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**NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH  
COURT NO.1**

ATTENDANCE CUM ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
BENGALURU BENCH, BENGALURU, HELD ON 17.07.2019

**CAUSE LIST - 2**

PRESENT: 1. Hon'ble Member (J) Shri Rajeswara Rao Vittanala  
2. Hon'ble Member (T) Dr Ashok Kumar Mishra

CP/CA No.	Purpose	Sec	Name of Petitioner	Petitioner Advocate	Name of Respondent	Respondent Advocate
CP(IB) No. 46/BB/2018	For hearing IA 244/19 IA 334/19 – For extension of time	Sec 7 of I&B code 2016	Mr. John Varghese	Ravi, Sunita & Suri Advocates	M/s Value Designbuild Pvt Ltd	Crest Law Partners, Ravishnagr Devarakonda, RP, CK Nandakumar Counsel for RP

FOR. HDFC LIMITED – RAGHURAM CADAMBI & VARUN.S

Ravi Sankar Devarakonda IAP

ADVOCATE FOR PETITIONER/s:

SUNITA SRINIVAS

Sunita Srinivas  
9844011095

ADVOCATE FOR RESPONDENT/s:

ABHIJIT ATUR  
Mr. Koshy Varghese  
9663309317 (Promoter)

P90

**ORDER**

Heard Shri Raghuram Cadambi along with Shri Varun .S, learned Counsel for the Applicant (HDFC Ltd.), Shri Ravi Sankar Devarakonda, learned IRP and Ms. Sunita Srinivas, learned Counsel for the Petitioner and Shri Abhijit Atur, learned Counsel for the Respondent.

I.A.No.244/2019 is allowed by dismissing the main Company Petition bearing No. CP(IB)No.46/BB/2018 by separate order.

  
**MEMBER (T)**

  
**MEMBER (J)**

Shruthi



**IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH**

IA No.244/2019 in  
C.P. (IB)No.46/BB/2018  
U/s. 12A and 60(5) of the IBC, 2016  
R/w Rule 30A of IBBI  
(Insolvency Resolution Process for  
Corporate Persons) Regulations, 2016  
R/w Rule 11 and 34 of the  
NCLT Rules, 2016

**In the matter of:**

The Committee of Creditors,  
Corporate Insolvency  
Resolution Process of  
Value Designbuild Private Limited. - Applicant

**Versus**

Mr. John Varghese  
S/o. Mr. Abraham Varghese  
Major, Residing at Schilerenstrasse 59  
8142 Uitikon – Waldegg  
Switzerland. - Financial Creditor

**AND**

M/s. Value Designbuild Private Limited  
R/o. at. A/04/A, Nusa Dua,  
R. Narayanapura Road,  
Whitefiled,  
Bangalore – 560 066. - Corporate Debtor



**Date of Order: 17<sup>th</sup> July, 2019**

**Coram:** 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

**Parties/Counsels Present:**

For the Applicant/ : Shri Raghuram Cadambi  
HDFC Bank Ltd. :  
For the Petitioner : Ms. Sunita Srinivas  
For the Respondent : Shri Abhijit Atur  
For IRP : Shri Ravi Sankar Devarakonda

**ORDER**

**Per:** Rajeswara Rao Vittanala, Member (J)

1. I.A.No.244/2019 in C.P. (IB)No.46/BB/2018 is filed by The Committee of Creditors ('Applicant'), U/s. 12A and 60(5) of the IBC, 2016, R/w Rule 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, R/w Rule 11 and 34 of the NCLT Rules, 2016, by inter alia seeking for withdrawal of the instant Company Petition and consequently dismiss it.
2. Brief facts of the case, which are relevant to the issue in question are as follows:-
  - (1) C.P. (IB)No.46/BB/2018 is filed by Mr. John Varghese (Petitioner/Financial Creditor) U/s. 7 of the Code, R/w. Rule 4 of the I&B (AAA) Rules, 2016, by inter alia seeking to initiate CIRP in respect of M/s. Value Designbuild Private Limited (Respondent/Corporate Debtor) on the ground that it has committed, default for an amount of Rs.5,02,23,791/-

(Rupees Five Crores Two Lakhs Twenty Three Thousand Seven Hundred and Ninety One only). Accordingly Adjudicating Authority admitted the case on 10.01.2019, by initiating CIRP and appointing IRP etc.

- (2) Accordingly, IRP has conducted the First meeting of Committee of Creditors on 08.02.2019, wherein HDFC Ltd, Authorised Representative of the Home Buyers, Shri Koshy Varghese, Managing Director of the Corporate Debtor, Ms. Sunita Srinivas, Authorised Representative of Mr. John Varghese, apart from IRP were present. Consequently, during 4<sup>th</sup> CoC meeting, basing on the claims received from the Financial Creditors of the Company, Committee of Creditors consisting of HDFC Ltd., (with claim amount of Rs.25.62 Crores constituting 57.90%); Home Buyers (with claim amount of Rs.18.63 Crores, constituting 42.10%) were formed. The Financial Creditor (Petitioner of the CP) was not included in the COC as he is the brother of Director of Corporate Debtor and thus he is related party.
- (3) During 4<sup>th</sup> COC held on 29.04.2019, it was inter alia decided not to continue the CIRP; not to confirm the IRP; decided to file withdrawal Application by COC as per order of Adjudicating Authority passed on 11.03.2019 in IA.No.90 of 2019, since Financial Creditor refused to concede the request of COC to file such Application. Accordingly 5<sup>th</sup> COC was held on 4<sup>th</sup> May, 2019, wherein it was inter alia decided to file Application U/s.12-A of Code by the Authorised Representative of largest Creditor of the Committee of Creditors (HFDC) with 89.85% which includes Homebuyers.



Accordingly, the instant Application is filed with requisite majority of 89.85%, which includes Home Buyers constituting 31.95% directly for withdrawal of the Application, while 10.15% has not responded to the proposal, which indicates that they have no objection for withdrawal.

- (4) The IRP scrutinize all the claims including claims of the Petitioner and found that the Petitioner is entitled for a sum of Rs.90,29,491/- as per books of accounts of the Corporate Debtor. Accordingly, the Corporate Debtor offered the Cheque bearing No.000351 dated 17.07.2019 drawn on HDFC Bank, Richmond Road Branch, Bangalore for a sum of Rs.90,29,491/- (Rupees Ninety Lakhs Twenty Nine Thousand Four Hundred and Ninety one only) in favour of Mr. John Varghese with this Tribunal to the Petitioner/Financial Creditor. However, the Petitioner refused to accept the same and thus cheque is deposited with the Registrar of Tribunal.
3. The Application is strongly opposed by the Financial Creditor/ Petitioner of the CP, by inter alia contending the authorisation has given to Shri Sridhar Chinni on behalf of the Committee of Creditor is not in accordance with law; it is alleged that HDFC Ltd., has connived with the Promoter of the Corporate Debtor and has raised false allegations against the initiation of the CIRP and also against the Petitioner. As per law, the Application U/s.12-A of the Code, has to be filed through IRP/RP with the consent of Petitioner of the main Company Petition, and thus the instant Application for withdrawal is not maintainable. And he is interested in continuation of CIRP rather than accepting the cheque for admitted amount of Rs.90,29,491/-

4. Heard Shri Raghuram Cadambi, learned Counsel for the Applicant (HDFC Limited), and Shri Ravi Sankar Devarakonda, learned IRP and Ms. Sunita Srinivas, learned Counsel for the original Petitioner/Financial Creditor and Shri Abhijit Atur, learned Counsel for the Respondent. We have carefully perused the pleadings of the parties and extant provisions of the Code and the law.
5. Shri Raghuram Cadambi learned Counsel for the Applicant (HDFC Limited), while reiterating various averments made in the Application, has further submitted that 'Applicant' as referred to in Section 12-A of Code is any party, who has filed Application under that Section, and moreover, the Adjudicating Authority permitted them to file Application.
6. Ms. Sunita Srinivas, learned Counsel for the original Petitioner/Financial Creditor, has further submitted that the Application is not maintainable and even the requisite percentage of 90% is not fulfilled and she would not accept the cheque furnished by the Corporate Debtor and the Petitioner is only interested in continuing CIRP failing which Liquidation.
7. The main Company Petition was filed by Mr. John Varghese (Petitioner/Financial Creditor), U/s. 7 of the Code, on the ground that it has committed default for an amount of Rs.5,02,23,791/-. On scrutiny of all claims including the claim of Petitioner, IRP accepted the claim of Petitioner for an amount of Rs.90,29,491/- as per books of accounts of the Corporate Debtor. Admittedly, the Petitioner is not a part of the Committee of Creditors. Since the Petitioner insisted for continuation of CIRP rather than revival of



Corporate Debtor with the existing management and refusing to file Withdrawal Application, the Tribunal by an order dated 11.03.2019 passed in IA.No.90/2019, by inter alia granted liberty to the CoC to file necessary Application U/s. 12-A of the Code. Accordingly the instant Company Application is filed. In fact, when the Claim of Financial Creditor, on verification, happens to be only Rs.90,29,491/- which is not challenged, the Financial Creditor cannot maintain the original Petition itself. Since the Adjudicating Authority cannot fully scrutinise the claim of Petitioner in summary proceedings and thus on finding prima facie, the case was admitted.. Therefore, it is for the IRP to scrutinise all claims including the claim of Petitioner as per records of Corporate Debtor.

8. Aggrieved by the order of admission of the case passed on 10.01.2019, Shri Koshy Varghese, Promoter/Managing Director of the Corporate Debtor, has filed an Company Appeal (AT) (Insolvency) No.696 of 2019 before Hon'ble NCLAT, New Delhi, by inter alia contending that he was ready to pay the admitted dues to the Respondent/Financial Creditor and also filed an Application U/s.12-A by HDFC Ltd., and other Home Buyers before this Adjudicating Authority. However, the Hon'ble NCLAT, while dismissing the said appeal vide order dated 10.07.2019, on the ground of delay, has inter alia observed that there would be fresh cause of action to the Appellant, if the Application filed U/s. 12-A was not entertained by the Adjudicating Authority.
9. The main points for consideration are whether Section 12-A Application can be filed by the largest Creditor of the Committee of Creditors, and whether requisite 90% is fulfilled or not. As stated



supra, the Tribunal permitted the HDFC Ltd., and Home Buyers to file an Application for the reasons stated in the IA.No.90/2019 and that order became final as it was not questioned. Therefore, the instant Application can be filed by COC. So far as the second question i.e. with regard to fulfilling 90% is concerned, as per General Clause of Act, the percentage (%) of 89.85% can be rounded off to 90%. Moreover, the Home Buyers constituting to the 10.15% have not responded to the proposal, it means they have not opposed the proposal indirectly.

10. It is relevant to point out the judgment of the Hon'ble Supreme Court in *Anup Prakash Vyas Vs. University of Pune and another*<sup>1</sup> at page no.630, has also inter alia held the concept of round up can be applied in given case basing on justification. It is relevant to extract relevant paragraphs 8, 10, 13 & 14 of the judgement as below:

**“8.** *In State of U.P. and another vs. Pawan Kumar Tiwari and ors.,<sup>2</sup> the U.P. State Public Service Commission advertised ninety three posts of Civil Judge (Junior Division). Certain posts were reserved in accordance with the relevant laws. The controversy pertained to the application of percentage as against the total number of posts. The percentage of reservation as applicable and as were actually applied were set out in a table. Under the general category, the percentage prescribed was 50%, whereas the percentage of the candidates appointed in that category was 46.50% and forty six posts were reserved. The respondent who belonged to the*

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<sup>1</sup> [2013 (2) Mh. L. J]

<sup>2</sup> (2005) 2 SCC 10

*general category was the first in the waiting list, having been denied an appointment. His petition for a writ of mandamus was allowed by the High Court, inter alia on the ground that the figure of 46.5% ought to have been rounded off to 47% and not 46%. Upholding the judgment of the High Court, the Supreme Court held as under:-*

*“7. We do not find fault with any of the two reasoning adopted by the High Court. The rule of rounding off based on logic and common sense is: if part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. 46.50 should have been rounded off to 47 and not to 46 as has been done. If 47 candidates would have been considered for selection in general category, the respondent was sure to find a place in the list of selected meritorious candidates and hence entitled to appointment”.*

*“10. We are unable to agree with Mr. Kulkarni’s submission that the ratio of this judgment ought to be restricted only to cases of employment. The ratio of this judgment would apply to the present case. There is nothing in the judgment that warrants restricting it to cases of employment. The rule of rounding off was held to be based on logic and common sense. We do not read the observations as being limited to any particular kind of case. Rounding off therefore, is a rule in the absence of anything to the contrary. If the rules or other provisions specifically provide otherwise, it would be a different matter.*



*In the absence of such a provision, the rule of rounding off must be applied”.*

**“13.** *Faced with this Mr. Kulkarni submitted that the rule of rounding off ought to be limited only to the case of employment and admissions to academic courses. Here again, he was unable to indicate any reason why the rule ought to be so restricted”.*

**“14.** *The rule of rounding off recognised by the Supreme Court and by the Division Bench of this Court in the above cases applies equally to cases such as these.*

Therefore, the facts and circumstances in the instant case fully justify to round off from 89.85% to 90%.

11. Even at the time of admission of the case, the Respondent has expressed willingness to repay the admitted balance amount of Rs.63,80,000 and Rs.26,60,000 amounting to Rs.90,40,000/-. As per law, every claim should be scrutinised by IRP/RP, as per records of Corporate Debtor. In accordance with statement made in the Appeal expressing willingness to pay admitted debt to the Financial Creditor, the Appellant/Promoter of Corporate Debtor has offered Cheque bearing No.000351 dated 17.07.2019 drawn on HDFC Bank, Richmond Road Branch, Bangalore for a sum of Rs.90,29,491/- (Rupees Ninety Lakhs Twenty Nine Thousand Four Hundred and Ninety one only) in favour of Mr. John Varghese, the Financial Creditor. When the Cheque is offered to the learned Counsel for the Petitioner/Financial Creditor, she refused to accept to it. Therefore, the cheque is deposited with the Registry, NCLT Bengaluru Bench, vide memo dated 17.07.2019.

12. It is relevant to refer the judgement of the Hon'ble Supreme Court in the case of *Swiss Ribbons Private Limited and Another Vs. Union of India and Others*<sup>3</sup>, with regard to the filing of the Application Under Section 12-A and its related questions. Para Nos 79, 80, 81, 82 and 83 deals with the issue, which are extracted below:

As per Under Section 12-A, which reads as under:

**“Section 12-A** is not violative of Article 14

**“79.** Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018. It reads as follows:

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

*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 specified”.*

**“80.** The ILC Report of March 2018, which led to the insertion of Section 12-A, stated as follows:-

**29.1.** Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the Application on a request by the Applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the Corporate Debtor, judicial permission for withdrawal of CIRP was granted

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<sup>3</sup> (2019) 4 Supreme Court Cases 17

*(Lokhandwala Kotaria Construction (P) Ltd. Vs. Nisus Finance and Investment Managers LLP<sup>4</sup>; Mothers Pride Dairy India (P) Ltd. Vs. Portrait Advertising and Marketing (P) Ltd.<sup>5</sup>; Uttara Foods and Feeds (P) Ltd. Vs. Mona Pharmachem<sup>6</sup>. This Practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that “all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution”. Thus, it was agreed that once CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the Corporate Debtor but is envisaged to be a proceedings involving all creditors of the debtors. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.*

**29.2** *On a review of the multiple NCLT and NCLAT judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for*

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<sup>4</sup> (2018) 15 SCC 589

<sup>5</sup> (2017 SCC OnLine SC 1789

<sup>6</sup> 2017 (2018) 15 SCC 587



*withdrawal post admission if the CoC approves of such action by a voting share of ninety percent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage (as observed by the Hon'ble Supreme Court in Uttara Foods and Feeds (P) Ltd. Vs. Mona Pharmachem and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules.”*

*Before this section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT.*

**81.** *Regulation 30-A of the CIRP Regulations states as under:*

**30 – A.** *Withdrawal of application:- (1) An Application for withdrawal under Section 12-A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under Regulation 36-A.*

**(2)** *The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of Regulation 31 till the date of application.*

**(3)** *The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.*

**(4)** *Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the*

*adjudicating authority on behalf of the applicant, within three days of such approval.*

*(5)The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4).”*

*This Court, by its order dated 14.12.2018 in Brilliant Alloys (P) Ltd. Vs. Rajagopal<sup>7</sup>, has stated that Regulation 30-A(1) is not mandatory but is directory for the simple reason that on the facts of given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36-A.*

*“82. It is clear that once the Code gets triggered by admission of a creditor’s petition under Sections 7 to 9, the proceedings that is before the adjudicating authority, being a collective proceedings, is a proceedings in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, a Committee of Creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional), we make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided*

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<sup>7</sup> (2018 SCC OnLine SC 3154



*after hearing all the parties concerned and considering all relevant factors on the facts of each case.*

*“83. The main thrust again the provisions of Section 12-A is the fact that ninety per cent of the Committee of Creditors has to allow withdrawal, This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12-A also passes constitution muster.*


By reading of extant provisions of Code and the above judgment, it is clear that power to accept Application for withdrawal of Petition/Application is vest with Committee of Creditors and finally with Adjudicating Authority. Therefore, there is no bar for the Committee of Creditors to the file withdrawal Application by themselves or through IRP. In instant case, as stated supra, original Petitioner is not interested to file an

Application for withdrawal, even though the Corporate Debtor has given cheque for the admitted amount, and thus it is just and proper to accept the instant application in the interest of justice..

Therefore, the contention of the Financial Creditor that the Petitioner alone has the Authority to file Withdrawal Application and none other him has right to file the Application for Withdrawal U/s 12 A of Code is not at all tenable and liable to be rejected. And the Adjudicating Authority is empowered to permit any Applicant to file an Application U/s 12-A of the Code and can consider it.

13. For the aforesaid reasons and circumstances and the law on issue, we are inclined to allow I.A.No.244/2019 in C.P. (IB) No.46/BB/2018 to withdraw the main Company Petition and consequently dismissing the same.
14. In the result, I.A. No. 244/2019 in C.P.(IB) No.46/BB/2018 is allowed by permitting the Applicant to withdraw the main Company Petition No. C.P. (IB) No.46/BB/2018. Accordingly, Company petition is dismissed. The learned Counsel for the Petitioner/Financial Creditor is at liberty to collect the cheque deposited with the Registry, NCLT, Bengaluru Bench, filing an appropriate memo as and when Petitioner desire. No order as to costs.

  
**(ASHOK KUMAR MISHRA)**  
**MEMBER, TECHNICAL**

  
**(RAJESWARA RAO VITTANALA)**  
**MEMBER, JUDICIAL**