

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB)-1781(ND)/2018
IA/3896/2020, IA/3898/2020
IA/3371/2020 & IA/3912/2020

IN THE MATTER OF:

INDU KUMAR & ORS.

...PETITIONER

VERSUS

SAHA INFRATECH PRIVATE LIMITED

...RESPONDENT/CORPORATE DEBTOR

SECTION: 12A of IBC, 2016

(IB)-1781(ND)/2018
IA/3371/2020

IN THE MATTER OF:

INDU KUMAR & ORS.

...PETITIONER

VERSUS

SAHA INFRATECH PRIVATE LIMITED

...RESPONDENT/CORPORATE DEBTOR

AND IN THE MATTER OF:

- 1. AASHRAY SOCIAL WELFARE SOCIETY
THROUGH ITS PRESIDENT MR. ONKAR GUPTA
HAVING ITS OFFICE AT PLOT NO. 12,
TOWER P-2 ATS GREEN VILLAGE, SECTOR 93A,
NOIDA - 201304**
 - 2. ONKAR GUPTA
P1/81, ATS GREEN VILLAGE, PLOT NO.1, SECTOR 93A,
NOIDA - 201304**
 - 3. KUL BHUSHAN SHARMA
P2/12, ATS GREEN VILLAGE PLOT NO.1,
SECTOR 93A, NOIDA- 201304**
- ... APPLICANTS**

VERSUS

**SAHA INFRATECH PRIVATE LIMITED
N-101/B, MUNSHI LAL BUILDING,
CONNAUGHT CIRCUS,
NEW DELHI-110001**

.....RESPONDENT

SECTION: U/S 22 of IBC, 2016

**(IB)-1781(ND)/2018
IA/3912/2020**

IN THE MATTER OF:

- 1. INDU KUMAR
205, 2ND FLOOR, DDA COMPLEX
ASHOK VIHAR, PHASE III, POCKET - B
ASHOK VIHAR, NEW DELHI - 110052**
- 2. SHRADHA KALHAN
2C/25, NEW ROHTAK ROAD
KAROL BAGH, NEW DELHI**
- 3. SANDEEP KALHAN
2C/25, NEW ROHTAK ROAD
KAROL BAGH, NEW DELHI**

...FINANCIAL CREDITORS

VERSUS

- 1. SAHA INFRATECH PVT. LTD.
THROUGH ITS RESOLUTION PROFESSIONAL
MR. ARUN JAIN
N - 101/B, MUNSHI LAL BUILDING
CONNAUGHT CIRCUS,
NEW DELHI - 110001**

...CORPORATE DEBTOR

AND IN THE MATTER OF:

- 2. MANSI BRAR
D-66, THRID FLOOR
DEFENCE COLONY, NEW DELHI - 110024**

...APPLICANT

AND IN THE MATTER OF:

- 3. ANIEL KUMAR SAHA
(SUSPENDED DIRECTOR OF SAHA INFRATECH P. LTD.)
B-4, 6TH FLOOR, MATRIX TOWER
SECTOR 132 EXPRESSWAY
NOIDA - 201301**

...SUSPENDED DIRECTOR



CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. L. N. GUPTA, MEMBER (TECHNICAL)

PRESENT:

Mr. Raghavendra Bajaj and Mr. Nikhil Bamal, Advocates for Financial Creditor in IA-3371/2020

Mr. Sunil Fernandes for Respondent No.-4

ORDER

PER MR. ABNI RANJAN KUMAR SINHA (MEMBER JUDICIAL)

By filing IA/3896/2020 & IA/3898/2020, the applicant on whose application the Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor was initiated sought a permission to withdraw the application, whereas by filing IA/3371/2020 & IA/3912/2020, applicant who claimed themselves as an allottee under that Project as well as the Financial Creditors have filed two separate application for the replacement of the IRP.

2. Since, all these IAs are connected with each other, therefore, we would like to dispose of all the four IAs by this common order.

IA/3896/2020 & IA/3898/2020:

3. Both of these applications are being preferred to seek permission to file application under Section 12A of the Insolvency and Bankruptcy Code 2016 read with Regulation 30A of the Insolvency and Bankruptcy Board of

India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 for withdrawal of Corporate Insolvency Resolution Process against the Corporate debtor.

4. The brief facts, as per averments, leading to filing of the application **IA/3896/2020** are as under:

- i. That the application is filed by financial creditors/applicants seeking permission of the Adjudicating Authority to allow the financial creditors/applicants to file the application under section 12 A of the IBC 2016 read with regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, for withdrawing the petition bearing No. (IB)1781(ND)2018 titled as 'Ms. Indu Kumar Versus Saha Infratech Private Limited' filed under section 7 of the IBC 2016.
- ii. That the Section 7 IBC 2016 application was admitted by this Adjudicating Authority vide order dt. 28.02.2020 and Mr. Arun Jain was appointed as Interim Resolution Professional (IRP).
- iii. It is pertinent to mention here that the claims of Indu Kumar & Shraddha Kalhan have already been settled. The Corporate Debtor has undertaken to pay and settle the claim of the third applicant Mr. Sandeep Kalhan in proceedings pending before the Court of Ms. Surpreet Kaur, MM, Rohini Courts.
- iv. Thus, all of the Applicants, as hereinabove, do not want to proceed with Corporate Insolvency Resolution Process of M/s. Saha Infratech Private Limited. Hence an application under section 12A read with regulation



30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, for withdrawal of Corporate Insolvency Resolution Process was filed before the IRP through email dated 11.09.2020 requesting the IRP to place the said application before the Adjudicating Authority within three days from the date of its receipt, as per law. But the IRP instead of placing the said withdrawal application, vide his email dated 14.09.2020 refused to put up the said withdrawal application for the reason that he has not taken the charge of IRP in the matter of M/s Saha Infratech Pvt Ltd and further, he informed that he has already filed an application seeking replacement of IRP, which is pending before this Adjudicating Authority.

- v. As the applicants i.e., Indu Kumar, Shraddha Kalhan and Sandeep Kalhan, all are presently travelling outside India, therefore, the present application is being filed and signed by Shraddha Kalhan and Sandeep Kalhan through their son and SPA Sumeet Kalhan, who has been duly authorized and made competent to sign, file the present application. Similarly, the Applicant Indu Kumar has also authorized Mr. Sumeet Kalhan to file the present application for and on her behalf.
- vi. Hence, the applicants are seeking permission of the Adjudicating Authority to allow the applicants to file the application under Section 12A read with Regulation 30A before the Adjudicating Authority without seeking the assistance of Ld. IRP.



IA/3898/2020

5. The facts averred in this application are almost similar to the facts of **IA/3896/2020, except the facts given below**, therefore, it is needless to repeat the same.

- i. It is submitted that Mr. Arun Jain, who was appointed as IRP by this Authority vide order dated 28.02.2020 has never taken charge/commenced the Corporate Insolvency Resolution Process of M/s. Saha Infratech Private Limited, and thus, no public announcement of notice as required under Section 15 of the Code was made. Thus, no Committee, as being provided in Section 21 of the Code, has been formed. Thus, the applicants herein are seeking withdrawal of their application under Regulation 30-A.
- ii. That since his appointment Mr. Arun Jain, the Interim Resolution Professional (IRP), neither commenced nor acted to further the Corporate Insolvency Resolution Process of M/s. Saha Infratech Private Limited, and thus, has not incurred any expense to the knowledge of Applicants, therefore no Bank Guarantee is required to be furnished as per sub regulation (2) of Regulation 30-A.

IA/3371/2020:

6. This application is preferred on the behalf of Aashray Social Welfare Society / Financial Creditors under Rule 11 of the NCLT Rules, 2016 for appointment of an Interim Resolution Professional of the Corporate Debtor.



7. The brief facts, as per averments, leading to filing of the instant application are as under:

- i. That CIRP was initiated against the Corporate Debtor, Saha Infratech Private Limited vide order dated 28.02.2020 and Mr. Arun Jain was appointed as the Interim Resolution Professional of the Corporate Debtor.
- ii. That the Applicant Nos. 1 and 2 are also allottees of the project being developed by the Corporate Debtor. The Applicant No. 2 had even filed an independent petition under section 7 of the Code for initiating CIRP of the Corporate Debtor being CP(IB) No. 283 (ND)/2019, which was pending, when the Admission Order was passed in this matter.
- iii. That pursuant to the passing of the Admission Order, the Applicants were waiting for the Public Notice but could not find such notice either in any of the local newspaper or online.
- iv. That in the month of June 2020, when Unlock -1 was announced, the Applicants managed to trace out the mobile number of the IRP who was appointed by way of the Admission Order and learnt from him that he has already informed this Adjudicating Authority about his inability to accept his appointment as the IRP of the Corporate Debtor.
- v. That since the IRP so appointed by this Adjudicating Authority has not taken charge, the affairs of the Corporate Debtor are still being run by its promoters much to the detriment of the interests of the Applicants. Further, since the IRP has not taken charge, the CIRP process is getting delayed and the



progress of construction of the real estate project being built by the Corporate Debtor is also getting unnecessarily delayed, which is in any case far behind schedule.

- vi. That under such circumstances, the Applicants are constrained to prefer the instant Application so that another IRP can be appointed in place of Mr. Arun Jain. The Applicants propose the name of Mr. Gopal Lal Baser, whose registration number is IBBI/IPA-002/IP-N00553/2017-2018/ 11677. The Applicants undertake to pay the initial fees and expenses of the IRP as was ordered by way of the Admission Order.

IA/3912/2020:

8. This application is being preferred on behalf of a Financial Creditor/Homebuyer - Mrs. Mansi Brar under section 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the “Code”) read with Rule 11 of the NCLT Rules, 2016.

9. The brief facts, as per averments, leading to filing of the instant application are as under:

- i. That CIRP was initiated against the Corporate Debtor, Saha Infratech Private Limited vide order dated 28.02.2020.
- ii. That the Applicant also moved a Section 7 application vide Company Petition No. IB/485/PB/2019. However, this Adjudicating Authority admitted the Corporate Debtor to insolvency and the application was disposed of.



- iii. That the Applicant by way of the present application seeks the appointment of an unbiased, competent and independent Interim Resolution Professional (“IRP”), as the IRP appointed by way of the admission Order dated 28.02.2020 – Sh. Arun Jain- has failed to take charge of the affairs of the Corporate Debtor, contrary to the provisions of the Code. The IRP has neither issue public announcement nor called for claims from creditors and as a consequence, failed to constitute the Committee of Creditors u/s 18 of the Code. The IRP has reluctantly failed to run the Corporate Debtor as a going concern u/s 20 of the Code.
- iv. That a total of 14 petitions u/s 7 or 9 of the Code were clubbed and last listed together for hearing before the Hon’ble Principal Bench on 06.02.2020. While the aforesaid bunch of applications were pending adjudication, the Petitioners therein later realised that a solitary Petition (instant petition) was pending before this Bench wherein an admission Order has been passed.
- v. That the aforesaid led the Applicant and other similarly situated home-buyers to a reasonable belief that the matter was pressed by the Corporate Debtor in possible collusion with the Petitioner/Financial Creditor Indu Kumar to take refuge under the moratorium and have a favourable person appointed as the IRP.
- vi. That since the passing of the admission Order on 28.02.2020, the suspended directors of the Corporate Debtor have filed Applications in various Courts to have cases against them adjourned sine



die in view of the moratorium imposed by the admission Order

- vii. That an application dated 06.03.2020 filed by suspended Director in CC No. 6769 of 2019 titled “Mansi Brar Fernandes v. Saha Infratech Pvt. Ltd. & Ors.” pending before the competent Magistrate, South-East District, Saket District Courts, New Delhi.
- viii. That since 28.02.2020 till present, the CIR Process has been in a state of suspended animation and has worked only to the advantage of the suspended Directors and only a competent and independent IRP, who is above all suspicion, can make up for lost time.
- ix. That the Applicant through counsel wrote to the IRP seeking a status report of the CIR Process and the IRP replied to the Applicant’s e-mail stating that he had not taken over the CIR Process due to revised IBBI guidelines (the relevent guideline not stated).
- x. That the present IRP – Shri Arun Jain, should have performed his role as the IRP and taken over the affairs and assets of the CD till his replacement was notified by this Adjudicating Authority.
- xi. That in view of the aforesaid submissions, the Applicant prays for following reliefs:
 - a. Appoint an impartial and independent IRP for the commencement of CIR Process of the Corporate Debtor–Saha Infratech Pvt. Ltd. from the list of IBBI approved Insolvency Professionals;



- b.** Direct the suspended Director, Sh. Aniel Kumar Saha to file an affidavit disclosing transactions undertaken by the CD since 28.02.2020 (the date of admission) till present;
- c.** Call for a status report from the newly appointed IRP as to the affairs of the CD and status of CIRP of the CD;
- d.** Pass any other Order(s)/Direction(s) that this Hon'ble Tribunal feels appropriate in the facts and circumstances of the present case.

IA/3896/2020 & 3898/2020:

10. Ld. Counsel appearing for the applicant submitted that the main application was admitted by this Adjudicating Authority on 28.02.2020 and Mr. Arun Jain having IBBI registration No. IBBI-/IPA-O1/IP-00590/2017-18/11029 was appointed as an Interim Resolution Professional (IRP) but he never took the charge and therefore, no public announcement as required under Section 15 of the IBC, 2016 was made by the IRP.

11. He further submitted that they also submitted Form FA to the IRP for the withdrawal of the main application but the IRP did not file the withdrawal application.

12. He further submitted in view of Regulation 30A of Insolvency Resolution Process for Corporate Persons Regulations, 2016. The IRP or RP was required to file an application within three days from the date of receipt of Form FA.



13. He further submitted that since all the three Petitioners on whose application the CIRP was initiated are presently travelling outside India, on the basis of special power of Attorney and authorization letter, the applicants have filed the present application for withdrawal of the CP(IB) No. 1781/ND/2018. He further submitted that since the IRP refused to perform his duties and so the present application has been filed. He further submitted that under such circumstances, the applicants may be permitted to withdraw the main application in terms of settlement arrived in between the parties.

IA/3371/2020:

14. Ld. Counsel for the applicant, the Aashray Social Welfare Society, submitted that the applicant of this IA had filed a Company Appeal (AT) (Insolvency) No. 166/2021 before the Hon'ble NCLAT and the Hon'ble NCLAT vide order dated 08.03.2021 has directed this “...**Adjudicating Authority to urgently appoint another IRP (in place of earlier IRP Mr. Arun Jain, who has not taken charge it appears) within 10 days....**”

15. He further submitted that Mr. Arun Jain, IRP has appeared before this Adjudicating Authority and showed his unwillingness to continue as an IRP.

16. He further submitted that Hon'ble NCLAT also held that “**If the Adjudicating Authority wants to take action of Contempt regarding the conduct of IRP Mr. Arun Jain it would be open for the Adjudicating Authority to proceed with the steps regarding**



Contempt but the CIRP initiated on 28.02.2020 cannot be kept in abeyance.”

17. He therefore, submitted that under such circumstances, the IRP Mr. Arun Jain may be changed/replaced.

IA/3912/2020:

18. Ld. Counsel for the applicant of this IA submitted that the applicants are the Home Buyers and have also filed an application being Company Petition No. IB/485/PB/2019. Since, this Bench has admitted the application and initiated the CIRP against the Corporate Debtor, the applicant prayed for replacement of Mr. Arun Jain, IRP and sought appointment of an independent, impartial and unbiased Interim Resolution Professional.

19. He further submitted that it also appears from the conduct of the IRP as well as the applicants on whose application the CIRP was initiated, that they were in collusion with Corporate debtor who proposed the appointment of their own IRP and that is the reason IRP had never taken the charge.

20. Ld. Counsel further adopted the arguments advanced on behalf of the applicant of IA/3371/2020.

21. Now, in the light of the submissions made on behalf of the parties of all the four IAs, we consider the position of law. It is true that the CIRP was initiated on 28.02.2020 and Mr. Arun Jain was appointed as an IRP



but it is also a fact that the said Mr. Arun Jain never took the charge of CIRP and made no public announcement as required under Section 15 of the IBC by the IRP. **It is also a fact that during the pendency of these applications i.e., IA/3371/2020 and IA/3912/2020, the IRP Mr Jain was summoned and he had appeared on 19.10.2021. For convenience, the order dated 19.10.2021 passed by this Tribunal in these IAs is reproduced below :**

“IA/3371/2020 & IA/3912/2020: The Counsel for the Applicant is present and prayed for appointment of new RP on the grounds that the IRP Mr. Arun Jain who was appointed vide Order dated 28.02.2020 of this Tribunal has failed to take charge of the Corporate Debtor. He has neither made the public announcement of the CD being under CIR Process nor formed the CoC till date. Further, it has been brought to our notice that an email dated 19th June, 2020 sent by the IRP Mr. Arun Jain to the Office of the Counsel for the Applicant has recorded that he had filed an Application before this Authority for Appointment of an alternative RP. Whereas, it does not appear that any such Application has been filed before this Authority. It appears from the conduct of the IRP Mr. Arun Jain that the Order of CIRP admission dated 28th February, 2020 passed by this Authority has been completely flouted and therefore, he should explain the reasons as to why the contempt proceeding should not be initiated against him. The IRP Mr. Arun Jain is present in person. He is directed to file a short Affidavit to explain the



reasons for not initiating CIRP till date against the CD and the reasons why he could not informed this Authority about the same. The above said Affidavit shall be filed by the RP, Mr. Arun Jain on or before 23rd October, 2020.”

Thus, the IRP, who was present in person, was directed to file a short Affidavit by or before 23.10.2021 to explain the reasons for not initiating CIRP against the CD and the reasons why he could not inform this Authority about the same. The IRP neither filed the said Affidavit nor bothered to represent thereafter. It is also a fact that against the order passed by this Adjudicating Authority and for replacement of the IRP, the applicant of IA/3371/2020 had filed an appeal i.e. Company Appeal (AT) (Insolvency) No. 166/2020 before the Hon'ble NCLAT, which has directed this Adjudicating Authority to urgently appoint another IRP in place of earlier IRP, Mr. Arun Jain within ten days and that is the reason, the matter has been taken up on priority basis.

22. Since, **an application for withdrawal of Company Petition** i.e., CP(IB) No. 1781/2018 have also been filed on behalf of the applicants, on whose application the CIRP was initiated, firstly, we would like to consider this aspect that whether the said application is maintainable or not ?

23. It is an admitted fact that the applicants, who filed the original IB petition for initiation of the CIRP have not filed this application. Rather on their behalf, one Mr. Sumeet Kalhan son of Shraddha Kalhan and Sandeep Kalhan have filed this application on the basis of a Special Power of



Attorney and Authorization Letter issued by another applicant Indu Kumar.

24. Before considering the prayer made in these two applications i.e IA/3896 & IA/3898 of 2020, we would like to refer the provision of law, the applicants claimed that the present applications are filed under Section 12A of the IBC, 2016 read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Said provisions 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 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”.

25. On perusal of Section 12A of IBC, 2016, we notice that the Adjudicating Authority may allow a 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 fulfill two conditions i.e., first, the application must be filed by the applicant on whose prayer the application under Section 7, 9 or 10 is admitted and secondly, it must be approved by 90% voting share of the CoC. The application for withdrawal application admitted under Section 7, 9 or 10 shall be filed by the applicant.

26. Similarly, Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides 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, on whose application CIRP was initiated, shall fill up this application mentioning the particulars of the application, case number etc.

27. Therefore, nowhere either in Section 12A of the IBC nor in Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it is mentioned that the application for withdrawal may be filed by the person other than the applicant or by his authorized agent. It is also stated by the applicant that all three applicants on whose application the CIRP was initiated are travelling outside India but the Special Power of Attorney is prepared in India before the Notary, which also contradicts the submission of the applicant that they are travelling outside India. The Form FA also shows that it shall be filled up and submitted by the applicant who filed the application but we observe that neither the Form FA is signed by the applicant nor the withdrawal



application is signed by the applicant rather it is signed by persons, who have filed the application on the basis of Special Power of Attorney and Authority Letter.

28. We further notice that in view of the Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the application must be filed through IRP.

29. At this juncture, we would like to refer to the submissions of the applicants, who in the course of arguments submitted that he had approached the IRP and sent the withdrawal application on his email id but the IRP did not file the same. We also notice that the present petition was filed under Section 7 of IBC and it is the petitioner, who had proposed the name of the IRP Mr Arun Jain. Here, a question arises, if the IRP after initiation of CIRP on 28.02.2020 failed to perform his duties, why the petitioners did not take appropriate steps for replacement of the IRP and why did they sit over the matter for such a long time. This has not been explained by the applicants. Silence of the applicants on this point makes one to believe that the present application has been filed by them in connivance with the Corporate Debtor and the IRP has also colluded with the Corporate Debtor, who despite his consent and after appointment as IRP of the Corporate Debtor by the Adjudicating Authority, has failed to initiate the CIR process and discharge his duties as required under the IBC, 2016.

30. The circumstances suggest that the IRP deliberately did not make the Public Announcement, so that the Corporate Debtor could get time to



settle the matter with the Applicants, who initiated the CIR Process. Further, the aforesaid Applicants and IRP in connivance with the Corporate Debtor abused the process of law in order to avoid the strict condition of terminating the CIRP by 90% Votes of the Member of the CoC as stipulated in Section 12A of IBC, 2016.

31. At this juncture, we would like to make it clear that under Section 7 of the IBC, 2016 at the time of filing of the application, the petitioner is required to mention the name of the IRP in the application and enclose his/her consent form. Accordingly, we notice that the consent form (Form 2) was given by the IRP Mr Arun Jain, which is at page 74 of the main petition and he was appointed IRP. Even then, Mr. Arun Jain IRP failed to perform his duties under the law and the applicants have knowingly not taken any step to file an application for his replacement.

32. Further, we observe that the applicants, who have filed the present application for withdrawal of the main petition are not the petitioners of the main Company Petition No. 1781/2018 and there is no provision under the law to permit an agent or an authorized representative to file the withdrawal application. If the intention of the legislature was to permit the authorized representative, then under Section 12A of the IBC and Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, such a provision in the Section or in Regulation would have been there, clearly stating that the application may also be filed by the applicant or authorized representative.



34. Since a large number of Home-buyers/allottees are involved in the matter, and the CIRP proceeding is a '*proceeding in rem*' as held by Hon'ble Supreme Court in the matter of **Swiss Ribbons Pvt. Ltd. and Ors. Vs. Union of India (UOI) and Ors- MANU/SC/0079/2019**, the rights of other Home-buyers/allottees in respect of whom the Corporate Debtor has committed default, would be jeopardized if the CIRP is allowed to be terminated.

35. Therefore, we have no option but to reject the prayer of the applicants for withdrawal of the of the main Company Petition No. 1781/2018. So far as the conduct of the IRP is concerned, we shall consider it later on while considering the prayer of other two applicants for the replacement of the IRP

For the reasons discussed above, we are of the considered view that the present applications seeking withdrawal of the main petition are not maintainable. **Accordingly, both the IAs i.e. IA/3896 & 3898 of 2020 stand dismissed.**

36. **IA/3371/2020**: In the light of the submissions made on behalf of the applicant, now, we consider whether the law permits for replacement of the IRP on an application filed by a person, who is not a party to the proceedings.

37. Before making any comment, we would like to refer to the provisions under IBC for replacement of IRP/RP. There are two provisions for the replacement of the IRP/RP. The first one, is under Section 22 of the IBC



and the second one is under Section 27 of the IBC. Both the provisions are quoted below:

Section 22-Appointment of resolution professional.

(1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

(3) Where the committee of creditors resolves under sub-section (2):

(a) to continue the interim resolution professional as resolution professional subject to a written consent from the interim resolution professional in the specified form, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority; or

(b) to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed



resolution professional in the specified form.

(4) The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board.

(5) Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

Section 27: Replacement of resolution professional by committee of creditors.

(1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.



(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent. of voting shares, resolve to replace the resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under subsection (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

38. Mere reading of the provisions shows that under Section 22(2) of the IBC, 2016, the committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution



professional as a resolution professional or to replace the interim resolution professional by another resolution professional. Whereas under Section 27 (2) there is a provision for replacement of Resolution Professional, who was appointed under Section 22, with another Resolution Professional by a vote of sixty-six per cent of voting share of the CoC. Therefore, Section 27 of the IBC, 2016 has a provision for replacement of Resolution Professional, who was appointed under Section 22 of the IBC. Hence, in our considered view Section 27 is not applicable in this matter, because prayer is for the replacement of the IRP not the RP. Therefore, under Section 22 of the IBC, 2016, there is a provision for replacement of IRP, who is appointed under Section 16(2) or (3) of the IBC, 2016 but under this provision, the replacement can be made only with the approval of the 66% of the voting share of the financial creditors/CoC but here in the case in hand, it is an admitted fact that the CoC has not been constituted, even the public announcement as required under section 15 of IBC has not been made and the IRP has not taken the charge of the Corporate Debtor to initiate the CIR Process.

39. At this juncture, we would also like to refer to Section 16 of the IBC, 2016 which deals with the provision of appointment and tenure of the IRP and the same is quoted below: -

16-Appointment and tenure of interim resolution professional.

(1) The Adjudicating Authority shall appoint an interim resolution professional on the insolvency commencement



date. within fourteen days from the insolvency commencement date.

(2) Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under section 7 or section 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(3) Where the application for corporate insolvency resolution process is made by an operational creditor and-

(a) no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;

(b) a proposal for an interim resolution professional is made under sub-section (4) of section 9, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(4) The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority under sub-section (3), recommend the name of an insolvency professional

(5) The term of the interim resolution professional shall not exceed thirty days from date of his appointment shall continue till the date of appointment of the resolution professional under section 22.



40. Since, the main petition was admitted under Section 7, we confine ourselves to the provision, which relates to the appointment of the IRP under Section 7 of the IBC.

41. Section 16(2) deals with the provision of the appointment of the IRP in an application filed under Section 7 or 10, which says that if an application under Section 7 or 10 is filed and the applicant has proposed the name of the IRP and no disciplinary proceedings are pending against him, the Adjudicating Authority shall appoint the IRP. As we have already observed in the aforementioned paragraph that Mr. Arun Jain IP was appointed as an IRP, because his name was proposed by the applicant in the application form filed under Section 7 of the IBC along with his written consent.

42. Therefore, we are of the considered view that by not performing his duties as an IRP of the Corporate Debtor after his appointment on 28.02.2020, the Mr. Arun Jain IP, has contravened the provisions of the IBC Code, 2016 as well as Regulations thereunder and his conduct is not free from doubts. And an inference can be drawn that the IRP Mr. Arun Jain in connivance/collusion with the Corporate Debtor as well as the applicants/Financial Creditors obstructed the proceedings of CIRP and in this way, caused a serious and irreversible obstruction to the the judicial proceedings. The CIRP, which is required to be completed within the prescribed period, has been virtually kept in abeyance due to conduct of the IRP.



43. We further notice that vide order dated 19.10.2020, Mr Arun Jain IRP was asked to explain the reasons as to why contempt proceedings should not be initiated for flouting the order of admission of the CIRP. He **was also directed to file a short Affidavit by or before 23.10.2021 to explain the reasons for not initiating CIRP against the CD and the reasons why he could not inform this Authority about the same.** Mr Arun Jain IRP **neither submitted the explanation as sought for nor filed the Affidavit.** All this shows that the IRP not only failed to perform the duty of initiating CIRP of the CD but also disobeyed the directions given by this Adjudicating Authority. -The non-initiation of CIRP of the Corporate Debtor is a serious dereliction of duty on the part of the IRP and for which apart from the contempt proceedings, disciplinary proceeding must be initiated against the IRP.

44. We note that the other financial creditors, who are the home buyers and filed applications for the initiation of the CIRP against the Corporate Debtor could not proceed as the CIRP against the Corporate Debtor was initiated in the present petition, and therefore, in view of Section 11 of the IBC, 2016, the other applications became infructuous. The other applicants were waiting for public announcement in light of the CIRP admission order dated 28.02.2020 passed by this Adjudicating Authority but no public announcement was made by the IRP and due to this, the applicants of this application as well as IA/3912/2020 could not file their claim as Financial Creditors. Apart from these, there are other allottees too, who have neither filed their claim nor their applications were



admitted. Here, it is worthwhile to refer to the Judgement of the Hon'ble NCLAT dated 14.08.2020 passed in the matter of Sh. Sushil Ansal Vs. Ashok Tripathi & Ors. in the Company Appeal (AT) (Insolvency) No. 452 of 2020, wherein the Hon'ble NCLAT had observed:

“14. In a case where interests of the majority of stakeholders are in serious jeopardy, it would be inappropriate to allow settlement with only two creditors which may amount to perpetrating of injustice. Exercise of inherent powers in such cases would be a travesty of justice.”

45. Of course, neither under Section 22 nor under Section 27 of the IBC, there is a provision for replacement of the IRP on the prayer made by a person, who is not a party to the proceedings. As we noticed earlier that even the applicants on whose application the CIRP was initiated did not take any steps for the replacement of the IRP.

46. Considering the peculiar facts and circumstances of this matter and specifically in the light of the directions given the Hon'ble NCLAT in the Company Appeal No. 166/2020, which states that:

“We request the Adjudicating Authority to urgently appoint another IRP (in place of earlier IRP Mr. Arun Jain who has not taken charge it appears) within 10 days, if required by taking name from the IBBI, on urgent basis”

47. we think it proper to exercise our inherent power under Rule 11 of the NCLT Rules, 2016. Therefore, in sequel to the above, by exercising the power under Rule 11 of the NCLT Rules, 2016 read with directions given by the Hon'ble NCLAT in the Company Appeal No. 166/2020 in para 7 of the order, we hereby appoint **Mr. Shiv Nandan Sharma, Registration No.-IBBI/IPA-001/IP-P00384/2017-18/10641, Email id: sharmasn@gmail.com, Mobile No. 9540000212** as an IRP from the panel communicated to this Adjudicating Authority by IBBI and order that:

48. **Mr. Shiv Nandan Sharma** is directed to take the charge of the CIRP of the CD with immediate effect. The Court Officer will immediately inform the IRP so appointed by all modes.

49. **With this order, the IA/3371/2020 stands disposed of**

50. **IA/3912/2020 also stands disposed of in the light of order passed in IA/3371/2020.**

51. The Registrar NCLT shall immediately send a copy of this order to the IBBI for initiating disciplinary action against Mr. Arun Jain IP having IBBI registration No. IBBI-/IPA-O1/IP-00590/2017-18/11029 in accordance with the provisions of law and by treating this order as a complaint under Section 217 of the IBC, 2016.



**(L. N. GUPTA)
MEMBER (T)**



**(ABNI RANJAN KUMAR SINHA)
MEMBER (J)**