



**THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT III**

New IA-4704/2022
In
Company Petition No. IB-3370(ND)/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of:

Norvic Shipping North America Inc ...Applicant/Petitioner

Versus

Sharda Ma Enterprises Pvt Ltd. ...Corporate Debtor

And

In the matter of:

Narendra Jindal ...Applicant/Petitioner

Versus

HDFC Bank Ltd. ...Corporate Debtor

Judgment delivered on: 15.03.2023

Coram:

SHRI BACHU VENKAT BALARAM DAS
Hon'ble MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI
HON'BLE MEMBER (TECHNICAL)

For the Applicant : K.K.R. Das, Advocate

For the Respondent : Mr. Harshit Khare, Advocate for SBI, Mr.
Anand Singh Sengar, Advocate



ORDER

Per: BACHU VENKAT BALARAM DAS, MEMBER (J)

1. This application has been filed by one Mr. Narender Jindal, Promoter and Member of the Suspended Board of Directors of the Corporate Debtor, seeking a direction to the HDFC Bank, a Member of the Committee of Creditors to convey their approval to Form- FA to the Resolution Professional.

2. The Applicant has submitted that Company Petition No. IB-3370/ND/2019 under Section 9 of IBC, 2016 was filed by M/s. Norvic Shipping North America Inc (Operational Creditor) seeking initiation of CIRP against M/s. Sharda Ma Enterprises Pvt Ltd. (Corporate Debtor). The said petition was admitted by this Tribunal vide order dated 08.04.2022 and CIRP was initiated. On 30.04.2022, the interim resolution professional constituted the Committee of Creditors with three Financial Creditors of the Corporate Debtor as its members. The names of the Financial Creditor and their voting share are indicated in the following table: -

Sr. No.	Name of Financial Creditor	Voting Share %age
1.	State Bank of India	56.83 %
2.	ICICI Bank	23.23%
3	HDFC Bank	19.94%

3. The Applicant has submitted that after initiation of CIRP vide order dated 08.04.2022, the promoters and managing director of the Suspended Board of Directors of the Corporate Debtor entered into a settlement with the Operational Creditor on 18.05.2022. Consequent,



upon the said settlement, the Operational Creditor completed Form-FA and forwarded the same to the Resolution Professional on 20.05.2022 for withdrawal of the CIRP against the Corporate Debtor. On 27.05.2022, this Tribunal passed an interim order directing the Resolution Professional not to publish Form-G inviting Expression of Interest (EoI) till the next date of hearing.

4. In the third meeting of CoC held on 23.06.2022, the Resolution for approval of the Committee of Creditors for withdrawal of the CIRP proceedings in accordance with Section 12A of IBC, 2016 and read with Regulation 30A of CIRP Regulations, 2016 was placed before the Committee of Creditors by the Resolution Professional for voting. The State Bank of India and ICICI Bank jointly constituting 80.06% voting share voted in favour of the Resolution whereas HDFC did not participate in the voting stating that the matter is pending approval by their Competent Authority. Thus, the Resolution for withdrawal of the CIRP proceedings which requires 90% voting for approval was not passed in the meeting of CoC held on 23.06.2022.

5. In the fourth meeting of CoC held on 18.08.2022 for approval of Form-FA for withdrawal of the CIRP proceedings, the representative of HDFC Bank sought ten days time for getting the decision from their Competent Authority. The relevant portion of the fourth meeting of Committee of Creditor is reproduced below: -

QUOTE

“The said agenda item was taken up for detailed discussion amongst the CoC members. Representative of HDFC Bank Limited, Shri Anirudh Ji informed the CoC members for requirement of another 10



days for getting final decision from their decision making authority with regard to approval of the Settlement Application.

All the CoC members requested Shri Anirudh Ji, to take the matter on utmost priority, since time being the essence in the CIRP process.”

6. It is submitted by the Applicant that the Corporate Debtor was negotiating with the Financial Creditors of the Company consisting of the consortium of three lenders with the State Bank of India as the lead Bank and ICICI and HDFC Bank along with other lenders and several meetings of joint lenders were held wherein settlement proposal was arrived at. The State Bank of India being the lead Bank of the consortium, vide letter No. SAMB-II/CL-IV/SKR/378 dated 06.06.2022, approved the revised proposal & revised payment schedule offered by the Corporate Debtor to pay Rs.22 crores towards the dues of the Corporate Debtor to the consortium banks comprising SBI as the lead Bank, ICICI Bank and HDFC Bank.

7.It is stated that the State Bank of India, being the lead Bank issued Compromise Acceptance Letter dated 06.06.2022 which was also accepted by the borrower/directors/guarantors of the Corporate Debtor and was submitted to the lead Bank-SBI.

8.Pursuant to the acceptance of the Compromise Settlement,an amount of Rs.,2,20,00,000/- being 10% of the settlement amount was paid by the Promoter on 01.07.2022. The Promoters of the Corporate Debtor have already paid Rs.3,87,50,000/- to the SBI on different dates as detailed below: -

Sr. No.	Date	Bank's Name	D.D. No.	Amount
1.	09.11.2020	Corporation	169175	57,50,000

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		Bank		
2.	01.03.2021	State Bank of India	874511	10,00,000
3.	06.04.2021	State Bank of India	874551	15,00,000
4	14.06.2021	State Bank of India	874580	15,00,000
5	15.07.2021	State Bank of India	139706	15,00,000
6	12.04.2022	State Bank of India	591956	55,00,000
7	01.07.2022	State Bank of India	Bank Tfr	220,00,000
			Total	387,50,000

9. In the fourth meeting of the Committee of Creditors held on 18.08.2022, the resolution regarding appointment of Transaction Auditor to determine preferential undervalued, extortionate credit and fraudulent transactions under Section 43, 45, 50 and 66 of IBC, 2016 was approved by the Committee of Creditors.

10. The HDFC Respondent No. 1 filed its reply to the present application. The Respondent raised the following objections in its reply: -

I. The resolution for withdrawal of CIRP of Corporate Debtor has not been voted in favour by the committee of creditors and has not been passed by the threshold of 90% as required under the Code. Any direction passed by the Adjudicating Authority would interfere with



the decision of the Members of the CoC while exercising their commercial wisdom.

II. The Respondent No. 1 has never agreed with the terms of the Settlement offered by the Applicant. The relief sought in the present application under Rule 11 of NCLT Rules, 2016 cannot be granted and the application is not maintainable.

III. The Respondent No. 1 HDFC Bank is one of the CoC Member having 19.94% voting share in the CoC and therefore, the Applicant cannot seek any relief against the Respondent which will interfere with the commercial wisdom of the CoC Member.

IV. The Respondent No. 1 HDFC Bank has never given its acceptance to the offer of settlement/compromise nor authorized the State Bank of India being the lead Bank to accept the offer of settlement on behalf of the Respondent No. 1. The State Bank of India and the ICICI Bank have submitted the offer of settlement on their own in their individual capacity.

11. It is further submitted by the Respondent No. 1 that, in the 5th meeting of the CoC held on 28.09.2022, it has been categorically conveyed that the HDFC Bank has rejected the offer of settlement made by the Applicant. The relevant portion of the 5th meeting of CoC held on 28.09.2022 is reproduced below: -

"Sh. Anirudh Ji, HDFC Bank confirmed that their decision making authority has denied approval on "Form FA" (Withdrawal Application) and this being the final decision from their higher authorities.

RP further informed the CoC members that the next date of hearing with Hon'ble NCLAT on Stay of "Form G" is 10th October, 2022 and RP would apprise the Hon'ble NCLAT about the final decision of the CoC on the same being non approval of Withdrawal Application by the CoC. "



12. It is further submitted that Section 12A of IBC which provides for withdrawal of application admitted under Section 7, 9 or 10 envisages that approval of 90% voting share of the Committee of Creditors is required. Since, the Applicant failed to procure the 90% threshold in accordance with Section 12A of the Code, the matter cannot be withdrawn in exercise of powers under Section 12A of the Code. The Respondent No. 1 HDFC Bank has therefore prayed that the present application be dismissed.

13. We have heard the submissions made by Mr. K.K.R. Das, Learned Counsel appearing for the Applicant who is a Promoter & Member of Suspended Board of Directors as well as Mr. Harshit Khare, Learned Counsel appearing for the HDFC Bank and Mr. Anand Singh Sengar, Learned Counsel appearing for the ICICI Bank.

14. The issues involved in this application are as follow:-

Issue 1 - Whether this Tribunal can issue a direction to the HDFC Bank, who is one of the members of the consortium consisting of SBI Bank and ICICI Bank and HDFC Bank, to give its approval to the withdrawal application, Form FA.

Issue 2 -Whether in case of a consortium of Banks, the Lead Bank having majority voting share can give its approval on behalf of another Bank even though the said Bank does not give its consent or reject the proposal.

15. Learned Counsel appearing for the Applicant submitted that a settlement has been arrived at between the Operational Creditor and the Corporate Debtor after commencement of CIRP vide an order passed by this Tribunal on 08.04.2022 and consequent thereto a



proposal for approval to withdraw CIRP against Corporate Debtor and sign Form FAIN terms of Section 12A of IBC, 2016 was submitted to the Financial Creditor of the Corporate Debtor who are in a consortium consisting of State Bank of India as Lead Bank with 56.83% voting share, ICICI Bank with 23.23% and HDFC Bank with 19.94%. It is the case of the Petitioner that on 06.06.2022, the consortium accepted the settlement submitted by the Promoters of the Corporate Debtor and the State Bank of India, the Lead Bank who issued an acceptance letter dated 06.06.2022 to the Promoters. The State Bank of India also intimated to the Promoters that the deposit of Rs. 1.10 Crores made by the Promoters has been adjusted towards the upfront payment and gave schedule for making the balance payment.

16. On 01-07-2022, Promoters remitted the second instalment of Rs.2.20 Crores. On 05-07-2022, SBI and ICICI Bank, constituting 80.06% voted in favour of the withdrawal of the CIRP while HDFC Bank holding 19.96% did not participate in the voting. In the 4th meeting of the CoC held on 18-08-2022, HDFC Bank sought another ten days' time for getting final decision from their Decision-Making Authority. Since the approval from HDFC Bank was not forthcoming, the Applicant e-filed the present IA on 26-09-2022.

17. It is also submitted that all the three financial creditors of the CD viz. State Bank of India, ICICI Bank and HDFC Bank were in a "consortium lending with the CD and had executed Working Capital Consortium Agreements as under:-

I. On 20-08-2014, and thereafter, on 30-12-2015, the "Consortium" lead by State Bank of Bikaner & Jaipur (since merged and now known as SBI), ICICI Bank, HDFC Bank & State Bank of Patiala (since merged and now known as SBI) sanctioned working capital facilities and by consent of all the Parties, State Bank of



Bikaner & Jaipur (since merge and now known as SBI) was designated and recognized as the "Lead Bank" of the Consortium.

II. Reserve Bank of India framed and issued detailed guidelines to all the Commercial Banks and these guidelines titled "Master Circular" on "Income Recognition, Asset Classification and Provisioning Pertaining to Advances" were first issued in a consolidated manner on 1st July, 2015 and were updated several times thereafter and the latest being 1st October, 2021. As per the Corrective Action Plan covered by these guidelines include (a) Rectification, (b) Restructuring and (c) Recovery. These guidelines supplemented by its subsequent updates also stipulate that the decisions agreed upon by a minimum of 75% of creditors by value and 60% of creditors by number in the Joint Lenders Forum would be considered as the basis and will be binding on all lenders.

III. It is a well settled position that the circulars issued by the Reserve Bank of India under Section 21 or 35 of the Banking Regulation Act, 1949 are statutory in nature and are binding and hence required to be complied with by all the Banks.

18. On the basis of the above-mentioned averments, Learned Counsel submitted that since, a settlement has already been arrived at and Form FA has been presented by the Resolution Professional before the CoC for approval and further in view of the fact that the SBI who is the Lead Bank in the consortium had issued an acceptance letter dated 06.06.2022, accepting the compromise settlement, the settlement is binding up all the members of the consortium. Further, the Promoter have already paid Rs.3,87,50,000/- in terms of the said compromise settlement. He further submitted that the RBI guidelines relied upon by him will have to be invoked, since, there is no express provision in the IB Code to meet a situation that has arisen in the



present case. He submitted that as per RBI's Master Circular 01.07.2015, the applicable criteria is that the decision taken by minimum 75% of the Creditors by value and 60% of the Creditors by number will be binding on all the lenders.

19. He therefore submitted that the withdrawal Form-FA has been approved by 80% of the creditors by value and 66% of the creditors by number. Learned Counsel appearing for the HDFC Bank has categorized his submissions which are as under: -

I. The HDFC Bank (Respondent No. 1) has not entered into any settlement with the Applicant or the Corporate Debtor.

II. The HDFC Bank (Respondent No. 1) holds 19.94% voting share in the CoC of the Corporate Debtor and has voted against the settlement. The HDFC Bank has not delegated any specified power to the SBI as envisaged under Section 21(6) of IBC, 2016. Further, the acceptance letter dated 06.06.2022 was issued by SBI independently and without any approval of the HDFC Bank. He also submitted that the Rules and Regulations of RBI with respect to consortium lending relied upon by the Applicant is not applicable in the CIRP proceedings.

III. The commercial wisdom of the CoC cannot be challenged. Learned Counsel for the HDFC Bank has further submitted that the HDFC being the member of the CoC has taken a decision to reject the settlement proposed by the Applicant and therefore the commercial wisdom of the CoC member i.e., HDFC Bank cannot be challenged. Learned Counsel has relied upon a judgment of the Hon'ble Supreme Court of India in the case of ***Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 4*** wherein the Hon'ble Court has held that the decision taken by the CoC in accordance with its commercial wisdom will prevail.



He further relied upon a judgment of Hon'ble Supreme Court of India in the case of " E.S. Krishnamurthy & Others versus Bharath Hi-Tecch Builders Private Limited, 2022 3 SCC 161, wherein the Court of Hon'ble Supreme Court has held that while Adjudicating Authority and Appellate Authority can encourage settlement, they cannot direct them by acting as Court of equity. It has also been held as follows:-

"As already stated hereinabove, the provisions under Section 12A IBC have been made more stringent as compared to Section 30(4) IBC 17. Whereas under Section 30(4) IBC, the voting share of CoC for approving the resolution plan is 66%, the requirement under Section 12A IBC for withdrawal of CIRP is 90%.

When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders 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 capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules."

20. The Resolution Professional/Respondent No. 2 has filed reply affidavit in which it was submitted that the Resolution for withdrawal of CIRP failed as he did not receive 90% votes in its favour as required under Section 12A of the Code and that Resolution Professional is duty bound to continue its duty as the Resolution Professional and to ensure the conduct of CIRP in time bound manner.

Analysis: - In order to arrive at just decision in the present case, it is pertinent to refer to Section 12A IBC which is reproduced below: -



“Section 12A:-

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](#).”

21. From the bare perusal of the above-mentioned provision, it is very clear that approval of 90% voting share of CoC is required for Adjudicating Authority to allow withdrawal of an application admitted under Section 7 or Section 9 or Section 10 of IBC. In the instant case admittedly, the SBI and ICICI Bank jointly constituting 80.06% voting share is in favour of Form FA while the Applicant/HDFC Bank holding 19.96% did not participate in the voting. Thus, the Resolution for withdrawal of the CIRP was failed as it did not constitute 90% votes as required under Section 12A of the Code.

22. Learned Counsel appearing for the Applicant relied upon certain guidelines issued by the RBI and submitted that the decisions agreed upon by minimum of 75% of creditors by value and 60% of creditor by number in the Joint Lenders Forum would be considered as the basis and will be binding on all the lenders. It is his submissions that since in the instant case the SBI and ICICI Bank constituted 80.06% votes in favour of the Form FA, the decision will be binding on all the lenders. In this regard, Learned Counsel for the HDFC bank placed reliance on the provision in Section 21(3) of IBC, 2016 which provides that when the Corporate Debtor owes a financial debt to a consortium each such Financial Creditor shall be part of CoC and their voting shall be determined on the basis of the financial debt. Learned



Counsel also submitted that the SBI has no powers as a consortium leader in the CoC during the course of CIRP, since, no specific power has been delegated in accordance with the provisions under Section 21(6) of IBC, 2016. He further submitted that the Rules and Regulations of RBI with respect to consortium lending which have been relied upon by the Applicant are not applicable in the CIRP proceedings. Having perused the relevant provisions contained in Section 21(3) of IBC, Section 21(6) of IBC and the Rules and Regulations of RBI which have been relied by the Applicant, we are of the considered view that the decision taken by the HDFC Bank being one of the CoC Members cannot be questioned, it being a commercial wisdom of the CoC member and further the Rules and Regulations of RBI will not be applicable in the CIRP proceedings inasmuch as Section 12A of IBC specifically provides that 90% voting share of the CoC is mandatory for allowing the withdrawal of an application admitted Section 7, Section 9 and Section 10 of IBC.

23. Having perused the relevant provisions contained in Section 21(3) of IBC, Section 21(6) of IBC and the Rules and Regulations of RBI which have been relied by the Applicant, we are of the considered view that the decision taken by the HDFC Bank being one of the CoC Members cannot be questioned, it being a commercial wisdom of the CoC member.

24. At this juncture, it will be necessary to refer Section 238 of the Code, 2016 which essentially grants IBC an overriding effect by insertion of a non-obstante clause by ensuring that provisions of the Code will continue in full force even if they were inconsistent with any other law. Section 238 of the Code, 2016 is reproduced herein below:-

“238. Provisions of this Code to override other laws. –



The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

25. In light of Section 238 of the Code, 2016 and the above discussion, we are of the considered view that the Rules and Regulations of RBI as relied by the Applicant will not be applicable for the withdrawal of CIRP proceedings in view of specific requirement of 90% voting in favour for withdrawal of CIRP proceedings as provided under Section 12A of IBC as the requirement of 90% voting share in favour of the CoC is a mandatory requirement for allowing the withdrawal of an application admitted Section 7, Section 9 and Section 10 of IBC.

26. In view of the foregoing reasons, we are of the view that the present application cannot be entertained and the same is **dismissed**.

SD/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

SD/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**