IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH - I, CHENNAI

IA(IBC)/1410(CHE)/2022 in IBA/1459/2019

(filed under Section 12A of the Insolvency & Bankruptcy Code, 2016 read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

Along with

IA(IBC)/1134(CHE)/2022 in IBA/1459/2019

(filed under Section 12(2) of the Insolvency & Bankruptcy Code, 2016 read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

*In the matter of **M/s. Appu Hotels Limited***

Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D3, Triumph Apartments,
Jawaharlal Nehru Salai,
Arumbakkam, Chennai – 600 106

… Applicant

Along with

Inv. P(IBC)/10(CHE)/2023 in IA(IBC)/1410(CHE)/2022 in IBA/1459/2019

(filed under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules 2016)

*In the matter of **M/s. Appu Hotels Limited***

Committee of Creditors of
Appu Hotels Limited
Represented by
Indian Bank
Stressed Assets Management Branch
2nd Floor, 55, Ethiraj Salai, Egmore,
Chennai – 600 008

… Applicant

-Versus-

Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D3, Triumph Apartments,
Jawaharlal Nehru Salai,
Arumbakkam, Chennai – 600 106

… Respondent

Along with

Inv. P(IBC)/7(CHE)/2023 in IA(IBC)/1410(CHE)/2022
in IBA/1459/2019

(filed under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules 2016)

In the matter of ***M/s. Appu Hotels Limited***

M.K. Rajagopalan
Balaji Villa, No.30A, Beach Road,
Kapaleeshwarar Nagar, Neelangarai,
Chennai – 600 115

… Applicant

-Versus-

Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D3, Triumph Apartments,
Jawaharlal Nehru Salai,
Arumbakkam, Chennai – 600 106

… Respondent

Along with

Inv. P(IBC)/12(CHE)/2023 in IA(IBC)/1410(CHE)/2022
in IBA/1459/2019

(filed under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules 2016)

In the matter of ***M/s. Appu Hotels Limited***

Sankalp Recreation Pvt. Ltd.
In consortium with
Globe Ecologistics Pvt. Ltd.
Reg. office: 17th Floor, Sankalp Square 3-A,
Taj Skyline, Sindhu Bhavan Marg,
Ahmedabad, Gujrat – 380 058

… Intervenor / Applicant

-Versus-

Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited
D3, Triumph Apartments,
Jawaharlal Nehru Salai,
Arumbakkam, Chennai – 600 106

… Respondent

Counsel appearing for the Parties

For Resolution Professional	:	*N.L. Rajah, Senior Advocate*
For CoC	:	*E. Om Prakash, Senior Advocate* *In Inv.P(IBC)/10(CHE)/2023*
For Promoters	:	*P.H. Arvindh Pandian, Senior Advocate*
For Intervenors	:	*U.K. Chaudhry, Senior Advocate* *R. Venkatavaradhan, Advocate* *In Inv. P(IBC)/7(CHE)/2023* *P. Chidambaram, Senior Advocate* *P.R. Raman, Senior Advocate* *In Inv.P(IBC)/12(CHE)/2023*

CORAM:

SANJIV JAIN, MEMBER (JUDICIAL)
VENKATARAMAN SUBRAMANIAM, MEMBER (TECHNICAL)

Order Pronounced on ***20th December, 2023***

COMMON ORDER

(Heard through Video conferencing mode)

IA(IBC)/1410(CHE)/2022 is an Application filed by the Resolution Professional of the Corporate Debtor viz. Appu Hotels Limited under Section 12A of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC, 2016) read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking reliefs as follows;

(a) Permit the withdrawal of the application originally filed by Tourism Financial Corporation of India Ltd in IBA/1459/2019 in accordance with the proposal submitted by the promoter of the Corporate Debtor and approved by the Committee of Creditors with 100% majority of voting.

(b) Direct that the CIR Process against Appu Hotels Limited, the Corporate Debtor may be terminated;

(c) Direct that the rights and management of the Corporate Debtor shall stand restored to its Board of Directors with immediate effect and

(d) grant such other relief(s) which are deemed fit and necessary in the nature and circumstances of the case and thus render justice.

2. **Inv. P(IBC)/10(CHE)/2022** is an Intervention Application filed by the Committee of Creditors of the Corporate Debtor viz. Appu Hotels Limited under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016, seeking reliefs as follows;

(a) That this Hon'ble Tribunal may be pleased to permit the Applicant herein to intervene in the above IA/1410/2022 to support the 12A proposal of the Promoters and pass such further other orders as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case and thus render justice.

(b) That this Hon'ble Tribunal may be pleased to pass such other and further reliefs as the nature and circumstances of the case may require and thus render justice;

3. **Inv. P(IBC)/7(CHE)/2022** is an Intervention Application filed by Mr. M.K. Rajagopalan, who is a Prospective Resolution Applicant of the Corporate Debtor viz. Appu Hotels Limited under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016, seeking reliefs as follows;

(a) Reject the Section 12A settlement proposal of the Promoter, as approved by the Committee of Creditor in its 19th meeting dated 12.10.2022 and declare the same is non – est in law;

(b) Direct the Resolution Professional to proceed in terms of the directions of the Hon'ble NCLAT contained in its judgment dated 17.09.2022 and upheld by the Hon'ble Supreme Court vide Judgment dated 03.05.2023 and proceed with the consideration of Resolution Applications received from the seven Resolution Applicants (including the Applicant herein); and

(c) Any other order that this Hon'ble Tribunal might deem fit in the facts and circumstances of the case.

4. **Inv. P(IBC)/12(CHE)/2022** is an Intervention Application filed by Sankalp Recreation Private Limited, who is a Prospective Resolution

Applicant of the Corporate Debtor viz. Appu Hotels Limited under Section 60(5) of IBC, 2016 read with Rule 11 of NCLT Rules, 2016, seeking reliefs as follows;

(a) Allow the Intervention Petition of the Present Applicant, a prospective Resolution Applicant; or

(b) Dismiss the 12A settlement proposal of the Promoter, approved by the CoC in its meeting dated 12.10.2022; or

(c) Reject the Application filed by the Resolution Professional dated 03.11.2022, IA/1410/CHE/2022 for approval of the Settlement proposal under 12A of the IBC; or

(d) Direct the CoC to consider the Resolution Plan of the Applicant afresh; and

(e) Any other order that this Hon'ble Tribunal might deem fit in the facts and circumstances of the case.

5. **IA(IBC)/1134(CHE)/2023** is an Application filed by the Resolution Professional of the Corporate Debtor under Section 12(2) of IBC, 2016 seeking reliefs as follows;

(a) Permit the Applicant herein to complete the CIRP process by 12.11.2022 (from 13.10.2022 to 12.11.2022) and

(b) Granting such other relief which are deemed fit and necessary in the nature and circumstances of the case and thus render justice.

5.1. In relation to **IA(IBC)/1134(CHE)/2023**, the 330 days CIRP period expired on 12.10.2022. It is stated in para 17 of the

Application that the CoC in its 18th meeting held on 29.09.2022 discussed that the Resolution Plan need be deliberated amongst the members of the CoC and the CoC required further time and in the interest of all the stakeholders and with a view to maximize the value of the Corporate Debtor, it was resolved to file an Application for extension of CIRP. Accordingly, IA(IBC)/1134(CHE)/2022 has been filed.

5.2. The reasons stated by the Applicant appears to be plausible and accordingly, the **IA(IBC)/1134(CHE)/2022** stands **allowed**.

6. FACTUAL MATRIX OF THE CASE

6.1. In an Application filed under Section 7 of Insolvency and Bankruptcy Code, 2016 by a Financial Creditor viz. Tourism Finance Corporation of India Limited against the Corporate Debtor viz. M/s. Appu Hotels Limited, this Tribunal vide its order dated 05.05.2020 initiated Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor and appointed one Mr. Mukesh Kumar Gupta as the *"Interim Resolution Professional"* (IRP). Subsequently, the Applicant viz. Radhakrishnan Dharmarajan was appointed as the *"Resolution Professional"* (RP) of the Corporate Debtor by this Tribunal vide order dated 02.11.2020.

6.2. On 08.05.2020, the IRP caused a Public Announcement in Form-A, inviting claims from the creditors of the Corporate Debtor and constituted the Committee of Creditors ("CoC"). 2nd CoC meeting was held on 06.08.2020, in which the CoC approved for issue of Expression of Interest (EoI) viz. Form-G for invitation of Prospective Resolution Applicants (PRAs).

6.3. In pursuance of the same, the IRP received three Resolution Plans. Finally, revised Resolution Plan was received only from Mr. M.K. Rajagopalan (who is the Intervenor in INV. P/7(CHE)/2023). The same was placed before the CoC and was approved by the CoC with 87.39% voting share.

6.4. The RP filed IA(IBC)/150(CHE)/2021 before the Tribunal seeking approval of Resolution Plan and this Tribunal vide its order dated 15.07.2021 approved the Resolution Plan submitted by Mr. M.K. Rajagopalan. While approving the Resolution Plan, this Tribunal considered the objections raised by the Promoters of the Corporate Debtor in detail and dismissed the same.

6.5. Aggrieved by the order of this Tribunal dated 15.07.2021 approving the Resolution Plan, the promoter of the Corporate Debtor viz. Dr. Palani G Periasamy filed an Appeal before Hon'ble NCLAT vide Company Appeal (AT)(Ins) No. 164 of 2021.

The Hon'ble NCLAT on 30.07.2021 granted stay of implementation of order dated 15.07.2021. Thereafter, on 17.02.2022, Hon'ble NCLAT allowed the appeal filed by the promoter of the Corporate Debtor and set aside the order passed by this Tribunal dated 15.07.2021 *qua* approving the Resolution Plan. The Hon'ble NCLAT in the operative portion of the order, held as under;

> *Company Appeals (AT) (CH) (Ins.) Nos. 164, 176, 218 & 219 of 2021 are allowed.*
>
> *The Common order passed in Miscellaneous Applications, IA/150/CHE/2021, MA/13/CHE/2021, MA/18/CHE/2021, MA/48/CHE/2021, IA/181/CHE/2021, IA/183/CHE/2021, IA/192/CHE/2021, IA/217/CHE/2021, IA/172/CHE/2021, IA/291/CHE/2021, IA/572/CHE/2021, IA/571/CHE/2021 passed in Company Appeal in IBA/ 1459 of 2021, dated 15 July 2021, approving the Resolution Plan is set aside. Resolution Professional is directed to proceed with the CIRP from the publication stage of Form 'G' for inviting Expression of Interest afresh as per CIRP Regulations. RP is directed to put up the Appellant/Promoters Settlement proposal for consideration before the CoC.*
>
> ***The Resolution Professional is directed to call the CoC within 15 days from the date of order and settlement proposal should be put to the vote and if approved with 90% vote share of the Committee of Creditors, then proceeding for withdrawal of the CIRP under Section 12 A read with Regulation 30A of CIRP Regulation.***
>
> *Further, it is declared that the claim of related part Financial/Operational Creditor cannot be discriminated from unrelated Financial/Operational Creditors.*
>
> *In the circumstances stated above, the time taken in the Appeal may be excluded for computation of the CIRP period. No order as to cost.*
>
> *(emphasis supplied)*

6.6. Aggrieved by the order passed by Hon'ble NCLAT, the Successful Resolution Applicant viz. Mr. M.K. Rajagopalan preferred an Appeal before Hon'ble Supreme Court vide Civil Appeal No. 1682 – 1683 of 2022. The said Appeal was heard in length by the Hon'ble Supreme Court on 07.03.2022, 11.03.2022 and 14.03.2022. Finally on 16.03.2022 upon conclusion of hearing, the Hon'ble Supreme Court passed the following order;

> *We have heard Dr. Abhishek Manu Singhvi, learned senior counsel in rejoinder on behalf of the appellant. We have also heard further submissions by learned senior counsel Mr. Jaideep Gupta and Mr. Rakesh Dwivedi; and learned. counsel Ms. Haripriya Padmanabhan and Mr. Goutham Shivshankar.*
>
> *Arguments concluded. Judgment reserved.*
>
> *Learned counsel for the respective parties may file the notes/additional notes on their submission latest by 22.03.2022. It has been informed during the course of submissions that meeting of the Committee of Creditors ('COC') pursuant to the Tribunal impugned order of the National Company Law Appellate ('NCLAT') had taken place on 03.03.2022 and further meeting is slated for 21.03.2022.*
>
> ***In the totality of the circumstances, it is considered appropriate and hence provided that the meetings/proceedings of the COC may continue but the entire process shall remain subject to the final orders to be passed in these appeals**.*
>
> *(emphasis supplied)*

6.7. In the meantime, the RP convened the 11th CoC meeting on 03.03.2022, as per the directions of Hon'ble NCLAT. The proposed settlement of the promoter under Section 12A was put for

voting before the CoC. On 25.03.2022, the said 12A proposal was rejected by the CoC with 51.80% of the voting share.

6.8. Since the proposal of the promoter under Section 12A was rejected by the CoC, the RP, as per the directions of the Hon'ble NCLAT proceeded with the issuance of fresh Expression of Interest.

6.9. In view of the aforesaid development, the Successful Resolution Applicant moved an Application before the Hon'ble Supreme Court seeking an interim stay over the fresh issuance of Expression of Interest. The Hon'ble Supreme Court vide its order dated 20.05.2022 passed the following order;

> *The matter is taken up today on the application for direction moved by the appellant. We have taken note of the averments therein.*
>
> ***Having regard to the order passed on 16.03.2022, making all the proceedings subject to the final judgment in these appeals, no further order or direction is considered expedient or necessary at this stage**.*
>
> *The judgment remains reserved.*

6.10. Thereafter, in pursuance of the Expression of Interest, the RP received seven Resolution Plans and the same were put before CoC for its consideration.

6.11. At this stage, the promoter of the Corporate Debtor viz. Dr. Palani G Periasamy moved another proposal under Section 12A

of IBC, 2016 on 19.09.2022. The said proposal was considered by the CoC in its 19th CoC meeting dated 12.10.2022 and was put to vote between 14.10.2022 and 31.10.2022. The CoC with 100% voting share approved the proposal submitted by the promoter of the Corporate Debtor and the following resolution was passed;

> *"Resolved that the settlement proposal submitted by Mr. Palani G Periasamy (Promoter) under Section 12A of the IBC, 2016 which was placed before the COC for discussion and approval in the nineteenth COC meeting held on 12.10.2022 is hereby approved"*

6.12. Pursuant to the same, the promoter filed an IA No. 168602/2022 before the Hon'ble Supreme Court and apprised the fact that the CoC has approved the proposal of the promoter under Section 12A. Taking into consideration the said fact, the Hon'ble Supreme Court on 17.11.2022 passed the following order;

> *We have heard the learned counsel for the respective parties on I.A. No.168602/2022.*
>
> *Learned counsel for the parties may file further notes on their submissions in relation to I.A. No.168602/2022 on or before 21st November, 2022.*
>
> *The judgment remains reserved.*
>
> *However, having regard to the totality of the circumstances, when it has been pointed out that the approval as now accorded by CoC in its meeting dated 31.10.2022 has been placed for approval before the Adjudicating Authority, we would request the Adjudicating Authority to await the decision of this Court in these matters*

6.13. Thereafter, on 03.05.2023, the Hon'ble Supreme Court pronounced the Judgment in Civil Appeal Nos. 1682 – 1683 of 2022. The operative portion of the order is reproduced hereunder;

> ***Conclusion***
>
> *70. - In view of the above, these appeals are disposed of in the following terms:*
>
> 1. *The impugned judgment and order dated 17.02.2022 is not interfered with only insofar the Appellate Tribunal has not approved the resolution plan in question for the reasons which have been affirmed by us in points C2, C3 and D1 hereinbefore. Other findings, observations and directions of the Appellate Tribunal are set aside.*
>
> 2. *The question of dealing with fresh settlement proposal of the promoter, as approved by the CoC in its nineteenth meeting dated 12.10.2022 after receiving fresh resolution plans, is left open for consideration of the Adjudicating Authority, who shall be expected to deal with this aspect of the matter while keeping in view the law applicable and the facts of the present case as also the observations foregoing.*

6.14. The Hon'ble Supreme Court also made some observations in para 65 to 69 and the same are discussed in the later portion of the order.

7. IA(IBC)/1410(CHE)/2022 – SECTION 12A APPLICATION FILED BY RP

7.1. As already alluded *supra*, the proposal of the promoter of the Corporate Debtor under Section 12A of IBC, 2016 was approved by the CoC with 100% voting rights. It is to be noted here that during the CIRP, the petitioner who had filed the Application under Section 7 of IBC, 2016 before this Tribunal viz. Tourism Finance Corporation of India, assigned its rights and interests in

favour of Phoenix ARC Private Limited. Accordingly, the RP reconstituted the CoC and filed the status report before this Tribunal on 18.04.2022.

7.2. It is stated by the RP that as contemplated under Regulation 30A(1)(b) of the IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016, the CoC has justified the consideration of the proposal under Section 12A and the same was subsequently put to vote. It is stated that necessary Form – FA as contemplated under Regulations was also submitted by Phoenix ARC as original Petitioning Creditor. It is stated that the unconditional Bank Guarantee as contemplated under the said Regulation is not required as the entire CIRP cost has already been paid.

7.3. It is stated in the settlement proposal that many operational creditors and other creditors have not submitted their claims with the RP mainly due to the lack of information about CIRP commencement and publication of Form – A during Covid – 19 pandemic and consequent lockdowns. It is stated that the proposal is based on the books of accounts of the Corporate Debtor, on the basis of which the details of liabilities of the Corporate Debtor are given below;

Amount in INR (Crores)

S. No.	Type of Creditor	Admitted Claim / Balance as per Books	Remarks
1(a)	Secured Financial Creditors	340.43	Admitted Claim
1(b)	Additional Interest to Secured Financial Creditors	25.29	Additional Payment from the promoter
2	Unsecured Financial Creditors	49.13	Admitted Claim
3	Unsecured Financial Creditors – Related	45.00	Admitted Claim
4	Operational Creditors	17.39	Admitted claim was only Rs.4.30 Crores
5	Other Creditors & Liabilities	16.35	As per Books
6	Preference Shareholders	9.00	
7	Equity Shareholders	89.71	
	Total	**592.30**	
8	CIRP Expenditure	Unpaid actual, if any as approved by CoC	

A. Treatment proposed for Secured Financial Creditors

S. No.	Class of Creditor – Secured Financial Creditor	Amount proposed to be paid (Rs. In Crores)	Term of payment
1	State Bank of India	102.88	Immediate i.e. On Withdrawal Date
2	Bank of India (Tokyo)	52.24	
3	IDBI Limited	11.81	
4	Indian Bank	69.33	
5	Phoenix ARC Private Limited (Assigned by TFCI)	21.88	
6	Edelweiss ARC	4.13	
7	IBDI Debentures Trusteeship Limited	76.53	
8	Allium Finance Private Limited	1.63	
	TOTAL	**340.43**	

- *Further as an improvement to the above admitted claim amount, we are also willing to pay a simple interest @ 6% p.a. on the admitted claim amount due to the Secured Lenders to the extent of Rs.25.29 Crores for the period from 6 May 2020 to 31" July 2021.*
- *Upon settlement and payment of dues of the secured financial creditors in term of above, the secured creditors shall release the existing charges, encumbrance, Lien or the like if any, on the properties and assets of the Company and that of its guarantors and shall forth with and concurrently handover the original legal documents evidencing and creating the said charge along with the title deeds of the properties and assets of the company and that of its guarantors if any, held by them and also issue no due certificate to that effect immediately to the corporate debtor and the guarantors within 7 days from the date of receipt of the payment by the respective lenders.*

B. TREATMENT PROPOSED FOR UNSECURED FINANCIAL CREDITORS

S. NO.	CLASS OF CREDITOR – UNSECURED FINANCIAL CREDITOR	AMOUNT PROPOSED TO BE PAID (RS. IN CRORES)	TERM OF PAYMENT
A	**UNRELATED PARTY FINANCIAL CREDITORS**		
1	Prabhat Resource Limited1	16.66	Immediate on withdrawal date
2	URC Builders	1.50	
3	Aryav Exports Private Limited	4.87	
4	Modern Constructions	3.34	
5	M. Chandrasekaran	0.61	
6	Sun Bright Industries	16.56	
7	RSM Industries Private Limited	5.59	
	Sub – Total (A)	**49.13**	
B	**RELATED PARTY FINANCIAL CREDITORS**		
1	Related Party Financial Creditors	45.00	To be paid in normal course of Business preferably within 365 days from the date of NCLT approval.
	Total (A+B)	**94.13**	

- *Any bonafide debt for which claim has not been filed / or has not been recognized in books of accounts, shall be settled as per treatment given to that class of creditor.*

C. <u>TREATMENT PROPOSED FOR ALL OTHER CREDITORS VIZ. OPERATIONAL CREDITORS, WORKMEN & EMPLOYEES, RELATED PARTY CREDITORS, STATUTORY DUES, OTHER LIABILITIES, ETC.</u>

S. NO.	AMOUNT TO BE PAID	TERM OF PAYMENT
1	100% of ascertained book liability (Operational Creditors, Workmen & Employees, Statutory Dues and Other liabilities	1) Claims to the extent of Rs.4.30 Crores admitted by the RP will be paid immediately after approval of NCLT on the 12A proposal 2) The remaining unclaimed debts of Rs.13.09 Crores to be paid as and when claims are made by the respective creditors in the normal course of business preferably within 365 days from the date of approval of this proposal by NCLT.

- *Any bonafide debt for which claim has not been filed / not recognized in books of accounts in this category shall be settled as per treatment given as per the above schedule.*
- *Any liability which is under dispute / litigation pending before any court / quasi – judicial authority and admitted by RP shall be paid subject to the outcome of those proceedings or any out-of-court settlement made after the withdrawal date.*

D. <u>TREATMENT PROPOSED FOR PREFERENCE AND EQUITY SHAREHOLDERS</u>

S. NO.	AMOUNT TO BE PAID	TERM OF PAYMENT
1	The share capital of Rs.98.71 Crores comprising of Equity	The rights and benefits accrued to the Equity Shareholders and Preference Share Holders will

	Share capital of Rs.89.71 Crores and Preference Share capital of Rs.9.00 Crores will be retained as a Going concern.	continue without any dilution after approval of NCLT on the 12A proposal.

7.4. It is stated that the aforesaid proposal, which is appended as "Annexure – 11" to the typed set filed along with IA(IBC)/1410(CHE)/2022, was approved by the CoC with 100% voting share. The copy of the voting result is appended as "Annexure – 12".

8. INTERVENTION APPLICATION INV. P(IBC)/10(CHE)/2023 – COC OF APPU HOTELS LIMITED

8.1. The CoC of the Corporate Debtor represented by Indian Bank has filed an Intervention Application seeking permission to intervene and support the 12A proposal of the Promoters of the Corporate Debtor.

8.2. It is stated that the Proposal of the promoter under Section 12A of the Code was put to vote before the Committee of Creditors in the 19th CoC meeting on 12.10.2022 and the CoC with 100% majority voting has approved the Section 12A proposal submitted by the Promoter.

8.3. It is stated that by way of an Order dated 03.05.2023, the Hon'ble Supreme Court upheld the Judgement of the Hon'ble NCLAT with regard to rejection of the Resolution Plan.

8.4. It is stated that on comparison of the Proposal submitted by the Promoter under Section 12A and the other seven Resolution Plans, the amount offered by the Promoter under Section 12A is found to be much more than the other Resolution Plans. It is stated that the 12A proposal settles the entire claim amount filed against the Corporate Debtor and the proposal has been submitted with the definite source of funds for immediate payment by way of 25% cash deposit in no lien account with the lead bank and 75% Bank Guarantee.

8.5. It is stated that the 12A proposal of the Promoters, offers reasonable interest amount to all the secured Financial Creditors in addition to the admitted claims.

8.6. It is stated that the other Resolution Plans completely ignore the interest of other stakeholders and operational creditors who have not preferred claims before the RP and also the preference and equity shareholders. It is stated that the 12A proposal seems to balance and it protects the interest of all the stakeholders without any dilution.

8.7. It is stated that value of the assets of the Corporate Debtor are more than its liabilities and the 12A proposal of the promoters seems to be practicable solution assuring recovery of 100% dues to all the stakeholders, and hence the CoC has voted in favour of the 12A proposal with 100% majority.

8.8. Under such circumstances, the CoC of the Corporate Debtor has prayed for allowing the proposal under Section 12A of IBC, 2016 submitted by the Promoter of the Corporate Debtor.

9. INTERVENTION APPLICATION INV. P(IBC)/7(CHE)/2023 – M.K. RAJAGOPALAN

9.1. Mr. M.K. Rajagopalan was the successful Resolution Applicant whose Resolution Plan was approved by this Tribunal on 15.07.2021. The said order dated 15.07.2021 was set aside by the Hon'ble NCLAT and the same was also confirmed by Hon'ble Supreme Court vide its order dated 03.05.2023. However, the Hon'ble Supreme Court while setting aside the Resolution Plan, has observed in para 56 and 57 as follows;

> *56. A comprehensive look at the factual aspects and the orders previously passed in the matter make it clear that right from the inception of CIRP in question, the promoter and erstwhile director had made several attempts to invoke the operation of Section 12-A of the Code. At the very initial stage, while admitted the petition made by TFCI, the NCLT observed in its order dated 05.05.2020 that the attempts on the part of corporate debtor by way OTS settlement proposal had only been to gain time. Yet again, when the process has gone several steps ahead and when the day resolution plans were being put to vote, just a day before voting, the promoter put forth yet another settlement proposal without any concrete plan and without disclosing the source of funds to complete the settlement. The CoC, after due deliberation, refused to consider the same and thereafter voted on the resolution plan in question.*
>
> *57. The Adjudicating Authority (NCLT) dealt with the matter in sufficient detail (vide paragraph 15.2 and relevant extraction therein) while noting that even the original applicant of CIRP, i.e.,*

TFIC was kept in dark about such a proposal. It was also noticed that even the term-sheet to support the proposal from Deutsche Bank came with a disclaimer. In the totality of facts and circumstances, the proposals as made by the promoter and erstwhile director were all of eyewash and of dilatory tactics. However, the Appellate Tribunal (NCLAT) proceeded to observe that in the ninth CoC meeting, no discussion about settlement proposal had occurred and that CoC never considered the settlement proposal submitted by the promoter and erstwhile director; and that after getting the settlement proposal, it was incumbent upon the resolution professional to call the CoC meeting for consideration of such proposal. The observations of the Appellate Tribunal cannot be said to be in conformity with the record of proceedings.

57.1. As noticed, the proposal in question was forwarded for consideration only at the eleventh hour, i.e., a day before CoC was to vote on the resolution plan in its ninth meeting. The CoC, in the said meeting, indeed, took into consideration the proposition of settlement and application for withdrawal request letter, which was circulated two hours before the meeting. The creditors with significant voting shares such as SBI and Bank of India were clear in their stand that they would stick to the agenda and would not deviate therefrom. The resolution professional had to request the representatives of the corporate debtor to allow the agenda items to go through as per the wishes of the majority of CoC and no further discussions were to be made on the letter sent to CoC. When the substantial majority of CoC was not in favour of such discussion which was proposed to be thrusted on them only a few hours before the meeting, their approach cannot be faulted at. In any case, an application for withdrawal in terms of Section 12-A of the Code could have been made only if CoC approved the proposal with 90% voting share. When the creditors with substantial voting share were against any such proposal, any consideration was clearly ruled out and there could not have been any valid application for withdrawal.

58. Thus, the Appellate Tribunal has erred in holding that the settlement offer of the promoter in terms of Section 12-A was not placed for consideration of CoC. Approval of resolution plan in question could not have been reversed on this count. However, as noticed herein before approval of the resolution plan in question could not have been endorsed by the Appellate Tribunal because of other substantial reasons.

9.2. Learned Senior Counsel for the Intervenor Mr. M.K. Rajagopalan has submitted that right from the inception of CIRP, the promoter and the erstwhile directors of the Corporate Debtor had made several attempts to invoke the operations of Section 12A of IBC, 2016. He stated that immediately on the initiation of CIRP on 05.05.2020, attempts were made by the promoters of the Corporate Debtor to make settlement by OTS proposal only to gain time. When the process had gone several steps ahead and when the resolution plans were being put to vote, just a day before the voting, the promoter/ erstwhile director put forth yet another settlement proposal without any concrete plan and without disclosing the source of funds, however, the CoC refused to consider the same and the CoC after due discussion and deliberation approved the resolution plan of Mr. M.K. Rajagopalan.

9.3. Learned Senior Counsel submitted that this Tribunal in para 15.2 of the order dated 15.07.2021 clearly noted that even the financial creditor/ petitioner viz. Tourism Finance Corporation of India (TFIC) was kept in dark about the proposals of settlement put forth and even the term sheet to support the called settlement proposal by Deutsche Bank came with a disclaimer. It is observed in the said order that the proposals made by the promoter director were all eyewash and dilatory tactics. Learned Senior Counsel submitted that the Hon'ble Supreme Court therefore observed that the finding of the NCLAT in its order dated 17.02.2022 that the proposal of promoter/erstwhile director ought to have been

considered by the CoC is not in conformity with the record of proceedings and hence disapproved the same.

9.4. Learned Senior Counsel submitted that the Hon'ble NCLAT vide its order dated 17.02.2022 directed that the offer of the promoter/director be considered by the CoC within 15 days from the date of the order. In terms of the said direction, the proposal given by the promoter of the Corporate Debtor was placed in the 11th CoC meeting held on 03.03.2022, and the same was rejected by 51.81% voting on 25.03.2022.

9.5. Learned Senior Counsel submitted that in view of rejection of the promoter's proposal on 25.03.2022, fresh invitation for Eol was issued, and on 29.09.2022 in the 18th CoC meeting, the 7 resolution plans were put forth for processing. However, before the 18th CoC meeting scheduled on 29.09.2022, yet another proposal was given by the promoter of the Corporate Debtor on 19.09.2022.

9.6. Learned Senior Counsel submitted that the Hon'ble Supreme Court in para 63 has observed and held that it is necessary under Regulation 30A of the CIRP Regulations that withdrawal of CIRP after issuance of Eol must be with reasons justifying such withdrawal. Further, the Hon'ble Supreme Court has observed that a pattern appearing in the proposals of the promoter and the proposal given a day before or close to approval of the resolution plan, is quite striking.

9.7. Learned Senior Counsel submitted that like earlier proposals, this proposal dated 19.09.2022 is also received close to the consideration of Resolution Plans and from the pattern it is observed by the Hon'ble Supreme Court that it is obvious that the promoter / erstwhile director is obviously in a position to know about the propositions in the resolution plans when received in response to invitation.

9.8. Learned Senior Counsel submitted that, the Hon'ble Supreme Court in para 66 has observed that it would be appropriate to leave the same for the Adjudicating Authority to consider all the relevant aspects of the matter which are left open and also to see the justification for invoking Section 12A after issuance of fresh EoI and after Resolution Plans. In other words, the Hon'ble Supreme Court left all the relevant aspects open for consideration to the Adjudicating Authority in accordance with law while keeping in view the observations of the Hon'ble Supreme Court.

9.9. Learned Senior Counsel submitted that even in the 18th CoC meeting held on 29.09.2022, the proposal which was considered by the CoC was in the draft form. In other words, there was no form FA and there was no compliance of Section 12A read Regulation 30A of the CIRP Regulations;

9.10. Learned Senior Counsel submitted that inconclusive discussion of the CoC in the meeting held on 29.09.2022 was

however approved on 12.10.2022 and was decided to be put to vote. Learned Senior Counsel submitted that from the minutes of the meeting held on 29.09.2022 (18th CoC) and 12.10.2022 (19th CoC), it is clear that no form FA or other necessary requirement of Section 12A or Regulation 30A were noticed by the CoC members and the proposal was still named as draft proposal by some of the CoC members. Learned Senior Counsel submitted that there is no justification in the minutes of the CoC dated 12.10.2022 justifying withdrawal under Regulation 30A of CIRP Regulations.

9.11. Learned Senior Counsel submitted that the Form FA dated 11.10.2022 which was signed at Mumbai, could not have been placed before the CoC in its meeting held on 29.09.2022 and 12.10.2022. The proposal was submitted by the promoter only on 19.09.2022. Learned Senior Counsel submitted that another Form FA was executed at Mumbai on 01.11.2022 and it could not have been placed before the CoC members on 29.09.2022 and 12.10.2022. Learned Senior Counsel stated that the Form – FA is in patent violation of Section 12A and Regulation 30A of the CIRP Regulations framed under IBC, 2016.

9.12. Learned Senior Counsel submitted that there is a misrepresentation to the extent as there cannot be two form FA relating to the same proposal worded identically the same but executed on 11.10.2022 and 01.11.2022. Learned Senior Counsel

submitted that the paperwork appears to be antedated and thus there has been a fraud which is played upon this Tribunal.

9.13. Learned Senior Counsel submitted that in whole of the Application filed by the RP in IA(IBC)/1410(CHE)/2022, there is no justification as to why Section 12A was considered when the Resolution Plans had been received pursuant to the Invitation and were pending consideration of the CoC. Learned Senior Counsel submitted that upon perusal of Form FA dated 11.10.2022 and 01.11.2022, it is clear that no proposal as required by Section 12A and specified under Regulation 30A was available to the CoC for approval and therefore, voting on a draft proposal is subsequently backed up by duly executed documents. It is thus evident that Form FA dated 01.11.2022 was obtained after the voting ended on 31.10.2022.

9.14. Learned Senior Counsel submitted that the commercial wisdom of the CoC cannot substitute for the material irregularities, illegalities, misrepresentation of facts and non-compliance of law, bordering on fraud and fabrication. He submitted that the Hon'ble Supreme Court in the case of **Vallal RCK vs. Siva Industries and Holdings Ltd & Ors** in para 18 has held that *"a perusal of section 12A and Regulation 304, the said regulation would reveal that where an application for withdrawal under Section 12A of the IBC is made after constitution of the CoC the same has to be made through the IRP/RP. The application has to be made in form FA. It further provides that when the*

application is made after invitation of expression of interest under 36A, the applicant is required to state the reasons justifying withdrawal of the same. The RP is required to place such application for consideration before the CoC. Only after such application is approved by CoC with 90% voting share, the RP is supposed to share the same along with the approval to the Adjudicating authority. It is thus seen that a detailed procedure is prescribed under 30A."

9.15. Learned Senior Counsel submitted that in para 24 of **Siva Industries *(supra)***, it is clearly held by the Hon'ble Supreme Court that interference would be warranted when the Adjudicating Authority or Appellate Authority finds the decision of the CoC totally capricious, arbitrary, irrational and *de-hors* the provisions of the statute and the rules. In the present case, neither the provisions of Section 12A of IBC, 2016 nor the provisions of Regulation 30A have been complied with and therefore the Application under Section 12A of IBC, 2016 need be rejected on this ground alone.

9.16. Learned Senior Counsel submitted that the present application under Section 12A is not supported by the internal resources of the promoter or through sale of its own assets. The promoter is still dependent on third party assurances and promises which had not been kept in the past and this amounts to allowing a backdoor entry of a third party as a Resolution Applicant without following the principles for approval.

9.17. Learned Senior Counsel submitted that the very fact that the promoter is offering the exact figure in his 12A proposal as that of Mr. M.K. Rajagopalan in his Resolution Plan proves that the promoter is misusing his position as an attendee to the CoC meetings and this also amounts to disclosure of confidential information to an outsider.

9.18. Learned Senior Counsel submitted that the promoter in his Section 12A proposal has added INR 98.71 Crore being the total issued share capital to the total settlement amount and reached a figure of INR 592.30 Crore, when in fact the same is not the value of the money being paid under the 12A proposal.

9.19. Learned Senior Counsel submitted that the figures have been artificially inflated in the 12A proposal to make it attractive. In reality, Mr. M.K. Rajagopalan Resolution plan is better than the proposal of the promoter under Section 12A of IBC, 2016. Learned Senior Counsel submitted that the figure of INR 25.29 Crores stated to be payable as interest to secured creditors is only because the Corporate Debtor has a ready cash by way of accruals in its account. Further, the promoter is claiming clean slate principle and recasting of accounts. Learned Senior Counsel submitted that the promoter has not given a settlement proposal but a Resolution Plan of *'iHeart'* who will become a creditor of the Corporate Debtor as per own admission of the Promoter.

9.20. Learned Senior Counsel submitted that the Corporate Debtor will be in debt trap of iHeart for INR 493.59 Crores against the present secured loan debt of INR 340.43 Cr. However, on the other hand, if the Resolution plan is approved, the Corporate Debtor will be debt free and will receive more infusion of funds by the SRA. Therefore, as per the observations of Hon'ble Supreme Court and facts of this case, as also as per law, the Corporate Debtor must be protected from its defaulting promoter and as such the present 12A application must be dismissed.

9.21. Learned Senior Counsel submitted that Mr. M.K. Rajagopal has cured the defects and is eligible under the new resolution plan. The Resolution Plan has been submitted in his individual capacity. The Net worth certificate, guarantees are a part of the resolution plan. Thus, the Corporate Debtor will be debt free and will be easily rehabilitated and all creditors will get their funds.

9.22. Learned Senior Counsel submitted that no opportunity was given by the CoC to Mr. M.K. Rajagopalan on his resolution plan to offer a modified plan with re-allocation or further upward revision.

9.23. Learned Senior Counsel submitted that in view of the aforesaid submission and adverse observations of the Hon'ble Supreme Court against the promoter, the Application under Section 12A of IBC, 2016 is required to be dismissed with exemplary cost and directions be issued to the RP that the CoC be reconvened and

all the Resolution Plans be placed before the CoC for their consideration.

10. <u>INTERVENTION APPLICATION INV. P(IBC)/12(CHE)/2023 – SANKALP RECREATION PRIVATE LIMITED</u>

10.1. Learned Senior Counsel for the PRA submitted that the CoC ignored the resolution plans after issuance of expression of interest without any justification. He submitted that the Applicant viz. Sankalp Recreation Private Limited had submitted its resolution plan before the RP on 30.07.2022. Thereafter, Applicant was informed that all the resolution plans are under evaluation by the CoC, post rejection of the settlement offer, of the promoter as per directions of the Hon'ble NCLAT. He submitted that in the 18th Meeting of the CoC dated 29.09.2022, the revised settlement proposal, which was received on 19.09.2022, was discussed by the CoC without statutory compliance and authority as per the IBC.

10.2. Learned Senior Counsel submitted that post-rejection of the settlement proposal under section 12A, after the Hon'ble NCLAT Judgement, the CoC had no option other than to follow the directions of the Hon'ble NCLAT to consider and evaluate the resolution plans. Learned Senior Counsel submitted that the CoC holds a crucial power, which is the ability to consider and approve a resolution plan or settlement plan for a distressed company under the provisions of the IBC. The discretionary power of the CoC is not superior to the object and purpose of the IBC. The principle of

commercial wisdom cannot be invoked by the CoC as a cloak or shield by doing something, which is not permissible under the law or not provided.

10.3. Learned Senior Counsel submitted that the consideration of a settlement proposal and its withdrawal is not the rule, but an exception under IBC, especially post constitution of the CoC and issuance of expression of interest, which in the present case, had already passed the muster of IBC, 2016.

10.4. Learned Senior Counsel submitted that it is the mandatory and statutory duty of the CoC to satisfy itself to use its exceptional discretionary power within the mandate of the IBC. The non-consideration of the resolution plans by the CoC, submitted pursuant to issuance of the expression of interest on the second occasion, despite the clear and unambiguous mandate of the Hon'ble NCLAT, reflects material irregularity on the part of the CoC, frustrating the entire intent of the IBC. He submitted that the members of the CoC were intent on rewarding the recalcitrant promoter ignoring viable resolution plans put forth by the others.

10.5. Learned Senior Counsel submitted that the CoC, while discussing the revised settlement proposal of the promoter, has chosen to completely ignore the Resolution Plans placed before it. He submitted that the entire procedure adopted by the CoC is

fraught with the absence of transparent and fair procedure in the interest of all the stakeholders.

10.6. Learned Senior Counsel submitted that the principle of 'commercial wisdom' for settlement proposal under section 12A of the IBC is invoked in the present Application by the CoC, wherein, the Promoter was allowed ultimately to succeed after multiple failed attempts by indirectly assuming control of the company using the settlement route through unacceptable means, and simultaneously ignoring the resolution plans and denying the opportunity of hearing or representation to the resolution applicants, including the applicant herein.

10.7. Learned Senior Counsel submitted that in the case of **Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta,** *2020 (8) SCC 531*, the Hon'ble Supreme Court upheld the existence of some inherent assumptions relevant to the CoC, including the concept of commercial wisdom and held that the assumptions, however, must not be misconstrued as absolute and must be viewed in light of the IBC's fundamental objectives and the inherent checks and balances that regulate concept of commercial wisdom in the first place.

10.8. Learned Senior Counsel submitted that the CoC is barred from changing its position on the settlement proposal and

that the CoC cannot be permitted to take any different stand at the instance of the Promoter as taken in the present case.

10.9. Learned Senior Counsel submitted that the present CoC had rejected the settlement proposal of the promoter on three different occasions and the revised settlement proposal of the promoter was not different compared to the content and conditions as rejected by the CoC earlier. Learned Senior Counsel submitted that under the scheme of the IBC, the Promoter cannot submit multiple settlement proposals till it is ultimately approved and to permit the Promoter to revise its settlement proposal any number of times till it is approved, shall be detrimental to the Prospective Resolution Applicants, which encompasses the applicant herein. In the present case, multiple 12A IBC, 2016 applications of the promoter were employed merely as a dilatory tactic. Learned Senior Counsel referred to the observation of the Hon'ble Supreme Court and contended that the Promoter has misused the provision under Sec. 12A by floating multiple settlement proposals upon having knowledge of the contents of the Resolution Plans before the CoC. Learned Senior Counsel submitted that section 12A should not be used by the Promoter as an opportunity to abuse the process of law.

10.10. Learned Senior Counsel submitted that withdrawal application under section 12A of the IBC is totally unsustainable once the CoC, had already rejected the earlier settlement proposals

by the Promoter. He submitted that once, the settlement proposal is rejected by the CoC as per the directions of the Hon'ble NCLAT and expression of interest was issued and resolution plans were on the stage of evaluation, there is a legal and statutory impediment on the CoC, doing a volte face and accepting or approving the settlement proposal under Section 12A. This was the reason why the Hon'ble Supreme Court, upon assessing the factual matrix and the multiple settlement proposals filed by the Promoter, issued a direction to this Tribunal to decide the matter keeping in mind the law, facts of the case and the observations of the Hon'ble Supreme Court.

10.11. Learned Senior Counsel submitted that it is a trite law that all parties concerned must be heard before allowing the withdrawal under section 12A of the IBC. The interests of all stakeholders in the public at large are to be taken into consideration before any decision could be made. That the principles of natural justice are applicable to the IBC proceedings and do not stand excluded by implication expressly and any arbitrariness or bias approach would make decisions as a result thereof void, particularly when grave prejudice was caused to the applicant.

10.12. Learned Senior Counsel submitted that compliance to principles of natural justice is implied/ necessary when any statute/ code under which an action is being taken by any administrative or statutory authority, is silent as to its application. He submitted that the statutory functionaries akin to the CoC are represented by public

financial institutions, and therefore, all are expected to act in a fair and neutral manner so that the objects of IBC are achieved for the benefit of all the stakeholders. He stated that the applicant had submitted the expression of the interest after the public announcement and complied with all the procedural formalities as mandated under the IBC. The CoC had further given an impression to the applicant that all the resolution plans were under evaluation and external agency was also roped in to prepare a matrix of all the submitted resolution plans. However, surprisingly out of the blue, the CoC permitted the revised rejected settlement proposal to vote on 12.10.2022 and approved the same without giving any justification for not considering the submitted resolution plans. There was no opportunity of hearing nor the representation was allowed to the PRAs either in the 18th or 19th meetings of the CoC, wherein, the Settlement Proposal was approved.

10.13. Learned Senior Counsel submitted that the decision of approval of the settlement proposal by the CoC in its 19th meeting dated 12.10.2022 is required to be set aside by this Tribunal on the ground that the same is capricious, arbitrary, irrational and *de hors* the provisions of the statute or the Rules under the IBC and in violation of the principles of natural justice. He submitted that there are material irregularities committed by the RP and COC in the present case, hence, the actions of CoC must be quashed. The actions of the CoC are a clear-cut case of undue haste without exercising commercial wisdom.

10.14. Learned Senior Counsel submitted that there is a legitimate expectation that the CoC would act fairly while taking into consideration the broader objectives of the IBC over its narrow interest of realization of its own dues and debt. Any act or omission to the contrary by the CoC cannot be accepted in the garb of supremacy and justifiability of commercial wisdom of CoC and therefore, same need to be judicially examined by this Tribunal. It is just that the application for approval of the settlement proposal must be decided after hearing all the parties concerned, including the Resolution Applicants and considering all relevant factors on the facts of the present case in all fairness for meeting the ends of justice or to prevent abuse of the process under the IBC.

10.15. Learned Senior Counsel submitted that the CoC in approving the proposal of the promoter/Corporate Debtor did not have the opportunity of examining the observations and findings of the Hon'ble Supreme Court in its judgment pronounced on 03.05.2023. Hence the decision of CoC is flawed and the said judgment has left the Adjudicating Authority to consider all attendant circumstances in considering the issue of acceptance of the settlement proposal. Thus the proposal of the intervener applicant is to be dealt with on merit. Learned Senior Counsel submitted that the CoC's decision is vulnerable on the aspect of non-consideration of the matters relevant to the resolution plans which the Hon'ble

Supreme Court has made clear, which are to be taken into account by the Adjudicating Authority.

10.16. Learned Senior Counsel submitted that the promoters had provided multiple 12A proposals over the CIRP period and the final 12A proposal was backed by one iHeart properties Pvt Ltd. He submitted that the said entity supposedly had given a deemed loan to the Corporate Debtor to pay off the debts of the Financial Creditors which shall be regularized after the approval of the 12A. Further, iHeart was the one, which had opened the no-lien account and provided all of the financial assurances to the CoC towards the 12A. The promoter did not part with a single penny towards the 12A nor has taken any sort of liabilities on himself to redeem the Corporate Debtor. The discussions relating to iHeart were also made in the 18th CoC. Learned Senior Counsel submitted that the intent of iHeart is to replace all of the financial creditors and become a single creditor to the Corporate Debtor and eventually take control over the Corporate Debtor. Thus, iHeart is nothing but a Resolution Applicant who has found favour with the promoters and is aiming to take over the Corporate Debtor without having to jump through the hoops otherwise set up by the IBC for a Resolution Applicant.

10.17. Learned Senior Counsel submitted that as per the minutes of the 19th CoC, the Resolution professional had opened the lines for voting from 14.10.2022 to 21.10.2022. However, in the end of the minutes, it was observed that the voting was extended until

31.10.2022. It is unclear how this extension was communicated nor it is mentioned as to how such an extension was actually possible. He submitted that the CoC never communicated nor passed a resolution allowing for such an extension and this extension appears to be a purely unilateral decision by the RP. He submitted that as on 21.10.2022, SBI had not voted on the 12A proposal and SBI holds 26.41 voting percentage in the CoC. That being the case on 21.10.2022, the actual percentage that had voted on the 12A was 73.59% therefore not passing the muster prescribed under Sec 12A of the Code which prescribes 90% acceptance of the CoC.

10.18. Under such circumstances, Learned Senior Counsel submitted that the Application under Section 12A of IBC, 2016 is required to be dismissed.

11. REPLY ARGUMENTS TO INV.P/7/CHE/2023 AND INV. P/12/CHE/2023

11.1. The Learned Senior Counsel for the Promoters, at the outset submitted that the Prospective Resolution Applicants (PRAs) namely Mr. M K Rajagopalan and Sankalp Recreation Private Limited do not have any *'Locus-standi'* to raise any objections in the Corporate Insolvency Resolution Process. The COC has approved 12A proposal with 100% voting rights. He submitted that the intervention application filed by Mr. M K Rajagopalan is not at all maintainable on the ground that Mr. M K Rajagopalan is a stranger

and not eligible to be Resolution Applicant in view of the Order of Hon'ble NCLAT and Hon'ble Supreme Court.

11.2. Learned Senior Counsel submitted that the PRAs as per the judgment of the Hon'ble Supreme Court in ***Arcelor Mittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1*** have no vested right to raise the objections to the 'CIRP' seeking to have their 'Resolution Plan' approved; and/or to have their 'Resolution Plan' considered in exclusivity.

11.3. In so far as the ground raised by the PRAs that the COC ignored the Resolution Plans after the issuance of EOI without any justification, Learned Senior Counsel submitted that after considering all the resolution plans that were pending before them and the 12A proposal, the COC unanimously approved the 12A proposal since the entire admitted dues of the Corporate Debtor are being settled without any haircut. He submitted that the Hon'ble Supreme Court has consistently held that the commercial wisdom of the CoC has to be given paramount status without any judicial intervention for ensuring the completion of the stated processes within the timelines prescribed under IBC.

11.4. Learned Senior Counsel submitted that the earlier settlement proposals of the Promoter were not coupled with instant payments and hence the said proposals were not entertained by the CoC. Now, the Promoter has deposited a sum of Rs.105.00 Crores

with Indian Bank (CoC member/ Lead Bank) and also deposited bank guarantee for a sum of Rs.315.00 Crores, which would satisfy the entire liabilities of the Corporate Debtor with interest and the same was eventually unanimously approved by the CoC with 100% voting.

11.5. Learned Senior Counsel submitted that although the scope of the present application under Sec.12A of IBC, 2016 is narrow and limited, several baseless objections have been raised by two meddlesome interlopers, under the garb of Prospective Resolution Applicants, in a futile attempt to divert the issue on hand with an ulterior motive. He submitted that the objectors to the present application, who are prospective Resolution Applicants, do not even fall within the ambit of 'stakeholders' and are third parties to the entire process.

11.6. Learned Senior Counsel submitted that the objector, M.K.Rajagopalan has been held by the Supreme Court to be ineligible to act as a Resolution Applicant. His earlier Resolution Plan was rejected on that score. He invited the attention to the observations made against Mr. M.K. Rajagopalan in Para 44.1,44.2, 44.3, 44.3.1, 44.4. 44.5, 19.4.2 and 68 of the Judgement of dated 03rd May 2023. The few observations are reproduced below for the ready reference;

> *44.5. In the given set of facts and circumstances of this case, in our view, the Appellate Tribunal has rightly held the resolution plan being in*

contravention of the provisions of law for the time being in force. Observations and findings of the Appellate Tribunal in paragraphs 106 to 112 of the impugned order dated 17.02.2022 (reproduced hereinabove in paragraph 19.4.2.) deserve to be and are approved.

> *19.4.2. The relevant observations and findings of the Appellate Tribunal in regard to this aspect read as under: -*
> *"101.* ***Resolution Applicants ineligibility u/s 29A(e) of the Code****…….*
> **** *** ****
> *105. ……..* ***However, the rejected Trust was none other than the 2nd Respondent's Trust, namely 'Balaji Vidyapeeth', which was never disclosed to the COC and has been deliberately suppressed.*** *The IRP/ Resolution Professional should have informed the CoC that the 2nd Respondent had presented the Resolution Plan by competing with the said Trust****. He has used the very same ''Trust' to support his credentials and creditworthiness in the Resolution Plan.*** *The relevant portions of the Resolution Plan are extracted hereunder for ready reference:*
> ***************
> *106. Therefore, it is incorrect to say that the 2nd Respondent has not gained any advantage from the Charitable Trust. The case on hand squarely falls within the ambit of Section 88 of the Indian Trusts Act, and as such,* ***the Resolution Plan is illegal****.* ***Since the said 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent cannot act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain is barred by Section 88 of the Indian Trusts Act. The said provision is extracted hereunder for ready reference.***
> ******************
> *109. The argument of the 2nd Respondent that the Trust had submitted their EOIs independently and both of them were aware that the other was submitting their EOIs is* ***purely mischievous****. Admittedly, the 2nd Respondent is the Managing Director of the said Trust, and the fact remains that two EOIs were submitted by the 2nd Respondent, one for himself and the other on behalf of the Trust.*

> *110. However, the said facts have been suppressed from the CoC, and the CoC did not have an occasion to consider that the 2nd Respondent had submitted two EOIs. Therefore, it is also false to claim that the 2nd Respondent had complied with the provisions of the RFRP and the IBC.* ***The 2nd Respondent suppressed material facts and gave false declarations about his ineligibility and the conflict of interest.***
>
> *111. The argument of IInd Respondent that a conflict of interest would arise in case the Trust were allowed to submit a Resolution Plan* ***is incorrect and misleading****. **********. Therefore, it is incorrect to say that the 2nd Respondent has* ***not gained any advantage from the Charitable Trust.***
>
> *112.* ***The case on hand squarely falls within the ambit of Section 88 of the Indian Trusts Act, and as such, the Resolution Plan is illegal.*** *Since the said 'Sri Balaji Vidyapeeth' has already been declared as ineligible, the 2nd Respondent cannot act as its alter ego in implementing the Resolution Plan and attain any financial advantage or gain is barred by Section 88 of the Indian Trusts Act.*

11.7. Learned Senior Counsel submitted that when the said intervenor is barred by the Hon'ble Supreme Court from even submitting a Resolution Plan, his intervention petition is nothing but a sheer abuse of process and has to be dismissed with exemplary costs. He submitted that the contention of the said ineligible PRA that his ineligibility would not extend to the fresh Plan submitted by him is preposterous, especially when the said PRA still depends upon the credentials of the same Balaji Vidyapeeth Trust to show his creditworthiness.

11.8. Another contention that the Hon'ble NCLAT had given only 15 days' time to consider the 12A proposal and if the 12A

proposal was not approved within the said period, then the rights of the promoters be forfeited and no further proposal could be submitted by the promoters. Learned Senior Counsel submitted that the said contention is untenable because the promoters can take all steps to settle their dues before approval of any plan or even in liquidation and no court can deprive the right of settlement. In the present case, the proposal was initially rejected by the COC after the expiry of the stipulated period of 15 days by the Hon'ble NCLAT without assigning any reasons despite offering entire dues to be settled without any haircut. Against this backdrop, the promoters made representation to the COC and the COC agreed to consider the 12A proposal provided the entire dues be settled upfront. In line with the discussion, the promoters submitted the revised 12A proposal along with Rs.420.00 Crores comprising of Rs.105.00 Crores as a cash deposit & Rs.315.00 Crores as a Bank Guarantee, and the same was approved by the COC with 100% voting rights.

11.9. Learned Senior Counsel submitted that perusal of the minutes of the 18th and 19th CoC meetings would show that the Resolution Plans received were evaluated by the CoC through an independent agency namely, BDO India LLP and the reports had been considered by the CoC, before deciding to vote on the settlement proposal, which is a commercial decision of the CoC. Ultimately, in exercise of its commercial wisdom, considering the interests of all the stakeholders, the CoC has rightly approved withdrawal of CIRP.

11.10. Learned Senior Counsel submitted that all the dues of the Corporate Debtor are being fully settled and the interests of all the stakeholders are safeguarded, however the intervening objectors have been attempting to derail the process by misinterpreting certain observations made by the Hon'ble Supreme Court in its Judgment dated 03.05.2023, expressing its concerns on the previous settlement proposals of the promoter. He submitted that the promoter has always been proposing to settle the entire dues of the Corporate Debtor irrespective of the value of Resolution Plans submitted and such proposal has been ultimately accepted by the CoC in view of instant availability of funds. He submitted that an intervening objector, who has been declared to be ineligible by the Hon'ble Supreme Court, has been casting aspersions on the Promoter, who has been sincerely trying to revive the Corporate Debtor and protect the interests of the stakeholders. He submitted that the Intervening Petition filed by such an ineligible person demeans the verdict of the Hon'ble Supreme Court and cannot be entertained.

11.11. Learned Senior Counsel submitted that all the prospective Resolution Applicants, including the intervening objectors were also apprised of the CoC's decision to vote on the settlement proposal by way of an e-mail dated 18.10.2022, to which they did not respond. The objectors do not have any *locus standi* to

question withdrawal of the CIRP. Reliance has been placed upon the following judgments;

(i) **Ebix Singapore Private Limited and ors. Vs. Committee of Creditors of Educomp Solutions Limited and ors** *(2022) 2 SCC 401*, wherein it has been held,

> *"109. …On the contrary, a CoC's withdrawal of the CIRP under Section 12A is coupled with a requirement of payment of CIRP costs, but no damages are statutorily payable to the Resolution Applicant, irrespective of the stage of the withdrawal. …*
>
> *125. … Further, in the event that the CoC enters into a settlement with the Corporate Debtor and withdraws from the CIRP under Section 12A, the Regulation 30A provides for only payment of insolvency costs and not compensation or damages to Resolution Applicant for investing time and money in the process.*

(ii) **Arcelor Mittal India (P) Ltd. Vs. Satish Kumar Gupta and others** *(2019) 2 SCC 1*, wherein it has been held,

> *"76. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition Under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage."*

11.12. Learned Senior Counsel submitted that it is a well settled position of law that the prospective Resolution Applicants do not have a vested right to seek consideration of the Resolution Plans. He submitted that the objections raised on the flimsy and irrelevant

grounds of non-consideration of the Resolution Plans, submission of two Form FAs, alleged conduct of the promoter, source of funding, etc. are totally absurd and defeat the object and spirit of IBC. In this regard, reliance has been placed upon the following Judgments;

(i) **Shwetha Vishwanath Shirke and others Vs. Committee of Creditors and another** *2019 SCC Online NCLAT 1049*, wherein it has been held,

> *"12. From Section 12A and the decision of the Hon'ble Supreme Court in 'Swiss Ribbons Pvt. Ltd.' (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.*
>
> *13. In view of the aforesaid provisions of law, we hold that Section 29A is not applicable for entertaining/considering an application under Section 12A as the Applicants are not entitled to file application under Section 29A as 'resolution applicant'.*
>
> *14. In the present case, the 'Corporate Insolvency Resolution Process' was initiated pursuant to an application under Section 7 filed by the 'Andhra Bank' (Appellant herein). <u>The application under Section 12A having been approved by the 'Committee of Creditors' more than 90% of the voting share, it was not open to the Adjudicating Authority to reject the same</u> and that too on a ground of ineligibility under Section 29A, which is not applicable."*

(ii) **K.Srinivas Krishna Vs. Shyam Arora and others** *Company Appeal (AT) (Insolvency) No.221 of 2021*, wherein it has been held by the Hon'ble NCLAT as under:

"23. Ld. Adjudicating Authority has rejected the Application on the ground that the Application Section 12A of the IBC is not filed by the Applicant (Operational Creditor) on whose instance CIRP was initiated against the Corporate Debtor. No doubt, as per Section 12A of the IBC, the Application must be filed by the Applicant and Regulation 30A of the Regulations provides the procedure and format of the Application i.e. FA. Now the question arises that when the admitted claim of the Operational Creditor and other creditors are satisfied by the Corporate Debtor and CoC approved the resolution for withdrawal of the Application by 100% voting share and the Corporate Debtor has provided a bank guarantee as per sub-Regulation 2 of Regulation 30-A even though the Operational Creditor (Applicant) misusing his position, refused to sign the form FA and does not file Application under Section 12A of the IBC.

24. In aforesaid peculiar facts and circumstances of the case no cause of action survives in favour of the Operational Creditor to proceed with CIRP. Thus, exercising the inherent powers under Rule 11 of National Company Law Appellate Tribunal, Rules, 2016 to prevent abuse of process, we hereby set aside the impugned order as well as the order of initiating CIRP against the Corporate Debtor. Resultantly, the Corporate Debtor Company is released from the rigours of the CIRP and is allowed to function through its Board of Directors from immediate effect. The IRP shall hand over the records to the Board of Directors."

(iii) **Mayuras Industrial Services Vs. S R Shriraam Shekar and another** *Company Appeal (AT) (CH) (Insolvency) No.07 of 2023*, wherein it has been held by the Hon'ble NCLAT as under:

"5. Advancing argument, the Learned Counsel for the Appellant submits that without receipt of any consent viz. Form –FA from the Appellant, who initiated 'CIRP' the 1st Respondent/Interim

Resolution Professional should not have passed a 'Resolution' for withdrawal of the 'CIRP'. …

25. One cannot remain in oblivion of the fact that the 'mandate of the Code' is for 'Resolution' and 'Revival' of Companies. Furthermore, the Appellant is an affected person, because they want more money than what is owed to them by the 'Corporate Debtor'. …

27. It must be borne in mind that the jurisdiction of an Adjudicating Authority/Tribunal u/s 12 of the Code is very much limited. In reality, where 'CoC', had approved with more than 90% of voting share, it is not open to an Adjudicating Authority/Tribunal in law to reject the 'Application'.

28. In Rajakumar V Nagarajan & Ors.(vide judgement in Civil Appeal 1792/2021) the Hon'ble Supreme Court had observed that a 'Company Director', is entitled to seek withdrawal of an application initiating 'CIRP', if, is able to establish that he would be settling the dues of Creditors. …

30. In the judgement dated 03.06.2022 of the Hon'ble Supreme Court in Vallal RCK V M/s. Siva Industries and Holdings, the Hon'ble Supreme Court has observed that 'Tribunals' should not interfere with the Commercial wisdom of the Committee of Creditors, agreeing to the settlement Plan submitted by the Corporate Debtor, once it got the approval of 'Committee of Creditors', with more than 90% voting in its favour.

31. Be that as it may, …the averments made in the Petition by the 'Resolution Professional' as withdrawal was approved by the CoC meeting that took place on 06.06.2022 (third meeting), the IA 676(CHE)/2022 filed by the Resolution Professional in the main IBA/374/2020 on the file of the Adjudicating Authority/NCLT, Division Bench II, (filed under section 12A of the Code) was rightly

allowed by the Adjudicating Authority/NCLT, Division Bench II, Chennai."

(iv) **Shaji Purushothaman Vs. Union Bank of India and others** *Company Appeal (AT) (Insolvency) No.921 of 2019*, wherein it has been held by the Hon'ble NCLAT as under:

"6. At this stage, learned counsel for the Appellant submits that the Appellant is ready to settle the claim with all the Creditors including 'M/s. Edelweiss Asset Reconstruction Company Ltd.'

7. However, Mr. R.P. Agarwal appearing on behalf of 'Union Bank of India' submits that the 'Resolution Plan' has already been approved by the 'Committee of Creditors' after taking into consideration the claim of the 'M/s. Edelweiss Asset Reconstruction Company Ltd.' …

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."

11.13. Learned Senior Counsel submitted that IBC does not bar either multiple settlement proposals or raising of funds from external sources for settlement of dues. While it is true that the Hon'ble Supreme Court in its Judgment dated 03.05.2023 has expressed its concerns on the previous settlement proposals of the promoter, the fact remains that the previous proposals were not supported by funds to the satisfaction of the CoC and the present

proposal is coupled with the payments in the nature of Deposit and Bank Guarantee. Hence, the objection raised by the intervening PRAs that the present settlement proposal should be rejected because of rejection of the earlier proposals is absurd and preposterous, especially when all the concerned stakeholders are benefitted by the withdrawal of CIRP.

11.14. Under these circumstances, the Learned Senior Counsel for the promoters prayed for dismissal of the Intervention Applications filed by the Prospective Resolution Applicants and approval of the Settlement proposal of the promoters under Section 12A of IBC, 2016.

12. ANALYSIS

12.1. The Resolution Plan submitted by Mr. M.K. Rajagopalan was approved by this Tribunal vide its order dated 15.07.2021. In the appeal filed by the promoter of the Corporate Debtor, Hon'ble NCLAT vide its order dated 17.02.2022 set aside the Resolution Plan and directed the CoC to proceed with the CIRP from the publication stage of Form 'G' for inviting Expression of Interest afresh and also to place the settlement proposal of the promoter within a period of 15 days from the date of the order.

12.2. The Resolution Applicant Mr. M. K. Rajagopalan filed an Appeal before Hon'ble Supreme Court. The Hon'ble Supreme

Court after hearing the arguments, vide its order dated 16.03.2022 directed that the CoC may continue but the entire process shall remain subject to the final orders to be passed in these appeals.

12.3. As per the directions of Hon'ble NCLAT, the promoter gave a settlement proposal and the same was placed before the CoC. The said settlement proposal was rejected by the CoC with 51.81% voting share on 25.03.2022. Thereafter, fresh Form – G was issued on 26.04.2022 and Seven Prospective Resolution Applicants submitted the Resolution Plan.

12.4. In the meantime, the promoter gave another settlement proposal under Section 12A of IBC, 2016 to the CoC and the same was discussed in the 18th and 19th CoC meeting. Thereafter, in the 19th CoC meeting, the settlement proposal of the promoter was approved and the CoC with 100% voting passed a Resolution for withdrawal by moving an Application under Section 12A of IBC, 2016. The Application under Section 12A of IBC, 2016 was filed before this Tribunal on 03.11.2022. The factum of approval of withdrawal under Section 12A was brought to the knowledge of the Hon'ble Supreme Court and the Hon'ble Supreme Court vide its order dated 17.11.2022 requested the Adjudicating Authority to await the decision of the Hon'ble Supreme Court in these matters.

12.5. The Hon'ble Supreme Court vide its order dated 03.05.2023 upheld the order of NCLAT setting aside the Resolution Plan of Mr. M.K. Rajagopalan. The Hon'ble Supreme Court also took

note of the fact that the settlement proposal has been approved by the CoC with 100% voting. The Hon'ble Supreme Court in para 66 has held as under;

> *66. We are not expanding further on the matter because when we find that the settlement proposal of the promoter, after approval of CoC, for invoking the provisions of Section 12-A of the Code, is pending before the Adjudicating Authority, in our view, it shall be in the fitness of things that all the relevant aspects of the matter are left open for consideration of the Adjudicating Authority, including those relating to the justification for invoking Section 12-A after issuance of fresh invitation for EOI and after receiving resolution plans. In other words, we would leave all the relevant aspects open for consideration of the Adjudicating Authority in accordance with law while keeping in view the observations of this Court.*

12.6. A table recapitulating the list of dates and events is enumerated hereunder;

DATE	EVENTS
05.05.2020	CIRP initiated by this Tribunal
15.07.2021	Resolution Plan submitted by Mr. M.K. Rajagopalan approved by this Tribunal
17.02.2022	Resolution Plan set aside by Hon'ble NCLAT
25.03.2022	12A proposal of the promoter rejected by the CoC with 51.80% voting share
26.04.2022	Fresh Form G issued pursuant to the NCLAT order
29.09.2022	Date of 18th meeting of the CoC
12.10.2022	Date of 19th meeting of the CoC
12.10.2022	Date of filing of extension of CIRP application before this Tribunal
31.10.2022	12A proposal approved by CoC – E-voting date
03.11.2022	Date of filing of Section 12A Application before this Tribunal
17.11.2022	Hon'ble Supreme court directed this Tribunal to await orders before considering the 12A Application
03.05.2023	Judgment of Hon'ble Supreme Court as against the order passed by Hon'ble NCLAT dated 17.02.2022

13. ISSUES FRAMED BY THIS TRIBUNAL

Upon hearing the submissions made by the Learned Senior Counsel for the parties, the following issues arise for consideration and adjudication before this Tribunal.

(i) Whether the Promoter has the right to give the settlement proposal any number of times during the CIRP of the Corporate Debtor in the light of the observations made by the Hon'ble Supreme Court?

(ii) Whether the time limit for settlement proposal under Section 12A is curtailed only to 15 days from 17.02.2022 as directed by the Hon'ble NCLAT by its order dated 17.02.2022?

(iii) Whether the Applicant / Creditor has adduced sufficient reasoning justifying the withdrawal of the Application after issuance of Expression of Interest?

(iv) Whether non-compliance of Regulation 30A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 would amount to illegality or irregularity?

(v) Whether the CoC ought to have compared the Resolution Plan of the PRA and the Settlement proposal of the Promoter under Section 12A simultaneously and put up for voting?

(vi) Whether, based on the facts and circumstances of the present case, the Prospective Resolution Applicants have any locus to challenge the withdrawal of Application under Section 12A of IBC, 2016 and whether any prejudice has been caused to the Prospective Resolution Applicants?

(vii) Whether in a settlement proposal under Section 12A of IBC, 2016 can the Adjudicating Authority delve into the aspect of source of funds brought forward by the promoter of the Corporate Debtor?

14. ISSUE NOS. (I) AND (II)

14.1. The Issue no.(i) is *"whether the Promoter has the right to give the settlement proposal any number of times during the CIRP of the Corporate Debtor in the light of the observations made by the Hon'ble Supreme Court?"*

14.2. The issue No. (ii) is *"whether the time limit for settlement proposal under Section 12A is curtailed only to 15 days from 17.02.2022 as directed by the Hon'ble NCLAT by its order dated 17.02.2022?"*

14.3. In order to answer the aforesaid two issues, it is imperative to take note of the Judgment of the Hon'ble Supreme Court in para 59 to 66 in relation to the impact and subsequent events, which are reproduced hereunder;

> ***Point G – Impact and effect of subsequent events***
>
> *59. The discussion aforesaid would have been decisive of the matter but there had been several subsequent events in this matter, particularly of fresh invitation for EOI and then, approval of the settlement offer of the promoter by the CoC in its nineteenth meeting held on 12.10.2022 by 100% majority of the voting share. Thus, the question is about the impact and effect of such subsequent events. For dealing with this question, we need to recapitulate the relevant background aspects of the case and the chronology of subsequent events.*
>
> *60. As noticed, in the impugned judgment and order dated 17.02.2022, the Appellate Tribunal had directed the CoC to reconsider the offer of the promoter within fifteen days from the date of its order (i.e., within fifteen days from 17.02.2022). Prior to this, twice over the propositions of such settlement offer by the promoter had been dealt with disfavourably. The relevant parts of proceedings in the ninth CoC meeting concerning such proposal have already been noticed*

hereinbefore. It is noticed that after approval of the resolution plan, the promoter again submitted a settlement proposal on 08.03.2021 which was followed by a letter dated 14.07.2021 from one Saveetha Institute of Medical and Technical Sciences as proof of funding, but the said letter was subsequently withdrawn by the said Institute. The resolution plan was approved by the Adjudicating Authority on 15.07.2021, which was challenged by the promoter and the Appellate Tribunal granted stay over operation of the order dated 15.07.2021. The Appellate Tribunal, ultimately, allowed the appeal and apart from disapproving the resolution plan in question, directed the resolution professional to call for the meeting of CoC within 15 days from the date of judgment and to proceed with CIRP from the stage of publication of Form G and put the proposal of promoter before CoC for consideration. In compliance of these directions of NCLAT, eleventh CoC meeting was held on 03.03.2022 where the settlement proposal of the promoter was put to vote in the CoC; the voting continued until 25.03.2022; and ultimately, the said settlement proposal was voted against by 51.81% of the voting share.

61. After such rejection of the settlement proposal of the promoter, as we have detailed hereinabove in paragraphs 26.1 to 26.4, proceedings continued in CoC for invitation of fresh EOI and for that purpose, CoC even resolved to seek further time extension to the Adjudicating Authority.

61.1. On 29.09.2022, in the eighteenth CoC meeting, it was informed that seven resolution plans had been received and their evaluation was under process but, the CoC members were informed that another settlement proposal was received from the promoter on 19.09.2022. At that stage, again, when the mandatory 330 days' period was about to end, the CoC members unanimously voted to seek extension of CIRP timelines. Then, on 12.10.2022, the discussion on the settlement proposal of the promoter took place, it was put to vote and was approved by the CoC with 100% of the total voting powers.

62. The aforesaid proceedings continued with the matter remaining pending in this Court. The question is, what ought to be the way forward? At the first blush, it may appear that when the settlement proposal has now been approved by the CoC with 100% voting powers in their commercial wisdom, the process thereunder may be allowed to

continue as such. However, a blanket approval by this Court at this stage is fraught with other complications.

63. Section 12-A was introduced in the Code later and in accordance with the Insolvency Law Report, March, 2018. This provision was introduced to provide for a mechanism for withdrawal upon settlement which was missing in IBC as originally promulgated. Regulation 30-A was also introduced to the CIRP Regulations. It was further amended with effect from 25.07.2019, providing for withdrawal of CIRP even after issuance of expression of interest but, with the condition that the applicant shall state the reasons justifying withdrawal after issuance of EOI.

64. As noticed from various events, even at the threshold stage, the NCLT noticed the settlement proposal on behalf of the corporate debtor but then, found the same to be an eyewash which was put forward only to gain time. The petition was admitted, triggering CIRP. Significantly, the settlement proposal then came up from the promoter only a day before the received resolution plans were to be put to vote, i.e., on 21.01.2021. The CoC, even when not formerly voting on it, clearly rejected the same for the Agenda having already set for dealing with the resolution plan received from the resolution applicant. As noticed, after approval of the resolution plan, the promoter again submitted a settlement proposal but the Institute, said to be supporting the same, subsequently withdrew. After allowing of the appeal by NCLAT and in terms of those directions, the new settlement proposal was precisely put to vote and was rejected. Thereafter, fresh EOIs were invited and resolution plans were received. Significantly, the promoter moved another settlement proposal for invoking Section 12-A of the Code on 19.09.2022, only after receiving of the resolution plans from seven prospective resolution applicants. A pattern in the aforesaid dealings by the promoter is quite striking. When the resolutions plans had been received at the earlier stage, only at the eleventh hour, the settlement proposal came up. This time too, the settlement proposal came up from the promoter only after resolution plans had been received. Prior to it, his proposal had already been rejected. It gets perforce commented that the representative of the corporate debtor being a part of CoC, such proposer is obviously in a position to know about the propositions in the resolution plans when received in response to invitation.

65. We have pondered over various facets of this rather ticklish part of the matter because on one hand stands the approval of the re-submitted settlement proposal by 100% voting powers in the CoC and on the other hand, fact of the matter remains that before such settlement proposal, second time EOIs had been invited and in fact, seven resolution plans had been received. As noticed, the earlier settlement proposal from the promoter came up only a day before the resolution plans were to be put to vote, i.e., on 21.01.2021. This time again, the settlement proposals came up from the promoter only on 19.09.2022 after receiving of seven resolution plans from the prospective resolution applicants.

66. We are not expanding further on the matter because when we find that the settlement proposal of the promoter, after approval of CoC, for invoking the provisions of Section 12-A of the Code, is pending before the Adjudicating Authority, in our view, it shall be in the fitness of things that all the relevant aspects of the matter are left open for consideration of the Adjudicating Authority, including those relating to the justification for invoking Section 12-A after issuance of fresh invitation for EOI and after receiving resolution plans. In other words, we would leave all the relevant aspects open for consideration of the Adjudicating Authority in accordance with law while keeping in view the observations of this Court.

14.4. The observations made by the Hon'ble Supreme Court are summarized hereunder;

(i) Prior to the approval of the earlier Resolution Plan dated 15.07.2021 by NCLT, the promoter had given settlement proposal twice and the same had been dealt with disfavourably by the CoC.

(ii) After setting aside the approval of Resolution Plan, the Hon'ble NCLAT vide its order dated 17.02.2022 directed the CoC to reconsider the offer of the promoter within 15 days from the date of its order and the said proposal was rejected by the CoC with 51.81% voting share.

(iii) Thereafter, when the Expression of Interest was issued and seven Resolution Plans were received, another settlement proposal was received from the promoter on 19.09.2022, which was approved by the CoC with 100% voting share.

(iv) It is observed *"A pattern in the aforesaid dealings by the promoter is quite striking"*.

(v) When the resolutions plans had been received at the earlier stage, only at the eleventh hour, the settlement proposal came up. This time too, the settlement proposal came up from the promoter only after resolution plans had been received.

(vi) It gets perforce commented that the representative of the corporate debtor being a part of CoC, such proposer is obviously in a position to know about the propositions in the resolution plans when received in response to invitation.

(vii) In our view, it shall be in the fitness of things that all the relevant aspects of the matter are left open for consideration of the Adjudicating Authority, including those relating to the justification for invoking Section 12-A after issuance of fresh invitation for EOI and after receiving resolution plans. In other words, we would leave all the relevant aspects open for consideration of the Adjudicating Authority in accordance with law while keeping in view the observations of this Court.

14.5. These observations made by the Hon'ble Supreme Court are required to be kept in mind before passing any orders

under the Application filed by the promoter under Section 12A of IBC, 2016.

14.6. In the instant case, the Hon'ble Supreme Court has commented on the pattern followed by the promoter in respect of submissions of the settlement proposal. It was observed that only at the eleventh – hour, the settlement proposal has been received from the promoters.

14.7. This Tribunal vide its order dated 15.07.2021 has also observed that the settlement proposal of the promoter is only an eye wash and dilatory tactics to derail the CIRP of the Corporate Debtor. Eventhough the promoter offered multiple proposals earlier, the same was rejected by the CoC. However, the present settlement proposal of the promoter was found to be satisfactory by the CoC and approved with 100% voting share. We may note that the statute i.e. IBC, 2016, more particularly Section 12A gives the right to the promoter to settle the matter and withdraw the CIRP proceedings. A conjoint reading of Section 12A with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 makes it clear that the Application can be withdrawn even after issuance of Expression of Interest, provided the Applicant adduces reasons justifying such withdrawal.

14.8. Thus, under Section 12A of IBC, 2016 the promoters / suspended Directors of the Corporate Debtor can take all steps to

settle the matter and the said statutory right cannot be deprived to any person. Only after the CoC approves the Settlement proposal with 90% majority vote, the Application can be filed before this Tribunal under Section 12A of IBC, 2016.

14.9. In the present case, we see that the promoter is desperate to take over the Corporate Debtor. It was also observed by Hon'ble Supreme Court that the promoters have approached CoC multiple times for giving a settlement proposal. It is seen that the CoC in its 'commercial wisdom' rejected the said settlement proposal twice earlier.

14.10. In the instant case, in terms of the order of Hon'ble NCLAT, the promoters of the Corporate Debtor had given the proposal within a period of 15 days, under Section 12A of IBC, 2016. The CoC rejected the proposal of the promoter, eventhough the promoters of the Corporate Debtor offered to settle the entire dues of the Financial Creditors without any haircut. In this backdrop discussions took place among the CoC members and the promoters of the Corporate Debtor and finally in its 16th meeting held on 10.08.2022, the CoC allowed the promoters of the Corporate Debtor to submit the revised proposal based on the discussion held with the CoC. The said fact is reflected in the Settlement proposal dated 11.10.2022 submitted by the promoter of the Corporate Debtor and the same is extracted hereunder;

11. Subsequently the e-voting was conducted by the RP on the 12A proposal submitted by the promoter from 21" March 2022 to 25th March 2022 and requested the CoC members to take the decision thereon. The e-voting results were declared on 26 March 2022 wherein our proposal has been rejected without assigning any reasons for such rejection despite we offered entire dues of the Financial Creditors will be settled without any haircut. As per the e-voting results, 30.40 % of the voting share voted in favour of the proposal, 51.80% of voting share voted against the proposal and 17.80% of the total voting share abstained from the voting.

12. In this back drop, we have made representation vide letter dated 4th Aug.2022 to all the CoC members/ RP wherein we informed that the rejection of said 12A proposal is nothing but arbitrary and against the settled law and the Hon'ble NCLAT's order and thereby requested to consider the 12A proposal in fair manner after affording us a proper and complete opportunity to present and discuss our proposal. The said representation once again made by us in the 16" CoC meeting held on 10th Aug. 2022 wherein we agreed to submit the revised 12A proposal in line with the various discussions held with the Consortium Lenders.

13. The promoters, in the circumstances, has proposed once again under Section 12A of the Code for settlement of its debt including the claim of the Lenders.

14.11. Thus, after the CoC unanimously voted for the settlement proposal of the promoter, an application for withdrawal under Section 12A of IBC, 2016 has been filed before this Tribunal.

14.12. Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 contemplates withdrawal of an application under two circumstances;

(i) Before Constitution of CoC – Reg. 30A(1)(a)
(ii) After Constitution of CoC – Reg. 30A(1)(b)

14.13. Regulation 30A initially permitted withdrawal of CIRP only prior to publication of invitation for Expression of Interest (EoI). However, the Regulation was amended on 25.09.2019 to permit withdrawal of an application even after the publication of invitation of EoI, provided the Applicant states the reasons justifying such withdrawal.

14.14. The Hon'ble NCLAT recently in the matter of **Hem Singh Bharana -Vs- M/s Pawan Doot Estate Private Limited & 4 Ors.** in *Company Appeal (AT) (Insolvency) No.1481 of 2022* has held that withdrawal of CIRP under Section 12A cannot be permitted after the resolution plan had been approved by the CoC and was pending approval of the NCLT. It is held as under;

> *22. The law laid down by the Hon'ble Supreme Court as indicated in the above paragraphs is clear that the approval by the CoC of a Resolution Plan is not in the realm of contract, but is insulated by the Scheme under the Code and this bind both the Successful Resolution Applicant as well as CoC. The Hon'ble Supreme Court in the Ebix itself has laid down timelines provided in the Code have to be adhered to. In event, the submission of the Appellant is accepted that even after the approval of the Plan by the CoC, the CoC be given power to entertain a Settlement Proposal by the Ex-Promoter, the timelines for the different process and its finality shall be breached. Approval by the CoC of a Resolution Plan has to be in accordance with its commercial wisdom and when CoC approves a Plan and the Resolution Applicant is prohibited to modify or withdraw from the Plan, same embargo has to be accepted on CoC also from changing its stand. The judgment of the Hon'ble Supreme Court in Ebix Singapore lays down that after approval by the CoC of a Resolution Plan, CoC itself is bound by its decision and cannot be allowed to go back from its decision and pass any other resolution. This has to be accepted to give finality on different steps of the IBC and for timely conclusion of the resolution process.*
>
> *(emphasis supplied)*

14.15. Thus, the law laid down by the Hon'ble NCLAT in the matter of **Hem Singh *(supra)*** presupposes the fact that the withdrawal Application under Section 12A can be filed till such time the Resolution Plan is approved by the CoC. However, after the Resolution Plan is approved by the CoC, the CoC cannot be allowed to go back from its decision and pass any other resolution.

14.16. It is thus settled that under Regulation 30A(1)(b) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, post constitution of CoC, the Application for withdrawal of CIRP can be filed **after issuance of Expression of Interest and before the approval of the Resolution Plan by the CoC**.

14.17. The Hon'ble NCLAT in the present case vide its judgment dated 17.02.2022 has reset the CIRP of the Corporate Debtor from Form – G stage. Nowhere in the Judgment dated 17.02.2022, the Hon'ble NCLAT barred the promoter from giving subsequent 12A proposal.

14.18. We are therefore of the view that a Tribunal cannot curtail the statutory right which is available to a party, unless the statute expressly or by necessary implication says so. For instance, Section 29A of IBC, 2016 curtails a promoter from giving a Resolution Plan under Section 30 of IBC, 2016, however Section 29A

of IBC, 2016 has been made applicable only to Section 30 of IBC, 2016 and is not applicable for withdrawal of Application under Section 12A of IBC, 2016.

14.19. We therefore hold that the Promoters can submit the settlement proposal before the CoC and this Tribunal cannot curtail the statutory right available to the promoters, unless there is a statutory bar.

14.20. Accordingly, issue no. (i) and (ii) are answered.

15. <u>ISSUE NO. (III)</u>

15.1. The Issue no. (iii) is *"whether the Applicant / Creditor has adduced sufficient reasoning justifying the withdrawal of the Application after issuance of Expression of Interest."*

15.2. To address this issue, it is relevant to refer to the relevant portion of Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which is extracted hereunder;

> ***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.*

(emphasis supplied)

15.3. The proviso to Regulation 30(1)(b) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 states that the **Applicant / Financial Creditor** shall state the reasons justifying withdrawal after issue of Expression of Interest. In the present case, the 'Applicant' denotes the original Petitioning Creditor at whose instance CIRP was triggered i.e. Tourism Finance Corporation of India. It is seen that the original petitioning Creditor viz. Tourism Finance Corporation of India assigned its rights and interests in favour of Phoenix ARC Private Limited during CIRP and accordingly, the RP reconstituted the CoC.

15.4. We see that in Form – FA given by Phoenix ARC Private Limited, sufficient reasons have been adduced by the Applicant / Creditor justifying the withdrawal after issuance of Expression of Interest. The justification mentioned in Form – FA at para 3 is captured herewith.

3. We, the Applicant herein withdraw the application bearing IBA/1459/2019 filed before the Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 for below mentioned reasons.

a. Promoter of Corporate Debtor is paying the entire dues of all the Secured Financial Creditors and Unsecured Financial Creditors immediately upon receipt of the approval by the Adjudicating Authority along with simple interest @ 6% p.a. on the admitted claim amount due to the Secured Lenders to the extent of Rs.25.29 Crores for the period from 6th May 2020 to 31 July 2021;

b. That the aforementioned proposal is higher in value as compared to the Resolution Plans received from the Prospective Resolution Applicants.

c. That the said Section 12(A) proposal has been approved with 100% vote of CoC Members.

15.5. It is well settled that once the reasons have been attributed by the Applicant / Creditor in Form – FA, it is not open to the Prospective Resolution Applicants to question the veracity of the reasoning.

15.6. The CoC in its 19th meeting held on 12.10.2022 has discussed about the Settlement proposal of the promoter and it is observed as follows;

The Chairperson then requested the CoC members to provide him the reasoning to be given to the RAs. Mr. Arun Shah suggested that RAs should be informed that 12A proposal submitted by the promoters deserved a priority consideration and since the promoters have substantiated with the availability of funds, the CoC felt the need to discuss the matter with respect to 12A proposal first and then subsequently with RAs. *He also suggested that RA may be communicated that CoC has got the Resolution plans evaluated by some external agency and the report has come and the CoC is in the process of evaluation pros and cons of each Resolution Plan, therefore CoC need time. To this the Chairperson*

replied that at this stage it is not appropriate to say that the CoC requires further time as the CIRP timelines are coming to a close.

(emphasis supplied)

15.7. The CoC has stated that the Settlement proposal submitted by the promoters deserves a priority consideration and since the promoters have substantiated with the availability of funds, the CoC felt the need to discuss the matter with respect to 12A proposal. The CoC has also given the reasons as to the consideration of the withdrawal application under Section 12A of IBC, 2016.

15.8. Further, the CoC has filed a detailed Affidavit to justify the stand taken in Form – FA by the Applicant Creditor, which is extracted hereunder;

3. There is no merit in the submission that the Committee of Creditors ignored the resolution plans after issuance of expression of interest without any justification. Till the cut-off date 01.08.2022, seven resolution plans were received from Resolution Applicants. The resolution plans were sent for evaluation through an external agency namely BDO India LLP who was appointed by the Committee of Creditors. When the evaluation process was on progress, on 19.09.2022, the Promoter submitted a revised settlement plan under Section 12A of the Insolvency and Bankruptcy Code, 2016.

4. The second Item of the agenda of the 18th meeting of the Committee of Creditors held on 29.09.2022 related to deliberation on the evaluation of the resolution plans by the Committee of Creditors. Since the evaluation report was not received, it was resolved that the evaluation process should be speeded up so that the same can be discussed in the next meeting of the Committee of Creditors. The third item of the agenda related to take note of the 12A proposal submitted by the Promoter. As a matter of fact, in the joint lenders meeting held on 22.9.2022 between the members of the Committee of

Creditors, it was decided to discuss the 12A proposal submitted by the promoter. In the 18th meeting of the Committee of Creditors, the members of the Committee of Creditors debated on the possibilities of consideration of 12A proposal vis a vis the evaluation and consideration of the resolution plan and also discussed its pros and cons. It was submitted on behalf of the promoter that under the 12A proposal, they are offering to settle all the suppliers and even those suppliers whose claims are not filed and admitted including the stakeholders like the shareholders. A request was also made that the 12A proposal should not be treated on par with the resolution plans. It is also relevant to mention that the Committee of Creditors had suggested certain modifications in the settlement proposal

5. The next meeting of the members of the Committee of Creditors was held on 12.10.2022. The members of the Committee of Creditors were conscious of the fact that the Committee of Creditors has to justify as to why 12A proposal was taken for consideration post issuance of expression of interest. After elaborate deliberations and discussions, it was decided to put the 12A proposal to vote. The promoter also agreed to give a modified Bank Guarantee. The members of the Committee of Creditors observed that the 12A proposal deserved a priority consideration especially when the promoter has submitted the availability of funds. It was also observed, that the Resolution Applicants should be informed that the Committee of Creditors in its commercial wisdom decided to put to vote the 12A proposal and that the future course of action would be decided based on its outcome. This decision was taken collectively and unanimously by the members of the Committee of Creditors. The settlement proposal submitted by the promoter under Section 12A of the Insolvency and Bankruptcy Code, 2016 was put for voting. Subsequently, on 31.10.2022, 12A proposal was approved with 100% of the total voting powers of the Committee of Creditors. BDO India LLP has submitted the evaluation report of Resolution plans on 29.09.2022 to all the members of the Committee of Creditors. Therefore, the evaluation report was available with all the members of the Committee of Creditors before they voted on the 12A proposal.

6. Under the settlement proposal which was approved unanimously by all the members of the Committee of Creditors, an amount of Rs. 105 crores

of the settlement proposal was deposited on 11.10.2022. It was also informed that an amended Bank Guarantee from Axis Bank for the balance amount of Rs. 315 crores would be submitted immediately after the members of the Committee of Creditors approves the draft Bank Guarantee. Under the settlement proposal submitted by the Promoter, the entire dues of the banks will be settled along with 6% interest accrued during the CIRP as discussed with the secured creditors. As far as the unsecured creditors including the operational creditors are concerned, they will recover the entire dues as per the books of account of the Corporate Debtor and the dues of the other creditors and other liabilities will also be settled. It was also ensured that the unsecured creditors including the operational creditors will be able to recover their dues in terms of 12A proposal. It was also mentioned that any contingent liability as and when crystalized would be settled in full to mitigate the situation and to protect the livelihood of suppliers. It was also proposed that the Corporate Debtor would continue as a going concern which will provide direct employment to around 800 employees. ***The revival of the company will increase the economic value and at the same will generate future employment. The livelihood of about 250 suppliers and service providers Indirectly associated with the Corporate Debtor through its transporters, security agencies, dealers, vendors, etc., will be safeguarded. There won't be any loss to the exchequer in terms of GST custom duty, Income tax, etc. Valuable foreign exchange earnings will increase and the travellers and the corporate guests will get facilities for stay. It is this proposal which was accepted by all the members of the Committee of Creditors unanimously.***

7. It is evident from the statement that the net value offered by the Intervenor namely Consortium of Sankalp IN (SI) & Globe Ecologistics Pvt. Ltd. is Rs. 270 crores which is the lowest with a payment term from 90 days to 2 years. Similarly, the net value offered by the intervenor Mr. M.K.Rajagopalan is only Rs. 438.86 crores. Since the net value offered by the Intervenors is less than the total amount offered by the Promoter I.e., Rs592.30 crores which is in full settlement of entire liabilities of the Corporate Debtor, there is no merit in any contention raised by the Intervenors herein and their applications for Intervention should be dismissed.

8. It is also submitted that the Committee of Creditors took into account the settlement plan submitted by the Promoter and accepted the same since the said proposal settles all the claims of the secured and the unsecured creditors which includes the operational creditors. The proposal of the promoter is for payment of Rs.592.30 crores of which Rs. 420.00 crores was paid upfront by promoter with Rs105.00 crores by way of deposit in the no-lien account and balance amount of Rs. 315.00 crores was duly supported by bank guarantee which is to be encashed Immediately on receiving the approval given by this Hon'ble Tribunal

9. In the above background, it is submitted that the proposal given by the promoter was approved unanimously by the members of the Committee of Creditors since the said proposal settles all the claims and the proposal was duly supported by deposit of Rs105 crores and the balance amount of Rs. 315.00 crores by way of a Bank Guarantee. Therefore, there is no violation of Section 30-A(1) of the CIRP regulations 2016. The resolution plans given by the resolution applicants stands no comparison with the proposal given by the Promoter. It is also submitted that the Committee of Creditors decided to consider the settlement proposal and voted unanimously and there is no bar for considering the settlement proposal which was deliberated upon and the suggestions made by the Committee of Creditors with regard to change of some of the proposal terms were accepted by the Promoter and a revised proposal was submitted. Therefore, there is no change in the position of the Committee of Creditors on the settlement proposal as alleged. It is further submitted there was no violation of any law In convening and holding of the 18th and 19th meeting of the Committee of Creditors and the same is in accordance with law. The Resolution Applicant has no right to take part in the meeting of the Committee of Creditors.

10. It is submitted that in a catena of judgements it has been held that the commercial wisdom of the CoC is paramount and the legislature has consciously not provided any ground to challenge the commercial wisdom. I further submit that the ultimate object of the IBC is to put the Corporate Debtor back to rails. I submit that the Petitioners in the Intervention Petition Nos. 7 and 12 of 2023 who are only the Resolution Applicants are not stake

holders and they have no locus standi to challenge the decision of the CoC which in its commercial wisdom has approved the 12 A proposal of the Promoter with 100% voting. I submit that the Intervening Petitioners are not stake holders or aggrieved persons to maintain the above Intervention Petitions

11. For the reasons mentioned above, it is humbly prayed that this Hon'ble Tribunal may be pleased to dismiss the present Intervention Petition Nos. 7 and 12 of 2023 in I.A. No. 1410/CHE/2022 in IBA/1459/2019 and allow the IA 1410/22 filed under Sec-12A of IBC filed and thus render justice.

15.9. The aforesaid Affidavit filed by the CoC supports the stand of the Applicant Creditor in adducing reasons for withdrawal of the Application after issuance of Expression of Interest.

15.10. In the Affidavit filed by the CoC, it is stated that the CoC has compared the Resolution Plan amount offered by the Resolution Applicants to the settlement proposed by the Promoter of the Corporate Debtor and stated that the net value offered by the Intervenors is less than the total amount offered by the Promoter i.e., Rs.592.30 crores which is in full settlement of entire liabilities of the Corporate Debtor.

15.11. In the Settlement proposal given by the Promoter, the dues of all the stakeholders are being settled in full. Even the interest of last person standing in the queue viz. the preference shareholders and equity shareholders, under the waterfall mechanism of Section 53 of IBC, 2016, are being protected under the Settlement proposal

of the promoter. When the entire dues are being paid in full without any haircut to the stakeholders, there cannot be any comparison made to the Settlement proposal of the promoter under Section 12A with the Resolution Plan of the PRAs.

15.12. Thus, we are of the view that the Applicant / Creditor has adduced sufficient reasons, justifying the withdrawal of CIRP after issuance of Expression Interest and after receipt of Resolution Plan.

15.13. Accordingly, issue no. (iii) is answered.

16. <u>ISSUE NO. (IV)</u>

16.1. The Issue no. (iv) is *"whether non-compliance of Regulation 30A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 would amount to illegality or irregularity."*

16.2. The bone of contention of the Learned Senior Counsels for the Prospective Resolution Applicants is that Regulation 30A was given a total go by and the RP never placed the Form – FA before the CoC for its consideration. It was contended that the said Form FA is required to be voted by the CoC with a majority of 90%, which is not done in the present case. In fact, Form – FA was obtained only after the CoC voted for withdrawal of Application under Section 12A of IBC, 2016. Hence Form – FA, which is placed before this Tribunal itself is a fraud.

16.3. In order to address this issue, we find it apt to refer to Regulation 30A of IBC, 2016 which is 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-I 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.

16.4. On an analysis we find that in Regulation 30A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016, the following steps are prescribed;

(i) The Application shall be made under Form – FA accompanied by a Bank Guarantee

(ii) The CoC has to consider the Application (Form – FA) within a period of 7 days.

(iii) The said Application (Form – FA) has to be approved by the CoC with 90% voting share.

(iv) The RP shall submit the Application (Form – FA) along with the approval of the CoC to the Adjudicating Authority within a period of 3 days.

(v) The Adjudicating Authority may, by order approve the Application (Form – FA)

16.5. The procedure prescribed under Regulation 30A of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 *vis-à-vis* the compliances made by the Applicant / RP are tabulated hereunder;

REGULATION	**COMPLIANCE**	**REMARKS**
(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;	**NOT APPLICABLE**	
(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:	**YES**	
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.	**YES**	Petitioning Creditor has given justification for withdrawal of Application after issue of EoI in Form – FA.

(2) The application under sub-regulation (1) shall be made in Form FA of the Schedule-I 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).*	**NOT APPLICABLE** **NOT APPLICABLE**	Since the entire CIRP cost is being paid in full, the issuance of Bank guarantee does not arise
(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.	**NOT APPLICABLE**	
(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.	**NO**	Only the **Settlement Proposal** of the Promoter was considered by the CoC on 12.10.2022 and **not the Application of the Applicant** *(Form FA)*
(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.	**NO**	CoC with 100% voting share approved only the **Settlement proposal** on 31.10.2022 and **not the Form FA.**

16.6. Thus, from the above table it is clear that the CoC has effectively considered the Settlement proposal of the promoter in the 19th CoC meeting and voted unanimously. However, no voting *per se* has been done in relation to Form FA.

16.7. While considering the Applications under Section 12A of IBC, 2016, at first, the CoC effectively approves the settlement proposal. Only after the settlement proposal given by the promoter is found to be satisfactory to the CoC and it passes the muster of 90% voting share, the withdrawal application under Section 12A of IBC, 2016 is filed. The Form FA is a *pro forma* application, which is required to be submitted before this Adjudicating Authority with the CoC approved settlement proposal under Section 12A of IBC, 2016.

16.8. Regulation 30A prescribes the set of procedure for withdrawal of Application under Section 12A of IBC, 2016. This is nothing but a set of procedural rules. All the rules of procedure by themselves are to aid the Tribunal which is exercising its judicial power to render justice. Procedure rules are a hand-maiden to justice and should never be made a tool to deny justice or perpetuate injustice. Procedural defects or irregularities which are curable should not be allowed to defeat the substantive rights or to cause injustice.

16.9. In the present case, the CoC by way of filing Inv.P(IBC)/10(CHE)/2023 has categorically stated that they wanted to withdraw the CIRP proceedings as against the Corporate Debtor.

16.10. Another issue raised was that two Form – FAs were filed by the RP in the present Application one dated 11.10.2022 and another dated 01.11.2022 and both of them were not placed before the CoC.

16.11. In this regard the approach adopted by the Hon'ble Apex Court and also by the Appellate Tribunal in dealing with the Applications filed under Section 12A of IBC, 2016 read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, since its inception, are discussed hereunder;

EVOLUTION OF SECTION 12A OF IBC, 2016

16.12. After the advent of IBC, 2016 the CIRP against the Corporate Debtors were initiated by the Adjudicating Authority under Section 7, 9 and 10 of IBC, 2016. Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides for withdrawal of an Insolvency Application before admission;

> *"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."*

16.13. However, the IBC, 2016 was silent on the aspect whether an application after admission can be withdrawn or settled by the Corporate Debtor. This issue arose for the first time before the Hon'ble NCLAT in the case of **Mother Pride Dairy India Pvt. Ltd. v. Portrait Advertising & Marketing Pvt. Ltd**; in *Company Appeal (AT) (Ins) No.94 of 2017*, where the Hon'ble NCLAT while interpreting Rule 8 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 held *" …once an application is admitted, it cannot be withdrawn even by the Operational Creditor, as other creditors are entitled to raise claim pursuant to public announcement under Section 15 read with Section 18 of the I&B Code, 2016."* The Hon'ble NCLAT was thus of the view that post initiation of Corporate Insolvency Resolution Process of the Corporate Debtor, all the creditors are eligible to join the process of resolution and the satisfaction of debt of the Applicant Creditor alone is not enough to permit withdrawal / settlement, and any decision to settle has to be taken collectively by all the creditors.

16.14. An appeal against the said decision of the NCLAT was preferred. The Honourable Supreme Court while setting aside the decision of Hon'ble NCLAT accepted the settlement between the applicant creditor and the corporate debtor by exercising its plenary power under Article 142 of the Constitution of India **Mother Pride Dairy India Pvt. Ltd. v. Portrait Advertising & Marketing Pvt. Ltd.,** *Civil Appeal No. 9286 of 2017)*

16.15. Similar issue arose again before the Hon'ble Supreme Court in the matter of **Lokhandwala Kataria Construction Limited v. Nisus Finance and Investment Managers, LLP** in *Civil Appeal No. 9279 of 2017* where the Financial Creditor approached Hon'ble NCLAT for withdrawal of Section 7 application on account of an out-of-court settlement with the Corporate Debtor post admission of the Section 7 application by the NCLT. The Hon'ble NCLAT held that such a settlement cannot interfere with the order of the NCLT admitting the Application in the absence of any infirmity in the admission process. Hon'ble NCLAT did not deem this to be a fit case for exercise of its inherent powers under Rule 11 of the NCLAT Rules, 2016. Thereafter, Hon'ble Supreme Court recorded the out-of-court settlement and disposed of the Appeal.

16.16. Since number of similar appeals had been filed before the Honourable Supreme Court praying for the exercise of its inherent powers under Article 142 of the Constitution of India, the Apex Court noted that there was a lacunae in the Code and the attendant Regulations. The Honourable Supreme Court directed the Competent Authority to amend the law. The Hon'ble Supreme Court made the following observations in the case of **Uttara Foods and Feeds Private Limited v. Mona Pharmachem** in Civil Appeal No. 18520 of 2017;

> *"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 agreement has been reached."

16.17. As a direct consequence of the observations of the Honourable Supreme Court in **Uttara Foods** *(supra),* the Insolvency Law Committee was formed on 16.11.2017 to examine relevant issues in the administration of the Corporate Insolvency Process *qua* tasked with recommending a solution for the issues relating to withdrawal of an insolvency application post its admission. The Committee presented its report in the month of March 2018 which analyses the aspect of settlement post admission of an Insolvency Petition in detail. The Report concludes that the proceeding post admission is not an individual one but a collective one. Therefore, any settlement and consequential withdrawal of insolvency proceedings have to be taken by the CoC collectively.

16.18. Thereafter, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated on June 06, 2018. The Ordinance inserted Section 12A in the Code which provides for withdrawal of insolvency applications after they have been admitted by the Adjudicating Authority.

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 CoC, in such manner as may be specified

16.19. In order to complement Section 12A of IBC, 2016, Regulation 30 A of the Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Regulations), 2016 was inserted with effect from 04.07.2018. The Regulation 30A which was prevalent as on 04.07.2018 is extracted hereunder;

> ***"30A. Withdrawal of application.***
>
> *(1) An application for withdrawal under section 12A 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)."*

16.20. As per the earlier Regulation 30A, a withdrawal application under Section 12A of IBC, 2016 could be only be filed before the issuance of Expression of Interest under Regulation 36A.

JUDICIAL PRECEDENCE OF HON'BLE SUPREME COURT IN DEALING WITH WITHDRAWAL APPLICATIONS UNDER SECTION 12A OF IBC, 2016.

16.21. After insertion of Regulation 30A Insolvency Bankruptcy Board of India (Insolvency Resolution Process for Corporate Regulations), 2016 with effect from 04.07.2018, a settlement post admission of CIRP was rejected by the Adjudicating Authority on the ground that the said settlement was made after the issuance of Expression of Interest. The Hon'ble Supreme Court in the matter of **Brilliant Alloys Pvt. Ltd. v. Mr. S. Rajagopal** in Civil Appeal SLP (Civil) No. 31557/2018 while dealing with the said Regulation 30A, held as under;

> *"The only reason why the withdrawal was not allowed, though agreed to by the Corporate Debtor as well as the Financial Creditor -State Bank of India and the Operational Creditor-Respondent No.3, is because Regulation 30A states that withdrawal cannot be permitted after issue of invitation for expression of interest.*
>
> *According to us, this Regulation has to be read along with the main provision Section 12A which contains no such stipulation.*
>
> ***Accordingly, this stipulation can only be construed as directory depending on the facts of each case**.*
>
> *Accordingly, we allow the Settlement that has been entered into and annul the proceedings.*
>
> *The Special Leave Petition is disposed of accordingly."*

16.22. While that being the case, the Constitutional Validity of Section 12A was challenged before the Hon'ble Supreme Court in the case of **Swiss Ribbons v. Union of India;** *2019 (4) SCC 17*. The Hon'ble Supreme Court uphled the constitutional validity of Section 12A, and held in para 79 to 83 as under;

> ***Section 12-A is not violative of Article 14***
>
> ***79.*** *Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. It reads as follows:*
>
> > *"**12-A. Withdrawal of application admitted under Sections 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."*
>
> ***80.*** *The ILC Report of March 2018, which led to the insertion of Section 12-A, stated as follows:*
>
> > *"29.1. Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP, (2018) 15 SCC 589] ; Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P) Ltd. [Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P) Ltd.,*

2017 SCC OnLine SC 1789] ; Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem [Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587]]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLRC Report, that the design of the Code is based on ensuring that "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 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.

29.2. On a review of the multiple NCLT and Nclat judgments in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On this basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage [as observed by the Hon'ble Supreme Court in Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem [Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587]] and even otherwise, as the issue can be specifically addressed by amending Rule 8 of the CIRP Rules."
(emphasis in original)

Before this section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT.

81. *Regulation 30-A of the CIRP Regulations states as under:*

> *"**30-A. 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 36-A.*
> *(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 per cent 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 (P) Ltd. v. S. Rajagopal [Brilliant Alloys (P) Ltd. v. S. Rajagopal, 2018 SCC OnLine SC 3154] , has stated that Regulation 30-A(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 36-A.

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.

(emphasis supplied)

16.23. Thereafter, the Hon'ble NCLAT in the matter of **Arjun Puri v. Kunal Prasad** in *Company Appeal (AT)(Ins) No.52 of 2019*, by relying upon the judgment of the Hon'ble Supreme Court in the case of Swiss Ribbons (SC) set aside the order of admission passed under Section 7 of IBC, 2016 on the ground that the parties have **entered into a settlement**.

16.24. Further, in the matter of **Krishna Kumar Mintri v. Kamlesh Kumar Singhania** in Company Appeal (AT)(Ins) No. 456 of 2018, the Hon'ble NCLAT **allowed the settlement** between the parties since the Punjab National Bank who was the sole Financial Creditor gave its consent to the settlement after the Resolution Plan was submitted.

16.25. In the light of the above judicial pronouncements, the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was amended, vide Notification dated 25.07.2019, to allow withdrawal of application under section 7, 9 and 10 of the Code at any time; (a) one before the constitution of the CoC and (b) after constitution of the CoC and issuance of expression of interest. The amended regulation further mandates the requirement of the bank guarantee in support of the application made under Form FA for the withdrawal, both for application filed prior to the constitution of the CoC and one filed after constitution of the CoC. The amended Regulation 30A dated 25.07.2019 is extracted hereunder;

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-I 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.

16.26. The Hon'ble Supreme Court in the matter of **Vallal RCK v. Siva Industries & Holdings Ltd.** *(2022) 9 SCC 803* held as under;

21. *This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. A reference in this respect could be made to the judgments of this Court in K. Sashidhar v. Indian Overseas Bank [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] , Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] , Kalpraj Dharamshi v. Kotak Investment Advisors Ltd. [Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401 : (2022) 1 SCC (Civ) 233] and Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd. [Jaypee Kensington Boulevard Apartments*

Welfare Assn. v. NBCC (India) Ltd., (2022) 1 SCC 401 : (2022) 2 SCC (Civ) 165]

22. *No doubt that the aforesaid observations have been made by this Court while considering the powers of the CoC while granting its approval to the resolution plan.*

23. ***As already stated hereinabove, the provisions under Section 12A IBC have been made more stringent as compared to Section 30(4) IBC. Whereas under Section 30(4) IBC, the voting share of CoC for approving the resolution plan is 66%, the requirement under Section 12-A IBC for withdrawal of CIRP is 90%.***

24. ***When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, in our view, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules****.*

25. *In the present case, the proceedings of the 13th, 14th and 15th meetings of CoC would clearly show that there were wide deliberations amongst the members of the CoC while considering the settlement plan as submitted by the appellant. Not only that, the proceedings would also reveal that after suggestions were made by some of the members of the CoC, suitable amendments were carried out in the settlement plan by the appellant. One of the members of the CoC having voting share of 23.60%, though initially opposed the settlement plan, subsequently decided to support the same. Accordingly, NCLT itself, vide order dated 29-3-2021 [IDBI Bank Ltd. v. Siva Industries & Holdings Ltd., 2021 SCC OnLine NCLT 498] , directed the RP to reconvene the CoC meeting. As per the directions of NCLT, on 1-4-2021, the 17th meeting of the CoC was reconvened, wherein the settlement plan was approved by 94.23% votes.*

26. ***It is thus clear 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. We are therefore of the considered view that***

neither the learned NCLT nor the learned NCLAT were justified in not giving due weightage to the commercial wisdom of CoC.

27. *This Court has, time and again, emphasised the need for minimal judicial interference by NCLAT and NCLT in the framework of IBC. We may refer to the recent observation of this Court made in Arun Kumar Jagatramka v. Jindal Steel & Power Ltd. [Arun Kumar Jagatramka v. Jindal Steel & Power Ltd., (2021) 7 SCC 474] : (SCC p. 533, para 95)*

> *"95. … However, we do take this opportunity to offer a note of caution for NCLT and NCLAT, functioning as the adjudicatory authority and appellate authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, 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 IBC."*
>
> *(emphasis supplied)*

16.27. Hon'ble Supreme Court in the matter of **Amit Kaytal v. Meera Ahuja and Others** in *Civil Appeal No. 3778 of 2020* while dealing with withdrawal of Application under Section 12A of IBC, 2016 has held as under;

> *6. As observed hereinabove, immediately on constitution of COC, this Court has stayed the impugned order. No further steps are taken by the IRP/COC pursuant to the admission of the CIRP proceedings except the IRP was appointed and the COC was constituted. Under Section 12A of the IBC which has been inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018, 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 COC, in such manner as may be specified. The rationale behind the insertion of Section 12A is contained in the Insolvency Law Commission Report, which is as under:

> *"29.1 Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted. [….] Thus, it was agreed that once 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."*

7. ***It is true that the procedure for preferring an application under Section 12A of the IBC is contained in Regulation 30A of the CIRP Regulations, 2016. However, as per the decision of this Court in the case of Brilliant Alloys Pvt. Ltd. v. S. Rajagopal, 2018 SCC Online SC 3154, the said provision is held to be directory, depending on the facts of each case.***

7.1 In the case of Swiss Ribbons Pvt. Ltd. (supra), it is held that at any stage before a COC is constituted, a party can approach NCLT/Adjudicating Authority directly and the Tribunal may in exercise of its powers under Rule 11 of the NCLT Rules, allow or disallow an application for withdrawal or settlement. Therefore, in an appropriate case and where the case is being made out and the NCLT is satisfied about the settlement, may permit/allow an application for withdrawal or settlement.

(emphasis supplied)

16.28. The Hon'ble Supreme Court in the matter of **Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp**

Solutions Limited & Anr; *(2022) 2 SCC 401* while dealing with the withdrawal of Applications under Section 12A of IBC, 2016 in para 156 has held as under;

> ***156.*** *Since the aim of the statute is to preserve the interests of the corporate debtor and the CoC, it was recognised that settlements between the corporate debtor and the CoC may be in the best interests of all stakeholders since insolvency is averted.*
>
> ***156.1.*** *Two decisions of two-Judge Benches of this Court in Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance & Investment Managers LLP [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance & Investment Managers LLP, (2018) 15 SCC 589] and Uttara Foods & Feeds (P) Ltd. v. Mona Pharmachem [Uttara Foods & Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587] , (prior to the insertion of Section 12-A which enabled withdrawal of the CIRP on account of settlement between the parties), had refused to effectuate this remedy by exercising inherent powers of the adjudicating authority under Rule 11 of the NCLT Rules, 2016 or the power of parties to make applications to the adjudicating authority under Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.*
>
> ***156.2.*** *In Uttara Foods [Uttara Foods & Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587] this Court had granted a one-time relief under Article 142 of the Constitution since all the parties were present before it and had presented it with signed consent terms. This course of action, in refraining from the exercise of inherent powers to effect procedures and remedies that were not specifically envisaged by the statute, was explicitly affirmed by the Insolvency Law Committee Report dated March 2018 which proceeded to suggest amendments to IBC and recommended a ninety per cent voting threshold by the CoC for withdrawals of a CIRP and a specific amendment to Rule 8 of the then existing CIRP Rules to enable parties to file such applications. This report led to the insertion of Section 12-A which vested the CoC with the power to withdraw the CIRP or vote on such withdrawal, if sought by the corporate debtor. This provision was introduced*

with retrospective effect on 6-6-2018. Significantly, no such exit routes have been contemplated for the resolution applicant. ***It is relevant to note that the newly inserted and then unamended Regulation 30-A (w.e.f. 4-7-2018) of the CIRP Regulations stipulated that withdrawal under Section 12-A can be allowed through submitting an application to the IRP or RP (as the case may be) before the invitation for EoI is issued to the public. The CoC was to consider the application within seven days of its constitution and an approval for such application required approval of the ninety per cent of the voting share of the CoC.***

156.3. *However, on 14-12-2018, a two-Judge Bench of this Court, held in Brilliant Alloys (P) Ltd. v. S. Rajagopal [Brilliant Alloys (P) Ltd. v. S. Rajagopal, (2022) 2 SCC 544] that Regulation 30-A is directory, and not mandatory in nature since Section 12-A IBC does not stipulate a deadline by which a withdrawal from the CIRP can be made.* ***Thus, in exceptional cases withdrawals from the CIRP under Section 12-A IBC could be permitted even after the invitation of EoI has been issued. Regulation 30-A of the CIRP Regulations was then amended by the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2019, w.e.f. 25-7-2019 to reiterate the decision of this Court. The newly amended provision allows for withdrawals even after the invitation for expression of interest has been issued, provided that the applicant states the reasons justifying such withdrawal.***

(emphasis supplied)

16.29. Upon perusal of the aforesaid catena of judgments rendered by the Hon'ble Supreme Court in relation to withdrawal of Applications under Section 12A of IBC, 2016 it is evident that a liberal approach has been made both by Hon'ble NCLAT and by Hon'ble Supreme Court. The Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is time and again held to be **directory** and not mandatory.

16.30. In the present case, we see that in the 19th CoC there was a discussion on the settlement proposal submitted by the promoters of the Corporate Debtor under Section 12A of IBC, 2016. The said proposal was discussed as Agenda Item No. A.2 and the same is extracted hereunder;

> ***Agenda Item No. A.2 To discuss and put to vote the settlement proposal submitted by promoters under section 12A if approved by COC.***
>
> *The Chairperson apprised that settlement proposal put forth by the promoters was discussed in the last COC meeting and the COC had sought certain modifications and clarifications in the said settlement proposal. The Chairperson then requested the COC members and promoters to continue their discussion.*
>
> *Mr. Suresh from Phoenix ARC enquired about Rs. 105 crores deposit made by the promoters into the Indian Bank in the name of a third party. To this Mr. Srinivasalu, from Indian Bank confirmed that a deposit of Rs. 105 crores have been made and lien has been marked in the name of Resolution Professional of Appu Hotels Ltd. Mr. Suresh then asked whether the account is in the name of a third party. To this Mr. Srinivasalu confirmed that account is in the name of a third party (Iheart private limited),but lien has been marked in the favour of Resolution Professional of Appu Hotels Ltd.*
>
> *Mr. Ajay from State Bank of India emphasized that it was decided, that the money will be deposited in a no lien account and the deposit should be with a lead bank or any other bank of the consortium. He further enquired whether any commitment letter has been received from Iheart Properties Private Limited. Mr. Srinivasalu confirmed that letter has come from Iheart private limited (Iheart).*
>
> *Mr. Suresh requested the Chairperson to shed some light on the issue with reference to legal compliance. The Chairperson explained that as far as*

proposal under12A and role of RP under the Code is concerned there is no requirement for funds verification as 12A is withdrawal application that required 90 percent approval of the COC, therefore, the entire onus is placed on COC. He further explained that 12A plan is different from resolution plan. In a resolution plan, the RP has to do compliance check under various provisions of the Code and regulations, however, under a12A plan, it is purely left to the commercial wisdom of the CoC. He emphasized that role of COC is very important in 12A as a justification has to be given to the NCLT by the applicant as to why 12A settlement is taking place post issuance of expression of interest. The only requirement is that the promoters / directors have to provide a bank guarantee for CIRP cost, hence question raised by Mr. Suresh is a pure risk-based question that has to be assessed by him as an individual COC member and as an applicant.

Mr. Navin Sambtani from IDBI Trusteeship sought clarification on similar issue. He submitted that since the money has been deposited into the account of Iheart, is there anything else apart from lien being marked in the name of RP to make this fairly irrevocable in favour of the intended end uses or the COC will have to wait for specific instructions from Iheart to allow the funds to be used for the intended purpose.

Mr. Srinivasalu from Indian Bank apprised that they have asked the branch not to give the original receipt. Original receipt will be retained by the Bank in addition to the lien marked. He further apprised that they have received a very clear and detailed letter from Iheart instructing that the funds are to be used for the 12A proposal of the Promoters of Appu Hotels Limited.

Mr Ajay of SBI, emphasized that the instructions were very clear with respect to deposit of money into no lien account, however, despite the instructions the money has been deposited into the account of Iheart. Mr. Srinivasalu confirmed that it is as good as no lien account backed by commitment letter issued by Iheart. It was mutually agreed between the COC members that Indian Bank will issue a confirmation that the money is at the disposal of COC represented by the RP. To this Indian Bank requested the COC members to go through the letter issued by Iheart where these issues have been dealt with.

The letter issued by Iheart was shared by Indian Bank on the screen. Mr Ramachandran from Prabhat Resources, pointed out that the forfeiture clause is missing in the letter and the same must be communicated to Iheart, that in case of any breach, the amount deposited shall be liable to be forfeited. Mr Ajay, questioned that in whose favour the title deeds will be released after approval of settlement, Iheart or the borrower? As the point no 7 in the letter refers to wording as "us" which means to indicate it is Iheart and the same needs to be clarified by the Promoters.

Mr. Navin Sambtani, pointed out that most important question to consider right now is that is the COC comfortable with other clauses of the letter with respect to the fact that this is a no lien account and only specifically meant for a particular purpose. And after this the COC can come to the issue of release of documents.

Mr. Ajay from State Bank of India emphasized that as per SBI's instructions the amount was supposed to be deposited into a no lien account and India Bank had also conveyed that it will be transferred to a no lien account. He further emphasized that he will have to get it examined from the legal department of SBI as to whether this mechanism will work or not for SBI, and then only SBI can give its approval.

Mr. Periasamy, promoter of Corporate Debtor, while addressing the issue of release of security submitted that once the dues of the creditors are cleared, they can release the security documents in favour of the new lenders also.

Mr. Suresh from Phoenix ARC asked whether Section 186 of Companies Act is applicable to this. To this the promoter, Mr. Periasamy, replied that private limited companies are exempted from the applicability of Section 186 of Companies Act and clarified that the sponsor is a private limited company.

Mr. Navin enquired from the promoter that whether the funds will be directly infused by Iheart to Appu Hotels as borrower or it will be given directly to the promoters who will then infuse the money into Appu Hotels after plan approval. To this the promoter clarified that it will be a deemed loan for Appu

Hotels Ltd and the same will be regularised through compliance once the 12A proposal is approved by the CoC and NCLT.

Mr. Suresh from Phoenix, requested the Chairperson to check the applicability of Section 186 of Companies Act just to make sure that the transaction is not ultra vires. Mr. Navin opined that since this 12A issue is incumbent on COC, the whole authorization of loan coming directly from Iheart needs to be checked externally through some law firm.

Mr. Periasamy assured the COC members that they will comply with all the necessary authorizations required for disbursement of money from Iheart, and agreed to give a separate undertaking in this regard as a shareholder and promoter of Appu Hotels Limited. He further urged the CoC members to consider the proposal favourably, given that he and his team have worked hard to put up this proposal to retain the business of the CD and he has the backing of majority of the shareholders.

Mr. Suresh from Phoenix ARC opined that as COC members it is their duty also to check the pre-requirement and do the ring fencing to ensure that the COC is taking steps in the right direction and in accordance with law so as to avoid any legal infirmity in the future.

Mr. Navin advised that the process can be started with the submission of undertaking letter by Mr. Periasamy within 2-3 days and in the meantime the COC will put its own mind on the specific requirements for authorizations which the COC will ask Mr. Periasamy to comply with.

The Chairperson reminded the COC members that today's meeting was convened for taking certain decisions on 12A proposal and if not the CoC should consider the Resolution plans which are under evaluation by the CoC. He further emphasised as we ran out of time in the CIRP, it is important for the CoC to decide in this meeting, if they are going to put the 12 A proposal to vote and if not, the Resolution plans evaluation may be taken up by the CoC and we can't convene another CoC meeting to decide that, given that we are on a very tight timelines and any decisions taken after today is subject to

the approval of the Adjudicating Authority and hence CoC members should keep that in consideration.

Mr. Arun Shah from Aryav Exports emphasized that the promoters have complied with the requirements as stipulated by COC in the last COC meeting. He further emphasized that discussions of today's meeting are additional and involves technical issues which needs to be safeguarded and for that the promoters are ready to furnish undertakings. He then requested the COC members to stipulate the requirements in writing and hand it over to the promoter so that the promoter complies with the requirements and the process will move faster. He also emphasized that money is now available for disbursement the moment the COC and NCLT approves the 12A settlement proposal.

Mr Srinivasalu of Indian Bank, agreed with the submissions of Mr. Arun Shah and requested the Chairperson to put the 12A settlement proposal to vote. Mr. Suresh opined that the 12A proposal can be put to vote and the final filing can be done subject to regulatory compliance.

Mr. Navin also opined that settlement proposal, be put to vote and the promoter to also furnish the necessary undertaking and further authorisations as stipulated by the CoC members and the same can be examined and decided by the CoC members, before they vote.

Mr. Rishi Gupta of IDBI Bank, pointed out that there is one additional letter for amendment in the bank guarantee and the last clause of the said letter is with respect to extension of bank guarantee i.e.,upon approval of 12A proposal by COC the validity of bank guarantee will extend prior to one month before expiry and if the renewed bank guarantee is not submitted within the stipulated time it can be invoked by the RP on instructions of the COC with 51% of the mandate and for such invocation NCLT order is not required. Mr. Rishi then asked why instructions of COC is required for invocation of bank guarantee and the same shall be allowed to be invoked by RP upon failure by the promoters. He further pointed out that once the plan is approved there is no question of coming back to COC for a mandate of 51%.

To this Mr. Sennimalai, MD of the CD replied that once the proposal is approved money will be deposited and in case the money is not deposited the bank guarantee can be revoked. It is clearly stated in the document that if the money is not deposited and the validity of bank guarantee is not extended then the banks will be at liberty to revoke it.

Some of the COC members opined that it is a draft proposal and if there is any technical issue or any amendment or modification is required in the draft proposal, the same can be suggested to the promoters and accordingly they can get it amended.

Mr. Periasamy agreed with the view of COC members and requested them to give the proposed amendment / modifications in writing and they will amend the proposal and send it to the COC.

Mr. Ajay from SBI agreed with the opinion of Mr. Rishi and opined that there should not be any requirement to seek instructions from COC to invoke bank guarantee. RP should be authorized to invoke the BG without coming back to anybody.

Mr. Periasamy and others agreed to remove the said clause from the proposal.

Mr. Kaliannan, representing the CD, submitted that rest of the clauses of the BG will remain same and they will amend the BG with the suggested changes.

Mr. Ajay from SBI requested for a confirmation from Indian Bank on the issue. Indian Bank opined that let the promoters remove the clause as mentioned by the COC and submit it and the same will be circulated among COC members.

Mr. Arun Shah then asked all the COC members to confirm whether the COC is fine with removal of the clause from BG and submission of amended BG by the promoters.

The Chairperson asked the COC members when can he open the voting lines for voting on 12A settlement proposal. To this Mr. Ajay opined that voting lines can be opened after circulation of minutes by the RP. The Chairperson proposed that voting lines may be opened from 14.10.2022 till 21.10.2022, if fine with all the COC members.

Mr. Srinivasalu enquired from the promoters when can they expect the modified bank guarantee to come. To this Mr. Periasamy replied they need 1-2 days' time to submit the modified BG.

The Chairperson then requested the COC members to provide him the reasoning to be given to the RAs. Mr. Arun Shah suggested that RAs should be informed that 12A proposal submitted by the promoters deserved a priority consideration and since the promoters have substantiated with the availability of funds, the COC felt the need to discuss the matter with respect to 12Aproposal first and then subsequently with RAs. He also suggested that RA may be communicated that COC has got the resolution plans evaluated by some external agency and the report has come and the COC is in the process of evaluating pros and cons of each resolution plan therefore COC need time. To this the Chairperson replied that at this stage it is not appropriate to say that the CoC requires further time as the CIRP timelines are coming to a close.

Mr. Ajay suggested that RAs should be informed that while COC was evaluating resolution plans a12A proposal from the promoter is received and the COC decided to examine the same.

Mr. Navin affirmed the suggestion made by Mr. Ajay and added while COC was evaluating the resolution plans submitted by RAs, a 12A proposal from the Promoter is received, and the COC in its commercial wisdom decided to evaluate the 12A proposal. He further suggested that RAs should be informed that COC in its commercial wisdom has decided to put to vote the 12A proposal and any further course of action will be decided based on this outcome. The other CoC members concurred with the suggestion and requested the RP to take note, that this is the collective decision of the CoC.

Resolution for Voting by the CoC

"Resolved that *the settlement proposal submitted by Mr. Palani G Periasamy (Promoter) under Section 12A of the IBC, 2016 which was placed before the COC for discussion and approval in the nineteenth COC meeting held on 12.10.2022 is hereby approved."*

(The above Resolution of the Promoter for settlement under Section 12A of the IBC,2016, which was put to vote on 14.10/2022 to 31/10/2022 is approved with 100% of the Total voting powers of the CoC.

Result of the Resolution, Post Voting ended on 31/10/2022 at 10 PM

The above resolution is being put to vote from 14/10/2022 12 PM till 21/10/2022 11.59 PM and based on the result of this voting, the post voting minutes will be updated and sent to the CoC.)

The Voting results and the approval sheet from the E-Voting is sent to the CoC separately.

CIRP Expenses Ratification

RP informed that he had mailed to the CoC, the summary of the CIRP expenses from 05.05.2020 to 30/09/2022 which is Rs 4,14,50, 885 and highlighted the key expenses for the period from 31/07/2022 to 30/09/2022 and the same is taken as ratified at this CoC meeting.

VOTE OF THANKS

As there was no other matter for discussion, the CoC concluded the meeting with a vote of thanks to everyone by the Chairperson.

16.31. On a careful perusal, we find that the CoC has extensively discussed about the settlement proposal of the promoter and also enquired about the deposit made by the promoter in the Indian Bank in the name of a third party. Discussions were also

made in relation to the funds being infused by *'iHeart'* to the Corporate Debtor.

16.32. The CoC also deliberated on the issue as to whether they want to proceed with the evaluation of the Resolution Plans or go ahead with the voting of 12A proposal and thereafter the CoC took a collective decision to go ahead and put the settlement proposal to vote. At the cost of repetition, the relevant portion is extracted hereunder;

> ***"Mr. Navin affirmed the suggestion made by Mr. Ajay and added while COC was evaluating the resolution plans submitted by RAs, a 12A proposal from the Promoter is received, and the COC in its commercial wisdom decided to evaluate the 12A proposal. He further suggested that RAs should be informed that COC in its commercial wisdom has decided to put to vote the 12A proposal and any further course of action will be decided based on this outcome. The other CoC members concurred with the suggestion and requested the RP to take note, that this is the collective decision of the CoC."***
>
> *(emphasis supplied)*

16.33. It is also noted that the RP on 18.10.2022 had sent an email to the Prospective Resolution Applicant stating that the proposal of the promoter under Section 12A of IBC, 2016 is under consideration by the CoC. The sample e-mail sent to one of the PRAs is extracted hereunder;

Annexure - R2

Gmail rp appu <rp.appuhotels@gmail.com>

Resolution Plan, Appu Hotels- CIRP Update

rp appu <rp.appuhotels@gmail.com> Tue, Oct 18, 2022 at 10:41 AM
To: rajagopalan mk <mkrdirect@gmail.com>

Dear Sir,
We refer to the Resolution Plan submitted by you for Appu Hotels Ltd. While the CoC was evaluating the same and had also appointed an agency to assist the CoC in that process, a 12 A proposal from the Promoter was received by the CoC and the CoC in their commercial wisdom decided to consider the proposal and the same is being put to vote currently by the CoC based on their commercial wisdom and any future course of action will be decided based on this outcome. It is also reminded that whatever outcome is still subject to the SC decision which was reserved for order on 16/03/2022.

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Regards,
Radhakrishnan Dharmarajan
Resolution Professional
Appu Hotels Limited.
(IBBI/IPA-001/IP-P00508/2017-18/10909)

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Resolution Professional
Appu Hotels Limited.
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16.34. Considering the totality of the circumstances, we are of the view that this collective decision of the CoC to go ahead with the evaluation of 12A proposal is **non – justiciable**.

16.35. Further, the Settlement proposal of the promoter was put to vote from 14.10.2022 12PM till 21.10.2022 11.59 PM. The said voting line was extended based upon the request made by State Bank of India till 31.10.2022. It is seen that the CoC approved the settlement proposal of the promoter under Section 12A of IBC, 2016 with **100%** voting.

16.36. Thus, from perusal of the aforesaid minutes, it is clear that the CoC has unanimously accepted the settlement proposal

made by the promoters of the Corporate Debtor. In such a scenario, once a settlement proposal of the promoter of the Corporate Debtor is accepted, the logical conclusion would be to release the said Corporate Debtor from the rigors of CIRP and not to raise any hyper-technical grounds that the process prescribed under Regulation 30A was not meticulously followed.

16.37. As already alluded *supra*, the Hon'ble Supreme Court and Hon'ble NCLAT have time and again held that Regulation 30A is directory, and not mandatory. At this juncture, we find it significant to refer to the decision of Hon'ble NCLAT in the matter of **K. Srinivas Krishna v. Shyam Arora,** *2021 SCC OnLine NCLAT 3298* wherein the Hon'ble NCLAT allowed withdrawal of CIRP, even where Form FA was refused to be issued by the Applicant Creditor at whose instance the CIRP was initiated.

16.38. Further, the Hon'ble NCLAT in the matter of **Piya Puri v. Debhashish Nanda,** *2022 SCC OnLine NCLAT 4006* observed as under:

> *"15. ……Be that as it may, while it is important to maintain the sanctity and credibility of CIRP proceedings, it is equally important to ensure that hypertechnicality is not allowed to occupy centre-stage and besiege the proceedings as it would end up frustrating and defeating the very object and purpose of IBC. It is against this evaluation parameter that we may now proceed to examine the acts of omission and commission on the part of Respondents No.1 and 3 in the present matter to conclude as to whether there has been any transgression of the bounds of rules and regulations leading to any serious miscarriage of justice suffered by the Appellants.*

23. ……..It is well recognised that rules of procedure being handmaid of justice, the object and intent of such procedures should be to advance the cause of justice and not become a tool to manipulate the process. The CIRP proceedings in the present case has already been a protracted affair. Remanding the matter back to CoC on the grounds of the procedural deviations raised by a dissenting minority in class of creditors would render the CIRP a never ending process. This would militate against the core objective of the IBC to ensure insolvency resolution in a time bound manner.

(emphasis supplied)

16.39. The Hon'ble Supreme Court in this matter vide its Judgment dated 03.05.2023 has held in para 42.1 and 42.3 as follows;

42.1. It has rightly been contended on behalf of the resolution professional that Form G was published in all leading newspapers on 09.08.2020 and then, IBBI was also informed about technical issues in uploading the Form on the website. ***The Adjudicating Authority has also rightly observed that a statutory provision regulating a matter of practice or procedure would generally be read as directory and in the present case, no prejudice has been shown by anyone as regards technical non-compliance of all the requirements of publication****. It has been too far-stretched on the part of the Appellate Tribunal to observe that when CIRP was conducted during the periods of lockdown in the face of Covid-19 pandemic, most of the people avoided reading newspapers under the apprehension of Covid infection. As noticed, initially as many as 13 EOIs were received. It has also rightly been contended on behalf of the resolution professional that all the requisite steps having been reasonably taken, the process that had reached an advanced stage could not have been annulled on such technicalities.*

42.3. The NCLAT held that the aforesaid was a commercial decision of CoC not requiring interference of the Court. It has been argued on behalf of the contesting respondents that, the aforesaid decision cannot be considered res judicata for they being not the parties to the said appeals decided by NCLAT on 05.05.2021. ***In our view, even if principles of res judicata are as such not applied, fact of the matter remains that at the given stage, the process as undertaken by the resolution professional had been***

consistently approved by CoC, Adjudicating Authority and the Appellate Tribunal. Even otherwise, as observed hereinabove, there had not been any such illegality or material irregularity for which the entire process would have been considered vitiated. *The findings of the Appellate Tribunal in this regard too, cannot be approved and are required to be set aside.*

(emphasis supplied)

16.40. Thus, from the discussions made *supra* and also in view of the Judgments of the Hon'ble Supreme Court and Hon'ble NCLAT in relation to Regulation 30A, we are of the view that when the CoC has unanimously approved the settlement proposal of the promoter in the 19th CoC meeting, the Application filed under Section 12A of IBC, 2016 cannot be thrown out on the hyper-technical ground that Regulation 30A was not strictly complied with.

16.41. Accordingly, issue no. (iv) is answered.

17. ISSUE NO. (V)

17.1. The issue no. (v) is "*whether the CoC ought to have compared the Resolution Plan of the PRA and the Settlement proposal of the Promoter under Section 12A simultaneously and put up for voting.*"

17.2. In this regard, it is imperative for this Tribunal to analyse as to what transpired in the 18th CoC meeting. The minutes of the 18th CoC meeting dated 29.09.2023 are extracted hereunder;

<u>Agenda Item No. A.2 To take note and deliberate on the evaluation of resolution plans by COC.</u>

The Chairperson apprised the COC members that all the seven resolution plans received till cut off date are being evaluated and the process is under progress. One of the COC members enquired whether BDO has participated in the COC meeting. The Chairperson requested Ms. Sunayana to respond to this query. Ms. Sunayana informed the COC that as per her last discussion with BDO personnel, they are waiting for a confirmation of appointment from Indian Bank and she requested the Indian Bank to update on the same. Mr. Srinivasalu from Indian Bank apprised that they have already issued a confirmation letter to BDO on 22.09.2022 confirming their appointment on 01.09.2022 accepting the terms and conditions of their appointment. Ms. Sunayana informed that there was some confusion with respect to their professional fees on which BDO wanted confirmation. To this Indian Bank replied that acceptance of terms and conditions includes acceptance of professional fees also and therefore no additional confirmation should be sought. Ms. Sunayana also explained that evaluation process is complete, however, they are unable to submit the report pending confirmation. She further emphasized that COC members need to evaluate resolution plans once the evaluation scoring and reports are received from BDO.

The Chairperson also emphasized that all of us should be mindful of the time being spent as nearly two months' time have taken for the evaluation exercise. He also informed the COC that RAs have been calling him regularly and questioning why they are not being called for discussion with COC. The Chairperson submitted that the CoC should speed up the evaluation process so that the same can be discussed in the CoC meetings.

It was decided to sort this issue of confirmation by Indian Bank after the COC meeting and procure the evaluation report from BDO without any further delay as they have already done the evaluation of resolution plans.

<u>Agenda Item No. A.3 To take note of the fresh 12 A proposal submitted by the Promoter and if the CoC decides to approve, to put to vote the same.</u>

The Chairperson apprised the COC members that on 19.09.2022 the promoter submitted a revised settlement plan under Section 12A of the Code and the COC intended to discuss the same in the present COC meeting. The

Chairperson then requested the COC members to proceed with the discussion on settlement proposal with the promoter.

Mr. Srinivasalu from Indian Bank apprised that as per their discussion in the last JLM held between the CoC members to discuss the 12 A proposal, they have forwarded the minutes and they have sought certain clarification from the promoters on settlement proposal under Section 12AHe submitted that Indian Bank is almost satisfied with the 12A proposal provided the clarifications sought are answered, for eg, the bank need copy of agreement of CD with I heart Properties, He stated that otherwise they are fine with the 12A proposal

Mr. Ajay Kumar Singh from State Bank of India enquired about the status of COC in the event Section 7 application is withdrawn pursuant to approval of 12A proposal. The Chairperson clarified that once 12A proposal is approved the moratorium is lifted, however, there will be direction by the NCLT to implement the 12A proposal and the same will be recorded in the order of NCLT. Mr. Ajay further enquired whether Bank Guarantee ("BG") furnished by the promoter is a payment instrument or it's a back-up instrument. Mr. Palani G Periaswamy, promoter of CD clarified that BG submitted by him is a full payment instrument. Mr. Ajay then reiterated that he wants the Chairperson to get it clarified from a legal person through legal opinion as to whether BG can be taken as a consideration payment instrument or it can be taken as a backup instrument i.e., if something fails then BG can be invoked. Mr. Ajay then informed that 12A proposal was discussed internally and the stand of SBI continues i.e. they want 25% margin to be kept in no lien account as per bank's policy.

Bank of India also agreed with the stand taken by SBI and confirmed that they also want 25% margin to be kept in no lien account.

Mr. Periaswamy asked what is the difference between BG and money when it is clearly depicted in BG that full payment will be made on getting the Order from NCLT.

Mr. Ayyapan of SBI, emphasized that before accepting any proposal as OTS under such cases, they need 25% of the total amount to be kept in no lien account and hence they have taken a stand that a 25% of the consideration amount to be brought in by the promoters and deposited into the no lien account and the balance 75% can be through BG.

Mr. Periaswamy requested the COC members to reduce the 25% margin to 10-15% margin. To this Mr Ayyappan replied that he has received promoter's email with respect to this request and that the said email will be replied to Mr. Periaswamy then asked for 4 days time from today to deposit 25% in no lien account and undertook to modify the BG mechanism as suggested by the CoC members.

Arun Shah from Aryav Exports submitted that there are some sincere efforts by the promoters and now they have also agreed to bring in the 25% in no lien account and modify the BG mechanism, the COC members should not lose the opportunity and go ahead to accept the 12A proposal with suggested modifications.

Mr Ramachandran of Prabhat Resources submitted that he is fully happy and satisfied with 16.66% share which might accrue to Prabhat Resources under the 12A proposal but his only apprehension as practitioner of IBC laws, that he should not be put to question later that why did he give his consent to a scheme or settlement when there is already a wilful default declaration on the same promoter by virtue of association of some other company and the company is now under CIRP. He requested the Chairperson, that this issue must be examined to pass the test of 12 A.

The Chairperson clarified that there is no bar under IBC and Regulations thereunder to submit 12A proposal by a promoter irrespective of being declared as Wilful Defaulter. As far as his question on wilful default declaration is concerned it is for the individual lenders to decide and take a call, whether to approve the proposal or not.

Mr. Periaswamy informed that they have already submitted a detailed letter to Central Bank of India, clarifying that they are not wilful defaulters and also represented before for being wrongly labelled as wilful defaulters. They further informed that they are taking this to appropriate forum to get it removed and they have submitted every evidence to prove they are not wilful defaulters.

Representative from Aryav Exports emphasized that if 12A proposal has no relation with wilful default then they should take the proposal for approval.

Mr. Srinivasalu of Indian Bank agreed with the observation made by Aryav Exports and suggested that they should move forward with the proposal.

Mr. Periaswamy reiterated that he has considered the points of SBI and Bank of India and he is ready to deposit 25% within 4 days as he has to make full payment after the approval. He submitted that earlier promoters were having difficulty in securing the funds but now they have secured the funds with all proofs and have also agreed to deposit 25% in no lien account and other terms, there should not be any reluctance on part of the lenders to support the promoters with 12A proposal. He requested the COC to go forward with the proposal and try to approve it quickly so that the promoters can get back and do business as usual. He also urged that the objective of the IBC is to revive the business and it will meet that objective, if the CoC members can approve his 12 A proposal and in terms of commercial value also his proposal is better than what is being offered by the Resolution Applicants.

The Chairperson explained the provisions of Section 12A and Regulation 30A (which has to be read with 12A). He explained that 12A application has to be moved by the Applicant bank i.e., Phoenix ARC and as per Regulation 30A if any application under Section 12A is made after issuance of expression of interest then the same has to be backed up by reasons and justifications. He further explained that COC will have to justify two things: first, the application of 12A and second not considering the resolution plans.

Mr. Ajay Kumar from SBI enquired whether any legal opinion has been obtained on this issue. To this the Chairperson replied that this is for the COC to take a call. Mr. Ajay opined that all other resolution plans should also be put to vote. He further opined that RAs cannot be denied the right to be a part of this process. He then requested the Chairperson to get the issue examined as to whether both proposal and plans can be put to vote simultaneously or not. The Chairperson clarified that as an RP he has presented the Resolution Plans to the CoC and also placed the 12A proposal received from the CoC, since the CoC was keen to consider that as well and it is up to the CoC to decide based on commercial wisdom and CoC prerogative on the way forward. Mr Ajay requested the RP to take a legal opinion in this regard.

Ms. Sunayana submitted that COC has not discussed / negotiated the plan with the RAs even once and if the resolution plan is put to vote without negotiation, then the plans may not give out much and therefore 12A and other seven plans can't be put to vote together.

Mr. Avinash submitted that there is a provision under IBC to consider a 12A proposal before the resolution plans are voted upon and requested the

Chairperson to check with the legal counsel. To this the Chairperson clarified that the provision relates to issuance of expression of interest wherein consideration of 12A proposal after issuance of expression of interest has to be justified with reasons. Mr. Avinash then asked after issuance of EOI till what stage of CIRP the 12A proposal can be entertained. To this the Chairperson replied that the Code does not have any provision on this time limit aspect.

Mr. Suresh from Phoenix ARC submitted that filing of 12A application is not only on behalf of the Applicant bank but on behalf of all the COC members therefore it should be in consultation with the COC only.

Mr. Ayyappan was also of the view that Regulation 30A does not provide any timeline and opined that after EOI publication there should be a valid reason for filing 12A application. He gave an example of Videocon CIRP wherein 12A proposal and resolution plan both were evaluated and put to vote and requested the Chairperson to seek input from the legal counsel. He requested that the issue should be examined thoroughly then only the COC can take a judicious call.

The Chairperson informed the COC members that voting percentage required for approval of a resolution plan is 66% and voting percentage required for approval of a 12A proposal is 90%. He submitted that so far he has not come across any precedence where 12A proposal and resolution plans were considered and voted upon together. He further submitted that legal people may be able to give some guidance on how this can be done together.

Mr. Navin Sambtani agreed with observation made by the Chairperson and submitted that they have dealt with different situations in CIRP but combining of a resolution plan and 12A proposal is unprecedented and they will be happy if they are made aware of such precedence.

Mr. Srinivasalu enquired whether there has been any situation where the COC is examining the resolution plans and a 12A proposal has come. To this the Chairperson replied that recently in a case 12A proposal had come at liquidation stage and the said proposal was rejected by NCLT and NCLT, however, the Supreme Court held that it is the prerogative of COC to decide. The Chairperson clarified that in terms of timeline there is a precedence but in terms of simultaneous voting there is none to his knowledge.

Representative from Aryav Exports emphasized that the COC members should favourably consider the 12A proposal based on representation made by Mr. Periaswamy.

Mr. Navin clarified that the COC is not averse to consideration of 12A proposal. The COC is discussing and trying to tackle a 12A proposal vs. resolution plan situation and what should be the best approach for the COC. None of the COC members is aware of a situation where both have been considered simultaneously by the COC.

Mr. Avinash submitted that as per the provisions of IBC a 12A proposal has to be voted upon within 7 days of its receipt and in the present case the 7 days have lapsed. Mr. Navin opined that timeline is not much of a concern as the same is directory and it will not render them ineligible. The real concern is direction.

Other COC members opined that it is not the final proposal and the timeline will start once the promoter submits the revised final proposal.

Mr. Srinivasalu asked the promoters on what date they will submit the final and correct 12A proposal and from that date the timeline will start. The promoters stated that they will try to submit the final and compliant 12A proposal on 07.10.2022 but not later than 10.10.2022 (Monday). Ms. Bhoomalakshmi from IDBI Bank submitted that she can approach the sanctioning authority only in the case when the 25% of fund and letter of proposal will come. She further submitted that she will not be able to vote on the proposal on 12.10.2022. The Chairperson clarified that on 12.10.2022 the proposal will be put to vote subject to COC approval and it is not necessary that the proposal needs to be voted upon on the 12th itself.

Ms. Sunayana enquired from the promoters whether the amended BG will be for the 75% amount if they deposit the 25% amount on 07.10.2022. Mr. Periaswamy clarified that with regard to BG and money he is committing for 10.10.2022 and with regard to the revised proposal he is committing 07.10.2022. He submitted that he will try to get both together, however, due to bank holidays he needs some time. For abundant caution he is committing 10.10.2022 as final date.

Mr Suresh from Phoenix, enquired from the promoters whether they will consider any improvisation in the interest payments to the Financial Creditors till the cut-off date. To this the promoters expressed their inability

to make any further improvement in the figures of 12A proposal committed by him.

Mr. Navin then referred to the clause of RFRP wherein it is stated that existing cash balances in the company belongs to the COC members at the time handover. He then asked the Chairperson to confirm the clause on cash balances as per RFRP. The Chairperson confirmed that on the date of handover to the Resolution Applicant, the cash shall go to the financial creditors. To this Mr. Periaswamy submitted that the clause under RFRP is for the Resolution Applicants and not for the promoters who are trying to revive their business.

Mr. Navin while responding to the submission of Mr. Periaswamy opined that since it is a 12A proposal and interest payment is not till the current period, the COC members have the right to consider all the possibilities. Further, he submitted that he has taken note of inability of the promoters to make any further improvisation in the proposal.

The CoC members further debated on the possibilities of consideration of 12 A proposal vis a vis the Evaluation and consideration of the Resolution Plans and discussed the pros and cons and most felt that a legal guidance a this stage can help the CoC with their decision making process and they are also conscious of the tight timelines left in the CIRP and will consider taking a very objective decision evaluating all the options and requested the RP to look at the possibilities of applying for Exclusion/Extension with the AA.

Chairperson reminded the CoC members that the mandatory 330 days period is completing on 12/10/2022 and he will have to schedule the next CoC on 12/10/2022, given that the CoC is deciding to give timelines till 10/10/2012 to the promoter.

CoC members asked the Chairperson if there can be additional Exclusion/Extension period that can be sought from the AA as the CoC is in the final stage of evaluation of the Resolution plans as well as the 12 A proposal submitted by the Promoter and the timelines of 12/10/2022 will not solve the purpose. RP, informed that two weeks' time lost due to his Covid infection and he can apply for Exclusion for the same on consultation with the legal counsel.

COC decision on resolution plans

Ms. Sunayana suggested that till the 10.10.2022 when the promoters submit the revised proposal, the COC needs to put in action other part also i.e., the resolution plans evaluated by BDO.

Mr. Ajay Kumar from SBI submitted that to decide on the resolution plans they need to have a legal opinion first on the issue.

Indian Bank agreed with stand of SBI and emphasized that legal opinion must be obtained before going forward with the resolution plans. To this the Chairperson submitted that he is obtaining the legal opinion upon the insistence of COC members on two issues i.e., on BG mechanism and on simultaneous voting of 12A proposal and resolution plans.

Mr. Srinivasalu requested the Chairperson to share a matrix of all the resolution plans so that it gives a bird's eye view to everybody. The Chairperson informed that summary cum matrix is already shared with the COC members containing summary of each and every plan, however, if anyone has not received it, he can reshare it.

After discussions and deliberation, the COC members observed that the evaluation of resolution plans is underway, however, a 12A proposal has been received from the promoters. Since the COC is at this particular juncture it would like to seek legal opinion on the way forward with respect to resolution plans. Also, the promoters of the CD have specifically requested the COC members to consider their 12A proposal in order to save their business and they shall be enabled to get back to their business. Further, keeping in view the stringent timelines of CIRP it has been mutually decided to convene the next COC meeting on 12.10.2022.

Mr. Sennimalai, suspended MD of the CD, submitted that 12A proposal is different from resolution plans. He further submitted that under 12A proposal they are offering to settle all the suppliers and even those suppliers whose claims are not filed and admitted, taking care of all the stakeholders including the shareholders. He therefore requested that 12A proposal should not be treated at par with resolution plan.

17.3. The Hon'ble NCLAT in the matter of **Shaji Purushothaman Vs. Union Bank of India and others** *Company Appeal (AT) (Insolvency) No.921 of 2019*, has held as under;

> *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."*

17.4. In the present case, it is seen from the 18th CoC meeting that there was a discussion as to whether there can a simultaneous voting of 12A proposal and the Resolution Plans. In the said meeting the RP informed the member of the CoC that he will obtain a legal opinion in this regard. However, it is seen from the 19th CoC meeting that the **CoC took a collective decision to go ahead and put the settlement proposal to vote**.

17.5. At this juncture, it is significant to refer to the Judgment of the Hon'ble Supreme Court in the case of **Arun Kumar Jagatramka v. Jindal Steels and Power Limited and Anr;** *(2021) 7 SCC 474* wherein the Hon'ble Supreme Court compared the Scheme under Section 230 of the Companies Act, 2013 *(which is akin to a Resolution Plan under Section 30 of IBC, 2016)* with the withdrawal applications under Section 12A of IBC, 2016 and held as under;

75. *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-A43, 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-A44 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.

Distinction between a withdrawal simpliciter and scheme of arrangement

77. *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 29-A 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.*

78. *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 [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] (para 82 extracted above) stipulates that where the CoC has not yet been constituted, 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 2013 Act.*** *A resolution plan upon approval under Section 31(1) 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 Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] . Rohinton F. Nariman, J. speaking for the three-Judge Bench of this Court, observed : (Essar Steel case [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] , SCC p. 615, para 105)

> *"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.'"*

80. *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 2013 Act cannot certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A 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 2013 Act or the IBC). Both, the resolution plan upon being approved under Section 31 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****.*

(emphasis supplied)

17.6. The provisions under Section 12A IBC, 2016 have been made more stringent as compared to Section 30(4) IBC, 2016. Under Section 30(4) IBC, 2016 the voting share of CoC for approving the resolution plan is 66%, and requirement under Section 12-A IBC, 2016 for withdrawal of CIRP is 90%. When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, it is not open to the Adjudicating Authority to reject the same.

17.7. The withdrawal of an Application under Section 12A of IBC, 2016 is not intended to be a culmination of Resolution process. The Hon'ble Supreme Court in the Judgment as referred above has categorically held that the withdrawal under Section 12A of IBC, 2016 leads to a *status quo ante* in respect of the liabilities of the

corporate debtor. Further, it has held that a withdrawal under Section 12A of IBC, 2016 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 2013 Act. It is also held that 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.

17.8. It is thus no longer *res – integra* that a Resolution Plan cannot be equated or compared with a withdrawal simpliciter application under Section 12A of IBC, 2016.

17.9. Another issue which was raised by the objectors that the promoter settlement amount of Rs.592.00 Crores is a farce. In this context it was submitted that the equity shareholders sum of Rs.98.00 Crores is added by the promoter in the settlement proposal, however in real they are not paying anything to the shareholders.

17.10. In this regard, it is seen that, in the present case, the asset value of the Corporate Debtor is double than its liabilities. At the time of approval of Resolution Plan in IA/150(CHE)/2021, the Fair Value of the Company was arrived at Rs.730.88 Crores during the Covid period. In the present case, both the Resolution Applicants who have filed the objections are paying **NIL** amount to the shareholders. In other words, the entire amount of equity and preference shareholders are extinguished. However, on the

contrary, the promoters are retaining the existing shareholders and their shareholding pattern remains undisturbed under the settlement proposal. Thus, the grounds raised by the Resolution Applicants that they are paying more than the promoter of the Corporate Debtor is required to be eschewed.

17.11. It was also contended that 25% of the Settlement Amount is made as cash deposit in no lien account with the lead bank and 75% is in the form of Bank Guarantee, however the said Bank Guarantee has been given by the third party viz. iHeart.

17.12. As already alluded *supra* the CoC in its 19th meeting held on 11.10.2022 has discussed in detail the bank guarantee and the payments to be made to the stakeholders. Since the CoC is very much appraised of the fact that the Bank Guarantee is standing in the name of the third party i.e. iHeart and went ahead and voted unanimously for the said 12A proposal, this Tribunal cannot venture into the said aspect.

17.13. Accordingly, issue no. (v) is answered.

18. <u>ISSUE NO. (VI)</u>

18.1. The Issue no.(vi) is *"whether Prospective Resolution Applicants have any locus to question the settlement proposal of the promoter under Section 12A of IBC, 2016 and whether any prejudice has been caused to the Prospective Resolution Applicants"*.

18.2. Learned Senior Counsel for Mr. M.K. Rajagopalan has submitted that, he was the one who had filed the appeal before Hon'ble Supreme Court and in the said appeal, the Hon'ble Supreme Court passed the orders stating that they have left open for consideration of the Adjudicating Authority, including those relating to the justification for invoking Section 12-A after issuance of fresh invitation for EOI and after receiving resolution plans. Therefore he has *locus* to question the settlement proposal of the promoter under Section 12A of IBC, 2016.

18.3. To consider the said issue, it is relevant to refer to the decision of the Hon'ble Supreme Court in the case of **Arcelor Mittal (India) (P) Ltd. v. Satish Kumar Gupta** *(2019) 2 SCC 1* wherein it is held as under;

> ***82.*** *Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time-limits specified where no other resolution plan is available with him.* ***It is clear that at this stage again no application before the adjudicating authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place****.*
>
> *(emphasis supplied)*

18.4. In the aforesaid Judgment, it is made clear that a resolution applicant has no vested right that his resolution plan be considered and that there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved.

18.5. It is required to be noted that the Prospective Resolution Applicant comes into the picture only after the Expression of Interest is issued. The Prospective Resolution Applicant is only a participant in the CIRP of the Corporate Debtor. He has no vested or fundamental right in relation to the submission and approval of resolution plan. The said Resolution Applicant is bound by the decision taken by the CoC in its commercial wisdom. Once the CoC approves the settlement proposal under Section 12A of IBC, 2016, all the Resolution Applicants are out of the fray and they are bound by the said decision. The Resolution Applicants are not the stakeholders of the Corporate Debtor. Therefore, they do not have any **locus** to question the decision of the CoC much less the settlement proposal given by the promoters of the Corporate Debtor.

18.6. The provisions of IBC, 2016 nowhere provides *locus* to the Prospective Resolution Applicants to challenge the decision of the CoC. Further, it is trite that the 'commercial wisdom' of the CoC cannot be questioned by the Adjudicating Authority or by the Appellate Tribunal. If the Prospective Resolution Applicants are being given the *locus* to question the decision of the CoC, then the

timelines prescribed under the provisions of IBC, 2016 for completion of Resolution Process cannot be achieved.

18.7. The Prospective Resolution Applicants cannot simply plead that they have *locus*. The plea of *locus* by the PRAs should be substantiated with the fact that the decision of the CoC has caused prejudice to them. While that being the case, whether the PRAs can state that the decision of the CoC not to consider the Resolution Plans and to consider the settlement proposal of the promoter has caused prejudice to them. To answer it straight away, we may refer to the Judgment of the Hon'ble Supreme Court in the case of **Arcelor Mittal *(supra)*** wherein it has been held that **a resolution applicant has no vested right that his resolution plan be considered**. At this juncture, it is significant to refer to the prayers of the Intervenors viz. Prospective Resolution Applicants which are extracted hereunder;

Inv. P(IBC)/7(CHE)/2022 - Mr. M.K. Rajagopalan,;

(a) Reject the Section 12A settlement proposal of the Promoter, as approved by the Committee of Creditor in its 19th meeting dated 12.10.2022 and declare the same is non – est in law;

(b) Direct the Resolution Professional to proceed in terms of the directions of the Hon'ble NCLAT contained in its judgment dated 17.09.2022 and upheld by the Hon'ble Supreme Court vide Judgment dated 03.05.2023 ***and proceed with the consideration of Resolution Applications received from the seven Resolution Applicants (including the Applicant herein); and***

(c) Any other order that this Hon'ble Tribunal might deem fit in the facts and circumstances of the case.

(a) Allow the Intervention Petition of the Present Applicant, a prospective Resolution Applicant; or

(b) Dismiss the 12A settlement proposal of the Promoter, approved by the CoC in its meeting dated 12.10.2022; or

(c) Reject the Application filed by the Resolution Professional dated 03.11.2022, IA/1410/CHE/2022 for approval of the Settlement proposal under 12A of the IBC; or

(d) Direct the CoC to consider the Resolution Plan of the Applicant afresh; and

(e) Any other order that this Hon'ble Tribunal might deem fit in the facts and circumstances of the case.

18.8. One of the prayers of the Intervenors is to direct the CoC to consider the Resolution Plans of the PRAs. The prayer of the Intervenor goes directly against the dictum laid down by the Hon'ble Supreme Court in **Arcelor Mittal** *(supra)* wherein it has been held that a resolution applicant has no vested right that his resolution plan be considered.

18.9. It is also pertinent to point out here that the Prospective Resolution Applicants also cannot state that non – compliance of Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has caused prejudice to them. Regulation 30A encompasses only (i) Applicant / Petitioning Creditor, (ii) CoC and (iii) IRP / RP. It does not confer any right upon the Prospective Resolution Applicants to object to the settlement

proposal or withdrawal of Application under Section 12A. Even assuming for a moment, if such a right is conferred, the Resolution Applicant is required to convince this Adjudicating Authority that non – compliance has caused serious prejudice to the Applicant. The Hon'ble Supreme Court in the matter of **Shivjee Singh v. Nagendra Tiwary,** *(2010) 7 SCC 578* while dealing with the issue of prejudice has held as under;

> ***7.*** *We have considered the respective submissions. By its very nomenclature, CrPC is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well-recognised rule of construction that procedural prescriptions are meant for doing substantial justice.* ***If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of the word "shall"****.*
>
> *(emphasis supplied)*

18.10. Thus, in view of the reasoning mentioned *supra,* we hold that non – compliance of Regulation 30A has not caused prejudice to the Prospective Resolution Applicants and hence they have no *locus* to object a settlement proposal under Section 12A of IBC, 2016.

18.11. However, the Hon'ble Supreme Court in its Judgment dated 03.05.2023 has held in para 66 as follows;

> *66. We are not expanding further on the matter because when we find that the settlement proposal of the promoter, after approval of CoC, for invoking the provisions of Section 12-A of the Code, is pending before the Adjudicating Authority, in our view, it shall be in the fitness of things that all the relevant aspects of the matter are left open for*

consideration of the Adjudicating Authority, including those relating to the justification for invoking Section 12-A after issuance of fresh invitation for EOI and after receiving resolution plans. In other words, we would leave all the relevant aspects open for consideration of the Adjudicating Authority in accordance with law while keeping in view the observations of this Court.

18.12. Eventhough we hold that the PRAs do not have any *locus* to object a settlement proposal under Section 12A of IBC, 2016, however keeping in view of the Judgment of the Hon'ble Supreme Court dated 03.05.2023, the grounds raised by the PRAs are considered and answered by this Tribunal.

18.13. Accordingly, issue no. (vi) is answered.

19. ISSUE NO. (VII)

19.1. The issue no. (vii) is *"whether in a settlement proposal under Section 12A of IBC, 2016 can the Adjudicating Authority delve into the aspect of source of funds brought forward by the promoter of the Corporate Debtor."*

19.2. The main bone of contention raised by the Resolution Applicants was that the present Section 12A is not supported by internal resources of the promoter or through sale of its own assets. It was argued that the promoter is still dependent on third party assurances and promises which have not been kept in the past and

this amounts to allowing a backdoor entry of a third party as a Resolution Applicant i.e. iHeart.

19.3. In order to answer the issue, we have to examine a scenario. Let us assume that a Resolution Applicant submits a Resolution Plan with the source of funds showing amounts to be borrowed by way of loan or from financial sponsor. The promoter is raising an objection to the said source of funds by the Resolution Applicant. Whether in these circumstances this Tribunal will reject the Resolution Plan on the ground that the Resolution Applicant is required to pay the Resolution Plan amount only from his internal accruals and not by way of loan. To answer it straight away, it is a NO.

19.4. The Adjudicating Authority will not exercise its judicial wisdom upon the said aspect since the infusion of funds by the Resolution Applicant and its credibility and ability to pay within the timelines stipulated, falls squarely with the domain of 'commercial wisdom' of the CoC. Even as a matter of record, in most of the Resolution Plans approved by this Tribunal, the source of funds shown by the Resolution Applicant is by way of loan or to be funded by a Financial Sponsor.

19.5. While this being the fact, it is not open to the PRAs to question the source of funds to be brought in by the Promoter, especially when the entire Settlement Amount is deposited by the

Promoters and secured by way of bank guarantee. In any case, as already alluded *supra*, the issue of infusion of source of funds by the promoters of the Corporate Debtor by way of loan or Financial Sponsor falls within the domain of 'commercial wisdom' of CoC. Further, the Resolution Applicants have no locus to question the source of funds of the promoters in an Application filed under Section 12A of IBC, 2016. Also, if such an argument is allowed, it presupposes the fact, as if the Resolution Applicants are having paramount interest over the Corporate Debtor than its promoter.

19.6. Accordingly, issue no. (vii) is answered.

20. CONCLUSION

20.1. We summarize the conclusion of the Judgment as follows;

(i) In the application filed by the RP under Section 12A of IBC, 2016, the Applicant / Financial Creditor has adduced sufficient reasoning in Form – FA. The reasoning for considering the 12A proposal of the Promoters is also spelt out in the 19th minutes of the CoC.

(ii) As held by the Hon'ble Supreme in its catena of Judgment, Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is directory in nature and the non – compliance of the same would amount to irregularity and not illegality and hence it can be cured.

(iii) The CoC has deliberated in detail the Settlement Proposal and took a decision exercising its commercial wisdom by voting **100%** for the Settlement proposal and the same cannot be thrown out on hyper-technical ground that Regulation 30A was not strictly complied with.

(iv) In view of the dispositive reasoning, IA(IBC)/1410(CHE)/2022 filed under Section 12A of IBC, 2016 and Inv. P(IBC)/10(CHE)/2022 filed by the CoC stand **allowed**.

(v) IA(IBC)/1134(CHE)/2022 filed under Section 12(2) of IBC, 2016 seeking extension CIRP period stands **allowed**.

(vi) Inv.P(IBC)/7(CHE)/2022 and Inv.P(IBC)/12(CHE)/2022 filed by the Prospective Resolution Applicants stand **dismissed**.

(vii) The main Company Petition viz. IBA/1459/2019 stands **dismissed as withdrawn**.

(viii) It is made clear that this Tribunal is allowing **withdrawal simpliciter** filed by the RP under Section 12A of IBC, 2016 and not approving the Settlement proposal dated 11.10.2022.

(ix) The CIRP initiated by this Tribunal against the Corporate Debtor in IBA/1459/2019 vide order dated 05.05.2020 stands **withdrawn**. The powers of the Board of Directors which stood suspended is restored and the management and affairs of the Corporate Debtor is

directed to be handed over to them by the RP, including the possession and control of books and assets of the Corporate Debtor, if any taken during the CIRP period. The RP is discharged from all his responsibilities. The position of the Corporate Debtor is restored to *status quo ante* prior to the Insolvency Commencement date. The Corporate Debtor shall operate through its own Board.

(x) The *Registry* of this Tribunal is directed to mark a copy of this order to IBBI for its information and record.

-Sd-

VENKATARAMAN SUBRAMANIAM
MEMBER (TECHNICAL)

-Sd-

SANJIV JAIN
MEMBER (JUDICIAL)

Raymond