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IBC: LATEST POSITION ON WITHDRAWAL OF AN APPLICATION BY CREDITOR(S) POST SETTLEMENT

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The Insolvency and Bankruptcy Code, 2016 (“**IBC**”) is considered as an important legislation for early detection of sickness of any corporate debtor and to deal with such sickness in a time bound manner by allowing the implementation of the effective resolution plan, if possible. Such legislation is a paradigm shift in comparison to the erstwhile legislation The Sick Industrial Companies (Special Provisions) Act, 1985 (“**SICA**”). The erstwhile SICA was not so successful in dealing with the revival and restructuring of sick companies due to the long-drawn pendency of the cases before the Board for Industrial and Financial Reconstruction.

The insolvency resolution process for revival or restructuring of defaulting corporate debtor can be invoked by any operational creditor or financial creditor by filing an application with the National Company Law Tribunal (“**NCLT**”). If the NCLT is satisfied that the application filed by such operational creditor or financial creditor meets the criteria as laid down under IBC, it will accept the application and shall order the appointment of an Interim Resolution Professional (“**IRP**”). Consequently, the insolvency resolution process will start and the entire management and control of the corporate debtor shall be taken over by the IRP.

Change in management and control of the corporate debtor is very critical from the perspective of existing promoter(s) since it adversely affects their interest in the company. No promoter(s) wants to lose his / their control over the affairs of the company. Hence, such promoter(s) prefer to settle the matter with the operational creditor or financial creditor before the acceptance of an application by the NCLT for initiating the insolvency resolution process against the corporate debtor. Sometimes, such creditor succeeds in settling the matter before the application is accepted by the NCLT or sometimes, settlement happens post acceptance of the application and appointment of IRP by the NCLT.

In this article, we have discussed and analyzed the legal provisions and judicial precedents pertaining to withdrawal of the application by the operational creditor or the financial creditor under the following heads:

Withdrawal of an application before its acceptance by the NCLT

In terms of the provisions of Rule 8 of The Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 (“**Relevant Rules**”), the NCLT / Adjudicating Authority has the power to permit the corporate debtor to

withdraw its application as filed before it prior to its acceptance. The relevant texts of such Rule 8 are reproduced below for ease of reference:

“The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission”.

Hence, the NCLT may permit withdrawal of an application filed before it, prior to its acceptance.

Withdrawal of an application post its acceptance by the NCLT and appointment of the IRP

Withdrawal of an application by the operational creditor or the financial creditor post its acceptance by the NCLT was a debatable issue since there was no specific provision(s) under IBC, which empowers the NCLT to allow withdrawal of the application for invoking insolvency resolution process post its acceptance. The operational creditor or the financial creditor, which has already settled the matter with the corporate debtor, did not have any option except filing of an appeal to the National Company Law Appellate Tribunal (“**NCLAT**”) for appropriate relief. However, the NCLAT did not grant any relief to the corporate debtor.

Thereafter, the aforesaid controversy also reached the Hon’ble Supreme Court in the matter of **Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Manager LLP (Civil Appeal No. 9279 of 2017)**.

Facts of the Case

In this case, Lokhandwala Kataria Construction Private Limited (“**Lokhandwala**”) has provided its guarantee on behalf of Vista Homes Private Limited (“**Principal Debtor**”) for the amount to be paid by the Principal Debtor towards redemption of the debentures. Nisus Finance and Investment Manager LLP (“**Nisus**”) being the financial creditor filed an application under Section 7 of IBC before the NCLT, Mumbai against Lokhandwala, as the Principal Debtor failed to repay the due amount under the Debenture Trustee Agreement (“**DTA**”). The NCLT, Mumbai, accepted the application of Nisus and passed the order for commencement of insolvency resolution process.

Thereafter, parties agreed to settle the matter and an appeal was filed by Lokhandwala before the NCLAT to allow withdrawal of application by Nisus in terms of the agreed settlement. The NCLAT dismissed the appeal and held that there are no specific provisions under IBC, which allow withdrawal of an application

filed by the financial creditor and held that the inherent power as given under Rule 11 cannot be exercised post acceptance of application by the NCLT.

The relevant texts of Rule 11 of National Company Law Appellate Tribunal Rules, 2016 (“**NCLAT Rules**”) are reproduced below for ease of reference:

*“**Inherent powers** – Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal”*

Subsequent to the dismissal of the appeal by the NCLAT, the corporate debtor made the appeal to the Hon’ble Supreme Court.

Supreme Court Judgment

The Hon’ble Supreme Court *inter alia* held that inherent power under Rule 11 of NCLAT Rules, 2016, cannot be adopted as the application has already been accepted and Rule 8 of Relevant Rules is only applicable before admission of the application. The Hon’ble Supreme Court utilized power provided in Article 142 of Indian Constitution which states that *the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it*, and in view of the same, allowed the settlement between the parties by taking consent terms dated 28.06.2017 and 12.07.2017 on record. The Hon’ble Supreme Court adopted a similar view in the matter of *Mothers Pride Dairy India Private Limited v. Portrait Advertising and Marketing Private Limited* (Civil Appeal No. 9286/2017) and in *Uttara Foods and Feeds Private Limited v. Mona Pharmachem* (Civil Appeal No. 18520/2017), where the settlement was allowed and the said applications were disposed by utilizing its inherent power under Article 142 of the Indian Constitution.

Report of the Insolvency Law Committee

Subsequent to above, the Insolvency Law Committee (“**Committee**”) was constituted on November 16, 2017, to make recommendation to the Government in relation to the issues arising from the implementation of IBC (“**Report**”). The Committee recommended that Rule 8 of Relevant Rules may be amended and an application may be withdrawn post admission, only if the Committee of Creditors (“**CoC**”) approves such action by a voting share of 90% (Ninety Percent). The aforesaid recommendation was based on the following criteria as mentioned in the Report:

“... all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.”

“Thus, it was agreed that once the CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.”

Subsequent Amendments in IBC

In line with the aforesaid recommendation of Committee, an ordinance was promulgated on June 6, 2018 and ***the hindrance in withdrawal of application after the acceptance by the Adjudicating Authority has been cured by inserting section 12A to IBC***. The relevant texts of the provisions of Section 12A are reproduced below for ease of reference:

Section 12A:

“The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety percent voting share of the committee of creditors, in such manner as may be prescribed”.

Application of Section 12A

Recently, the NCLAT has adjudicated upon the new Section 12A in the matter of *Vijender Kumar Singla v. Oriental Bank of Commerce & Anr* (Company Appeal (AT) (Insolvency) No. 143 of 2018), wherein, the withdrawal of application was allowed after the acceptance of the application filed by the financial creditor as the settlement was agreed between the corporate debtor and the financial creditor and withdrawal of such application was approved by 100% of the voting shares of the CoC fulfilling the mandatory requirement mentioned under Section 12A of IBC.

Conclusion

The insertion of Section 12A is a welcome move on the part of the Government. Now, the Government has settled the position regarding the withdrawal of an application post its acceptance by the NCLT. However, the threshold of 90% (Ninety Percent) of voting share of CoC as mandatorily required for withdrawal of an application post its acceptance seems to be a stringent condition, which is not easy to be complied with since each lender may have its own view with respect to revival or restructuring of the corporate debtor.

The position regarding withdrawal of an application prior to or post its acceptance by the NCLT is summarized below in tabular form for ease of reference:

Relevant Situation	Whether Permissible	Relevant Provision(s)
Withdrawal of an application prior to its acceptance by the NCLT	Yes	Rule 8 of The Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016
Withdrawal of an application post its acceptance by the NCLT	Yes, only with the approval of ninety percent voting share of the committee of creditors	Section 12A of The Insolvency and Bankruptcy Code, 2016

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.