

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

**M.A. 1396/2018, 827/2018, 1142/2018, & 828/2018
in C.P. (IB)-1362(MB)/2017**

Under section 12A of the IBC, 2016

Satyanarayan MaluApplicant

In the matter of

SBM Paper Mills Ltd....Corporate Debtor

Order delivered on 20.12.2018

Coram: Hon'ble Shri. M.K. Shrawat, Member (Judicial)

For the Petitioner : 1. Mr. Amir Arsiwala, a/w.
2. Mr. Zaid Mansuri (For Applicant)
3. Mr. Pulkit Sharma, i/b. Abhishek Adke
(For Resolution Applicant)
4. Mr. Sandeep Bajaj, a/w.
5. Mr. Anuj Jhaveri, i/b. PSL Advocates &
Solicitors for the Resolution Professional.

For the Respondent : 1. Mr. Ashish Pyasi, a/w.
2. Ms. Sayali Phansikar, Advocate, i/b.
Kritika Seth (For Financial Creditor).

Per M.K. Shrawat, Member (Judicial)

ORDER

1. Several Miscellaneous Applications are submitted, for the sake of completeness detailed as under:

a) **MA 1396/2018** submitted by Satyanarayan Malu on 14.11.2018, substantial prayer is as under:

"i) Allow the Applicant to withdraw Company Petition No. 1362 of 2017 filed under section 10 of the IBC in accordance with section 12A of the IBC".

b) **MA 827/2018** submitted by RP on 25.08.2018, seeking approval of resolution plan with the prayer as follows:

"a) Approve the resolution plan approved by the Committee of Creditors (CoC) u/s 31(1) of the IBC, 2016".

- c) **MA 1142/2018** submitted by Resolution Applicant M/s. Khandesh Roller Floor Mills on 03.10.2018, seeking permission for **withdrawal of its resolution plan** and connected substantial grounds as under:

"a) That this Hon'ble Tribunal be pleased to pass an order/directions to the Respondents to return and refund the Earnest Money Deposit of Rs. 50,00,000/- lying to the credit of the Committee of Creditors / Resolution Professional.

d) That this Hon'ble Tribunal be pleased to pass an order/directions to the Respondents to cancel and terminate the bank guarantee of Rs. 95,00,000/- dated August 24, 2018 and refund the original guarantee to the bank guarantor/ issuing such guarantee".

2. These applications were heard on last few occasions and thereafter on combined and consolidated reading of these applications it was felt necessary to formulate crucial as well as essential questions of law so that the controversies raised can be judicially addressed and properly decided, as reproduced below:

- (i) Whether an Applicant who has filed an Application/Petition u/s 10 of the IBC is entitled to **withdraw its own petition u/s 12A** of IBC 2016?
- (ii) Whether a Resolution Applicant who has submitted a Resolution Plan which was approved with majority vote by CoC can be allowed to **withdraw the said Resolution Plan** which is under consideration for approval before the NCLT?
- (iii) Whether ex-director of the **Corporate Debtor**, which is under Insolvency can offer **One Time Settlement** (OTS) with the Financial Creditor/Creditors if qualified u/s 29A of the Insolvency Code 2016?

3. Aforelisted questions have been communicated to the respective parties and it is worth to mention at the outset itself that all the Learned Representatives have diligently addressed the questions, as a result, hereinbelow, on the basis of their arguments, this bench has arrived at the conclusion. Foremost decision taken by me is that to resolve the controversies, almost dovetailed and intermingled between these Miscellaneous Application, under the fitness of circumstance first shall take up the Application filed by one of the Director of the suspended board of the Debtor company, namely S B M Paper Mills, bearing Miscellaneous Application number 1396 of 2018.

a) M.A. 1396/2018 dated 14 November 2018 submitted by Mr. Satyanarayan Malu, seeking order U/s 12A of I&BC;

- I) In this application it is stated that The Applicant is a member of the suspended Board of Directors of the company SBM Paper Mills. This company was Incorporated to carry out trading activity of papers.
- II) The 'Corporate Debtor' SBM Paper Mills had filed an **Application under section 10** of the Insolvency Code which was admitted vide an order dated 17/10/ 2017 by declaring commencement of insolvency proceedings (CIRP). Moratorium was declared and IRP was appointed. As per the said order, the admitted factual position was that the Corporate Debtor had filed the said application in respect of a default in payment of loan of **one 'Financial Creditor' that is Allahabad Bank**. This bank is the sole member of 'Committee of Creditors' (CoC).
- III) An advertisement was made inviting 'Expression of Interest' (EoI) and in response seven entities have expressed their interest in submitting a Resolution Plan. The resolution professional has disqualified two of the said entities. Ultimately, only one entity was considered as qualified

Resolution Applicant. A resolution plan of the said entity was received on 11 June 2018.

- IV) It may not be out of place to put on record that this Applicant had moved a Writ Petition before the honourable High Court of Nagpur bench on the ground that during the offer of One Time Settlement with the bank the Insolvency Proceedings be stayed, however, not accepted and the stay granted on 13 June 2018 was vacated by the Honourable High Court on 12 July 2018.
- V) The Resolution Professional convened few meetings of Committee of Creditors and finally an improved Resolution Plan was approved by the CoC. Facts have revealed that an Earnest Money of ₹50 lakhs was deposited by the Resolution Applicant. Further on demand also furnished a Bank Guarantee of ₹95 lakhs to show its bona fides.
- VI) It is interesting to note that on one hand the Resolution Professional has submitted the said Resolution Plan for approval by the Adjudicating Authority, side-by-side, the Applicant of this Miscellaneous Application, Mr. Satyanarayan Malu, was carrying a parallel negotiation with Allahabad bank.
- VII) It is informed in this Application that on 28th may 2018 this applicant, Mr. Malu, had made a OTS proposal to Allahabad bank. To settle the account of the corporate debtor SBM paper Mills, this applicant had offered 14 crores of rupees. The said OTS offer was improved and vide a letter dated 23 June 2018 improved one-time settlement offer of ₹17 crores was communicated to Allahabad bank.
- VIII) One of the main contentions of this Applicant before the CoC was that the offer he had made was a **better proposal** than the Resolution Plan under consideration. It was alleged that in spite of the fact that the said Plan had offered

significantly lesser amount than what had been proposed by the Applicant it was sent for approval U/s 31(1) of IBC (MA 827/2018) from the Adjudicating Authority (AA). This Applicant kept on pursuing directly with the Allahabad Bank Authorities hence expressed his willingness to deposit upfront payment with the condition that the Bank ought to refrain itself from considering the Resolution Plan in COC meetings. The Bank demanded 10% upfront payment and in compliance a sum of Rs. 1 Cr. deposited in a no-lien account. The Applicant was also directed by the Allahabad Bank to deposit entire one-time settlement amount in no-lien account as a pre-condition. It is informed in this MA that a COC meeting scheduled for 9/8/18 was deferred presumably on the ground of Applicant's offer and payment of up-front amount.

- IX) In this application an unexpected development is reported. The sole Resolution Applicant had expressed its desire to withdraw the Resolution Plan. As a consequence, there was no person as a Resolution Applicant for consideration before the Committee of Creditors. In that position when there was no Resolution Plan the only remedy left with the Comity of Creditors is to go for "Liquidation". On the other hand, if the applicant is allowed to withdraw U/s 12A IBC the present petition being filed by him as an Authorised person of the Corporate Debtor, all the stakeholders shall get benefit. The applicant had given an undertaking that The Operational Creditors and Unsecured Creditors shall be benefited since 100% dues shall also be paid in the ordinary course of business.
- X) Finally, in the light of the above background, this applicant has prayed for grant of withdrawal under section 12-A of Insolvency Code of the Petition filed under section 10 of the Insolvency Code.

- 4.1 In support of this Miscellaneous Application Ld. Counsel has opened his argument by referring the provisions of Section 12A of IBC to emphasize that the Adjudicating Authority can allow the withdraw of application even if submitted u/s 10 of IBC on an application made by the Applicant, however, with the approval of 90% voting of the CoC. This was introduced through **3rd Amendment, and modifications in CIRP Regulations as per Notifications No. IBBI/2018-19/GN/REG031 published in the Official Gazette on the 3rd of July 2018.** It is also made clear by the Ld. Counsel that the said **Notification came into force and made applicable on the date of its publication which shall be applied to CIRP commencing on or after the said date.** Simultaneously introduced Regulation 30A to provide a procedure for the implementation of withdrawal u/s 12A of the Code. So, the argument of Ld. AR is that CIRP Regulations (i.e. Regulation 30A) are required to be applied to CIRP proceedings which shall commence after 3rd July 2018. As far as this Company Petition (CP1362 of 2017) is concerned, the same was admitted on 17th October 2017 vide order passed u/s 10 of the Code, hence, the procedure laid down in Regulation 30A are not applicable in respect of withdrawal application filed u/s 12A of IBC, pleaded by the Ld. Counsel.
- 4.2 Next argument is that an application u/s 10(1) is to be filed by a **Corporate Debtor** who has committed default to be treated as a **"Corporate Applicant"** authorized to file an application for initiating Corporate Insolvency Resolution Process (CIRP) to be declared by the Adjudicating Authority. It is therefore, pleaded that the Corporate Applicant who has submitted Application u/s 10 is authorized to file withdrawal application u/s 12A, which prescribed that the **Adjudicating Authority can allow a withdrawal application either admitted u/s 7, or u/s 9, or u/s 10** on an application made by the 'Applicant'. Attention was drawn on the definition of **"Corporate**

Applicant” prescribed u/s 5(5) of the Definitions, which means an individual who is in-charge of managing the operations and resources of the Corporate Debtor or a person who has the control and supervision over the financial affairs of the Corporate Debtor. The present Applicant, although a member of the suspended Board of Directors of the Corporate Debtor M/s. SBM Paper Mills Ltd., but he is the same person who has submitted/signed the application u/s 10 of the Code to declare the Corporate Debtor as insolvent. He was having the control and supervision over the financial affairs of the Corporate Debtor at the time of submission/admission of the Petition.

- 4.3 Ld. AR has emphasized that the provision of Section 12A of IBC is to be applied wherein it is prescribed that the application must be supported by 90% voting share of the CoC and this application is to be moved by the Corporate Applicant and not necessarily by the RP. There is no requirement in this section that on a resolution of CoC necessarily to be convened by RP, thereafter only an application of withdrawal can be furnished. Technically speaking, the CIRP is still going on and there is no order for liquidation therefore, this withdrawal application is maintainable.
- 4.4 Ld. AR has drawn my attention on an application No. MA 827/2018 submitted on 21.08.2018 by the RP for an order u/s 31 to approve the resolution plan. According to him, it is pertinent to note that u/s 23(1) a Resolution Professional shall conduct the entire CIRP and manage the operations of the Corporate Debtor during the CIRP period. A 'Proviso' is inserted with retrospective effect from 6th June 2018 providing that a Resolution Professional shall, if the resolution plan u/s 30(6) is submitted, continue to manage the operations of the Corporate Debtor after the expiry of the CIRP period until an order is passed by the AA u/s 31. In his opinion, the impugned resolution plan is under consideration, although the resolution applicant is not pursuing the said plan, as well as there is no order for

Liquidation, therefore, at this stage the application for withdrawal is maintainable and an order can be passed u/s 12A of the Code.

- 4.5 Finally it is also pleaded that the applicant is giving the best offer to the Financial Creditor and others, therefore, withdrawal is beneficial for all stakeholders. If withdrawal is permitted, the **stakeholders shall get 100% of their dues without haircut.**
5. During the course of hearing Ld. Representative from the side of the RP and Allahabad Bank remained present. The stand of the RP is that in a situation when the period had expired hence, the RP is not having any control over the insolvency proceedings. Moreover, according to Ld. RP his job is now over because a resolution plan has already been submitted before the Adjudicating Authority for adjudication u/s 31(1) of the Code. That Resolution Plan was submitted through Miscellaneous Application No. 827/2018 dated 21.08.2018. My attention is drawn that the plan was submitted by the resolution applicant M/s. Khandesh Roller Floor Mills Ltd. Ld. AR of RP has clarified that now it has come to his notice that the said Resolution Applicant has moved an application seeking permission for **withdrawal of the approved resolution plan.** At this juncture, it is commented that the granting of permission for withdrawal is subjudice before this Bench but in any case totality of the circumstances are to be weighed by comparing the statistics of the resolution plan on one hand and the offer of the promoter director on the other hand.
6. From the side of the Allahabad Bank Ld. Representative has not objected this application u/s 12A primarily on the ground that the Bank authorities vide a communique dated 14th November 2018 has informed the Corporate Debtor i.e. SBM Paper Mills as follows:

*"The SBM Paper Mills Pvt. Ltd.
Shri S.N. Malu (director of suspended Board)*

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**MA 827, 1142 & 1396/2018 in
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Dear Sir,

Withdrawal of application from NCLT

This has reference to your application filed in NCLT Mumbai under section 10 of IBC. After a series of Negotiation with apex authorities of bank, latest being on 9th November 2018, wherein you have improved your offer from 17 crores to 18 crores and have desired to withdraw your application under section 12A for maximization of assets value, Bank is agreed upon to extend its consent for withdrawal of your application to explore possibilities of maximization of assets value."

- 6.1 Ld. Counsel of the Bank has emphasized that **two options** at present are available to the Bank, **one** is the resolution plan submitted by the resolution applicant viz. M/s. Khandesh Roller Floor Mills Ltd. and the **second** option is the offer of this applicant viz. **Mr. Satyanaran Malu who is offering 18 crores of rupees as onetime settlement.** Earnest money of Rs. 1 core has already been deposited in a no- lien bank account. The entire situation if to be considered commercially, it is prudent not to object the withdrawal of the petition.
7. To resolve the existing intricate situation, I have thought it prudent to first formulate controversy by framing few questions of law, as propagated supra. All the parties connected with this complex issue are heard at length in the light of the pleadings available on record supported by requisite evidences and law applicable. At the outset, it is worth to identify the problem that there are **two Miscellaneous Applications** for adjudication, **one** is an application **for withdrawal of the main CP** with a proposal of onetime payment of Rs. 18 crores and on the other hand **Second** application for **withdrawal of the Resolution Applicant** who has submitted a resolution plan which stood approved by the CoC and now under consideration for recording of "satisfaction" by the Adjudicating Authority.
- 7.1 To go to the root of the matter, it is expected from an author of a judgement to first identify which principle of Interpretation of statute, he is going to follow in his decision. An opening observation is that the Laws governing financial transactions must not be static due to one of the fundamental reason that the economic condition of the society keeps on fluctuating

depending upon the government policies and market conditions. The consequence is that each financial year is peculiar in nature hence advisable to be governed by special provisions of Law applicable to that year. Therefore, while interpreting legal provisions laid down in connection with the business transactions or even imposition of taxes, it is healthier to frame, as also interpret a law, which is capable of understanding the market conditions, indeed not having a straight graph. Hence a strict rule of interpretation is sometimes avoided. In my humble opinion, a Law is mandated for the benefit of the society and not *vice-versa*. The provisions of IBC, 2016 are such provisions which are directly going to affect the day-to-day functioning of the corporate organizations. Some of the Rules and Regulations under this Code are also directly influencing the trade relationships as well as the financial relationship. There are also so many instances, rather full of instances, where a smooth relationship had undergone a stressed relationship not because of the bad intention of the business entities but primarily due to the changed government policies, modified financial structure or international volatile situation. Because of all these reasons, it is absolutely necessary to be careful while interpreting a statute, needless to mention, ought to be based upon sound understanding of business operations and corporate model of functioning.

- 7.2 With modesty I put my view that a golden rule of interpretation of such statute is to subscribe a 'creative interpretation'. However, hastened to add that a "Laxman Rekha" is to be drawn while interpreting the provisions of a Law so that the main Legislative intent be not disturbed. A purposeful interpretation, also termed as "purposive interpretation" is sometimes more helpful to redress the grievance, so therefore preferred from literal interpretation. With all humility it is to be added that a Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result. My attempt herein below is also in this direction. A fair

construction of a statute dealing with economic laws is expected to be a purposive interpretation coupled with literal interpretation and this approach is said to be a correct modern day approach. Without transgressing the preamble of a statute and keeping in mind the fundamental principle on which a statute is based upon, it is our duty to adopt a practical approach of interpretation. Sometimes, it is noticed that too strict and literal meaning would be impractical and unworkable creating some stringent condition of compliance, which may lead to inequitable results. Even might not have been foreseen by the Hon'ble Legislatures while a legislation was drafted.

- 7.3 Under the fitness of circumstances, I have taken a conscious decision that a workable solution is to first decide the question framed above that **whether an Applicant who has filed a petition u/s 10 is entitled to withdraw its own petition u/s 12A of the Code, especially when the said applicant has furnished the impugned Petition(CP 1362/2018) and now offering a onetime settlement as a Director in the suspended management of the Debtor Company.** Section 12A is inserted w.e.f. 06.06.2018 which prescribes that the Adjudicating Authority may allow the withdrawal of application admitted either u/s 7 or u/s 9 or u/s 10, on an application made by the Applicant with the approval of 90% voting share of the CoC. The first reaction during the course of hearing of this Bench was that how it is justifiable on the part of an applicant who has moved a Petition u/s 10 to declare itself insolvent (as happened in this case) at one point of time and thereafter at a later stage suo-moto seeking permission for withdrawal of the said Petition? It has also been questioned that in this manner the procedure laid down in the provisions of the IBC may be wrongly utilized? How a person can be allowed to play with the precious time of a Court by moving a Petition with the prayer to commence CIRP and at the fag end of the process seeking permission of withdrawal of the said Petition? But, the answer is simple and single that the Code has now subscribed such

procedure through which withdrawal is possible in respect of a petition filed u/s 10 of the Code. The condition subscribed is that "on an Application made by the Applicant" withdrawal can be allowed, if approved by 90% voting share of the CoC. On this point, the Applicant has clarified that as a Director of the Debtor Company the said Application u/s 10 was signed by him and now he is the signatory of this withdrawal application, hence qualified.

- 7.4 In this regard, provisions of section 10 are unambiguous – where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating CIRP with the AA. The term **"corporate applicant" is defined u/s 5 of 'Definitions' of IBC**, means a member of the corporate debtor company who is authorized to make an application for CIRP under the constitutional document of the Corporate Debtor or a person who has the control and supervision over the financial affairs of the Corporate Debtor. In the present case an admitted position is that Mr. Satyanarayan Malu is the person who has control and supervision over the financial affairs of the Corporate Debtor. It has also been clarified that he is one of the directors in the Board of the Corporate Debtor as well as duly authorized to act on behalf of the company. At the time when the Petition u/s 10 was filed, he was the signatory and now also signed this withdrawal application.
- 7.5 It has also been questioned that being a defaulter whether not disqualified under the provisions of section 29A of the Code. However, it is clarified that the Applicant and the Debtor Company have never been qualified as a "Wilful defaulter" in accordance with the guidelines of RBI. It is also not a case that the signatory was ever disqualified as a director under the Companies Act. Moreover, this clause is not to apply in relation to a "connected person" holding the company and also in the management for control of the business of the Corporate Debtor.

7.6 As far as the applicability of **Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Person) Regulations 2016** is concerned, it is inserted as a (3rd amendment) Regulations 2018 **w.e.f. 03.07.2018**. It is clarified that this Regulation shall apply to CIRP commencing on or after 03.07.2018. A procedure is laid down in this Regulation for withdrawal of application after the insertion of section 12A in the statute. A question was that as per the procedure prescribed under Regulation 30A an application for withdrawal is to be submitted to IRP or RP in Form No. FA but before issue of invitation for expression of interest under Regulation 36A. So, a query has been raised that in a situation when EoI had already been invited then how this application for withdrawal can be entertained? It is vehemently pleaded that when the **CIRP has commenced** as per the order of this Bench **dated 17.10.2017** the said Regulation was not in the statute Book. Moreover, Section 12A was introduced w.e.f. 06.06.17 and even at that time Regulation 30A was not in the statute Book being introduced w.e.f. 03.07.2018. It is worth to add one more important feature about the introduction of this Regulation is that the Notification No. IBBI/2018-19/GN/REG031 introduced by The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018, it was made clear that the Regulations **shall come into force on their publication in the Official Gazette and shall apply to CIRP commencing on or after the said date i.e. 03.07.2018**. Because of the reason that the Statute itself has clarified about the date from which this Regulation should be applicable i.e. on or after 03.07.2018, no uncertainty was left in the statute Book about its enforceability. As a consequence, as far as the applicability of the provisions of the Code is concerned and to be applied on this Application, only section 12A is relevant for judicial consideration. It is also a known Law that the Regulations do not control the main sections of a statute, but it is vice versa. Since the provisions of section

12A has not laid down a condition of pre-EoI advertisement, therefore, the present '**withdrawal**' application is **maintainable**.

- 7.7 It has further been elaborated that this application is not a simplistic withdrawal application **but it is coupled with a proposal of onetime settlement**. The CoC has only one Financial Creditor i.e. Allahabad bank who has examined the pros & cons of this application. The CoC/the Allahabad Bank has also compared the proposal made in the Resolution Plan submitted for consideration. Undisputedly, onetime settlement offer is more economically advantageous to the Bank than the offer made through Resolution Plan. Precisely, the offer of payment of 18 crores in OTS is higher than the offer of 12.5 crores made by the Resolution Applicant. Further, the Bank has also tilted its decision in favour of OTS after considering the *bona fides* of this Applicant who has already deposited a sum of Rs. 1 crore as upfront payment. The Corporate Debtor is an ongoing concern having potential of better business therefore, it is vehemently pleaded that the **onetime settlement is a viable proposition for maximization of value of assets of the Corporate Debtor**. The Financial Creditor has certified that the financial debt is totally satisfied, i.e. 100% recovery of the debt.
8. In addition to the above factual matrix, one more development in this case is not only relevant but has a direct impact on the decision whether withdrawal application can be allowed when a Resolution Plan is subjudice for the pronouncement of an order u/s 31(1) i.e. approval of Resolution Plan. The Resolution Professional has submitted a **Resolution Plan of M/s. Khandesh Roller Floor Mills Ltd. annexed with Miscellaneous Application No. 827/2018 dated 21.08.2018 seeking an order u/s 31(1) of the Code**. As per this plan prima-facie the restructuring of liabilities of the Financial Creditor i.e. Allahabad Bank was only to the extent of

Rs. 1,250 lakhs as a full and final payment. While it was pending for disposal strangely an **Application was moved by the Resolution Applicant (MA No. 1142/2018)** seeking permission for withdrawal of the Resolution Plan. To my knowledge, this has happened for the first time in the two and half years (Approx.) that a Resolution Applicant is withdrawing a Resolution Plan which is approved by the CoC with majority vote. In the following paragraph I shall deal with the relevant provisions, if any, available to deal with the situation when a Resolution Applicant is seeking permission for withdrawal of an approved Resolution Plan pending for an order u/s 31(1). But before that, at the moment this situation is to be tackled keeping in mind that if the sole Resolution Plan be allowed to be withdrawn then there shall be no option left but to declare 'Liquidation' of the Corporate Debtor. One of the important provision is unambiguous that in case all attempts have failed to invite Resolution Applicant but no one come forward showing interest in the revival of the Debtor Company, the option available to CoC is to vote for Liquidation. Refer **Section 33(1)** of the Code prescribing '**Initiation of Liquidation**' that where Adjudicating Authority does not receive a Resolution Plan U/s 30(6) of the Code or reject a Resolution Plan U/s 31 of the Code, it shall pass an order requiring the Corporate Debtor to be 'Liquidated' by issuing a public announcement that the Corporate Debtor is in 'Liquidation'. Hence, a serious contention before this Bench has been raised that whether a Liquidation is beneficial vis-à-vis OTS proposal. The contention is that due to the unexpected and unprecedented development on the part of the Resolution Applicant, the CoC as well as the RP have been put in a strange situation that what to do and how to proceed when the CIRP period has also expired. Prima-facie it is conveyed to me that this situation is at par with a situation when there is no Resolution Plan available which automatically leads to 'Liquidation'. The parties present before me, especially the Bank, is not at all ready for Liquidation of the assets of the

Debtor Company, naturally so, due to lower Liquidated value of all those assets.

9. In the light of the foregoing detailed discussion and on due consideration of the provisions of the statute as also the connected Regulations it is hereby concluded that the proposal of this Applicant for onetime settlement is in the benefit of this Corporate Debtor for its revival along with all the stakeholders. Moreover, it is a practical solution through which Allahabad Bank is also recovering 100% debt amount as affirmed by the concerned **Bank authorities through an affidavit dated 27.11.2018 conveying their consent for withdrawal of the Petition on account of acceptance of OTS.** As a result, circumstances of this case demands that **permission be granted to allow the withdrawal of Application/Petition (CP 1362/2018).**
10. Before parting with this Miscellaneous Application on my own seeking an answer from myself that whether such an attempt of a Corporate Debtor be encouraged to first allow an Application/Petition u/s 10 for its insolvency and later on after consuming precious time of few months of the Court, as also resolution professional along with the members of the CoC, be allowed to withdraw Section 10 Petition? Because the jurisprudence is developing everyday concerning various provisions of this Code, hence in the absence of any precedent my conscientious view is that if deem fit such an attempt is required to be discouraged. This Code shall not be made a tool for deferment of payment of liabilities which ought to happen due to declaration of "moratorium". I, therefore, take a conscious decision to impose a **cost of litigation on the Corporate Debtor of Rs. 5,00,000/-** (Rupees Five Lakhs only) to be paid to MCA/NCLT within 15 days on receipt of this order. Compliance is to be reported to the Registrar, NCLT with evidence.

11. Subject to the fine imposed (supra) this withdrawal application is hereby **allowed** by invoking the jurisdiction prescribed u/s 12A of the IBC.
 - b. **MA 1142/2018 dated 03.10.2018 submitted by M/s. Khandesh Roller Flour Mills Pvt. Ltd. for withdrawal of Resolution Plan.**
12. Having granted permission for withdrawal of main Petition (CP 1362/2017) supra, this Miscellaneous Application has become otiose. Once the main Petition does not survive on account of withdrawal, the natural outcome is that there is no requirement of financial restructuring of the impugned Corporate Debtor as suggested in the Resolution Plan under consideration for an order u/s 31(1) of the Code. Due to the withdrawal of the main Petition, the approval of the Resolution Plan or withdrawal of the Resolution Plan, either way not going to have any impact on the issue of insolvency. Although a lengthy argument revolving around several provisions of the Code have been addressed, being a new issue, but keeping brevity in mind as well as considering the fact that no useful purpose shall be served related to this Petition, it is judicious to curtail this decision at this juncture without dealing with those arguments. However, certain admitted facts cannot be ignored that without assigning convincing reason this Resolution Applicant is making an attempt to withdraw the Resolution Plan, in other words thwarting the CIRP process. This attempt may not be allowed, unless and until circumstances of a case compel to do so. Withdrawal of a Resolution Plan at the stage when it is already approved by CoC has a far reaching effect. On one hand the other competitors who have submitted their Resolution Plan are deprived of their right of participation in the re-structuring of Corporate Debtor's financial position. The other Resolution Applicants are also deprived of their business opportunities of controlling the business of the Corporate Debtor being thrown out of race from the bidding of Resolution Plan. It is not

appropriate on the part of a Resolution Applicant to first bid and thereafter on its own withdraw its proposal.

12.1. On one hand, the Applicant (Resolution Applicant) viz. Khandesh Roller Flour Mills Pvt. Ltd. has pleaded that in the light of the Order of Hon'ble NCLAT in the case of Tarini Steel Company Pvt. Ltd. Versus Trinity Auto Components Ltd. & anr., Order dated 09.03.2018 [Company Appeal (At) (Insolvency) No.75 of 2018] a liberty be granted to withdraw the Resolution Plan, as held in the said precedent. On the other hand, the Resolution Professional has opposed the request of withdrawal primarily on the ground that such an Order granting withdrawal may be in contradiction of the provisions of the Insolvency Code. In support of this argument, reliance was placed on the decision of Nagarkar Ajit Chandrakant and Ors. Vs. Mulund Gymkhana's College of Physical Education and Ors. (MANU/MH/0753/2003) Order dated 24.07.2003 for the legal proposition that, quote "*The tribunal is a creature of the Act and it is not open to them to travel beyond the provisions of the statute. The High Court while examining the correctness or otherwise of the order passed by the tribunal or any action taken by an officer under the Act is also to be guided by the provisions of the statute*" unquote.

12.2. Be that as held by Hon'ble Courts, I am of the view that under the peculiar situation as discussed hereinabove at length, this Resolution Plan has although become futile, however, such attempt on the part of a Resolution Applicant is to be discouraged. It is a common practice, as also adopted by Hon'ble Courts, that in case of breach of commitment an earnest money can be forfeited. Therefore, the Prayer of return of entire earnest money deposited of ₹50 Lakhs is not acceptable in toto and the Resolution Professional is directed that out of ₹50 Lakhs, a sum of ₹25 Lakhs to be retained as a deterrence to be utilized towards CIRP cost and other related expenses yet to be ratified

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by this Tribunal. Only ₹25 Lakhs is directed to be refunded to the Resolution Applicant. Ordered accordingly.

MA 827/2018 - Approval of Resolution Plan.

13. This Application is submitted on 21.08.2018 by the Resolution Professional for approval of the Resolution Plan as prescribed u/s. 31(1) of The Insolvency Code. In the light of the circumstances as narrated in foregoing paragraphs as also considering the peculiar situation of this case it is hereby held that no adjudication under the provisions of The Code is now required because this Resolution Plan has become redundant.

14. Rest of the Miscellaneous Applications, if any, pending stood merged with this Order, hence required no separate Order.

Sd/-
M.K. SHRAWAT
MEMBER (JUDICIAL)

Date: 20.12.2018
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