

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1427 of 2019

IN THE MATTER OF:

Mr. K.C. Sanjeev

Shareholder of Solar Offset Printers

Age 62 years,

S/o Sh. N.K. Charles,

R/o TC 9/144, 7D

Kowdiar, Kowdiar Manor,

Jawahar Nagar,

Thiruvananthapuram, Kerala

...Appellant

Versus

1. Mr. Easwara Pillai Kesavan Nair

Interim Resolution Professional

of Solar Offset Printers Pvt. Ltd.

Vijaykumar and Eswaran Chartered Accountant,

6th Floor, Amritha Trade Towers,

SA Road, Pallimukku,

Cochin-682016

2. State Bank of India

Stressed Asset Management Branch

7th Floor, Vankarath Tower

Palarivattom-Bypass Junction

Ernakulam

Cochin-682024

3. Sidhi Vinayak Enterprises,

Rep. By its Partner, K.R.Rajesh Kumar,

G3,-B, 11th Street,

Sector 1 Ambattur Industrial Estate,

Chennai-600058

...Respondents

For Appellant: Mr. Ashish Dholakia, Mr. Ishaan George and Mr. Goutam, Advocates

For Respondent: Mr. Naveen R. Nath and Abhimanyu Verma, Advocates for Respondent No. 1 (IRP)

Mr. Mukund P. and Mr. T.P. Sindhu, Advocates for R-2

ORDER

28.02.2020 Heard Learned Counsel for the Appellant. It is stated that IRP did not duly move form F.A. for withdrawal leading to Impugned Order Dated 02.12.2019 being passed. The Learned Counsel for the Appellant submits that the Appellant has made efforts and now settled claims of the two Financial Creditors and two out of four Operational Creditors and is in the process of settling with the remaining two Operational Creditors who have responded to the Public Notice which was issued after Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 was admitted in this matter.

2. Mr. Abhimanyu Verma, Advocate for IRP states that the settlement has not taken place with all the Operational Creditors as well as KSIDC.

3. The Learned Counsel for the Appellant states that the Appellant had settled with the original Operational Creditor soon after the Application under Section 9 was admitted on 23.10.2019 and even filed the settlement with the IRP under Regulation 30 A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 (Regulations in Short) requesting the IRP to place the settlement before the Adjudicating Authority. It is stated that the IRP asked for further Rs. 2 Lakhs claiming that it is required for closure of CIRP which the Appellant paid. It is stated that when these facts were brought to the notice of the Adjudicating Authority, the Adjudicating Authority took the same seriously and by order dated

09th December the Adjudicating Authority (NCLT Kochi Bench) in TIBA/15/KOB/2019 dated 09th December 2019 made adverse comments against the IRP and directed the IRP to return back the amount of Rs. 2 Lakhs. The Learned Counsel for the Appellant states that documents regarding the settlement were handed over to the IRP on 08th November, 2019, and the same were required to be placed before the Adjudicating Authority within three days as required by the Regulations but the IRP did not do so and proceeded to constitute CoC on 20th November, 2019. The Learned Counsel for the Appellants states that Corporate Debtor being Solvent Company, the Appellant wants to save it and made serious efforts with all the Financial Creditors and Operational Creditors but the IRP is creating various hurdles.

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 in Para 79 and 80, Hon'ble Supreme Court observed as under:

“79. 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.

80. The main thrust against the provision of Section 12 A is the fact that ninety per cent of the committee of creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (Supra). Also, it is clear, that under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, 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 12 A also passes constitutional muster.”

(Emphasis supplied)

5. Considering the Judgment of the Hon’ble Supreme Court, it is apparent that Constitution of CoC makes a difference to the original Applicant and the Corporate Debtor in settling. Before Constitution of CoC they both can settle and withdrawal can be permitted but once CoC is constituted, the Scenario changes and requirement is to settle with the other Financial Creditors and Operational Creditors and one is required to go before the CoC which may allow withdrawal with 90 per cent voting share.

6. Subsequent to Judgment in the matter of Swiss Ribbons, the Regulations come to be amended. Considering this, and the practical difficulties which Applicants and the Corporate Debtor like the present one are facing, we are of the view that there is no reason why Parties cannot resort simultaneously to the window given by Hon'ble Supreme Court in above Para 79. In our view when the Applicant wants to withdraw the application before Constitution of CoC, while resorting to amended Regulation 30 A, there is no bar for a party to simultaneously move Adjudicating Authority for withdrawal relying on Rule 11 of the NCLT Rules 2016 in view of Right given in the Judgment of Hon'ble Supreme Court. The Adjudicating Authority should receive such applications and can deal with the Applications in terms of above Para 79 while it may await response from IRP.

7. Having said this, considering the facts in the present matter that now CoC has been constituted, we find it appropriate that the Appellant should follow procedure under Section 12 A of IBC & IRP & CoC need to urgently complete the process.

8. The Learned Counsel for the Appellant states that after this Tribunal on 07th February, 2020 directed that "If expression of interest has yet not been issued by IRP/RP the same may not be issued till next date", still it is stated that IRP has been writing letters to the Operational Creditors and calling them to come and file claims. The Learned Counsel requests that if the matter is remitted back to CoC, the Appellant may be permitted to directly take up the same with the CoC.

9. Regarding various grievances, Appellant is making against IRP, it would be open for the Appellant to take up the issue with IBBI.

10. For the above reasons, although we are not interfering with the Impugned Order however, we are remitting back the matter to the Adjudicating Authority. We permit the original Operational Creditor to move the CoC under Section 12A of IBC. CoC will urgently consider Form F.A. hearing the Appellant also. The IRP will cooperate in this regard. We request the CoC to urgently take a decision with regard to the request being made by the Appellant and the original Operational Creditor with regard to the withdrawal of the Application under Section 12 A of IBC one way or the other. Till the CoC takes this decision, the IRP may not take any further steps with regard to the CIRP. Effort should be made to complete the process in two weeks from today. Adjudicating Authority can extend time if necessary to complete process under Section 12A of I&B Code before CoC.

With those directions and observations, we dispose the present Appeal. No costs.

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

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

Basant B./md /