
(2020) 12 NCLT CK 0192

In the National Company Law Tribunal

Case No : Interlocutory Appeal No. 1198/MB/C-IV Of 2020 In Company Petition No. 3049/MB/C-IV Of 2019

CFM Assets Reconstruction Private Limited And Anr.

APPELLANT

Vs

Vishram Narayan Panchpor And Anr.

RESPONDENT

Date of Decision : 16-12-2020

Acts Referred:

Insolvency And Bankruptcy Board Of India (Corporate Insolvency Resolution Process) Regulations, 2016 — Regulation 2(1), 2(1)(a), 28, 28(1), 30A, 30A(1), 30A(1)(a), 30A(1)(b), 30A(2), 30A(2)(a), 30A(3), 30A(4), 31A
Insolvency And Bankruptcy Code, 2016 — Section 5(7), 7, 8, 9, 10, 12A, 21A, 30A(3), 60, 60(5)
Transfer Of Property Act, 1882 — Section 6, 7
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 2(h)(a), 5, 5(1), 5A, 5(1A), 5(1)(b), 5(4), 5(5)
Recovery Of Debts And Bankruptcy Act, 1993 — Section 2(g)
National Company Law Tribunal Rules, 2016 — Rule 11
Arbitration And Conciliation Act, 1996 11(4), 11(5), 11(6), 11(6A), 79(2)
Indian Contract Act, 1872 — Section 2(h)

Citation : (2020) 12 NCLT CK 0192

Hon'ble Judges : Suchitra Kanuparthi, J;Rajesh Sharma, Member (Technical)

Bench : Division Bench

Advocate : Rohit Gupta, Rubina Khan, Nidhi Bajpai, Rohan Savant, Krupa Joshi, Amir Arsiwala, Radhika Motiani

Final Decision : Dismissed

Judgement

1. This court convened through video conferencing today.
2. This Interlocutory Application has been filed by CFM Assets Reconstruction Private Limited, the Applicant/Assignee under section 60(5) and section 12A of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Mr. Vishram Narayan Panchpor, Interim Resolution Professional for seeking indulgence and challenging the action of IRP, of not filing the application

of withdrawal of CIRP of the Corporate Debtor.

3. Brief submissions of the aggrieved assignee of financial creditor Applicant are as under:

a) The Applicant is the Assignee of the Janata Sahakari Bank Limited, Financial Creditor. The Petition was admitted vide order dated 04.08.2020 by

this Tribunal which is annexed at pp. 15-23, Exhibit â??IIâ?? of IA and Mr. Vishram Narayan Panchpor was appointed as an Interim Resolution

Professional (IRP) to carry out the function under the I&B Code.

b) Subsequently the Financial Creditor has unconditionally and irrevocably assigned the loan together with the underlying security interest with respect

to the Corporate Debtor to the Applicant vide its Assignment Agreement dated 21.08.2020 which is annexed at pp.26- 59, Exhibit â??IIIâ?? of IA,

executed between the Financial Creditor and Applicant in terms of section 5(1) (b) of the SARFAESI Act, 2002.

c) The Financial Creditor vide its letter 21.08.2020 which is annexed at p.60, Exhibit â??IVâ?? of IA, informed the IRP along with copy of

Assignment Agreement dated 21.08.2020 and intimated the identity of the Assignee as per Rule 28 of IBBI (Insolvency Resolution Process of

Corporate Person), 2016.

d) Thenafter, the Applicant, vide its email dated 25.08.2020 which is annexed at p.61, Exhibit â??Vâ?? of IA, intimated to the IRP that the Applicant

is in the process of re-structuring the debt of the Corporate Debtor and thus not to wish to continue with the CIRP of the Corporate Debtor. The IRP

replied to the said email vide its reply email dated 25.08.2020 which is annexed at pp.62-63, Exhibit â??VIâ?? of IA, stating that the IRP will respond to

the Applicant's email after considering the position in law and after obtaining necessary legal guidance in the matter.

e) The Applicant received a letter dated 26.08.2020 vide email by the IRP which is annexed at pp.64-69, Exhibit â??VIIâ?? of IA, wherein the IRP

alleged that since the terms of the assignment were not provided to him there is non compliance of section 28(1) of the CIRP Regulation. The IRP

also contended in the said letter that to withdraw the CIRP Applicant has to get itself impleaded in the captioned Company Petition and get the cause

title amended.

f) On 26.08.2020, the Applicant sent a letter vide its email which is annexed at

pp.70-76, Exhibit â??VIIIâ?? of IA, providing a copy of Assignment

Agreement dated 21.08.2020 along with Form FA and demand draft of Rs. 3,00,000.00. Further, on 27.08.2020, the Applicant has delivered by hand

delivery, the said letter dated 26.08.2020 along with the original Form FA and Demand Draft. The acknowledgement of said delivery is annexed at

pp.77-80, Exhibit â??IXâ?? of IA. The Applicant stated that the Applicant has duly complied with the provisions the Code and the Regulation by

requesting the IRP before constitution of CoC, to file an application for withdrawal of CIRP proceedings, within 3 days of receipt of Form FA, as per

term Regulation 30A(1)(a) and 30A(3) of the CIRP Regulations.

g) Then after, the Applicant received a letter from IRP vide email contending that since the Applicant (Assignee) is not an Applicant in the captioned

petition, the Form FA cannot be filed by the IRP. The IRP also informed in the said letter that since the CoC has been constituted and the report has

also been filed before this Tribunal on 27.08.2020.

h) The Applicant submitted that the last date of submission of claim was 19.08.2020 and the last date for verification of claims was on 26.08.2020 (i.e.

with 7 days from the last date submission of claims), the IRP had time till 28.08.2020 for constituting the CoC and has filed certifying the constitution

of CoC before this Tribunal on 27.08.2020 (i.e. a day prior).

4. Mr. Vishram Narayan Panchpor, Interim Resolution Professional, filed his affidavit in reply dated 12.09.2020 and submitted as under:

a) The IRP stated that the Applicant relied upon section (5) of SARFAESI Act, 2002 which has no application to the present proceedings under I&B

Code, 2016. The only option given to an asset reconstruction company upon acquiring the financial assets of an originator is with respect to obtaining

the prior consent of such originator before filing substitution application and certainly does not give the Applicant an option whether to file a

substitution application or not.

b) This Tribunal has passed an admission order which is annexed at pp.96- 99, Exhibit â??Lâ?? of reply, in CP (IB) No. 3619/2018 filed under section

7 of I&B Code, 2016 by TJSB Sahakari Bank Limited against the same Corporate Debtor. TJSB Sahakari Bank Limited is a member bank of

consortium of banks of which the Financial Creditor in the present matter was the lead Bank. In this case, the Applicant has entered into a Deed of

Assignment with TJSB Sahakari Bank Limited, post order of admission dated 06.03.2019 passed by this Tribunal in the above- mentioned Petition.

Further, the Applicant filed MA No. 1043/2019 for being substituted in the place of TJSB Sahakari Bank Limited and MA No. 1044/2019 for

withdrawal of CIRP before this Tribunal. The Tribunal had allowed both the MAs on 01.04.2019 which is annexed at pp.100-102, Exhibit â??Mâ??

of reply, given the extent position in law as on that date.

c) The Applicant sent an email to the IRP which is annexed at P.26, Exhibit â??Câ?? of reply, stating that the Applicant have already acquired

39.57% share from 4 banks and the applicant is in the process of acquiring the debt of one more Bank and also the Applicant will submit its claim

within 2-3 days after the said acquisition together.

d) On 21.08.2020, the IRP received an email along with the attached Deed of Assignment from the Financial Creditor which is annexed at pp.27- 64,

Exhibit â??Dâ?? of reply, informing that the Financial Creditor wanted to withdraw its, claim which it had, which was filed with the IRP on 18.08.2020

since the Financial Creditor had assigned the debt in respect of Corporate Debtor in favour of the Applicant.

e) The IRP has confirmed the email dated 25.08.2020 sent by the Applicant which is annexed at p.61, Exhibit â??Vâ?? of reply and the response

thereto which is at pp.62-63, Exhibit â??VIâ?? of IA filed by the Applicant. The IRP has also confirmed the detailed reply sent to the Applicant vide

email dated 26.08.2020 which annexed at pp.64-69 Exhibit â??VIIâ?? of IA filed by the Applicant and also annexed at pp.65-70, Exhibit â??Dâ?? of

the reply filed by the IRP.

f) The IRP notified to the Applicant about the constitution of CoC vide its email dated 27.08.2020 and on 28.08.2020, the IRP was served with a copy

of the Interlocutory Application filed by the Applicant.

g) On 02.09.2020, the Applicant sent an email to the IRP which is annexed at pp.88-90, Exhibit â??Hâ?? stating that the CoC constituted by IRP is

incomplete and the Applicant as the Financial Creditor has not been included. Further, the Applicant stated that the Applicant is in the process to

submit its claim and the same is delayed due to some unavoidable reasons which are beyond control. The IRP replied to the said email vide his email

on the same day which annexed at pp.91-93, Exhibit â??Iâ?? of reply contending

the constitution of CoC is legal and convened strictly in accordance with the law.

h) On the 04.09.2020, this Tribunal directed to the Applicant to add the CoC as necessary party to the Application and accordingly the Application was amended and served upon the CoC on 06.09.2020 by the Advocate's letter of the Applicant.

5. Mr. Amir Arsiwala, Learned Counsel of CoChas filed affidavit and submitted as under:

a) The Application filed by the Applicant is not maintainable. The Assignment agreement filed by the applicant purported to have been executed on 21.08.2020. This document shows that it evidences of stamp duty Rs.100/-. As per Maharashtra Stamp Act, 1958, agreement of this nature require stamp duty of 0.1% of the amount of debt being assigned subject to cap of Rs. 1,00,000/-. In the absence of appropriate amount of stamp duty being paid the said Assignment Agreement cannot be taken into cognizance.

b) It is submitted by the Learned Counsel for the CoC that the amount owed by the Corporate Debtor towards the Original Petitioner as well as the other consortium members arises from an award passed by consent by an arbitrator on the 23.03.2017. As per the terms of this arbitral award which is annexed at Annexure 3, the Corporate Debtor and some of its related parties agreed to be joint and severally liable to make payment of an amount of Rs.52,58,36,865/- to the member of the consortium. The original petitioner which was obliged to receive the installments from the Corporate Debtor under the terms of the consent award and thereafter to distribute the same amongst the other consortium lenders. To this extent the Original Petitioner was appointed as an agent of all the consortium lenders through the terms of consent award dated 23.03.2017.

c) The Learned Counsel for the CoC submitted that section 6&7 of the Transfer of Property Act, 1882, which restrict the right of a person to effectuate a transfer of property. Therefore, the nature of the right created in favour of the Original Petitioner in terms of the consent award cannot be transferred.

d) The Applicant cannot file the present application as an Assignee as the Assignment Agreement between the Financial Creditor and the Applicant dated 21.08.2020 is insufficiently stamped which makes the same unenforceable

in law. The Respondent No. 2 relied upon the Judgment laid down in the case of *Garware Wallropes Limited V. Coastal Marine Construction and Engineering Limited*:

16. A close look at section 11(6A) would show that when the Supreme Court or High Court considers an application under section

11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions

of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the

agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as

a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an

independent existence, as has been contended for by the respondent.

19. When an arbitration clause is contained in a contract, it is significant that the agreement only becomes a contract if it is

enforceable by law. We have seen how, under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not

enforceable in law, unless it is duly stamped. Therefore, even a plain reading of section 11(6A), when read with section 79(2) of the 1996

Act and section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not

enforceable by law.

6. Written Arguments on behalf of the Applicant/Assignee are as follows:

a) There are two options available to the Petitioner to seek withdrawal of the Petition. First being before constitution of CoC and second after

constitution of CoC. In the present case the Applicant made request to the IRP for withdrawal before constitution of CoC. However, the IRP

deliberately proceeded to constitute the CoC.

b) It is admitted position that the request was initially made, by seeking the details of expenses on 25.08.2020 at p.61 and as on that date no CoC was

constituted.

c) As far as substitution is concerned, admittedly, Applicant is assignee of Janata Sahakari Bank, the original Financial Creditor who is the Applicant in

the Petition. Regulation 2(1)(a) defines applicant which means the person filing an application under section 7, 9 or 10 of the Code. The term

Financial Creditor defined under section 5(7) of the Code which includes a person to whom such debt has been legally assigned or transferred to.

Since the Applicant is an Assignee of the original Financial Creditor and is included in the definition of Financial Creditor, by no stretch of

imagination it can be said that the Applicant is not covered in the definition of Financial Creditor or Applicant in terms of section 5(7) and Regulation

2(1)(a).

d) The Applicant is an asset reconstruction company and has acquired the debt from the original Financial Creditor under section 5 of the SARFAESI

Act, 2002. Section 5(4) of the SARFAESI Act, 2002 provides that no proceedings filed by or against the assignor bank or financial institution shall in

any way be prejudicially affected by reason of acquisition of financial asset by an asset reconstruction company.

e) Section 5(5) of the SARFAESI Act, 2002 provides for substitution application in the pending proceedings. In the present case, the Petition has been

disposed on 04.08.2020 and there is no provision either under the SARFAESI Act, 2002 or under the Code that mandates the Applicant to first get

itself substituted to be recognized as an Applicant in the place of original Petitioner. In fact, as per Regulation 28, the IRP/RP has to inform this

Tribunal regarding the Assignment.

f) The withdrawal of the Petition on earlier occasion will not impact this withdrawal. It was discretion of the Tribunal as contemplated in the Judgment

of Swiss Ribbon, which was prior to the amendment coming into force. There was no provision for withdrawal before constitution of CoC.

g) Section 5(1A) of the SARFAESI Act, 2002 provides clear exemption on payment of stamp duty on assignment of debt under the provision of

section 5(1) of SARFAESI Act, 2002. Under the Registration Act, time provided to register the documents is more than 3 months which in the present

case did not elapse when the IRP admitted the claim of Applicant or when the Applicant sought for withdrawal of the Petition. Hence, no registration

of the said Assignment Agreement required at that time. The Agreement is now registered which is a prima facie proof that the document is properly

stamped.

h) The debt which assigned and the debt is defined the section 2(h)(a) of SARFAESI Act, 2002 and section 2(g) of Recovery of Debts and

Bankruptcy Act, 1993 and inter alia includes not just the uncrystallized debt but the debt in the form of award also. Therefore, the award as well as the

decree with respect to the debt can be assigned.

7. The submissions on behalf of IRP are as follows:

a) The Applicant is not entitled to file the Form FA or seek withdrawal of the original Petition as the Applicant is the "Applicant". Section 12A

r/w Regulation 2(1)(a), 30A, states that the Applicant can withdraw the original Petition. Relying on the Judgment in Feroze N. Dotivala V. P.M

Wadhawani & Ors (2003) 1 SCC 433 para 13, Regulation 2(1) defines an Applicant in the following words:

"Applicant" means the person(s) filing an application under section 7, 9 or 10, as the case may be;

b) As regards to the contention of the Applicant based on section 5A of SARFAESI Act, 2002, it is submitted that reliance on the said provision is

misplaced. There is no dispute with the contention that the assignee does not need to come on record in every proceeding and the assignor can

continue with the proceeding for the benefit of the assignee, however, in the present case, the Applicant does want to and has elected to

step into the shoes of the assignor and has sought withdrawal on its own. In this scenario, the Applicant as assignee ought to come on record before

this Tribunal and thereafter make an appropriate application. The provision of IBC shall prevail over the SARFAESI Act, 2002 as held by the NCLAT

in para 14 and 15 Encore Asset Reconstruction Co. Pvt. Ltd vs. Charu Sandeep Desai, 2019 SCC Online NCLAT 284 and hence the assignee of a

debt is required to come on record in the proceedings.

8. The Written Submissions on behalf of the CoCare as under:

a) The Applicant has submitted Form FA after the last date for verification of claims. Therefore, the Form FA could have to be put before the CoC

for voting in accordance with Regulation 31A of CIRP Regulations and section 21A of IBC. Notable, the CoC stood constituted before expiry of the

time period given to IRP to take action on the Form FA submitted by the Applicant.

b) The Learned Counsel for the CoC has summarized the scope of the Application

in the following points:

i. No prayer for withdrawal of given in the IA No. 1198/2020 filed by the Applicant either under section 12A of IBC, Regulation 31A of CIRP

Regulations, or Rule 11 of NCLT Rules.

ii. Relief being sought to direct RP to act upon Form FA. However, if Form FA is to be acted upon today, it would have to compulsorily be put up

before the CoC for voting.

iii. No relief sought by the Applicant for admission to CoC as member. Thus, no desire to participate in the CIRP of the Corporate Debtor.

c) The Honâ??ble Supreme Court has discussed the concept of withdrawal for proceedings under section 12A on the IBC in the Judgment in Swiss

Ribbons V. Union of India [para 52-53 on page 100], as:

â??52. It is clear that once the Code gets triggered by admission of a creditorâ??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 each case.â??

â??53. The main thrust against the provision of Section 12A 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 102 rejects

a just settlement and/or withdrawal claim, the NCLT, and

thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that

Section 12A also passes constitutional muster.â??

d) It is clear that, once commenced, CIRP is for the benefit of all creditors and not just the original Petitioner. It is a proceeding in rem. Therefore, the

law requires discussion and consent amongst the CoC. It is further stipulated that preferably a petition should only be withdrawn if there is an omnibus

settlement taking into account the interest of all creditors. In the present case, there is no settlement. The remaining members of the CoC do not wish

for withdrawal under section 12A.

e) The NCLAT in the case of *Jai Kishan Gupta v. Green Edge buildtech LLP*, has also held that the Adjudicating Authority need not allow withdrawal

under section 12A r/w Rule 11 of NCLT Rules in every case, but may direct the proposal to be placed before the CoC where felt necessary.

9. Mr. Dinesh Inani, member of the Suspended Board of Directors filed Submissions supporting of this Interlocutory Application by the Applicant in

the following terms:

a) A reading of section 12A of the IBC r/w Regulation 30A (1), (2), (3) and (4) demonstrate that there is no difference in the status of the right to

seek withdrawal of the section 7 Application either pre or post constitution of the CoC. This is apparent from the fact that in both Regulations 30A (3)

and in Regulation 30A (4); the word used is â??shallâ?. It is clear that if the conditions of Regulation 30A(1)(a) and (2) are fulfilled, the IRP â??shall

submit the application to the Adjudicating Authority, within three days of its receiptâ?. Similarly, if the conditions of Regulation 30A(1)(b) are fulfilled,

the committee â??shall consider the application, within seven days of its receiptâ??.

b) Hence, there is no statutory or regulatory preference to either a pre-CoC constitution withdrawal under section 12A or a post-CoC constitution

withdrawal. The plain language of Regulation 30A demonstrates that an Applicant is entitled to seek withdrawal under section 12A either pre or post

CoC constitution.

c) The contention that there is nothing which precludes a CoC constitution in the three days contemplated by Regulation 30A (3) is based on will

render the provisions of Regulation 30A (1)(a) otiose and nugatory. It would lead to an absurd outcome. The present case is demonstrative of the

consequence of such an interpretation. The Form FA was submitted to the IRP on 26.08.2020. If a withdrawal application was made to the NCLT

within 3 days, a withdrawal pre-CoC constitution would have been possible. However, by constituting the CoC on 27.08.2020, the IRP has sought to

defeat the attempt. He could not have done so. The law mandates that what is to be filed in the NCLT is an application under Regulation 30A (1)(a).

It therefore necessarily requires the IRP to not constitute the CoC once the Form FA is submitted to him. Otherwise, in every case, an IRP upon

being furnished with a Form FA, would proceed with CoC constitution and withdrawal under Regulation 30A (1)(a) r/w section 30A (3) would

become impossible. The CoC constitution cannot take precedence over the right of withdrawal under section 12A r/w Regulation 30A (1)(a).

Findings & Conclusion:

10. We have gone through the documents submitted by the parties and heard the arguments of Learned Counsel of applicant assignee of financial

creditor, Resolution Professional, CoC and Member of suspended Board of Directors. The Bench observed that the Interim Resolution Professional

has acted fair and has taken actions as per requirements of the Code judiciously. It is a settled law by the Honâ??ble Supreme Court through various

judicial pronouncements that Corporate Insolvency Resolution Proceedings (CIRP) are proceedings in rem. On the issue as to which event is crucial

for withdrawal of CIRP, as per the law laid down by Honâ??ble NCLAT in K C Sanjeev Vs. Solar Offset Printer Pvt. Ltd. {Company Appeal (AT)

(Insolvency) No. 1427/2019} dated 28.02.2020, the relevant date for considering withdrawal of CIRP is the date of application and nothing else. As a

matter of fact, in this case no application for withdrawal of CIRP has ever been filed by the Interim Resolution Professional before the Adjudicating

Authority, rather this IA has been filed by the assignee of financial creditor. As is evident from the records, since CoC has already been constituted in

this case, any application for withdrawal of CIRP has to comply with regulation 30A (1) (b) of CIRP regulations read with Section 12 A of IBC-2016.

Accordingly, IA filed by Assignee of original Financial Creditor is hereby dismissed. Stay granted on functioning of CoC is vacated.