

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Comp. App. (AT) (Ins.) No. 892 of 2021

[Arising out of Order dated 29.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Allahabad in I.A. No. 267/2021 in CP No.(IB)- 353/ALD/2019]

In the matter of:

M/s. Ashish Ispat Pvt. Ltd.

Through its Director Mr. Shubham Agarwal
Registered Address Plot No. 35, 36
JK Iron Mill Compound,
84/20, Fazalganj, Kanpur
Uttar Pradesh- 208012

....Appellant

Vs.

Primuss Pipes & Tubes Ltd.

Through its Resolution Professional
Mr. Nitin Jain
E-10A, LFG, Kailash Colony,
Greater Kailash-I
New Delhi- 110048

...Respondent

For Appellant: Ms. Mrinali Prasad, Advocate.

**For Respondent: Mr. Aditya Gauri, Advocate for R1.
Mr. Abhishek Kumar Advocate for Kotak Mahindra
Mr. Saket Singh, Advocate (Intervenor)**

Comp. App. (AT) (Ins.) No. 893 of 2021

[Arising out of Order dated 29.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Allahabad in I.A. No. 267/2021 in CP No.(IB)- 353/ALD/2019]

In the matter of:

Ajay Kumar Jain

Suspended Director,
Primuss Pipes and Tubes Limited
H-1/10, Kidwai Nagar,
Kanpur- 208011

....Appellant

Vs.

1. M/s. Ashish Ispat Pvt. Ltd.

84/20 Fazal Ganj,
J.K. Iron Compound, Kanpur,
Uttar Pradesh- 208012

2. Nitin Jain

Resolution Professional
Primuss Pipes and Tubes Limited
E-10A, LGF, Kailash Colony,
Greater Kailash- I,
New Delhi- 110048

...Respondents

For Appellant: **Mr. Adhitya Srinivasan, Ms. Shalya Agarwal, Mr. Rahul Patel, Mr. Varun Chugh, Ms. Shagun Shahi, Advocates.**

For Respondents: **Ms. Mrinali Prasad, Advocate for R1.
Mr. Aditya Gauri, Advocate for R2.
Mr. Abhishek Kumar Advocate for Kotak Mahindra
Mr. Saket Singh, Mr. Ankur Goel, Advocates (Intervenor)**

J U D G M E N T **(07th January, 2022)**

Ashok Bhushan, J.

1. Company Appeal (AT) (Insolvency) No. 892 of 2021 has been filed by 'M/s. Ashish Ispat Pvt. Ltd.' on whose Application, Corporate Insolvency Resolution Process (CIRP) was initiated against 'Primuss Pipes & Tubes Ltd.' (Corporate Debtor) and Company Appeal (AT) (Insolvency) No. 893 of 2021 has been filed by Suspended Director of 'Primuss Pipes & Tubes Ltd.' (Corporate Debtor). These two Appeals have been filed against the same judgment dated 29.09.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Allahabad Bench, Court-I in IA No. 267/2021. It shall be sufficient to notice the facts from the record of Company Appeal (AT)

(Insolvency) No. 892 of 2021. The brief facts and sequence of the events of the case are:-

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("Code" for short) was filed by the Appellant- 'M/s. Ashish Ispat Pvt. Ltd.' for initiating Corporate Insolvency Resolution Process (CIRP) against 'Primuss Pipes & Tubes Ltd.' (Corporate Debtor). By order dated 04.08.2021, the Adjudicating Authority admitted the Application and initiated the Corporate Insolvency Resolution Process of the Respondent Company. On 06.08.2021, the Interim Resolution Professional (IRP) made a Public Announcement in Form-A. On 25.08.2021, the Appellant and the Suspended Director/ erstwhile management of the Corporate Debtor amicably settled the dispute and executed a Memorandum of Understanding on 25.08.2021. In light of the said settlement, Form- FA was received by the Interim Resolution Professional to withdraw the Application in terms of Section 12A of the Code and Regulation 30A of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016'. On 25.08.2021, two Demand Drafts for amount of Rs.19 Lacs and Rs.6 Lacs alongwith cheque for an amount of Rs. 38,74,000/- was handed over to the Appellant. On 25.08.2021, Interim Resolution Professional filed an Application bearing IA No. 267/2021 under Section 12A of the Code read with Regulation 30A (1)(a) of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' read with Rule 11 of the NCLT Rules, 2016 for withdrawal of Section 9 petition. Committee of Creditors (CoC) was

constituted on 27.08.2021. On 03.09.2021, first meeting of the Committee of Creditors was held with two Financial Creditors namely— 'Kotak Mahindra Bank' and 'M/s. Anjali Capfine Pvt. Ltd.'. On 06.09.2021, Application I.A 267/2021 was listed before the Adjudicating Authority and on request made by the Interim Resolution Professional, hearing on Application was deferred. The Cheque of Rs. 38,74,000/- was presented by the Appellant and was returned unpaid. On 17.09.2021, the amount of Rs. 38,74,000/- was paid to the Appellant through RTGS and Addendum to Memorandum of Understanding dated 25.08.2021 was also executed confirming the entire payment including the payment of Rs.38,74,000/- by the Appellant. I.A. 267/2021 came for consideration before the Adjudicating Authority on 29.09.2021 and the Adjudicating Authority observed that there being two Financial Creditors out of which one having 17% of voting shares has dissented to allow withdrawal, hence the Application cannot be considered unless the consent from Committee of Creditors, as required under the statute, is obtained. Appellants- 'M/s. Ashish Ispat Pvt. Ltd.' and Suspended Director of 'Primuss Pipes & Tubes Ltd.' (Corporate Debtor) both aggrieved by the said order have filed these two Appeals.

2. Learned Counsel for the Appellant submits that the Application under Section 12A of the Code read with Regulation 30A of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' has been filed on 25.08.2021 i.e. before constitution of the Committee of Creditors. It is submitted that the requirement of obtaining consent of Committee of Creditors with ninety

percent vote shall arise only when Application is filed after constitution of the Committee of Creditors. It is submitted that the dispute between 'M/s. Ashish Ispat Pvt. Ltd.', the Applicant who had filed Section 9 Application as well as the Corporate Debtor having settled by Memorandum of Understanding dated 25.08.2021, there is no requirement of proceeding of Corporate Insolvency Resolution Process any further. Learned Counsel for the Appellant submits that before constitution of Committee of Creditors, Application for withdrawal of Corporate Insolvency Resolution Process was fully maintainable and ought to have been allowed by the Adjudicating Authority without directing for obtaining consent of the Committee of Creditors.

3. Learned Counsel appearing for the Financial Creditor- 'M/s. Anjali Capfine Pvt. Ltd.' opposing the submission of the Learned Counsel for the Appellant contends that the I.A 267/2021 was adjourned on 06.09.2021 on the request of the Interim Resolution Professional, there was breach of settlement due to non-encashment of cheque, hence Application under Section 12A could not have been allowed. He further submits that unless the Corporate Insolvency Resolution Process is proceeded, Financial Creditor will suffer prejudice. It is submitted that the Corporate Debtor has sold the assets and nothing will be left of the Corporate Debtor.

4. Learned Counsel appearing for the Financial Creditor- 'Kotak Mahindra' who has 83% of vote share supported the Appellants' submissions and submits that Application under Section 12A ought to have been allowed permitting withdrawal of Section 9 Application. It is submitted

that the entire object of the IBC is to revive the Corporate Debtor. Recovery through IBC is not the object.

5. Learned Counsel appearing in Company Appeal (AT) (Insolvency) No. 893 of 2021 also adopts the submissions made by the Counsel for the Appellant in Company Appeal (AT) (Insolvency) No. 892 of 2021 and submits that the fact that part of payment subsequently made shall not affect the Application under Section 12A. It is submitted that the Interim Resolution Professional having filed the Application in the Court on 25.08.2021 ought not to have constituted the Committee of Creditors and ought to have persuaded the Application under Section 12A.

6. We have considered the submissions of the Learned Counsel for the parties and perused the record.

7. One of the main issues which has arisen for the consideration in these Appeals as to whether in the facts of the present case the approval of the Committee of Creditors for withdrawal of Application was required or not.

8. Section 12A of the Code provides 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 7 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.”

9. Section 12A was inserted by Act 26 of 2018 w.e.f. 06.06.2018. Regulation 30A of the 'Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016' was subsequently substituted by Notification dated 25.07.2019 w.e.f. 25.07.2019. Regulation 30A provides as follows:-

“30 A. Withdrawal of application. (1) *An application for withdrawal under section 12A may be made to the Adjudicating Authority –*

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule accompanied by a bank guarantee-

(a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of subregulation (1); or (b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of

regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

(3) Where an application for withdrawal is under clause (a) of sub-regulation (1), the interim resolution professional shall submit the application to the Adjudicating Authority on behalf of the applicant, within three days of its receipt.

(4) Where an application for withdrawal is under clause (b) of sub-regulation (1), the committee shall consider the application, within seven days of its receipt.

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

(6) The Adjudicating Authority may, by order, approve the application submitted under subregulation (3) or (5).

(7) Where the application is approved under sub-regulation (6), the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to

any other action permissible against the applicant under the Code.”

10. The Hon’ble Supreme Court in **“Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.- (2019) 4 SCC 17”** has held that at any stage, before a Committee of Creditors is constituted, a party can approach National Company Law Tribunal (NCLT) directly and that the Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, allow or disallow an application for withdrawal or settlement. In paragraph 82, following was laid down:-

“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 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.”

11. The Hon’ble Supreme Court in the above judgment has observed that withdrawal of Application filed under Sections 7 and 9 was being permitted by the Hon’ble Supreme Court in exercise of jurisdiction under Article 142 even before any express provision was made in IBC and the Regulations. It is true that Section 12A mentions approval of ninety percent voting share of the Committee of Creditors. The ninety percent voting shares of the Committee of Creditors pre-supposes the constitution of Committee of Creditors, thus Section 12A requiring approval of ninety percent shall be applicable only when Committee of Creditors is constituted and filing of Application is contemplated with approval of ninety percent of voting share. Approval of ninety percent voting share is mandated when Committee of Creditors is already constituted and is in existence.

12. In the present case, the Application under Section 12A was filed on 25.08.2021 on which date settlement between the Appellants and the Corporate Debtor had already been entered. On the day when the Application was filed, there was no requirement of approval of ninety percent of voting share of Committee of Creditors.

13. When we look into the Regulation 30A, the scheme and procedure for filing withdrawal Application is made clear and specific. Sub-regulation (1) itself provides for Application of withdrawal to be made (a) before

constitution of the Committee of Creditors, by the Applicant through the Interim Resolution Professional; (b) after the constitution of the Committee of Creditors, by the Applicant through the Interim Resolution Professional or the Resolution Professional, as the case may be. Sub-regulation (3) itself provides that where an Application for withdrawal is under clause (a) of sub-regulation (1), the Interim Resolution Professional shall submit the Application to the Adjudicating Authority on behalf of the Applicant, within three days of the receipt. Further, as per sub-regulation (4), where an Application for withdrawal under clause (b) of sub-regulation (1), the committee shall consider the Application, within seven days of its receipt. Sub-regulations (3) and (4) thus make it clear that when Application is filed before constitution of Committee of Creditors, it is not to be considered by the Committee of Creditors and the requirement of Committee of Creditors to consider the Application arises when Application is under clause (b) of sub-regulation (1). The above statutory scheme makes it clear that when Application is filed prior to constitution of Committee of Creditors, the requirement of ninety percent vote of Committee of Creditors is not applicable and the Adjudicating Authority has to consider the Application without requiring approval by ninety percent vote of the Committee of Creditors.

14. One more aspect of the present case also needs to be noticed. As noted above, on 25.08.2021, as per the Memorandum of Understanding, two Demand Drafts of Rs.19 Lacs and Rs.6 Lacs were handed over to the Appellant and the cheque of Rs. 38,74,000/- was also given. Cheque of Rs.

38,74,000/- was returned and subsequently the said payment was made by RTGS on 17.09.2021 i.e. before the order was passed by the Adjudicating Authority on 29.09.2021. The entire payment as per the Memorandum of Settlement having been paid, there is no debt of the Appellant- 'M/s. Ashish Ispat Pvt. Ltd.' due on the Corporate Debtor.

15. Learned Counsel for the Appellant has placed reliance on judgment of the Hon'ble Supreme Court dated 25.08.2021 in Civil Appeal No. 4993 of 2021- "**Kamal K. Singh vs. Dinesh Gupta & Anr.**" in which case, the Application for withdrawal was rejected. In the above case also, the Committee of Creditors was not constituted when the Application was filed for withdrawal. The Hon'ble Supreme Court allowed the Appeal and set aside the order in rejecting the Application. In paragraphs 4, 5 & 6, following was made:-

"(4) In the instant case, as noticed earlier, the applicant-respondent no.1 had made an application before the NCLT, Mumbai Bench, under Rule 11 of the NCLT Rules for withdrawal of company petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) on the ground that the matter has been settled between the Corporate debtor and the applicant-respondent no.1.

(5) Having heard learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the view that the applicant- respondent no.1 was justified in filing the application under Rule 11 of the NCLT Rules for withdrawal of the company petition on

the ground that the matter has been settled between the parties.

(6) The appeal is accordingly allowed. The order of the NCLT dated 06.08.2021 is hereby set aside and the company petition, for which withdrawal application was filed under Rule 11 of the NCLT Rules, is ordered to be withdrawn. No costs.”

16. Learned Counsel for the Appellant has also placed reliance on judgment of this Tribunal in Company Appeal (AT) (Ins.) No. 283 of 2019- **“Sunil Tandon vs. Manoj Kumar Anand, I.R.P. & Ors.”** where this Tribunal had in a case where Application under Section 9 prior to constitution of Committee of Creditors allowed the Application.

17. Another judgment of this Tribunal which also needs to be referred is judgment dated 07.07.2021 in I.A. No. 815 of 2021 in Company Appeal (AT) (Ins.) No. 298 of 2021- **“Anuj Tejpal vs. Rakesh Yadav & Anr.”**. In paragraphs 40 & 41, following was laid down:-

“40. Section 12-A read together with amended Regulation 30-A effective from 25.07.2019 provides that stage of pre-Constitution of CoC which is now covered in Regulation 30-A(1)(a). It is evident that Section 12-A deals with the situation of Withdrawal of Application admitted under Sections 7, 9 or 10, on an Application made by the Applicant with the approval of 90% voting share of the Committee of Creditors, in such manner as may be specified’, meaning thereby that Section 12-A refers to a situation Post

Constitution of CoC, whereas Regulation 30-A(1)(a) deals with procedure to be followed PreConstitution of CoC. It is stated by the Learned Sr. Counsel that the language of the Section, whereunder IBBI has been empowered to frame Regulations is clear that the said Regulation should be consistent with the I&B Code. We refrain from making any such observations. The Apex Court clarified in 'Brilliant Alloys Pvt. Ltd.' Vs. 'Mr. S. Rajagopal & Ors.', SLP (Civil) No. 31557/2018 dated 14.12.2018 that Regulation 30-A 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 issuing the invitation for expression of interest under Regulation 36-A.

41. Rule 11 of NCLAT Rules, 2016 provides that 'Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.' The Hon'ble Apex Court in 'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra) has clearly discussed the stage and has observed that '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'. It is a well settled proposition of law that substantive law takes

precedence over a Regulation and Section 12-A clearly refers to withdrawal of an Application under Section 7, 9 or 10 after the Constitution of the Committee of Creditors, seeking approval of 90% of the voting share of the CoC. Keeping in view the ratio of the Hon'ble Supreme Court in 'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra) and the aforementioned reason, we hold that in the facts and circumstances of the attendant case before us, we do not find force in the contention of the proposed Intervenor Applicants that the Application for Withdrawal, filed, prior to Constitution of CoC ought to be mandatorily dealt with the provisions under the Regulation 30-A(1)(a). We find it just and proper to exercise our inherent powers under Rule 11 in this case.

18. The above judgment cited by the Learned Counsel for the Appellant does support the submissions of the Learned Counsel for the Appellant. In any view of the matter in the facts of the present case, entire dues of the Appellant were paid by the Corporate Debtor under Memorandum of Settlement dated 25.08.2021. An Application was also filed on 25.08.2021 i.e. before the constitution of the Committee of Creditors. There was no requirement of directing for obtaining approval of ninety percent vote of Committee of Creditors for considering the Application. There was no fresh Application before the Adjudicating Authority apart from Application dated 25.08.2021 which was filed prior to the constitution of Committee of Creditors. The Adjudicating Authority without considering the facts and sequence of the events had refused to entertain the Application on the

ground that it is not supported by ninety percent vote of Committee of Creditors. We are of the view that present is a case where the Application for withdrawal ought to be allowed permitting withdrawal of Corporate Insolvency Resolution Process.

19. In view of the foregoing discussion, this Appeal is allowed. The order dated 29.09.2021 of the Adjudicating Authority is set aside. Application I.A 267/2021 filed by the Interim Resolution Professional is allowed and the order dated 04.08.2021 passed by the Adjudicating Authority is also set aside.

20. Appeals are allowed accordingly. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Justice Jarat Kumar Jain]
Member (Judicial)**

**[Dr. Alok Srivastava]
Member (Technical)**

New Delhi
Anjali