

## Developing Jurisprudence on Section 12A of the IBC, 2016



*On July 24, 2017, the Supreme Court ordered withdrawal of CIRP in the matter of 'Lokhandwala Kataria Construction Private Limited Vs. Nisus Finance and Investment Managers LLP (2017)' on the basis of 'consent terms' between both the parties. Subsequently, the Insolvency Law Committee, in its Report in March 2018 recommended the inclusion of a provision for withdrawal application. Accordingly, the IBC, 2016 was amended by the Parliament and Section 12 A was inserted. Thereafter, IBBI framed related Regulations. In the course of time, the provision of withdrawal has become one of the flagship provisions of the IBC. In this article, the author presents a detailed account of the jurisprudence developing around the withdrawal. **Read on to know more...***



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### **1. Corporate Insolvency Resolution Process**

The Insolvency and Bankruptcy Code, 2016 (Code) provides the procedure for initiation of Corporate Insolvency Resolution Process (CIRP) against a Corporate Debtor (CD) which is in default in terms of making payment to its creditors. The Adjudicating Authority (AA), if it is satisfied that the application is complete in all aspects and there is no disciplinary case pending against the Interim Resolution Professional (IRP), admits the application and ordered commencement of CIRP.

### **2. Withdrawal of CIRP**

#### **(a) Withdrawal before Admission**

Initially there was no specific provision for withdrawal of CIRP application. Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicatory Authority) Rules, 2016 provides that the AA may permit withdrawal of the application on a request made by the applicant before its admission. As such the application could be withdrawn only before the admission of the application by the AA and not after admission.

#### **(b) Withdrawal after Admission**

Originally, there was no provision to allow the withdrawal of application after initiation of CIRP under the IBC, 2016.

The Supreme Court in the matter of *Lokhandwala Kataria Construction Private Limited Vs. Nisus Finance and Investment Managers' LLP* (2017) allowed withdrawal of CIRP application on the basis of 'consent terms' between both the parties. Thereafter, the Insolvency Law Committee, in its Report in March 2018 recommended for a provision of withdrawal of CIRP in order to cater to exceptional circumstances warranting withdrawal of an application for CIRP post-admission provided the CoC approves such action by ninety per cent of voting share.

**The applicant shall submit the withdrawal application under Section 12A to the IRP/RP in 'Form – FA' before the issue of invitation for Expression of Interest.**

Subsequently, Section 12 A was inserted in the Code through the Amendment Act, 2018 by the Parliament w.e.f. June 06, 2018. This section provides that the AA may allow the withdrawal of CIRP on an application made by the applicant with the approval of 90% voting share of the Committee of Creditors (CoC). Accordingly, Rule 30A was inserted<sup>2</sup> in IBBI (CIRP) Regulation 2018, which provides the procedure for withdrawal of application by the creditor that filed the application before AA for initiation of CIRP. The procedure for withdrawal of CIRP application is as follows:

- (a) The applicant shall submit the withdrawal application under Section 12A to the IRP/RP in 'Form – FA' before the issue of invitation for Expression of Interest (EOI).
- (b) The application shall be accompanied by a bank guarantee towards the estimated cost of expenditure incurred by the IRP/RP till the date of filing the application.
- (c) The IRP/RP shall put the application before the CoC for its consideration and approval.
- (d) The CoC shall consider the said application within seven days of its constitution or seven days of receipt of the application, whichever is later.

- (e) Withdrawal Application must be approved by 90% voting share of the CoC.
- (f) On getting the approval by the CoC, the IRP/RP shall submit the application on behalf of the applicant before the AA within three days from the date of approval by the CoC.
- (g) The AA may, by order, approve the application submitted for its withdrawal.

The Regulation 30A was substituted by a new Regulation vide Notification No. IBBI/2019-20/GN/REG048, dated July 25, 2019, which provides two types of withdrawals – *firstly*, withdrawal before the constitution of the CoC; and *secondly*, withdrawal after the constitution of CoC.

### 3. Withdrawal Application before constitution of CoC

In case of withdrawal before the constitution of CoC, the application shall be made through the IRP in 'Form –FA', accompanied by a bank guarantee towards estimated expenses incurred on or by the IRP till the date of filing of the application. The IRP shall submit the application to the AA on behalf of the applicant, within three days of its receipt. The AA may approve the application.

If the application is approved by AA, the applicant shall deposit an amount in the bank account of the corporate debtor, towards the actual expenses incurred by the IRP/RP till the date of approval by the AA, within three days of such approval. If the applicant fails to deposit this amount, the bank guarantee received shall be invoked, without prejudice to any other action permissible against the applicant under the Code.

Allowing the withdrawal of CIRP application in the matter of *Piramal Capital & Housing Finance Limited Vs. Dinanatha Developers Private Limited*<sup>3</sup>, the NCLT held that the AA allowed the applicant to withdraw the application since the FC is no more interested to prosecute the matter and to prolong the matter further. Similarly, in the matter of *Chandresh Cables Limited Vs. BGR Energy Systems Limited*<sup>4</sup>, the AA observed that on the filing of withdrawal application nothing survives for adjudication and therefore the application was dismissed as withdrawn. Furthermore, in the matter of *Sanfield India Limited Vs. Varaha Infra Limited*<sup>5</sup> the AA observed “the operational

<sup>1</sup> LLP Civil Appeal No. 9279 of 2017, Supreme Court dated July 24, 2017.

<sup>2</sup> Notification No. IBBI/2018-19/GN/REG031, July 03, 2018.

<sup>3</sup> IA 40/2023 in CP (IB) 113/(MB)/2022, NCLT, Mumbai Bench.

<sup>4</sup> CP (IB) No. 61/9/AMR/2021, December 20, 2022, NCLT, Amaravathi Bench.

<sup>5</sup> CP No. (IB)-200/9/JPR/2020, NCLT, Jaipur Bench.

creditor has agreed that it has received all the amount from the CD and the matter has been settled between the parties. The AA granted permission for withdrawal of the application”.

#### 4. Carrying out CIRP during pendency of Withdrawal Application

In the matter of *Shri Alok Kaushik, RP of Cheema Spintex Ltd Vs. Cheema Spintex Limited and Ors.*<sup>6</sup>, the NCLAT held that since the Section 12A application was filed by the IRP before the AA, well before the constitution of the CoC, the IRP's continuance with the CIRP without making adequate efforts to seek pointed clarification from the AA on whether to proceed with the CIRP or not, does not reflect well on his conduct.

**In the matter of *Cheema Spintex Ltd (2022)*, the NCLAT held that without seeking clear guidance from AA on CIRP modalities during pendency of withdrawal application, IRP/RP should not proceed with the CIRP in full throttle.**

It observed that the IRP cannot afford to be unmindful of the fact that he is the driving force and the nerve-center in the resolution process and is expected to assist in the CIRP in a fair and objective manner in the best interest of all stakeholders. Simply by registering presence on each date of hearing before the AA without seeking clear guidance on CIRP modalities cannot become a sufficient ground for the IRP to proceed with the CIRP in full throttle.

#### 5. Application after constitution of CoC

Post-constitution of the CoC, if a withdrawal application is filed after the issue of invitation for EOI under Regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation. The IRP/RP shall submit the withdrawal application before the CoC. The CoC shall consider the application within seven days of receipt of the application from the IRP/RP. The withdrawal application is to be approved by 90 % vote share of the CoC.

After approval of the withdrawal application by the CoC the RP shall submit such application along with the approval of the CoC to the AA on behalf of the applicant, within three days of such approval. The AA may approve the withdrawal application. After that the applicant shall deposit an amount in the bank account of the CD within three days of such approval, towards the actual expenses incurred by the IRP/RP till the date of approval by the AA,

as determined by the IRP/RP. If the applicant fails to do so, the bank guarantee received shall be invoked without prejudice to any other action permissible against the applicant under the Code.

If the settlement is for the future period, the AA may indicate in its order. In case there is no payment as per the settlement, the creditor has liberty to revive CIRP against the CD. In the matter of *Rajiv Garg Vs. Tulsiani Constructions and Developers Private Limited*<sup>7</sup> the CIRP was initiated against the CD on October 07, 2022. Appeal was filed by the CD against this order before the NCLAT. NCLAT vide its order directed not to constitute the CoC.

In the meantime, a settlement agreement was reached between the CD and the creditor on November 07, 2022. Subsequently, the withdrawal application was filed along with the settlement deed by the IRP on behalf of the applicant before AA. The IRP confirmed before the AA that he has received all the costs.

The AA observed that all the compliances for the withdrawal application have been complied with. The AA partly allowed the application only in respect of withdrawal of application and it did not go through the terms of settlement reached between the parties. The AA dismissed the application (IB) No. 1012/(PB)/2020, as withdrawn without any liberty to the applicant file fresh application.

#### 6. Withdrawal application cannot be rejected

The Supreme Court in the matter of *Vallal RCK Vs. Siva Industries & Holdings Limited and Ors.*<sup>8</sup> (2022), delivered a path breaking judgement regarding withdrawal application. In this case, IDBI Bank Limited had filed an application under Section 7 of the Code for initiation of CIRP against the CD. The AA, vide its order dated July 04, 2019, admitted the application. During CIRP, the RP presented a Resolution Plan before the CoC. The said Resolution Plan received only 60.90% share of the votes hence could not be approved. Therefore, the RP filed an application before the AA seeking initiation of liquidation proceedings.

Meanwhile, the promoter of the CD filed an application before the AA for settlement under Section 60(5) of the

<sup>6</sup> CA (AT) (Insolvency) No.896/of2022, NCLAT.

<sup>7</sup> IA 5490/2022 in CP (IB) No. 1012 (PB)/2022- PB, ND.

<sup>8</sup> Supreme Court, 2022 (6) TMI 173.

Code. In the said application he offered a one-time settlement plan and prayed the AA to direct the CoC to consider the terms of the settlement plan. The said settlement plan was discussed in various meetings of the CoC. The settlement plan received only 70.63% of votes. Subsequently, one of the Financial Creditors viz. International Assets Reconstruction Company Limited, having a voting share of 23.60%, decided to approve the settlement plan due to which the settlement plan was approved by the CoC with 94.23% votes.

Therefore, the RP filed an application before the AA seeking withdrawal of the application in view of the approval of the settlement plan by the CoC. The AA rejected the application for withdrawal and opined that the settlement plan was not a settlement 'simpliciter' under Section 12A of the Code but a 'Business Restructuring Plan'. The AA in its order initiated the liquidation process against the CD. Aggrieved against both the orders of the AA, the appellant filed an appeal before the NCLAT. The NCLAT dismissed the appeal filed by the appellant. The appellant filed an appeal before the Supreme Court.

The Supreme Court analyzed the provisions of the Code in relation to withdrawal and observed that the decision of the CoC was taken after the members of the CoC had due deliberation to consider the pros and cons of the settlement plan and took a decision exercising their commercial wisdom. The Apex Court held that neither NCLT nor the NCLAT was justified in not giving due weightage to the commercial wisdom of CoC. The need for judicial intervention or innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the Code. The Supreme Court set aside the order of NCLAT and allowed withdrawal application.

## 7. Application by Assignee

Regulation 28 provides that a creditor can assign or transfer the debt due to that creditor to another person during the CIRP. Both parties shall provide the IRP/RP the terms of such assignment or transfer and the identity of the assignee or transferee. The RP shall notify each participant and the AA of any resultant change in the committee within two days of such change. Whether such assignee can file an application for withdrawal of application?



In the matter of *Janata Sahakari Bank Limited Vs. Oasis Alcohol Limited*<sup>9</sup>, the applicant filed an application on August 04, 2020, to initiate CIRP against the Oasis Alcohol Limited. The said application was admitted. The IRP made a public announcement calling for claims from the creditors of the CD. The last date for verification of claims was August 26, 2020. On August 21, 2020, the petitioner unconditionally and irrevocably assigned the loans together with the underlying security interest with respect to the CD to the Applicant in terms of Section 5(1) of SARFAESI Act, 2002.

**In the matter of *Janata Sahakari Bank Limited Vs. Oasis Alcohol Limited (2020)*, NCLT Mumbai held that the application filed by the Creditor Assignee is maintainable.**

The FC *vide* its letter dated August 21, 2020, informed the IRP along with copy of Assignment Agreement and intimated the identity of the Assignee as per Regulation 28 along with Form FA for withdrawal of application, since the FC wanted to withdraw the application, along with fee of ₹3 lakhs to CIRP. The said application was agitated on the ground that the Assignment Agreement between the FC and the applicant is insufficiently stamped which makes the same unenforceable in law. The applicant contended that the withdrawal application was given before the Constitution of CoC. The allegation of the applicant is that in spite of that submission of 'Form-FA' by Assignee, the RP deliberately neglected to file an Application for withdrawal under section 12 A of the Code. The AA held that even after the knowledge of assignment, the RP did not file an application under Section 12A read with Regulation 30A, which is arbitrary

<sup>9</sup> IA 1198/2020 in CP (IB) No. 3049/MB-IV/2019, NCLT, Mumbai Bench.



and in violation of statutory regulations. It was held that the application filed by the Creditor Assignee is maintainable. This is a fit case for allowing the withdrawal of CIRP as per Regulation 30A.

### 8. Withdrawal after approval of Resolution Plan

Once the Resolution Plan was approved by the CoC, no withdrawal application can be filed. In the matter of *Hem Singh Bharana Vs. Pawan Doot Estate Private Limited<sup>10</sup> and Ors.*, the AA admitted an application for initiation of CIRP against the CD on May 10, 2019. Only one Resolution Plan was received and the same was approved by CoC with 100% votes. On January 18, 2020, the Letter of Intent was issued by the RP to the Successful Resolution Applicant (SRA). The same was unconditionally accepted by SRA and the performance guarantee was deposited on February 02, 2020. Subsequently, the RP filed an application - 'IA1077/2020' - before the AA for the approval of the Resolution Plan. Meanwhile, on September 25, 2022, an ex-promoter of CD filed an application before the AA with the prayer to keep in abeyance of 'IA 1077/2022', which was rejected by the AA.

**Once the Resolution Plan is approved by the CoC, no withdrawal application can be filed, held the NCLAT in the matter of *Hem Singh Bharana Vs. Pawan Doot Estate Private Limited and Ors.* (2022).**

The appellant filed an appeal before the NCLAT and submitted a settlement proposal which was duly approved by the CoC. The appellant contended that there is no impediment in CoC in accepting the settlement proposal under Section 12A, which is a better plan than the approved Resolution Plan. The RP has erred in not submitting the proposal before the CoC. However, the RP contended that once the Resolution Plan is approved there is no occasion to entertain any settlement proposal.

The Resolution Plan, approved by the CoC, is binding on it and other stakeholders. The NCLAT held that the AA has not committed any error in rejecting the interim application filed by the appellant.

### 9. Compliances after the withdrawal order

The IRP/RP shall forward the copy of the order to the IBBI, Insolvency Professional Agency (IPA) and to the

**Table 1: Reasons for withdrawal of CIRP cases till Dec. 2002**

Reason for withdrawal	No. of cases withdrawn
Full settlement with the applicant	306
Full settlement with other creditors	55
Agreement to settle in future	43
Other Settlements with creditors	210
Others	179

**Source:** *Quarterly Newsletter of IBBI, Oct.- December 2022.*

**Table 2: Amount distributed by means of withdrawal of CIRP cases till Dec. 2022**

Amount distributed by withdrawal	Percentage
Less than ₹ 1 crore	54%
More than ₹ 1 crore but less than ₹ 10 crore	24%
More than ₹ 10 crores but less than ₹ 50 crore	13%
More than ₹ 50 crore but less than ₹ 100 crore	4%
More than ₹ 100 crore but less than ₹ 1000 crore	4%
More than ₹ 1000 crore	1%

**Source:** *Quarterly Newsletter of IBBI, Oct.- December 2022.*

Registrar of Companies that will change the status of the company. The RP shall hand over the charge and assets of the CD to its promoters/ Board of Directors.

### 10. Conclusion

As per the recent data released by the IBBI<sup>11</sup>, till December 2022, a total of 793 CIRPs have been withdrawn. Among these withdrawals the number of withdrawals by Financial Creditor is 216; the number of withdrawals by Operational Creditor is 570 and the number of withdrawals by the Corporate Debtor is 07.

The main objective of the Code is the resolution of the CD. It prescribes the procedure for the revival of the CD. If the dues are settled even after the filing of application, the CD will survive and fulfils the objectives of the Code. Therefore, the withdrawal by settlement as agreed to between the parties may be encouraged for the revival of CD.

<sup>10</sup> Company Appeal (AT)(Insolvency) No. 1481/2022, NCLAT, New Delhi.

<sup>11</sup> The Quarterly Newsletter by IBBI, Oct. – December 2022.