

(2021) 12 NCLT CK 0004
In the National Company Law Tribunal
Case No : C.P. (IB) 2390 Of 2019

Ask Energy Solutions Pvt Ltd

APPELLANT

Vs

Shri Saikrupa Sugar & Allied Industries Limited

RESPONDENT

Date of Decision : 01-12-2021

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 12A, 60(5)
Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 — Regulation 30A, 30A(3)

Citation : (2021) 12 NCLT CK 0004

Hon'ble Judges : Suchitra Kanuparthi, Member (J); Anuradha Sanjay Bhatia, Member (T)

Bench : Division Bench

Advocate : Omkar V Deosthale, Nausher Kohli, Vignesh Iyer, Jaykar, Rajkumar Dhamdhare, Mohammed Varawala

Final Decision : Disposed Of

Judgement

Suchitra Kanuparthi, Member (J)

1. This is an application filed by the IRP seeking withdrawal of C.P. 2390 of 2019 which is admitted into CIRP vide order of admission dated 03.08.2021.

2. Pursuant to receiving of Admission order dated 03.08.2021 on 28.08.2021, the IRP made a public announcement in Form FA dated 29.08.2021 calling for claims from creditors. The last date of receiving claim from creditors was 11.09.2021.

3. On 04.09.2021, the applicant was given a copy of the settlement agreement dated 04.09.2021 between the Operational Creditor and the Suspended Directors of the Corporate Debtor along with Form FA. The Form FA is attached below;

4. This application was filed pre-constitution of CoC under Section 12A r/w Regulation 30A. The IRP fees and expenses incurred till the date of filing of application had been paid hence, the requirement of furnishing of bank

guarantee was sought to be dispensed.

5. During the course of hearing, the professional appearing for the IRP pointed out that in order of Hon'ble NCLAT was passed on 09.11.2021. the order is reproduced below;

6. The CoC was constituted and Mr. Ashish Pyasi, Counsel for one of the CoC member mentioned that the Petition for section 7 for recovery of amounts is pending vide C.P. 248 of 2018. The said matter is posted for hearing in the Court 2 on 01.12.2021 and had no objection if the CIRP against the Corporate Debtor is withdrawn.

7. However, I.A. 2440 of 2021 is filed another member of CoC namely; Punjab National Bank (PNB) objecting for the withdrawal of section 12A application and that they have filed a claim of Rs. 1,11,31,35,775/- and the Petition is pending vide C.P. No. 3572 of 2019 before Court-2.

8. The only issue for consideration which arises in the present is whether the section 12A application can be allowed.

9. It is pertinent to look at Section 12A of the Code read with Regulation 30A (3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is as follows:

Section 12A of the Code:

"12A. Withdrawal of application admitted under section 7, 9 or 10The 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."

Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:

"30 A. Withdrawal of application:

(1) An application for withdrawal under section 12A maybe 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

regulation36A, 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.

10. In the instant case, the IRP was informed on 04.09.2021 about the settlement agreement between the Operational Creditor and the Suspended Director of the Corporate Debtor. The Operational Creditor has also enclosed the Form FA. The CoC was constituted post filing of the Application for withdrawal.

11. It is relevant to refer to the decision of Hon'ble Supreme Court in the case of Hon'ble Supreme Court in the case of Swiss Ribbons Pvt Ltd and Anrs v/s Union of India [WP (Civil) 99 of 2018] wherein it was stated as follows:

"52. It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the Adjudicating Authority, being a collective proceeding, is a proceeding 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 the NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the concerned parties and considering all relevant factors on the facts of each case."

12. It is also important to refer to the decision of Hon'ble NCLAT in the case of K C Sanjeev v/s. Mr. Easwara Pillai Kesavan Nair (IRP) and Ors [Company Appeal (AT) (Insolvency) No. 1427 of 2020] dated 28 February 2020 wherein it has been held as under:

"4. Considering the Provisions of Section 12 A of IBC and Regulation 30 A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it is clear that the IRP is duty bound to place the Application for withdrawal within three days of its receipt. The grievance of the Appellant is that in spite of such provision such action was not taken. The Appellant is raising various grievances against the IRP. We have been

dealing with these types of matters relating to withdrawal and in this regard various parties do appear to have been facing problems. The date of filing of application for withdrawal to Adjudicating Authority is material considering Judgment in the matter of Swiss Ribbons Pvt. Ltd. vs. Union of India 2019 SCC Online SC 73 ..."

FINDING:

13. It is an undisputed fact that the Corporate Debtor settled the dues of the original Operational Creditor pursuant to the settlement agreement between the parties on 04.09.2021 soon after initiation of admission of CIRP on 03.08.2021. The IRP upon receipt of Form FA immediately has filed an application to withdraw the CIRP against the Corporate Debtor. The CoC was constituted post filing of the Petition seeking withdrawal of the CIRP against the Corporate Debtor. The first meeting of COC was held on 29.09.2021. The mandate with requirement of obtaining of 90 % of approval votes of CoC was not required as the Application for withdrawal had already being filed before the constitution of CoC.

14. It is clear that once a code gets triggered by admission of CIRP against the Corporate Debtor, 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 his claims. This being a collective action is a proceeding in rem. The moot question now remains to be answered is whether the Adjudicating Authority can allow a withdrawal of CIRP against Corporate Debtor on an application filed under Section 12A before constitution of COC and in the present factual matrix that the CoC happened to be constituted at a latter date. The Hon'ble Supreme Court in Swiss Ribbons Pvt. Ltd. vs. Union of India has categorically held that at any stage where the CoC is not yet constituted, a party can approach NCLT directly, the Tribunal may in exercise of the inherent powers under Rule 11 of NCLT Rules may allow or disallow an application for withdrawal of CIRP. The claim and rights of other creditors as it stands is not prejudiced/altered by the withdrawal of CIRP of Corporate Debtor.

15. This Bench is of the considered opinion that no prejudice would be caused to the Financial Creditors namely the to the Financial Creditors whose Petition vide C.P. No. 248 of 2018 and C.P. 3572 of 2019 is pending adjudication before NCLT, if the withdrawal of CIRP against the Corporate Debtor is allowed in view of Form FA being filed and that the settlement agreement has been entered between the parties. Therefore, the objection of the Financial Creditors in I.A. 2440 of 2021 in C.P. 2390 of 2019 is untenable as he has already enforced his Financial debt vide C.P. No. 3572 of 2019 and the same is pending for adjudication before Bench 2 of NCLT, Mumbai Bench. Further, his rights as a creditor are no way altered/affected by withdrawal of CIRP against the Corporate Debtor. It is also brought to our notice that one of the member of CoC has consented to the said withdrawal.

16. This Bench allows withdrawal of CIRP against the Corporate Debtor, the Corporate Debtor is relieved from the rigour of the CIRP and erstwhile

management is reinstated to the board of Corporate Debtor.

17. I.A. 1990 of 2021 is allowed and disposed off.

18. I.A. 2440 of 2021 is dismissed.