

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.969-970 of 2019

[Arising out of Orders dated 09.08.2019 and 22.08.2019 passed by National Company Law Tribunal, New Delhi, Court - III in IB-179(ND)/2019 and IB-179/ND/2019 respectively]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Mr. Jai Kishan Gupta
Ex-Director of the
Corporate Debtor
A 108 B, 1st Floor,
Suryanagar,
Ghaziabad

Appellant

Versus

1. Green Edge
Buildtech Llp
D-319, Gali No.11,
Hardevpuri,
Shahdara,
Delhi – 110093

Petitioner
(Operational Creditor)

Respondent No.1

2. Aadhar Shri
Infratech Private Ltd.
Corporate Debtor
Through
Mr. Manohar Lal Vij
Resolution Professional

Respondent
(Corporate Debtor/
RP)

Respondent No.2

3. Reliance Capital ltd.
“H” Block 1st Floor,
Dhirubhai Ambani
Knowledge City
Koparkhairne Navi
Mumbai 400710

Respondent No.3

For Appellant:

**Mrs. Tania Sharma and Ms. Shankari Mishra,
Advocates**

For Respondents: **Shri Varun Jain and Ms. Sonica Sharma,**
 Advocates (R-1)
 Shri C.S. Gupta, Advocate (R-2)
 Shri Anirban Bhattacharya, Advocate (R-3)
 Shri Hitesh Sachar, Advocate (for Syndicate Bank)
 Shri M.L. Vij – RP in person

J U D G E M E N T

(6th December, 2019)

A.I.S. Cheema, J. :

1. The Appellant - Mr. Jai Kishan Gupta, Director of Suspended Board of Respondent No.2 (Corporate Debtor) - Aadhar Shri Infratech Private Ltd. has filed this Appeal against two Impugned Orders. First is dated 9th August, 2019 and the other is dated 22nd August, 2019. The Orders were passed by Adjudicating Authority (National Company Law Tribunal, New Delhi, Court III) in IB-179/ND/2019.

2. In nutshell, Respondent No.1 - Green Edge Buildtech Llp filed Application under Section 9 (Page – 29) against the Respondent No.2 – Corporate Debtor. The record shows that the Application was dated 15th January, 2019. The Application came to be admitted on 11.07.2019 (Page – 205). According to the Appellant, the Operational Creditor and Corporate Debtor entered into settlement of the dispute as per document dated 26.07.2019 (Page – 214) and post-dated cheques were issued (Page – 223). As per the record, there is Application dated 13.07.2019 (Page – 224) which was filed for withdrawal of the insolvency proceedings which Application was moved by Nitin Jain on behalf of the Operational Creditor. Section 9 Application also had been filed for Operational Creditor through Nitin Jain

(Page – 29). The Counsel for the Appellant submitted that this Application CA 509/2019 (Annexure A-7) was filed on 30.07.2019. Appellant claims that after such Application was filed, the IRP - Mr. Prabhat Ranjan Singh also filed Form FA (Page – 255) which is dated 7th August, 2019 before the Adjudicating Authority in which the settlement dated 26.07.2019 was enclosed. The IRP filed Affidavit (Page – 258) referring to the settlement and the fact that Committee of Creditors (COC – in short) was yet not constituted.

3. The matter came up on 9th August, 2019 before the Adjudicating Authority (National Company Law Tribunal, Court III, New Delhi) and the following First Impugned Order came to be passed:-

“ORDER

This is an application filed at the instance of the operational creditor who had initiated the proceedings before this Tribunal and based on which CIRP of the corporate debtor was initiated and the application is filed by the IRP under Section 12A of IBC, 2016 read with attendant Rules and Regulations. It is brought to the notice of this Tribunal by learned IRP appointed by this Tribunal that pursuant to the paper publication effected for receipt of claims date was fixed on 03.08.2019. Within the specified time period only the operational creditor had filed the claim and after the expiry of the said period, two claims have been received namely Reliance Commercial Finance Ltd. and another from Syndicate Bank of Rs.20,88,675/- and Rs.8,61,16,294.48/- respectively. Learned IRP also represents that as such no COC has been constituted and in the circumstances a settlement agreement was made available to him and this application has been filed. However, this Tribunal is of the view that notice of this application is required to be given to the Financial Creditors, in order to ascertain as to

whether the said financial creditors has no objection even though the claim has been preferred after the due date mentioned in the publication issued by the IRP in the paper publication as 03.08.2019. In the circumstances let notice of this application be issued by the learned IRP to the financial creditors as given above at their respective addresses and also file an affidavit of service to this effect. Let notice be issued dasti and for which purpose order shall be made available dasti to the learned IRP. Post the matter on 19.08.2019.”

4. As the Adjudicating Authority directed to ascertain whether Financial Creditors who had already filed the claims had any objection, record shows that Reliance Commercial Finance Ltd. filed Affidavit (Page – 279) dated 21st August, 2019 raising objections to the withdrawal.

5. The matter again came up before the Adjudicating Authority on 22nd August, 2019 (Page 28) and the second Impugned Order came to be passed which is as follows:-

“ORDER

Learned Counsels for the parties are present. It is seen that the matter has been dealt with vide Order dated 09.08.2019. Application in CA No.509/C-III/ND/2019 has been filed under Rule 11 of the NCLT Rules, 2016 seeking termination of CP No.IB-179/ND/19 in view of the settlement between the parties.

Ld. IRP is present in person and represents claims have been received from the Financial Creditor as well as all other Operational Creditors and in the meantime, COC has also been constituted and in the circumstances, let this settlement which has prompted this Application be placed before the COC for its consideration. Ld. IRP to report to COC in relation to the settlement and place it before it in the meeting to be convened by the IRP in this regard.”

Thus, the Adjudicating Authority referred the matter to COC with regard to settlement and asked the IRP to place the settlement before the COC.

6. Against such developments in the proceedings, present Appeal has been filed by the Appellant for the Corporate Debtor raising grounds that the Adjudicating Authority wrongly observed in the Second Impugned Order that COC is already constituted without noticing that the Notice for Constituting COC was sent on 23rd August, 2019 (e-mail dated 23.08.2019 – Page 282). According to the Appellant, Adjudicating Authority could not have called objections from 3rd party which was not party to the dispute. The Appellant claims that as per Judgement in the matter of **“Swiss Ribbons Private Limited and another Versus Union of India and others”** reported in (2019) 4 SCC 17, the Adjudicating Authority was required to exercise its discretion to allow the withdrawal and could not have asked for the opinion of Financial Creditors who had filed claims but whose voting share was yet to be decided. According to the Appellant, COC should not have been allowed to be constituted.

7. Respondent No.2, through the IRP, has filed Reply (Diary No.16103) and defended the actions of the Adjudicating Authority. The learned Counsel for the Respondent tried to submit that the Appeal against the first Impugned Order was time barred as the Appeal Memo shows that Appeal Memo was dated 16.09.2019 while the Affidavit supporting it was

dated 28th August, 2019 and in the Appeal, date of refiling Appeal was 17.09.2019.

This objection we dispose of right away as the record shows that the Appeal was initially presented on 28th August, 2019 and Orders passed by the Registry show that defects were raised and the Appellant was required to refile Memo of Appeal and record shows that after removal of defects, delay in refiling of the Appeal was condoned. Counsel may not have been careful while refiling. We thus do not doubt the Affidavit in support. The original date of presentation of Appeal will not shift only because some time was spent in removing objections (which has been condoned). Original filing of Appeal on 28.08.2019 is there and even First Impugned Order cannot be said to be time barred.

8. The Respondent through IRP, in the Reply, points out that the matter between the Operational Creditor and Corporate Debtor was only relating to a few lakhs of rupees (Rs.11,48,606/-) whereas claims of more than Rs.8 Crores have been received from Financial Creditors. The Resolution Professional - Manohar Lal Vij (who was appointed in the first COC meeting dated 29th August, 2019) referred to the first COC meeting minutes where even the IRP found and put on record particulars as to how Director of the Corporate Debtor – Mr. Jai Kishan Gupta kept misleading and misrepresenting to the IRP even regarding the location of the office of Corporate Debtor and bogus and non-existent addresses were shown. The Resolution Professional has pointed out that Bank Statements taken out

show that huge cash withdrawals (Rs.25 Lakhs in single transaction) and further various cash transactions running into lakhs have been made by the Suspended Directors and money has been diverted and with such object, the books and records were not being provided to IRP or the Resolution Professional and that huge amounts have been siphoned off/diverted for which the Adjudicating Authority has been moved. The Counsel for the Respondent No.2 through IRP pointed out particulars from the first meeting of COC (Copy of which is at Reply Page 19 @ Page 23). Respondent No.2 has further pointed out that in the first COC meeting, COC considered the Second Order dated 22nd August, 2019 passed by the Adjudicating Authority and COC disapproved the withdrawal of the CIRP proceedings and decided to proceed.

9. The learned Counsel for the Appellant has relied on Judgements in the matters of **“Amit Katyal Vs. Manjula Khullar and Ors.”** in I.A. No. 229 of 2019 in Company Appeal (AT) (Insolvency) No. 79 of 2019, **“Arjun Puri Vs. Kunal Prasad and Ors.”** in Company Appeal (AT) (Insolvency) No. 52 of 2019 and **“Avishek Roy Vs. Diamond Steel Enterprise and Ors.”** in Company Appeal (AT) (Insolvency) No. 794 of 2018 of this Tribunal where withdrawal of proceedings was allowed as COC had not yet been constituted.

10. Both the parties have referred to Judgement in the matter of “Swiss Ribbons (Supra) with regard to withdrawal of proceedings under Section 7 and 9 after the same are admitted. The Counsel for Appellant referred to

para – 82 to claim that when withdrawal Application was filed by the Operational Creditor and when Form FA had been filed and COC was admittedly yet to be constituted, when First Impugned Order was passed the Adjudicating Authority should have allowed the withdrawal. The learned Counsel for the Corporate Debtor /RP submitted that what the Hon'ble Supreme Court has directed is that when such withdrawal Application is filed, the Adjudicating Authority would have discretion to permit or not to permit the withdrawal and in the present matter, the Adjudicating Authority, considering the claims of Financial Creditor which had already been received, (though after the prescribed date) called for their no objections and Reliance Commercial Finance Ltd. did raise objections and in the second Impugned Order, the matter was referred to COC.

11. In the Judgement of Swiss Ribbons, Hon'ble Supreme Court (in para – 81) referred to the “Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016” (Regulations – in short) and dealing with Regulation 30-A, relating to withdrawal of Application the Hon'ble Supreme Court referred to its earlier Judgement in the matter of **“Brilliant Alloys Private Limited versus S. Rajagopal & Ors.”** reported in 2018 SCC OnLine SC 3154 to observe that Regulation 30-A(1) was not mandatory but that it was directory. It was then observed in para – 82 of the Judgement as under:-

“82. 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 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 parties concerned and considering all relevant factors on the facts of each case.”

The Regulation 30A referred to in para – 81 of the Judgement of Swiss Ribbons appears to have been amended after the above Judgement dated 25th January, 2019. The amendment brought in the Regulations with effect from 25.07.2019 by way of substitution is as under:-

“[30 A. Withdrawal of application

(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –

- (a) before the constitution of the committee, by the applicant through the interim resolution professional;
- (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

PROVIDED that where the application is made under clause (b) after the issue of invitation for

expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee—

- (a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or
- (b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

(5) Where the application referred to in sub-regulation (4) is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(6) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-

regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.]”

12. In the present matter, Form FA dated 7th August, 2019 appears to have been filed by the IRP (Page – 255). Hon’ble Supreme Court has in para – 82 of the Judgement clearly provided that at any stage where the COC is yet not constituted, a party can approach NCLT (National Company Law Tribunal) “directly”. As such, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, Adjudicating Authority could allow or disallow an Application for withdrawal or settlement even when filed by Applicant directly when COC was yet not constituted. Although Regulation 30-A as subsequently amended, provides that even before the constitution of COC, the Applicant would require to approach Adjudicating Authority through IRP, we would not have found fault with the Operational Creditor directly approaching for withdrawal before COC was constituted as was done in the present matter on 13.07.2019 when Nitin Jain for the Operational Creditor applied for withdrawal.

13. The question, however, remains that the Hon’ble Supreme Court has in the above para – 82 left discretion with the Adjudicating Authority to allow or disallow an Application for withdrawal or settlement. The last sentence of the paragraph states that “this will be decided after hearing of

the parties concerned and considering all relevant factors on the facts of each case.” Thus, Adjudicating Authority has to consider all relevant factors on facts of each case and to take a decision. Para – 83 of the Judgement in the matter of “Swiss Ribbons” has dealt with a decision being taken by COC under Section 12A and left the door open that if COC arbitrarily rejects a just settlement and/or withdrawal claim the NCLT, and thereafter NCLAT can set aside such decisions under Section 60 of the Code.

14. The Counsel for Appellant has raised dispute that on 22nd August, 2019, the Adjudicating Authority wrongly observed that COC has been constituted. The basis for such claim is that the IRP on next day of 23rd August, 2019 sent e-mail (Page – 282) that meeting of the first COC has been fixed for 29th August, 2019. The observation of the Adjudicating Authority shows that the IRP had made the statement before the Adjudicating Authority that in the meantime, COC has also been constituted, after receiving the claims. We need not decide if or not as on 22.08.2019 COC was already constituted. Nothing much will turn on this dispute as admittedly on 9th August, 2019, when already Application for withdrawal had been moved, COC was admittedly yet not constituted. But, however, as the Judgement of the Hon’ble Supreme Court shows the Adjudicating Authority itself has a discretion to accept or not to accept a withdrawal. In the given set of facts, the learned Adjudicating Authority on 9th August, 2019 (the first Impugned Order) in spite of withdrawal

Application, found it appropriate to note that Reliance Commercial Finance Ltd. and also Syndicate Bank had already filed claims of huge amounts which would be more than Rs.8 Crores and wanted to hear the Financial Creditors. The Appellant did not immediately file Appeal against this Order dated 9th August, 2019 and in the meanwhile, COC was constituted and the second Order dated 22nd August, 2019 came to be passed. Record shows (minutes of first COC meeting Reply Page – 19) that the COC considered the withdrawal sought but disapproved the withdrawal of the CIRP (Reply Page 19 @ 29) considering the further developments, the Appellant has not challenged the rejection by COC.

15. We take note of the developments recorded by IRP in the minutes of the first COC meeting. The developments show undesirable conduct of the Director of Corporate Debtor as noted in the meeting and we also take note of the Reply filed by Resolution Professional supported by Affidavit with regard to huge cash withdrawals by the suspended Directors and diversion of property. The minutes show that the registered office of the Corporate Debtor was found empty by the IRP and in possession of some Bhasin family with one Kartik Bhasin claiming that the same was never rented by the Corporate Debtor and it was only a correspondence address. When the Appellant - Mr. Jai Kishan Gupta was contacted, he showed some other functional office of the Corporate Debtor where again no address of the office was found. The Adjudicating Authority did not write in so many

words but exercised its discretion to hear the Financial Creditor who had already filed claims. Considering facts of the matter, we do not interfere.

16. We do not find fault with the Impugned Orders passed. Adjudicating Authority did not accept or reject the withdrawal Application. It referred it to COC. The decision taken by COC in rejecting the request for withdrawal has not been challenged before the Adjudicating Authority. Considering these developments noticed also, no interference is called for.

The Appeal is dismissed. No costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md