

Withdrawal of Application under section 12A of IBC & implications: A Review Study

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Abstract

Application admitted under Insolvency and Bankruptcy Code, 2016 (IBC)¹ vide section 7,9 or 10 of IBC could be withdrawn under section 12A of IBC with the approval of ninety per cent voting share of the Committee of Creditors subject to the situations provided under the code. In terms of Regulation 30A of CIRP Regulations, an application for withdrawal under section 12A can be made to the Adjudicating Authority. The procedure for withdrawal of application prior to the constitution of the CoC and after the constitution of the CoC is provided in the code and its regulations. In the present paper the judicial pronouncements are reviewed to trace the several verdicts of Adjudicating Authorities and their observations.

Key Words: IBC, COC, CIRP, AA, sec 12A, 12C

1.INTRODUCTION

An application can be made under IBC under section 7 by the Financial Creditor and under section 9 by the Operational Creditor and under section 10 Corporate Debtors seeking admission. These applications can be withdrawn under section 12A of IBC with effect from 06.06.2018. In 2018, the Insolvency and Bankruptcy Code, 2016 was amended and section 12A was introduced. Section 12A gives the power to the Adjudicating authority to allow the withdrawal of application even after the admission. Cases admitted prior to this date cannot be withdrawn under section 12A as held in Shipra Hotels Ltd. Vs. Value Lines Interiors Pvt. Ltd. [Civil Appeal No. 7405 of 2018] SC order dt. 03.08.2018². As of 30th June, 2023 (IBBI News Letter)³ the number of cases withdrawn u/s 12A was 897 (13%)

out of 6815 of total admitted cases. There are several reasons for withdrawal, viz., (a) Full settlement with the applicant (336 cases - 38%); full settlement with other creditors (55 cases - 6%); agreement to settle in the future (48 cases with 5%) ; other settlement with creditors (244 cases - 27%) and others (211 cases - 24%). Further, the distribution of CIRP was withdrawn as per admitted claim mainly falls less than on or equal to Rs. 1 Crore is around 55% cases; greater than Rs. 1 crore but less than or equal to Rs. 10 Crore, there are 25% of cases; greater than Rs. 10 crores but less than or equal to Rs. Rs. 50 crores is 12% cases; greater Rs. 50 crores but less than or equal to Rs. 100 crores is 3% cases; greater than Rs. 100 crores and less than or equal to Rs. Rs. 1,000 crores is 4% cases and lastly greater than Rs. 1,000 crores is 1% of cases. Therefore, the major cases in terms of numbers is less than Rs. 1crore. In this paper an attempt is made to trace the differences in conditions or circumstances from judicial pronouncements on cases withdrawn under section 12A to make review.

2. Body of Paper

In terms of Regulation 30A of CIRP Regulations, an application for withdrawal under section 12A can be made to the Adjudicating Authority. The application needs to be made before the constitution of the Committee of Creditors by the applicant. This process needs to be done through the interim resolution professional. Further, after the constitution of CoC, an application under section 12A can be made through an interim resolution professional or the resolution professional, as the

case may be, [even after admission](#). Where an application is made after the constitution of the Committee in terms of Regulation 36A, the applicant shall state the reasons justifying withdrawal.

According to Section 12A of the Insolvency and Bankruptcy Code (IBC), an application for withdrawal of an admitted insolvency resolution process under Sections 7, 9, or 10 may be allowed by the Adjudicating Authority (AA) if the applicant files such an application with the approval of 90% of the voting share of the Committee of Creditors (CoC), as per the specified manner.

The Tribunal can exercise its powers under rule 11 of NCLT Rules for withdrawal of admission where the party approaches NCLT before the constitution of CoC. NCLT may permit withdrawal or reject the application. The same was held in *Swiss Ribbons Pvt. Ltd. &Anr. Vs. Union of India &Ors.* [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC order dt 25.01.2019⁴.

Rule 11 of NCLT Rules gives powers to the Tribunal. The rule is declaratory in nature. In fact, the Tribunal has inherent powers to pass orders or give directions necessary for advancing the cause of justice or prevent abuse of the Appellate Tribunal's process. The Appellate Tribunal does not enjoy the power of review under Rule 11. The power of review has not been expressly conferred on the Appellate Tribunal and the power vested in the Appellate Tribunal under Rule 11 can only be exercised for correction of a mistake.

In the case of Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance⁵ and Investment Managers LLP [2017] ibclaw.in 04 SC, the Supreme Court allowed both parties to settle the matter by invoking its inherent powers under Article 142 of the Constitution of India. In terms of article 142, Supreme Court has authority to pass any order or make any decree necessary to serve justice in any cause or matter before it. This does not matter for invoking SC powers under this article, even when insolvency proceedings have started. Accordingly, the Supreme Court allowed the settlement between the parties, even when the insolvency proceedings have commenced. In this case, the SC held simultaneously held the NCLAT's view of not exercising its inherent powers under Rule 11 of the NCLAT Rules, 2016, to be correct a position of law. Rule 11 provides tribunals with the power to issue orders or directions necessary to prevent abuse of the law or ensure justice.

1. Judicial pronouncements in respect of withdrawal of applications under sec. 12A :

(a) Withdrawal before CoC is constituted:

In the case of Brilliant Alloys Pvt. Ltd. Vs. S. Rajagopal & Ors. [Petition(s) for Special Leave to Appeal (C) No(s). 31557/2018] SC order dt. 14.12.2018⁶ it was held that Regulation 30A of the CIRP Regulations must be read along with section 12A of the Code. Accordingly, the stipulation in

regulation 30A can only be construed as a directory depending on the facts of each case.

(b) Withdrawal by the applicant and not by the RP:

Regulation 30A of the CIRP Regulations cannot override the substantive provisions of section 12A of the Code, according to which the applicant can only move an application for withdrawal before the AA and not by the RP. In the case of Francis John Kattukaran Vs. The Federal Bank Ltd. & Anr. [CA (AT) (Ins.) No. 242 of 2018] NCLAT order dt. 13.11.2018⁷ it was approved by the 'Committee of Creditors' by a majority vote of 100% approved the proposal and the 'resolution professional' moved an application under Section 12A of the I&B Code. The AA took the view that the 'resolution professional' cannot file an application for withdrawal of an application under Section 7 or 9 or 10 of the I&B Code. As per Section 12A, it is the applicant who can only file such an application for withdrawal on which the Adjudicating Authority may pass an appropriate order.

Once CoC is constituted, the withdrawal application under section 12A can be filed through the RP and not directly under section 60(5) of the code read with Rule 11 of the NCLT Rules, as held in the case of A. K. Corporation Vs. Anupam Extraction Ltd. [MA 2746/2019 in CP (IB) 2781/(MB)/2018] NCLT, Mumbai order dt. 14.08.2019⁸.

(c) The Promoters settle the issues with Creditors for withdrawal:

The promoter who takes all the necessary measures to arrive at a settlement with creditors. Thereafter, he shall propose Resolution Professional and in such an event, the RP needs to place it before the CoC for further processing of the application under section 12A of the code. A similar view was observed in the case of Sukhbeer Singh Vs. Dinesh Chandra Agarwal & Ors. [CA (AT) (Ins.) No. 259 of 2019] NCLAT order dt. 07.08.2019⁹.

(d) Sec 29A is not applicable to the application under Section 12A :

It was established in the case of Shweta Vishwanath Shirke & Ors. Vs. The Committee of Creditors & Anr. [CA (AT) (Ins.) No. 601 of 2019 and other appeals] NCLAT order dt. 28.08.2019¹⁰ it was observed Section 29A refers to eligibility of resolution applicant. It was further held that Section the application under section 12A was allowed and rejected the ineligibility under section 29A of the code.

To substantiate the stand, the party quoted reference from Swiss Ribbons' case - from Section 12A and the decision of the Hon'ble Supreme Court in 'Swiss Ribbons Pvt. Ltd. & Anr.' (Supra)¹¹, it is clear that the Promoters/Shareholders are entitled to settle the matter in terms of Section 12A and in such a 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.

(e) The exit channel under section 12A is applicable to applicants and not to Resolution Applicants:

The entire legal process is specified in section 7,9 and 10 of the Code and the exit channel envisaged under section 12A of the code is applicable to Applicants and to Resolution Applicant. The same was held in the case of Maharashtra Seamless Ltd. Vs. Padmanabhan Venkatesh & Ors. [Civil Appeal No. 4242 of 2019 and other appeals] SC order dt. 22.01.2020¹².

(f) Withdrawal under Rule 11 of NCLT Rules:

Ínterms of Rule 8 of the AAA Rules, the NCLT is empowered to entertain the application for withdrawal in the event an applicant requests prior to admission, as observed by the Insolvency Law Committee in its report in March, 2018. This is not applicable for entertaining after admission and there is no provision in the code or CIRP Regulation for withdrawal after admission. However, there are instances where judicial permission was granted as there was settlement between the applicant creditor and CD, as observed by the Insolvency Law Committee in the said report¹³.

After reviewing several NCLT and NCLAT judgments, the Committee agreed that a settlement may be reached amongst all creditors and the debtor for a withdrawal to be granted, and not only the applicant creditor and the debtor. Therefore, the Committee unanimously agreed to amend the relevant rules to provide for withdrawal post-admission if the CoC approves such action by a voting share of ninety per cent. The Committee discussed that rule 11 of the

NCLT Rules, 2016 may not be adopted for this aspect of CIRP at this stage, as observed by the Hon'ble Supreme Court in the case of Uttara Foods and Feeds Private Limited(supra).

In the case of Uttara Foods and Feeds Private Limited¹⁴ it was held that - this Bench had observed that in view of Rule 8 of the I & B (Application to Adjudicating Authority) Rules, 2016, the National Company Law Appellate Tribunal prima facie could not avail of the inherent powers recognised by Rule 11 of the National Law Appellate Tribunal Rules, 2016 to allow a compromise to take effect after admission of the insolvency petition.

- We are of the view that instead of all such orders coming to the Supreme Court, as only the Supreme Court may utilise its powers under Article 142 of the Constitution of India, the relevant rules be amended by the competent authority so as to include such inherent powers.

- This will obviate unnecessary appeals being filed before this Court in matters where such an agreement has been reached.

- On the facts of the present case, we take on record the settlement between the parties and set aside the NCLAT order.

Accordingly, In 2018, the Insolvency and Bankruptcy Code, 2016 was amended and section 12A was introduced.

(g) Withdrawal of application under Rule 11 of NCLT Rules:

In respect of Sintex Plastics Technology Ltd. Vs. Zielem Industries Pvt. Ltd. & Anr. [IA 18(AHM)/2021 in CP (IB) 759 (AHM) 2019]

NCLT, Ahmedabad order dt. 29.06.2021¹⁵, the NCLT allowed the withdrawal under Rule 11 of NCLT Rules under the Companies Act, 2013 as it does not fall under code under section 12A. In this case, the CoC was not formed after the admission of applications under IBC into CIRP. While allowing an application of withdrawal, the AA concluded that in a situation where CoC is not formed after admission of CD into CIRP, rule 11 of NCLT Rules under the Companies Act, 2013, and not regulation 30A of the CIRP Regulations, shall apply to withdrawal of CIRP. It observed that a situation, which is not covered under section 12A, cannot be covered under regulation 30A of the CIRP Regulations. However, the AA can exercise inherent jurisdiction under rule 11 for a situation not covered under any provisions of the Code. IBBI has preferred an appeal on the matter before the Hon'ble NCLAT, New Delhi.

(h) Commercial Wisdom is questioned where it does not comply with IBC:

Commercial Wisdom needs to comply with the provisions of IBC. Commercial wisdom can neither escape the provisions of the IBC nor transgress the judicial wisdom. In the matter of Siva Industries and Holdings Limited [MA/43/CHE/2021 & IA/647/IB/2020 & IA-586/CHE/2021 in IBA/453/2019] NCLT, Chennai order dt. 12.08.2021 it was observed that Once the CIRP is triggered in relation to a CD, the same is an order in *rem* and not in *personam* and that whether the CD is required to be wriggled out of the CIRP is to be decided by the AA by exercising its judicial wisdom and cannot be carried away by the commercial wisdom of CoC.

3. CONCLUSIONS

The legal process of withdrawal prior to Section 12A of IBC was different from the post Sec. 12A. Earlier, after the admission of the case, for the withdrawal the available avenues were Article 142 or Rule 11 of NCLT Rules under Companies Act, 2013. After the incorporation of Section 12A with the approval of 90 percent of the CoC, the application can be withdrawn. Commercial wisdom is upheld by the AA, except in the case of such commercial wisdom is in violation of provisions of the IBC and transgresses the judicial wisdom. It exercises its judicial wisdom only when there was no other alternative to provide justice envisaged under IBC. However, it is now a well established practice to provide a hassle-free legal process for withdrawal of applications under section 12A of the code.

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