVATE LIMITED VERSUS C-TEL INFOSYSTEMSPRIVATE LIMITED, and the present applications stands dismissed.***

Sd/-

K. K. VOHRA

Member (T)

Sd/- 02.2021

ABNI RANJAN KUMAR SINHA

Member (J)