NATIONAL COMPANY LAW APPELLATE TRIBUNAL

CHENNAI BENCH

CHENNAI

COMPANY APPEAL (AT)(CH)(INSOLVENCY) NO.211/2021

[Appeal Filed under Section 61 of the I & B Code, 2016, arising out of impugned order dated 12th August, 2021 in MA/43/CHE/21 in IBA/453/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench –II, Chennai]

In the matter of:

Mr. Vallal RCK,
Old No.30, New No.78
Giri Road, T. Nagar
Chennai 600017 Appellant

Vs

1. M/s Siva Industries and Holdings Ltd (In Liquidation)
   Through its Liquidator
   Mr. Ayyampalayam Venkatesan, Arun
   Ram S Court, 10/2 Balaji Nagar,
   1st Cross, Advaitha Ashram Road,
   Salem 636004

2. Mr. Abhijit Guhathakurta
   Ex Resolution Professional of
   M/s Siva Industries and Holdings Ltd
   Flat No.701, A Wing, Satyam Springs,
   CTS No.272A/2/1, Off BSD Marg,
   Deonar, Mumbai 400088 Respondents

Present:

Mr P.H. Arvindh Pandian, Sr Advocate, Mr. R. Sivaraman and Mr. P Ramesh Kumar, Advocates for the Appellant.

Mr. S. Sathiyanarayanan, Advocate for Respondent.

WITH

COMPANY APPEAL (AT)(CH)(INSOLVENCY) NO.212/2021

[Appeal Filed under Section 61 of the I & B Code, 2016, arising out of impugned order dated 12th August, 2021 in IA/837/IB/2020 in IBA/453/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench –II, Chennai]

In the matter of:

Mr. Vallal RCK,
Old No.30, New No.78
Giri Road, T. Nagar
Chennai 600017 Appellant

Vs

1. M/s Siva Industries and Holdings Ltd (In Liquidation)
   Through its Liquidator
   Mr. Ayyampalayam Venkatesan, Arun
   Ram S Court, 10/2 Balaji Nagar,
   1st Cross, Advaitha Ashram Road,
   Salem 636004

2. Mr. Abhijit Guhathakurta
   Ex Resolution Professional of
   M/s Siva Industries and Holdings Ltd
   Flat No.701, A Wing, Satyam Springs,
   CTS No.272A/2/1, Off BSD Marg,
   Deonar, Mumbai 400088 Respondents

Present:

Mr P.H. Arvindh Pandian, Sr Advocate and Mr. R. Sivaraman, Advocate for the Appellant.

Mr. S. Sathiyanarayanan, Advocate for Respondent.

JUDGEMENT

VIRTUAL MODE

M. VENUGOPAL, MEMBER (JUDICIAL)

INTRODUCTION

The Appellants have preferred the instant two Appeals in Comp App (AT)(CH)(Ins) No. 211/2021 and 212/2021 being dissatisfied with the common impugned order dated 12.08.2021 in MA/43/CHE/2021, IA/647/IB/2020 and IA/586/CHE/2021 in IBA/453/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench II, Chennai).

2. The 'Adjudicating Authority' (National Company Law Tribunal, Division Bench II, Chennai) while passing the impugned order dated 12.08.2021 in MA/43/CHE/2021 in IBA/453/2019, alongwith IA/647/IB.2020 in IAB/453/2019 alongwith IA/586/CHE/2021 in IBA/453/2019 at paragraph 22 to 28 observed the following:-

> *22. A Settlement simpliciter under Section 12A of IBC, 2016 is different from a Resolution Plan given under Section 30 and 31 of IBC, 2016. However, in the present case, the promoter of the Corporate Debtor who is ineligible to submit a Resolution Plan because of Section 29A of IBC,*

2016 is trying to provide a Settlement proposal, which is similar to a Resolution Plan under Section 12A of IBC, 2016. In other words, the promoter of the Corporate Debtor is trying to restructure the loans granted by the Financial Creditor under the pretext of a Settlement proposal to be given under Section 12A of IBC, 2016. Further, there exists an uncertainty in relation to the default, if any, being committed by the promoters of the Corporate Debtor and that this Tribunal has already come to a view that the Corporate Debtor cannot be pushed into liquidation in case of a default committed under Section 12 of IBC, 2016. In the first case, this Tribunal is of the view that the CoC ought to have voted for the proposal only if they have received the money in full as per the Settlement proposal given by the promoter of the Corporate Debtor and if such being the case, the apprehension of default on the part of the promoter of the Corporate Debtor would not have arisen and that the Tribunal would have no difficulty in approving the proposal under Section 12A of the IBC, 2016.

23. If such a settlement proposal as given by the promoter of the Corporate Debtor under Section 12A of IBC, 2016 is approved by this Tribunal, especially when as on date no money has been paid to the Financial Creditor of the Corporate Debtor, then this Tribunal would be left in lurch when there arises any default on the part of the promoters of the Corporate Debtor, since it would be uncertain as to how to proceed thereon when the Corporate is out of CIRP and hence there arises a legal quagmire.

24. Viewed from this perspective, all the judgement referred to by the Learned Counsel for the Resolution Professional, the Corporate Debtor and the IDBI Bank, would not apply to the facts of the present case, since here the settlement proposal as envisaged by the promoter of the Corporate Debtor is not a settlement simpliciter as envisaged under Section 12A of IBC, 2016.

25. For all the aforesaid reasons, we are of the view that the Settlement Proposal as given by the Corporate Debtor and the approval of the withdrawal of the CIRP in relation to the Corporate Debtor by the CoC in its 17th Meeting, is not a conformity with the provisions of IBC, 2016 and also not in line with the judicial conscientiousness of the Adjudicating Authority and also transcends beyond the scope of IBC, 2016.

26. In so far as IA/586/CHE/2021 is concerned, it is seen that the same has been filed by State Bank of India, who is one of the Financial Creditors in relation to the Corporate Debtor who has voted against the Settlement Proposal under Section 12A of IBC, 2016 given by the promoter of the Corporate Debtor. The State Bank of India, in IA/586/CHE/2021 has sought for a direction to declare that the mortgage rights of the Applicant over the immovable property offered by the Corporate Debtor will not get diluted upon withdrawal of the CIRP by the 2nd Respondent under Section 12A of IBC, 2016 pursuant to the decision of the CoC members. It is averred in the Application that the Applicant Bank is having exclusive mortgage rights over the immovable

property of the Corporate Debtor and the Applicant will be at liberty to enforce the SARFAESI Proceedings against the mortgaged property. Further, it is averred that the Applicant Bank viz. State Bank of India does not appear to have any objection for the withdrawal of the CIRP, provided that the rights of the Applicant Bank over the mortgaged property should not get diluted. Considering the submissions made by the Learned Counsel for State Bank of India we are of the view that since we are not inclined to allow the relief as sought for in MA/43(CHE)/2021, seeking withdrawal of the CIRP process. The necessary consequence will be an order of Liquidation, which is also passed vide separate order, the Applicant Bank may exercise the security interest over the subject property and may intimate the same to the Liquidator in so far as whether they are relinquishing their security or standing outside the Liquidation process. With the above said directions IA/586/CHE/2021 stands disposed off.

27. In view of the above discussions, we conclude as follows:

a. The purported Settlement Plan proposed by the promoter of the Corporate Debtor is not a Settlement simpliciter as envisaged under Section 12A of IBC, 2016 rather than it is a 'Business Restructuring Plan'.

b. As per the Settlement Plan, there is no final offer made by the promoter of the Corporate Debtor and also the acceptance made by the CoC in this regard. There is no finality reached between the promoter of the Corporate Debtor and the CoC as per clause 2 of

Chapter VIII of the Settlement proposal; hence based on ambiguity of terms of settlement, we cannot order for withdrawal of the CIRP.

c. The prayer seeking for liquidation of the Corporate Debtor in case of any default in the proposed Settlement Plan transcends beyond the scope of IBC 2016.

28. For the foregoing reasons which have been stated supra, the MA/43/(CEH)/2021 filed by the Applicant under Section 12A of IBC, 2016 stands dismissed."

SUMMATION OF FACTS

3. Before the 'Adjudicating Authority', the 'Former Resolution Professional'/Applicant had filed MA/43/CHE/2021(with the approval of 94.23% voting shares of COC) in IBA/453/2019 (under Section 12A of the I&B Code, 2016 r/w Regulation 30A of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016) seeking withdrawal of main Insolvency and Bankruptcy Application No. IBA/453/2019 etc.

4. It is represented on behalf of the Appellant before the filing of MA/43/CHE/2021 for withdrawal of the Main Application admitted under Section 7 of the Code the 2nd Respondent/Ex Resolution Professional of the Corporate Debtor had filed

IA/837/IB/2020 in IBA/453/2019 under Section 33 of the I&B Code for initiation of liquidation process pertaining to the Corporate Debtor, in as much as the single Resolution Plan received during the CIRP failed to receive the requisite majority of 66% votes for approval of the 'Resolution Plan'.

5. The Learned Counsel for the Appellant points out that with a view to save the Corporate Debtor from liquidation and to protect the interest of all stakeholders the Appellant/Shareholder/Promoter of the Corporate Debtor had filed IA/647/IB/2020 under Section 60 (5) of the Code r/w Rule 11 of the NCLT Rules, 2016 seeking to consider the settlement proposal initially circulated by the Appellant, with the creditor on 10.8.2020 for withdrawal of the Main Application admitted under Section 7 of the Code.

6. The Learned Counsel for the Appellant brings it to the notice of this Tribunal that the Adjudicating Authority based on the Application filed by the Appellant had directed the Ex Resolution Professional to convene a Meeting with COC to consider the proposal submitted by the Appellant and report to it on 2.11.2020.

7. It is the version of the Appellant that after deliberations and discussions, the settlement plan proposed by the Appellant as per

Section 12 A of the I&B Code was put to vote with an agenda for withdrawal of CIRP in tune with the settlement proposal which was initially voted by 70.63% of the Committee of Creditors in favour and later IARCL/one of the Financial Creditors through letter dated 05.03.2021 had intimated the 2nd Respondent that in the light of further discussions and in the interest of reserving the account and to enable the Corporate Debtor to revive, had decided to change their vote to approve the proposal submitted by the Appellant under Section 12 A of the Code.

8. The Learned Counsel for the Appellant points out that based on the request of IARCL/Financial Creditor to approach the Adjudicating Authority to permit the withdrawal under Section 12 A of the Code, the 2nd Respondent filed an application seeking directions in regard to the recasting of the vote and the Adjudicating Authority on 29.03.2021 in MA/12(CHE)/2021 had directed the 2nd Respondent to place the request of IARCL letter dated 05.03.2021 before the 'whole Committee of Creditors' for its consideration who shall record their approval or rejection specifically in the Meeting.

A PANORAMIC SPECTRUM OF FACTS

9. It comes to be known that the CIRP in respect of the 'Corporate Debtor' began on 04.07.2019. As a matter of fact the 'Adjudicating Authority' admitted the application IBA/453/2019 for 'CIRP' filed by the IDBI Bank against the 1st Respondent/Corporate Debtor under Section 7 of the Code and an Interim Resolution Professional was appointed.

10. On 08.05.2020, IA/837/IB/2020 in IBA/453/2019 was filed by the Resolution Professional as per Section 33 of the I&B Code seeking liquidation of the Corporate Debtor pursuant to the rejection of the Resolution Plan submitted by Royal Partners Investments Funds Ltd in the Committee of Creditors Meeting with 60.19% votes in favour of the Resolution Plan.

11. Moreover, the Appellant (Shareholder/Promoter of Corporate Debtor) filed IA/647/IB/2020 in IBA/453/2019 before the Adjudicating Authority praying for necessary direction for consideration of 'One Time Settlement Offer'. On 05.10.2020, the 'Adjudicating Authority' had directed the Resolution Professional to convene a COC Meeting to consider the One Time Settlement filed by the Appellant. On 13.10.2020, the 13th CoC Meeting took place and that the OTS of the Appellant was taken up in the Agenda based on the order of the 'Adjudicating Authority' dated 05.10.2020. The Committee of Creditors had sought time to complete the offer and revert back to the Resolution Professional for voting.

12. A detailed Settlement Proposal was submitted on 14.12.2020 by the Appellant in respect of M/s Siva Industries and Holdings Ltd and on 05.01.2021 an 'addendum' to the Settlement Plan was filed by the Appellant to the Union Bank of India. On 08.01.2021 the15th CoC took place, where

the CoC had prayed for time to contemplate the offer and to get back to the Resolution Professional for voting. On 14.01.2021 an 'addendum' to the Settlement Plan was filed by the Appellant.

13. Indeed, on 18.01.2021, the 16th Committee of Creditors Meeting took place, where the Committee of Creditors was asked to vote on the praying for withdrawal of Section 7 application projected by the IDBI Bank Ltd basis the settlement proposal. On 08.02.2021 the voting results on the Settlement Proposal by the Committee of Creditors was 70.63.

14. On 08.03.2021, the financial creditor/International Assets Reconstruction Co Ltd having 23.60% voting shares wrote to the Resolution Professional stating that it had reconsidered its vote and had now approved the Resolution and accordingly requested the Resolution Professional to pray for appropriate directions from the 'Adjudicating Authority' for validation of the recasted vote or seek fresh voting on the One Time Settlement.

15 As a matter of fact, the Resolution Professional on 24.03.2021 filed MA/12(CHE)/2021 before the 'Adjudicating Authority' seeking necessary directions based on the letter and request of IARCL. On 29.03.2021 the 'Adjudicating Authority' had directed the Resolution Professional to hold a CoC Meeting and seek the vote of COC, basis the IARCL letter, within 10 working days.

16. In the 17th COC Meeting that took place on 01.04.2021 where the CoC was asked to vote on the seeking of withdrawal of the application filed by the IDBI Bank Ltd, basis the Settlement Proposal and the order of the

Adjudicating Authority dated 29.03.2021. On 06.04.2021 the voting results on the One Time Proposal was passed by the COC with 94.23%.

17. On 08.04.2021 the Resolution Professional preferred the withdrawal application under Section 12A of the Code r/w Regulation 30A of the IRPCP Regulations for withdrawal of IBA/453/2019 admitted as per Section 7 of the Code. During the pendency of the application filed for withdrawal of 'CIRP' pertaining to the 'Corporate Debtor', the sole dissenting creditor of the proposed Settlement Plan filed by the Applicant/State Bank of India with voting share of 5.77% filed IA/586/CHE/2021 in IA/647/IB/2020 praying for a direction to declare that the mortgage rights of the State Bank of India over the immovable property offered by the Corporate Debtor will not get diluted upon withdrawal of the 'CIRP' by the Original Applicant/IDBI Bank Ltd under Section 12A of the I&B code.

18. on 12.08.2021, the 'Adjudicating Authority' had dismissed the withdrawal application filed by the Resolution Professional under Section 12A of the Code r/w Regulation 30A of the IRPCP Regulation through a common order in MA/43/CHE/2021 and IA/647/IB/2020 and IA/586/CHE/2021 in IBA/453/2019 and in continuation of the same passed an order of liquidation of the Corporate Debtor in IA/837/2020 in IBA/453/2019.

APPELLANT'S SUBMISSIONS

19. The Learned Counsel for the Appellant contends that the dismissal of withdrawal application filed by the 2nd Respondent as per Section 12A of the Code read with Section 30A of Insolvency &

Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 by the 'Adjudicating Authority based on the grounds that the 'Proposed Settlement Plan' is not a 'Settlement Simpliciter' but a business restructuring plan and final order was not made by the Promoter is not a tenable one in the Eye of Law.

20. The Learned Senior Counsel for the Appellant comes out with a plea that Section 12 A of the I&B Code does not speak of 'Settlement Plan' and only mandates the approval of the majority of the Committee of Creditors Members to withdraw the Application admitted under Section 7 or Section 9 or Section 10 by the Original Applicant with an objective that once an Application projected by the Original Applicant is admitted and Committee is formed the proceedings become 'action in rem' rather than 'action in personam'.

21. The Learned Counsel for the Appellant submits that the 'Settlement Plan' was irrelevant to the determination of the withdrawal application filed under Section 12A of the Code and inspite of the fact that no arguments were advanced regarding the terms itself and no querries were raised before the 'Adjudicating

Authority' and yet the said Authority had passed the impugned order on a mistaken premises.

22. The Learned Counsel for the Appellant urges that the 'Adjudicating Authority' had omitted to advert to Clause 4 of Chapter VIII of the Code under the Caption Binding Effect which takes that the 'Settlement Plan' is binding on the company and such Members of the Committee of Creditors who had approved the withdrawal application on the basis of the 'Settlement Plan' upon the approval of 90% voting shares of the Committee of Creditors and upon the receipt of the Adjudicating Authority's approval order.

23. The Learned Counsel for the Appellant urges this 'Tribunal' that the Adjudicating Authority fell into an error in sitting in judgement over the Committee of Creditors reasons for entering into a Contract of Settlement which is neither within its ambit nor power especially under Section 12A of the Code.

24. The Learned Counsel for the Appellant contends that the intent and object of Section 12A of the Code will be defeated if the 'Settlement Proposal' is rejected on a supposition of non-implementation and instead 'Liquidation' is preferred over 'Revival'.

25. The Learned Counsel for the Appellant comes out with an argument that the 'Adjudicating Authority' had committed an error in dismissing the 'withdrawal application' despite the same being filed in adherence to Section 12A of the Code and the Regulations made therein and with the receipt of the mandated approval of 90% of voting shares of the Committee of Creditors Members and in consonance with Regulation30A of the IRPCP Regulations.

26. The Learned Counsel for the Appellant prays for setting aside the impugned order because of the fact that the same suffers from an arbitrary, excessive and non-application of mind.

APPELLANT'S DECISIONS

27. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court in Swiss Ribbons Pvt Ltd and Another V. Union of India and others dated 25.01.2019 (vide Writ Petition (Civil) No.99 of 2018) whereby and whereunder at paragraph 51 to 53 it is observed as follows:-

> *"51. Before this Section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by the NCLT or the NCLAT. Regulation 30A of the CIRP Regulations states as under:-*

30A. Withdrawal of application.—*(1) An application for withdrawal under Section 12-A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under Regulation 36A.*

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of Regulation 31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its constitution or seven days of receipt of the application, whichever is later.

(4) Where the application is approved by the committee with ninety percent voting share, the resolution professional shall submit the application under sub-regulation (1) to the Adjudicating Authority on behalf of the applicant, within three days of such approval.

(5) The Adjudicating Authority may, by order, approve the application submitted under sub-regulation (4).

This Court, by its order dated 14.12.2018 in Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal & Ors., SLP (Civil) No. 31557/2018, has stated that Regulation 30A(1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be

allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36A.

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.

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 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."

28. The Learned Counsel for the Appellant refers to the Judgement of the Hon'ble Supreme Court dated 15.3.2021 in the case of Arun Kumar Jagatramka V. Jindal Steel and Power (Civil Appeal No.9664 of 2019) wherein at paragraph 72 to 75 it is observed as under:-

"Withdrawal of application

72. Section 12A of the IBC was inserted with effect from 6 June 2018 by Amending Act 26 of 2018. Under Section 12A, the Adjudicating Authority may allow the withdrawal of an application which is admitted under Sections 7, 9 and 10, on an application made by the applicant with the approval of a 90 per cent voting share of the CoC in such manner as may be specified. Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority)

Rules, 2016, on the other hand, contemplates that the NCLT, functioning as the Adjudicating Authority, may permit a withdrawal of an application made under Rule 4 (by the financial creditor), Rule 6 (by the operational creditor) or Rule 7 (by the corporate applicant) on the request made by the applicant before its admission. Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 contains provisions for the withdrawal of an application. Under Regulation 30-A, as it originally stood, an application for withdrawal under Section 12-A was required to be submitted before the issuance of an invitation for the expression of interest under Regulation 36-A. In the decision of this Court in Swiss Ribbons (supra), which was rendered on 25 January 2019, it was contemplated that an application for withdrawal may be presented between the period commencing from the admission of the application and the date of the constitution of the CoC. This led to the substitution of the Regulation 30-A on 25 July 2019. As substituted, Regulation 30-A stipulates that an application for withdrawal under Section 12-A may be made to the adjudicating authority: (a) before the constitution of the CoC, by the applicant through the IRP; and

(b) after the constitution of the CoC, by the applicant through the IRP or the RP as the case may be.

However, where the application under clause (b) is made after the issuance of the invitation for expression of interest, the applicant has to state the reasons justifying withdrawal after the issuance of the invitation. In the decision of this Court in Brilliant Alloys (supra), it has been held that a withdrawal may be contemplated even after the issuance of invitation of expression of interest. In Swiss Ribbons (supra), the provisions of Section 12-A were upheld against the challenge that they violated Article 14 of the Constitution. Justice Rohinton F Nariman, while adverting to the decision in Brilliant Alloys (supra), noted that Regulation 30-A(1) has been held not to be mandatory but directory because in a given case an application for withdrawal may be allowed for exceptional reasons even after issuance of an invitation for expression of interest under Section 36-A. Dealing with the provisions of Section 12-A, this Court observed:

"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 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.

83. 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, NCLT, and thereafter, 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."

Distinction between a withdrawal simpliciter and scheme of arrangement

73. The submission is that on the withdrawal of the application under Sections 7, 9 and 10, as the case may be, the company goes back to the same promoter in spite of such a promoter being ineligible under Section 29A for submitting a resolution plan. As such, it was urged that there is no reason or justification then to preclude a promoter from presenting a scheme of compromise or arrangement under Section 230.

74 There is a fundamental fallacy in the submission. An application for withdrawal under Section 12-A is not intended to be a culmination of the resolution process. This, as the statutory scheme would indicate, is at the inception of the process. Rule 8 of the Adjudicating Authority Rules, as we have seen earlier, contemplates a withdrawal before admission. Section 12-A subjects a withdrawal of an application, which has been admitted under Sections 7, 9 and 10, to the requirement of an approval of ninety per cent voting shares of the CoC. The decision of this Court in Swiss Ribbons (para 82 extracted above) stipulates that where the CoC has not yet been constituted, the NCLT, functioning as the Adjudicating Authority, may be moved directly for withdrawal which, in the exercise of its inherent powers under Rule 11 of the

Adjudicating Authority Rules, may allow or disallow the application for withdrawal or settlement after hearing the parties and considering the relevant factors on the facts of each case. A withdrawal in other words is by the applicant. The withdrawal leads to a status quo ante in respect of the liabilities of the corporate debtor. A withdrawal under Section 12-A is in the nature of settlement, which has to be distinguished both from a resolution plan which is approved under Section 31 and a scheme which is sanctioned under Section 230 of the Act of 2013. A resolution plan upon approval under Section 31(1) of the IBC is binding on the corporate debtor, its employees, members, creditors (including the central and state governments), local authorities, guarantors and other stakeholders. The approval of a resolution plan under Section 31 results in a "clean slate," as held in the judgment of this Court in Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta. Justice Rohinton F Nariman, speaking for the three judge Bench of this Court, observed:

> *"105. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were. In SBI v. V. Ramakrishnan [SBI v. V. Ramakrishnan, (2018) 17 SCC*

394 : (2019) 2 SCC (Civ) 458] , this Court relying upon Section 31 of the Code has held: (SCC p. 411, para 25)

"25. Section 31 of the Act was also strongly relied upon by the respondents. This section only states that once a resolution plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate debtor. Far from supporting the stand of the respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.""

In the same vein, the Court observed:

> *"107. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC OnLine NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."*

75 The benefit under Section 31, following upon the approval of the resolution plan, is that the successful resolution applicant starts running the business of the corporate debtor on "a fresh slate". The

scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A of the IBC. A scheme of compromise or arrangement, upon receiving sanction under Sub-section (6) of Section 230, binds the company, its creditors and members or a class of persons or creditors as the case may be as well as the liquidator (appointed under the Act of 2013 or the IBC). Both, the resolution plan upon being approved under Section 31 of the IBC and a scheme of compromise or arrangement upon being sanctioned under Sub-section (6) of Section 230, represent the culmination of the process. This must be distinguished from a mere withdrawal of an application under Section 12-A. There is a clear distinction between these processes, in terms of statutory context and its consequences and the latter cannot be equated with the former."

29. The Learned Counsel for the Appellant adverts to the Judgement of this Tribunal in Vipul Dilip Shah & Others V. Parinee Developers Pvt Ltd through 'Resolution Professional' Subhash Chadra Modi & Ors (vide Company Appeal (AT)(Ins) No.451 and 442 of 2021 wherein at paragraph 12 and 13 it is held as under:-

"12. We have considered the ground for dismissal of the Application. We are of the considered view that the legislation has provided a procedure for withdrawal of Application under Section 7, 9 or 10 of the IBC. In this case, the CoC has been constituted, therefore, the Application for withdrawal approved by the 99.9% voting shares of the CoC and the Application has been filed through the RP as provided under Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations).

13. We have gone through the settlement deed. There is a provision in the settlement deed that in case the settlement fails, the lenders may file Application for revival of CIRP or may file Application for initiation of contempt proceedings against the promoters of the Company. None of the conditions of settlement is against the provisions of IBC and Regulation and CoC has taken a commercial decision by voting shares of 99.9%. In such a situation, it is not appropriate to dismiss the Application on the ground that the CoC has not taken steps in time bound manner as provided in IBC and Regulations.

30. The Learned Counsel for the Appellant cites the Judgement of this Tribunal dated 28.08.2019 in Swetha Vishwanath Shirke V. Committee of Creditors, (Company Appeal (AT)(Ins) No.601 of 2019 etc) whereby and whereunder at paragraph 10 and 12 it is observed as under:-

"10. In so far Section 12A is concerned, it relates to withdrawal of the Application filed by an "applicant' under Section 7 or Section 9 of the I&B Code, if the 'Committee of Creditors' with more than 90% voting share approves the proposal as is apparent from Section 12A and reads as follows:

> *"12A. Withdrawal of application admitted under Section 7, 9 or 10.-*
>
> *The Adjudicating Authority may allow the withdrawal of application admitted under Section 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.*

12. From Section 12A and the decision of the Hon'ble Supreme Court in Swiss Ribbons Pvt Ltd & Anr (Supra), it is clear that the promoters/shareholders are entitled to settle the matter in terms of Section 12A and in such case, it is always open to an applicant to withdraw the application under Section 9 of the 'I&B Code' on the basis of which the 'Corporate Insolvency Resolution Process' was initiated."

31. The Learned Counsel for the Appellant relies on the Judgement of this Tribunal dated 4.07.2019 in Comp App (AT)(Ins) No.203 of 2019 wherein at paragraph 20 it is observed as under:-

"20. The Committee of Creditors' is to consider the feasibility, viability and such other requirements as has been specified by the Board. If it proposes maximisation of the assets and is found to be feasible, viable

and fulfil all other requirements as specified by the Board, the company being MSME, it is not necessary for the 'Committee of Creditors' to follow all the procedures under the 'Corporate Insolvency Resolution Process'. For example, if case is settled before the constitution of the 'Committee of Creditors' or in terms of Section 12A on the basis of offer given by Promoter, in such case, all other procedure for calling of application of 'Resolution Applicant' etc are not followed. If the Promoter satisfy all the creditors and is in a position to keep the 'Corporate Debtor' as a going concern, it is always open to 'Committee of Creditors' to accept the terms of settlement and approve it by 90% of the voting shares. The same principle can be followed in the case of MSME."

32. The Learned Counsel for the Appellant adverts to the Judgement dated 29.08.2019 of this 'Tribunal' in Bhaskar Biswas V. M/s Devi Trading and Holding Pvt Ltd & another (vide Comp App (AT)(INS) No.823/2019) wherein at paragraph 4 & 5 it is observed as under:-

4. "Normally, before the constitution of 'Committee of Creditors' if on behalf of the 'Corporate Debtor' a shareholder or Director settles the claim of the Applicant who files an application u/s 7 or 9 of the 'I&B' Code, the Adjudicating Authority in normal course can exercise its inherent power under Rule 11 of the NCLT Rules, 2016. However, it is seen that when allowing an application under Rule 11 of the NCLT Rules, 2016 may result into triggering a large number of cases as a number of creditors, including the 'Financial Creditors' (allottees) are also in the queue to trigger the process against the 'Corporate Debtor', it is open to the Adjudicating Authority to refuse to exercise its inherent power under Rule 11 of the NCLT Rules, 2016 otherwise it may result into triggering number of cases.

5. For the reasons aforesaid, we are not inclined to interfere with the impugned order dated 5th July, 2019, however we allow the Appellant or shareholders on behalf of the 'Corporate Debtor' to move an application u/s 12A for settling the claim of all the Creditors particularly the allottees stating how they will take care of the allottees and other lenders and in such cases the 'Committee of Creditors' uninfluenced by the order passed by the Adjudicating Authority and this Appellate Tribunal may consider the same and if it is feasible and viable may approve 90% of its voting shares u/s 12A to enable the Applicant - Devi Trading & Holding Pvt. Ltd.' to withdraw the application u/s 7 of the 'I&B' Code through the 'Resolution Professional'."

33. The Learned Counsel for the Appellant refers to the Judgement of this 'Tribunal' dated 27.02.2019 in Krishna Kumar Mintri V. Kamlesh Kumar Sighania & Anr wherein at paragraph 7 it is observed as under:-

"From the aforesaid decion of the Hon'ble Supreme Court in 'Brilliant Alloys Private Ltd Vs Mr. S. Rajagopal & Ors', it is clear that Regulation 30A cannot override the substantive provision of Section 12A. The Regulation has to be read alongwith the provision in Section 12A, which contains no such stipulation. No discrimination can be made for withdrawal of an application under Section 7 or Section 9 on the ground that the application was filed before a cutoff date or filed after a cutoff date. Such cutoff date has no nexus with the objective which is to be achieved. The Adjudicating Authority having failed to notice the aforesaid provisions issued long order discussing regulations and provisions of the Code. The Adjudicating Authority should have allowed application of withdrawal filed by the Applicant-Punjab National Bank, the Committee of Creditors having approved the Settlement with 100% voting share."

34. The Learned Counsel for the Appellant points out the Judgement of this Tribunal dated 06.09.2019 in Shaji Purushothaman V. Union Bank of India & Ors (vide Comp App (AT)(Ins) No.921/2019) wherein at paragraph 8 and 9 it is observed as under:-

> 8. *"In the circumstances, while we are not inclined to issue any specific direction, give liberty to the Appellant to move an application u/s 12A for settling the claims of all the Creditors including the guarantors.*
>
> 9. *If an application u/s 12A is filed by the Appellant, the 'Committee of Creditors' may decide as to whether the proposal given by the Appellant for settlement in terms of Section 12A is better than the 'Resolution Plan' as approved by it, and may pass appropriate order. However, as such decision is required to be taken by the 'Committee of Creditors', we are not expressing any opinion on the same."*

ASSESSMENT

35. It comes to be known that the CIRP of the 'Corporate Debtor' started on 04.07.2019. Pursuant to the public announcement, the Interim Resolution Professional among other things had invited all the creditors of the 'Corporate Debtor' to submit their claims by 22.07.2019. The 'Committee of Creditors' was constituted by the Interim Resolution Professional in respect of the 'Corporate Debtor' and on 29.07.2019 a 'Report' was filed by the 'Adjudicating Authority' about the constitution of the 'Committee of Creditors', in terms of Section 21 of the I&B Code and Regulation 17 of CIRP Regulations.

36. It comes to be known that as on the date of MA/43/CHE/2021, the verified and admitted financial debt of the Corporate Debtor was INR 4863.87 crores. The Resolution Professional had received claims for INR 471.71 crore from the 'Operational Creditors' of the 'Corporate Debtor' and an amount of INR 461.02 crore was admitted. The Resolution Professional had received claims amounting to INR 917.90 crore from other creditors of the Corporate Debtor and an amount of INR 40.55 crore was admitted. The 'Resolution Professional' had verified the list of all the creditors of the 'Corporate Debtor'.

37. It transpires that the RPIFL have submitted its Expression of Interest to the Resolution Professional on 07.12.2019. The last date for submission of Resolution Plan was on 25.11.2019 extended upto 16.12.2019. On the last date of submission of 'Resolution Plan', RPIFL was the only Resolution Applicant which submitted its Resolution Plan.

38. An Application was filed before the 'Adjudicating Authority' on 23.12.2019 seeking an extension of CIRP period by two months (more than the 180 days period). The Application was allowed by the 'Adjudicating Authority' and the CIRP period was extended for a period of 60 days, from 31.12.2019.

39. It is represented on behalf of the Appellant that the 'Committee of Creditors' had not functioned for 35 days till the application under Section 12(2) of the Code was heard and allowed by the 'adjudicating authority'. After the application being allowed, the Committee of Creditors had convened its operations and conducted the 9th COC Meeting on 07.02.2020. Subsequently, the Committee of Creditors in their Meeting dated 25.02.2020 and postpone

to 26.02.2020 with 98.32% votes had authorised the 'Resolution Professional' to prefer an application before the 'Adjudicating Authority' for an exclusion of a period of 30 days in CIRP.

40. Based on the application which was filed on 28.02.2020 the 'Adjudicating Authority' on 13.03.2020 has passed an order excluding a period of 30 days from the CIRP time frame of the Corporate Debtor.

41. Added further, the Appellate Authority, on 30.03.2020 had passed in suo moto Company Appeal (AT) No.1/2020 an order stating that *"the period of lockdown as ordered by the Central Government and the State Government shall be excluded for the purpose of counting the period for 'Resolution Process under Section 12 of the Insolvency and Bankruptcy Code, 2016 in all cases where Corporate Insolvency Resolution Process' has been initiated and pending before any Bench of the National Company Law Tribunal or in Appeal before this Appellate Tribunal"* and in the teeth of said order etc., the CIRP was extended till five days from the removal of the lock down.

42. According to the Appellant, the first version of the Resolution Plan was given by RPIFL on 16.12.2019 and RPIFL had not submitted an earnest money deposit of INR 5 crores as required under the provisions of 'RFRP' and had instead requested for the earnest money deposited to be reduced to INR 50 lakhs and the Performance Security as per 'RFRP' to be reduced to INR 3 crores. Further, on receipt of the Resolution Plan, while the compliance of the Resolution Plan with a requirement of the Code was being undertaken by the 'Resolution Professional', in the interest of time, the COC constituted a Committee with the Members to undertake negotiations with RPIFL and the

negotiations were undertaken by the said Committee and RPIFL on 24.12.2019 and 04.01.2020 with a view to improve the commercial proposal.

43. It is evident that the revised Resolution Plan post negotiations was undertaken with a Committee constituted by the Committee of Creditors was received from RPIFL on 14.01.2020 and because of the request from RPIFL to reduce the money required by the Committee of Creditors as per 'RFRP' as earnest money deposit and performance security, the Resolution Professional had conveyed a Committee of Creditors on 07.02.2020 to secure an approval of the Committee of Creditors for acceding to the said request. The Committee of Creditors through e-voting had accepted the same and 'RFRP' was amended on 13.02.2020 to allow for 'RPIFL' to submit its Resolution Plan with EMD with INR 50 lakhs and later provided performance security of INR 3 crores.

44. The Resolution Professional subsequently convened a Meeting of Committee of Creditors on 12.02.2020. The Resolution Professional invited the representative of RPIFL to the Meeting of the Committee of Creditors to present the revised Resolution Plan and that the Committee of Creditors therein had negotiated the commercial terms of the Resolution Plan with RPIFL. The Resolution Professional had convened a Meeting on the CoC on 25.02.2020 wherein the Resolution Plan of RPIFL was confirmed as being satisfied with the requirements of the Code and tabled for consideration by the 'Committee of Creditors'. However, the Committee of Creditors was dissatisfied with certain terms of the Resolution Plan and further negotiated the terms of the Resolution Plan with RPIFL.

45. Considering the fact that the COC was in the last stage of finalising the Resolution Plan of RPIFL, the Committee of Creditors opined that unless the CIRP period was extended (the same would come to an end on 29.02.2020) and that they might not provide them an opportunity to consider and vote on the Resolution Plan of RPIFL. Hence the Committee of Creditors, in its Meeting dated 25.02.2020 adjourned to 26.02.2020, with 98.32% vote had authorised the Resolution Professional to file an Application before the Tribunal seeking exclusion of a period of 30 days in CIRP and that the application was filed on 28.02.2020. The Tribunal through an exclusion order dated 1303.2020 but delivered on 16.03.2020 had excluded a period of 30 days from CIRP time frame of the Corporate Debtor.

46. The Resolution Professional convened the 12th Meeting of the Committee of Creditors on 16.03.2020 and inter alia presented the compliant Resolution Plan before the CoC for its approval and post discussions at the Meeting, the Plan was put up for e-voting and the results were declared on 04.03.2020 and the Resolution Plan of 'RPIFL' failed to receive requisite majority of 66% of the voting share of the Members of the Committee of Creditors and was rejected by Committee of Creditors on account of the receipt of 60.90% vote, in favour of the Resolution Plan which does not cross the minimum threshold as required under Section 30(4) of the Code.

47. After the expiry of the Corporate Insolvency Resolution Process of the Corporate Debtor, an application was filed by the Resolution Professional before the 'Adjudicating Authority' under Section 33(1)(a) of the I&B Code, 2016 for initiation of the liquidation process of the Corporate Debtor.

48. On behalf of the Appellant it is brought to the notice of this 'Tribunal' that the shareholder of the 'Corporate Debtor' submitted a detailed settlement plan before the entire Committee of Creditors and further that the shareholder of the 'Corporate Debtor' on 05.01.2021 and 14.01.2021 had submitted an 'addendum' to the Settlement Plan to Union Bank of India and the Resolution Professional and that 16th COC Meeting took place on 18.01.2021.

49. It comes to light that the Resolution Professional had opened the voting lines for the Committee of Creditors to vote on the following agenda:-

> *"To approve the application for withdrawal of Section 7 application admitted for CIRP of the Corporate Debtor in terms of Section 12A of of the IBC and authorise the 'Resolution Professional' to file the application for withdrawal with the NCLT on behalf of IDBI Bank in terms of Regulation 30A(5) upon receipt of bank guarantee in terms of Regulation 30A(2)(b) with leave to the creditors to seek liquidation of the Corporate Debtor in case of default in compliance with the terms of the settlement proposed dated 14 December 2020 and addendums dated 5 January 2021 and 14 January 2021 submitted by Mr. Vallal RCK and placed before the COC on the basis of which withdrawal of the application admitting the CIRP of the Corporate Debtor is being approved by the COC."*

50. It is the version of the Appellant that the voting result on the aforesaid agenda to authorise the Resolution Professional to seek 'Withdrawal of Section 7 Application' on behalf IDBI Bank Ltd on the basis of the 'Settlement Plan' were disclosed on 08.02.2021 whereby with a voting share of 70.63%, the

threshold for approval 90% was not secured and that the results were announced on 31.01.2021.

51. The Learned Counsel for the Appellant points out that the 'Resolution Professional' through a letter dated 05.03.2021 from IARCL, received an email dated 08.03.2021 stating that it had decided to change its vote as casted 'against' the OTS Resolution, now to 'approve' the Resolution. It was mentioned that the said vote now if allowed to be considered by the Hon'ble Adjudicating Authority after necessary directions/orders would reach the requisite 90% of voting threshold. The Resolution Professional intimated the 'Committee of Creditors' of the said letter and the request stated therein through email dated 09.03.2021.

52. The 'Resolution Professional' (based on the letter of IARCL) had filed an application on 24.03.2021 before the 'Adjudicating Authority' and by an order dated 29.03.2021 the Resolution Professional was directed to convene a Committee of Creditors and seek approval of the COC within 10 working days from the date of the order.

53. The Resolution Professional had convened the 17th COC Meeting on 01.04.2021 and the voting lines for the Committee of Creditors to vote on the following agenda was opened up:-

> *"To take approval of the Committee of Creditors for the voting agenda item voted upon in the sixteenth meeting of the committee of creditors.: To approve the application for withdrawal of Section 7 application admitted for CIRP of the Corporate Debtor in terms of Section 12A of the IBC and authorise the 'Resolution Professional' to file the application for*

withdrawal with the NCLT on behalf of IDBI Bank in terms of Regulation 30A(5) upon receipt of bank guarantee in terms of Regulation 30A(2)(b) with leave to the creditors to seek liquidation of the Corporate Debtor in case of default in compliance with the terms of the settlement proposal dated 14 December 2020 and addendums dated 5 January 2021 and 14 January 2021 submitted by Mr. Vallal RCK and placed before the COC on the basis of which withdrawal of the application admitting the CIRP of the Corporate Debtor is being approved by the COC."

54. The Learned Counsel for the Appellant comes out with a plea that with a voting share of 94.23%, the requisite threshold for approval i.e. 90% was attained and the results were made on 06.04.2021. As such, the Resolution Professional was authorised by the IDBI Bank Ltd to file the present Application i.e. MA/43/CHE/2021 before the 'Adjudicating Authority' as per Section 12A r/w Regulation 30A of CIRP Regulations.

LIQUIDATOR'S STATUS REPORT

55. The liquidation of the 1st Respondent/Corporate Debtor was ordered by the 'Adjudicating Authority' on 12.8.2021. The public announcement was made in 'Financial Express' (English Paper)' and 'Dinamani' (Tamil Paper) on 18.8.2021, in regard to the liquidation of the Corporate Debtor and claims were invited etc.

56. The Liquidator received the claims for Rs.8085.56 crores, out of which Rs.6515.31 crores claims were admitted. Based on the receipt and admission of the claims, the liquidator formed the Stakeholders Consultation Committee(SCC) on 10.10.2021 and a facilitation meeting took place on

22.10.2021 amongst the unsecured creditors to select the representatives and two representatives were nominated in respect of the unsecured creditors.

57. The Registered Valuers were appointed to value the land and buildings and vehicles of the Corporate Debtor and the said valuers for land and building and vehicles had furnished their report. However, the two securities and financial assets valuers, appointed by the liquidator had not submitted their valuation report. On 15.10.2021, the 1st quarterly progress report in respect of the Corporate Debtor was filed before the 'Adjudicating Authority'. The asset memorandum, SCC Constitution and Preliminary Report with the 'Adjudicating Authority' was filed by the Liquidator on 26.10.2021.

58. The 1st Stakeholder Consultation Committee Meeting was conducted on 14.12.2021 to update the stakeholders on the progress so far made in the liquidation process of the Corporate Debtor, appointment of valuers and other professionals to assist the liquidator and to arrive at a strategy to be adopted for the sale of the assets of the Corporate Debtor.

APPLICABILITY OF SECTION 12A

59. To be noted that, Section 12A of the I&B Code applies to an application for Insolvency Resolution which was admitted by the 'Adjudicating Authority' and all the more, when there is no challenge to the admission of the petition/application.

WITHDRAWAL OF APPLICATION

60. It is to be remembered that as per Rule 8 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the

'Adjudicating Authority' may allow withdrawal an application based on the applicant's request. By virtue of the 2nd amendment to the I&B Code, 2016 (during the year 2018) an 'Adjudicating Authority' may permit the withdrawal of an application under Section 7, 9 and 10 of the Code, even after admission, on an application made by an applicant with the approval of 90% voting share of the COC.

61. It cannot be ignored that if the 'CIRP' is initiated by admitting the application under Section 7 or 9 or 10, it cannot be set aside or withdrawn except for any illegality, to be exhibited or if it is without jurisdiction or for some other justiciable ground just because a promoter desires to pay all dues including the default amount cannot be a ground to set aside the CIRP.

62. Section 12A of the Code came into effect on 06.06.2018. Rule 8 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 is quite relevant for withdrawal of an application under Section 12A of the Code. Besides this, Regulation 30A of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is also relevant for withdrawal of application under Section 12A of the Code. An application for withdrawal ought to be submitted to the Interim Resolution Professional or the Resolution Professional, of course, in Form FA of the Schedule prior to the issuance of invitation for Expression of Interest under Regulation 36A.

63. The 'Withdrawal Application' is to go alongwith the Bank Guarantee in respect of the estimated cost meant for the purposes of Clauses (c) and (d) of Regulation 31 till the date of application. In reality, the Committee of

Creditors, will consider the Application within 7 days of receipt of the Application and if approved it with 90% voting share, the Resolution Professional will project the application to the 'Adjudicating Authority' for and on behalf of the Applicant, within three days of such approval. An 'Adjudicating Authority' may approve the application on merits by passing an appropriate order, in accordance with law.

64. A perusal of the Settlement Proposal/Plan under the caption 1. 'Claims admitted' as per the Code' reads as under:

(Amount in INR Cr)

S.No	Name of Financial Creditor	Amount claimed	Amount verified/admitted	Amount rejected.
1	Central Bank of India	410.43	402.95	7.48
2	Life Insurance Corp of India	354.36	354.36	-
3	State Bank of India	395.97	280.50	115.47
4	Union Bank of India	645.17	645.17	
6	International Asset Reconstruction Co Pvt Ltd	1,147.70	1,147.69	0.01
7	IDBI Bank Ltd	876.07	876.07	0.01
8	Punjab National Bank	305.83	305.83	-
9	Bank of India	74.42	74.42	-
10	Masdar Energy Ltd UAE	920.43	776.88	143.55
11	Tata Capital Financial Services Ltd	446.95	-	446.95
12	Indian Renewable Energy Development Agency Ltd	88.73	-	88.73
	Total	**5,666.06**	**4,863.87**	**802.20**

65. The Clause 1.3 of the Settlement Proposal/Plan reads as under:

S.No.	Operational Creditors	Admitted Amount (INR in Crores)
1	Vendors (9Nos)	5.14
2	Related Parties (1 Nos)	48.89
3	Statutory Authorities (Income Tax	406.89
4	Other Creditors)Maxis Communications Berhad)	40.55
	Total	**501.57**

66. Under Clause 3.2 detailed lenderwise Settlement Proposal it is mentioned as follows:

(Amount in INR Cr)

S.No	**Financial Creditor Name**	**Admitted amount**	**Trance-I Payment**	**Trance-II Payment**	**Settlement Amount**
1	Central Bank of India	402.95	4.77	40.23	45.00
2	Life Insurance Corpn of India	354.36	22.50	137.50	160.00
3	State Bank of India	280.50	2.50	22.50	25.00
4	Union Bank of India	645.17	3.00	27.00	30.00
5	International Asset Reconstruction Co Pvt Ltd	1,147.69	2.33	13.22	15.55
6	IDBI Bank Ltd	876.07	5.00	32.00	37.00
7	Punjab National Bank	305.83	0.62	3.52	4.14
8	Bank of India	74.42	0.15	0.85	1.00
9	Masdar Energy Ltd, UAE	776.88	1.58	8.94	10.52
	Total	**4,863.88**	**42.45**	**285.76**	**328.21**

67. From the above Settlement Proposal, it is latently and patently quite clear that the said proposal was taken into account and considered by the Committee of Creditors and that the nine financial creditors pertaining to the

Corporate Debtor had agreed to receive an amount of Rs.328.21 crores towards the settlement sum, as against the total admitted claim of Rs.4,863.88 crores.

68. In the Settlement proposal under 3. Financial Proposal, 3.1 overview, it mentioned as under:-

S.No	**Particulars**	**Amount (Rs.in crores)**	**Period**
1	Upfront Amount	5.00	Within 2 days from the date of COC's approval of this Settlement Plan.
2	Tranche-1	42.45	Within 30 working days from the NCLT Approval Date
3	Trance II	285.75	Within 180 working days from the NCLT Approval date.
	Total	**333.21**	

69. In this connection, it is not out of place to make a relevant mention that under Chapter VII-Miscellaneous in Sr. No.2 "Effective Date and Failure of Approved Settlement Plan, it is mentioned as under:

> *"The Obligation of the Promoters to take any step towards implementation of the Settlement Plan proposed by it, shall only arise after Effective Date. Till such time the Settlement Plan is made effective on the Effective Date, no past, present or future action, course of conduct or failure to act in relation to the proposed investment in SIHL will give rise to or serve as the basis for any obligation or other liability on the part of the Promoters.*
>
> *This document constitutes a binding proposal of the Promoters in respect of Settlement of dues of the Company. However, the proposal of the Promoters is subject to negotiation with the Committee of Creditors.*

Therefore, the terms of the Approved Settlement Plan may be different from the terms proposed herein.

The Promoters shall be entitled to withdraw the Approved Settlement Plan (without any liability) in case the Adjudicating Authority directs any material amendment to the Approved Settlement Plan, which results in an adverse effect or increased financial liability for the Promoters.

70. In view of the above covenant, it is crystalline clear that despite the proposal being approved, the promoter of the Corporate Debtor can vary the clauses of the proposal Settlement Plan. Apart from that, a mere glance of the terms of the implementation, it unerringly, in the considered opinion of this Tribunal, points out that it is more like that of a contemplated/Resolution Plan, proposed in terms of the ingredients of Section 30 of the Code and in short, it cannot be characterised as a 'Settlement' in a stricto sense of the one, envisaged as per Section 12A of Code.

71. It is well settled that a Resolution Plan is not an 'Auction/Sale/Recovery/Liquidation'. A Resolution Applicant as per Section 30 of the Code is to scrutinise the Resolution Plan and to find out whether it fulfils the requirements of Section 30(2) of the Code. If the Plan satisfies the requirements of Law, then the same is to be placed before the Committee of Creditors for its approval as per Section 30(3) of the Code and this can be approved by the Committee of Creditors as per requirement of Section 30(4) of the Code. If the Plan is approved by the Committee of Creditors, the Resolution Plan is to be placed before the 'Adjudicating Authority' as per

Section 31 of the Code and the said Authority is to apply his thinking judicial mind to the Resolution Plan so furnished, and on being satisfied with the Plan that it fulfils the ingredients or does not meet the ingredients or Section 30 of the Code may either accord approval to the Plan or negative the same.

72. In the instant case on hand, the Committee of Creditors had voted under Section 12A of the Code without even getting a single sum from the promoter of the Corporate Debtor, in respect of the withdrawal of the CIRP pertaining to the Corporate Debtor. As a matter of fact, the Adjudicating Authority had in the impugned order had categorically observed that the 'Settlement Proposal' is not a Settlement Simpliciter but it is a business restructuring plan.

73. The well settled legal principle is that the Committee of Creditors ought not to approve the Resolution Plan where the Resolution Applicant is ineligible under Section 29A of the Code. In this connection this Tribunal pertinently points out that in the instant case on hand, the promoter of the Corporate Debtor being ineligible to project a Resolution Plan by virtue of Section 29A of the Code had embarked upon the aspect of furnishing a settlement proposal 'which is akin to Resolution Plan'. To put it differently the promoter of the Corporate Debtor had ventured in endeavouring to restructure the loan sanctioned by the Financial Creditors based on the premise of a Settlement Proposal to be filed under Section 12A of the Code.

74. More importantly, the Committee of Creditors should have voted for the Settlement Proposal only in the event of receipt of money in entirety in terms of the Settlement Proposal of the Promoter of the Corporate Debtor in which

event there was no scope of contemplating a default of the promoter of the Corporate Debtor and ultimately the Adjudicating Authority would have approved the Settlement Proposal.

75. This Tribunal taking note of the primordial fact that no amount was paid to the Financial Creditors of the Corporate Debtor, then in case of default committed on the part of the promoters of the Corporate Debtor, then there will be no clarity in regard to the manner in which one is to proceed further, especially in the teeth of Corporate Debtor being out of the CIRP.

76. In view of the foregoing detailed qualitative and quantitative discussions, this Tribunal comes to the consequent conclusion that the Settlement Proposal, as projected by the Corporate Debtor and the approval of the withdrawal of the CIRP pertaining to the Corporate Debtor by the Committee of Creditors in its 17th Meeting dated 01.04.2021 was not quite in tune with the relevant provisions of the I&B Code, 2016 and to put it precisely, it is out of bounds of the Insolvency & Bankruptcy Code, 2016. Looking at from any angle, the observations and the conclusion arrived at by the 'Adjudicating Authority' to the effect that the projected settlement proposal plan of the promotor of the Corporate Debtor is not a settlement simpliciter as envisaged under Section 12-A of the Code, 2016 rather it is a 'business restructuring plan' and further that no finality was reached between the Promotor of the Corporate Debtor and Committee of Creditors as per Clause –2 of Chapter VIII of the Settlement proposal and hence, based on ambiguity of the terms of the settlement it cannot order for withdrawal of CIRP are free from legal infirmities. Consequently, the Appeal fails.

COMPANY APPEAL (AT)(CH)(INSOLVENCY) NO.212/2021

PREAMBLE:

77. The Appellant has filed the present Company Appeal (AT)(CH)(Ins) No. 212/2021 questioning the impugned order dated 12.08.2021 in I.A./837/IB/2020 in IBA/453 OF 2019 ordering liquidation of the 'Corporate Debtor' in continuation of the dismissal order passed through a common order 12.08.2021 passed by the 'Adjudicating Authority' in MA/43/CHE/2021 and IA/647/IB/2020 and I.A./586/CHE/2021 in IBA/453/19 wherein MA/43/CHE/2021 was filed by the 2nd Respondent with the approval of 94.23% voting share of the 'Committee of Creditors' of the 'Corporate Debtor' for withdrawal main Insolvency and Bankruptcy Application No. IBA/453/2019, pursuant to Section 12A of the I&B Code read with Regulation 30A of the IRPCP Regulations.

APPELANT'S CONTENTIONS:

78. The Learned Counsel for the Appellant contends that the impugned order passed by the 'Adjudicating Authority' on 21.08.2021 in ordering the liquidation pertaining to the 'Corporate Debtor' is an invalid one and in fact, the Settlement Plan proposed by the Appellant under Section 12A of I & B Code was burst aside by the 'Adjudicating Authority'.

79. The Learned Counsel for the Appellant submits that the observation of the 'Adjudicating Authority' in the impugned order that the 'Settlement Plan' is not a 'Settlement Simpliciter' as per Section 12A of the Code, but it is a 'Business Restructuring Plan' is an incorrect one because of the fact that the

Section 12A of the Code never speaks of 'Settlement Plan' and only mandates the approval of the majority of the Committee of Creditors members to withdraw the Application admitted under Section 7 or Section 9 or Section 10 by the original Applicant with an objective that once an Application file by the original Applicant is admitted and Committee is formed, the proceeding become 'action in rem' rather 'action in personam'.

80. The Learned Counsel for the Appellant takes a stand that the intent of the Legislation behind introducing Section 12A of the Code was to permit settlement before approval of a Resolution Plan for which the Legislature had mandated the approval of the 'Committee of Creditors' of a higher threshold of 90% as opposed to the requirement of 66% CoC approval for acceptance of a Resolution Plan.

81. Advancing his argument the Learned Counsel for the Appellant comes out with a plea that the 'Settlement Plan' merely provides the basis for the approval by the 'Committee of Creditors' which was accepted in entirety by them based on the terms mention therein. In fact, the 'Adjudicating Authority' had committed an error in sitting over the Judgment of the Committee of Creditors reasons for entering into a contract of settlement, which is neither its scope nor power under the Code, especially under Section 12A.

82. It is represented on behalf of the Appellant that there is no discretion under Section 12A of the Code for the 'Adjudicating Authority' to refuse to allow withdrawal of a case, based on the reason that 'CIRP would have to undergone again'.

83. The other contentions raised on behalf of the Appellant is that the 'Adjudicating Authority' was not correct in arriving at a conclusion that the terms of the Settlement is an ambiguous one since there is no final offer made by the Appellant and also the acceptance made by the CoC etc.

84. The Learned Counsel for the Appellant proceeds to point out that it is not the duty of the 'Adjudicating Authority' to investigate commercial ramification of the Committee of Creditor's decisions, especially when it is not in the nature of a 'Resolution Plan', but a 'Withdrawal Simpliciter'.

85. The Learned Counsel for the Appellant submits that the impugned order is an excessive one and suffers from non-application of mind by the 'Adjudicating Authority'.

86. According to the Learned Counsel for the Appellant, there is no requirement that money is need to be paid in advance for exercising the power under Section 12A of the Code. Also that the 'Settlement Plan' was an irrelevant one to the determination of the 'Withdrawal Application' filed under Section 12A of the Code.

87. Added further, it is a version of the Appellant that the 'Adjudicating Authority' had failed to advert to Class 4 of Chapter VIII under the caption 'Binding Effect' which states that a 'Settlement Plan' is binding on the Company and such Members of the 'Committee of Creditors' that had approved the 'Withdrawal Application' on the basis of the 'Settlement Plan' upon the approval of 90% voting shares of CoC and upon receipt of the 'Approval Order' of the 'Adjudicating Authority'.

88. Expatiating its submission, it is the contention of the Learned Counsel for the Appellant that a 'Settlement' being contract and its novation thereto has no ambit for judicial interference. In fact, the 'Adjudicating Authority' has no power to review such a contract as if it is a 'Writ Court'.

EVALUATION:

89. Before the 'Adjudicating Authority', the Resolution Professional/ Applicant filed IA/837/IB/2020 in IBA/453/2019 (under Section 33 of the I& B Code) seeking liquidation of the 'Corporate Debtor' consequent to the rejection of the 'Resolution Plan' submitted by Royal Partners Investment Fund Limited in 12th Committee of Creditor's meeting with 60.90 % votes in favour of the Resolution Plan.

90. The Resolution Professional/Applicant in IA/837/IB/2020 in IBA/453/2019 had prayed for passing of necessary orders by the 'Adjudicating Authority' in directing the liquidation of the 'Corporate Debtor' in the manner laid down in Chapter III of the Code etc. Furthermore, in the Interlocutory Application IA/837/IB/2020 in IBA/453/2019 the Resolution Professional/Applicant had at paragraphs 27 to 33 averred the following:

> *27. "It is respectfully submitted and reiterated that the Exclusion Order has erroneously recorded the 240th day of CIRP duration, the date post such exclusion has been erroneously recorded 20.03.2020, whereas the correct date post such 30 day exclusion from the last date of CIRP, i.e. 29.02.2020 would fall on 30.03.2020. A memo/application, making submission of the afore mentioned facts and figures, requesting for a correction in the Exclusion Order to record the*

end of the 30 day period as 30.03.2020 has been filed with this Hon'ble Tribunal.

28. In light of the NCLT having granted the 30 day exclusion of the CIRP pursuant to the Exclusion Order and, subject to the correction as submitted in the memo submitted with NCLT, the RP convened the 12th meeting of the OC on 16.03.2020 and amongst others, presented the compliant Resolution Plan before the COC for its approval. Post discussions at the meeting in relation to the final compliant version of the Resolution Plan, the plan was put for e-coting, the results for which were declared on April 4, 2020. Copy of the minutes of the CoC meeting held on 16.03.2020 is annexed and marked as 'Annexure A-13'.

29. In terms of the e-voting results as on April, 4, 2020, the Resolution Plan of RPIFL failed to receive the requisite majority of 66% of the voting share of the members of the CoC and was consequently rejected by the CoC on account of having received only a vote of 60.90% in favour of the Resolution Plan, which does not cross the minimum threshold as required under Section 30(4) of the Code. Copy of the voting results is annexed hereto and marked as 'Annexure A-14'.

30. In view of no resolution plan having received the requisite approval of the CoC under S.30(4) of the Code despite all efforts having been undertaken to achieve a resolution and the expiry of the CIRP of the Corporate Debtor, the present Application has been filed by the Resolution Professional before this Hon'ble Tribunal under Section 33(1)(a) of the Code for initiation of the liquidation process of the Corporate Debtor.

31. At the 12th CoC meeting held on 16.03.2020, the Resolution Professional tabled the agenda of discussing and approving to provide finding for the liquidation cost, and sale

of the Corporate Debtor as a going concern in case the Corporate Debtor is sent to liquidation as per Regulation 39B and 39C of the CIRP Regulations.

32. In the e-voting results which have been declared, the following agenda were also put to vote before the CoC.

I. To approve plan for funding the difference between –best estimate of the amount required to meet liquidation costs and best estimate of the value of the liquid assets available to meet the liquidation costs in terms of Regulation 39B, the plan being – 1) to meet the fee payable to the liquidator under regulation 4 out of the proceeds of sale of assets and 2) to meet he balance deficit as and when necessary by way of contribution from the financial creditors in proportion of their admitted debt.

II. To approve that the liquidator may first explore sale of the corporate debtor as a going concern under clause (e) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 or sale of the business of the corporate debtor as a going concern under clause (f) thereof, if an order for liquation is passed under section 33.

33. The aforesaid agenda were also rejected by the CoC with only 23.06% and 36.21% votes respectively in favour of the said agenda.

PURPOSE OF I & B CODE, 2016

91. The aim of the Code is one of 'Resolution'. The next objective is 'Maximisation Of the Value of Assets of the Corporate Debtor. The other one being 'Promoting of Entrepreneurship', 'Availability of Credit' and 'Balancing the Interests'.

LIQUIDATION:

92. It is to be remembered that the I & B Code, 2016 is not permitting 'Liquidation Of a Corporate Debtor' in a direct manner. Upon failure of the 'Corporate Insolvency Resolution Process', the Code allows liquidation.

93. It is pointed out that Section 33 of the I & B Code, 2016 enjoins 'Liquidation of the Corporate Debtor' if the 'Adjudicating Authority' comes to the conclusion that the Resolution Plan does not satisfy the ingredients of Section 30(2) of the Code.

94. If the 'Adjudicating Authority' is not receipt of Resolution Plan on or before the expiry of the Maximum Period allowed for completion of the Insolvency Resolution Plan, then, liquidation of the 'Corporate Debtor' is to ensue. If at any time prior to the confirmation of a Resolution Plan, the 'Committee of Creditor' resolve by a 66% majority of voting shares where the 'Corporate Debtor' is to be liquidated, then, the liquidation may follow suit. If the 'Corporate Debtor' breaches the conditions of the Resolution Plan and upon an Application by individual (other than the Corporate Debtor), whose interest are prejudicially affected by such breach, the 'Adjudicating Authority' can arrive at a conclusion that the 'Corporate Debtor' had violated the condition of the Resolution Plan, in which event, the Code visualises initiation of the 'Liquidation Process' in the considered opinion of this 'Tribunal'. Suffice it for this 'Tribunal' to make a pertinent mention that if any of the aforesaid situations exist, the 'Adjudicating Authority is empowered to pass an order requiring the 'Corporate Debtor' to be liquidated as per the relevant provisions Code.

94. If the time period for CIRP was extended but the Resolution Plan was not accepted by the 'Adjudicating Authority' then, liquidation of the Company can be ordered under Section 33 of the I & B Code. Timely liquidation is preferred over fruitless and endless Resolution proceeding.

95. In the instant case on hand, the Applicant/Resolution Profession of the First Respondent had filed IA/837/IB/2020 in IBA/453/2019 after the lapse of 330 days period of CIRP pertaining to the 'Corporate Debtor'. A mere cursory perusal of the contents of IA/837/IB/2020 in IBA/453/2019 shows that the Applicant/Resolution Professional had not made mention of the 'Liquidation Value' concerning the 'Corporate Debtor'.

96. Be that as it may, considering the fact this 'Tribunal' has dismissed the Company Appeal (AT)(CH)(Ins) No. 211 of 2021 (arising out of MA/43/CHE/2021), this 'Tribunal' comes to a resultant conclusion that the 'Adjudicating Authority' had rightly dismissed the MA/43/CHE/2021 and came to the legitimate and reasonable conclusion that the 'Corporate Debtor' was required to be ordered for Liquidation, in terms Section 33(1)(a) of the Code, 2016 and allowed the IA/837/IB/2020 in IBA/453/2019, and the same requires no interference. Viewed in that perspective, the Company Appeal fails.

RESULT: (Company Appeal (AT)(CH)(Ins) No. 211 of 2021)

In fine, the Company Appeal (AT)(CH)(Ins) No. 211 of 2021 is dismissed. No costs. Connected pending Application, if any, is closed.

RESULT: (Company Appeal (AT)(CH)(Ins) No. 212 of 2021)

In fine, the Company Appeal (AT)(CH)(Ins) No. 212 of 2021 is dismissed. No costs. Connected pending Application, if any, is closed.

[Justice M. Venugopal]
Member(Judicial)

(V.P. Singh)
Member(Technical)

28th January, 2022
Bm/Akc