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IBC – When a Resolution Plan can be withdrawn

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1. Introduction

1.1 According to the Insolvency and Bankruptcy Code, 2016 (Code), when insolvency resolution proceedings initiated against a corporate debtor then the Committee of Creditors (CoC) asks for bids from the interested parties who want to take over or purchase the assets of the corporate debtor. Under the Code, the person/company/etc. whose bid is accepted is considered as the successful Resolution Applicant (RA).

1.2 According to Section 12A of the Code that deals with the withdrawal of application admitted under Sections 7, 9, or 10 and insolvency proceedings have initiated. The Adjudicating Authority i.e. the National Company Law Tribunal (NCLT) may allow the withdrawal of the insolvency proceedings if approved by 90% of the members of Committee of Creditors (CoC) in a specified manner.

1.3 However, the National Company Law Appellate Tribunal (NCLAT) in its recent held that if the resolution plan is approved by the CoC then insolvency proceedings cannot be withdrawn through NCLT. It shall be binding on the RA, as subsequent withdrawal will be detrimental to the stakeholders and corporate debtors. The NCLAT relied on the decision passed in *Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd.* 2020 SCC OnLine NCLAT 592.

1.4 However, The Supreme Court has put a stay on the said order of the NCLAT.

2. Facts

2.1 Brief facts of the case

- M/s Astonfield Renewables Pvt. Ltd., (corporate debtor) was admitted into Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Code by the NCLT.
- After due considerations of the bid by the CoC, M/s Kundan Care Products Ltd. emerged as the successful

RA, and accordingly, a resolution plan was submitted before the NCLT for its approval.

- As the proceedings were pending before the Apex Court there was delay in approval of the Resolution Plan by the NCLT.
- Subsequently, RA sought to withdraw its resolution plan as they were not confident on the resolution plan to be commercially viable because of significant delays in the process. The RA moved an application before the NCLT and it was rejected on the ground that there is no specific provision under the Code pertaining withdrawal.
- The RA approached the NCLAT (Appellant Authority) against the order of the NCLT.

2.2 The issue before the NCLAT

Whether the NCLT erred in rejecting the application of the RA filed for withdrawal of the resolution plan? Whether the said order suffers from any legal infirmity?

2.3 Observations of the NCLAT

Justice Bansi Lal Bhat, Anant Bijay Singh (Judicial Member), and Dr. Ashok Kumar Mishra (Technical Member) made the following observations in the instant case-

- The RA whose resolution plan has been approved by the CoC cannot be allowed to withdraw it, causing detriment to various stakeholders.
- The NCLAT rejected the argument of the TA that specific performance of the resolution plan cannot be compelled based on the following grounds:-
 - a) The Code does not contain any provision that will entitle a successful RA to withdraw its resolution plan once approved by the CoC;

- b) The resolution plan contains contractual terms that bind the RA;
- c) The RA is estopped from shying away from the liabilities that are incurred on approval of the plan;
- d) The value of the assets of the corporate debtor reduces with time and if the successful RA would be allowed to withdraw then it would adversely affect all the stakeholders.

2.4 The decision of the NCLAT

The sanctity of the CIRP should sustain and the RA whose resolution plan has been approved by the CoC cannot be withdrawn and the NCLAT has no jurisdiction to approve the same. If a withdrawal is permitted then it could lead to 'disastrous consequences' and that might even cause the liquidation of corporate debtors.

2.5 NCLAT placed reliance on-

Educom case wherein the NCLAT held that after approval of the resolution plan by the CoC, the adjudicating authority has no jurisdiction to allow the withdrawal of the application filed by the RA. The adjudicating authority is barred to subside the majority decision of the CoC and is restricted to reject the same.

3. An appeal before the Supreme Court

An appeal was initiated before the Supreme Court wherein the appellants invoked Article 142 of the Constitution of India for seeking specific relief in alternate to the relief of withdrawal of the Plan. The appellant had submitted before the Apex Court that there is no justification in the finding of the NCLAT.

3.1 Judicial Precedents

- 3.1 The Supreme Court has laid down the principle in the case of *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh & Ors.* Civil Appeal No. 4242 of 2019, that a resolution plan cannot be withdrawn once approved by the CoC and the NCLAT.
- 3.2 *Lokhandwala Kataria Construction Pvt. Ltd. v. Nisus Finance & Investment Manager LLP*, Civil Appeal No. 9279 of 2017 wherein the Apex Court has considered the issue of withdrawal of application for initiation of CIRP. The Court granted permission to the parties for compromising their disputes and also allowed withdrawal of their application. In this case, the issue of withdrawal of application for initiation of CIRP was taken up by the Supreme Court before insertion of Section 12A to the Code.

4. The issue before the Supreme Court

- 4.1 Whether the NCLAT has correctly held that the adjudicating authority lacks jurisdiction to allow withdrawal of a Resolution Plan once approved by the CoC?

5. Observations of the Apex Court

[Three- Judges Bench comprising of Justices D.Y. Chandrachud, Indu Malhotra, and Indira Banerjee, Order date: 16 November 2020]

- 5.1 The appeal was listed before the Apex Court and after hearing the parties at length, notice was issued and an ad-interim stay was granted by the Apex Court in the operation and effect of the NCLAT's Judgment till the next date of hearing. The Appeal is pending as on date.
- 5.2 It was further directed by the Supreme Court that the judgment of NCLAT in the case of *Kundan Care Products Ltd. v. Amit Gupta & Ors.* Civil Appeal No. 3560/2020, would cease to have any effect in law.
- 5.3 The Court stated that the judgment of the NCLAT cannot be cited as a judicial precedent in any of the pending cases till the time the stay is lifted or the appeal is finally disposed of by the Supreme Court.

6. Conclusion

- 6.1 The time has come that RAs should be granted some form of relief specifically those who had submitted their plans before 25 March 2020. The pandemic has hit the nation and it has adversely affected the economy of the nation and has caused a deterrent impact on all businesses.
- 6.2 It is the need of the hour to ensure an equitable growth of the economy in India and essential measures should be taken in this regard. The decision of NCLAT has caused a blockage for the RAs that the Apex Court has cleared by putting a stay on the said order.
- 6.3 Moreover, the whole CIRP process being based on the commercial viability of the RA, it is necessary that the interest of the RA should be protected in case of delay in approval of resolution plan.
- 6.4 The Law is yet to be conclusively settled by the Hon'ble Supreme Court.

References:

1. <https://blog.ipleaders.in/can-approved-resolution-plan-withdrawn-section-12a>
2. <https://www.gnslegal.in/withdrawal-of-resolution-plan-supreme-court-stays-nclat-judgment-in-kundan-care-products-ltd-v-amit-gupta/#>
3. <https://nclat.nic.in/Useradmin/upload/12787593265f74473351662.pdf>
4. <https://www.scconline.com/blog/post/2020/10/07/nclat-will-ib-code-permit-a-successful-resolution-applicant-to-stage-a-u-turn-frustrating-corporate-insolvency-resolution-process-tribunal-decodes/>
5. <https://www.barandbench.com/news/litigation/withdrawal-successful-resolution-plan-coc-permitted-ibc-nclat>

A copy of the judgment is annexed hereto at page 3 to 7.

2020 SCC OnLine NCLAT 670

In the National Company Law Appellate Tribunal[±]
(BEFORE BANSI LAL BHAT, ACTING CHAIRPERSON, ANANT BIJAY SINGH, MEMBER (JUDICIAL) AND
ASHOK KUMAR MISHRA, MEMBER (TECHNICAL))

Kundan Care Products Ltd. (Through Its Director) ... Appellant;
Versus

Amit Gupta and Others ... Respondents.

Company Appeal (AT) (Insolvency) No. 653 of 2020[±]
Decided on September 30, 2020

Advocates who appeared in this case:

Mr. Prithu Garg and Mr. Siddharth Mehta, Advocate for the Appellant;
Mr. Amit Gupta, Resolution Professional, Advocate for the Respondents;
Ms. Pooja Mahajan and Ms. Mahima Singh, Advocates for R-1;
Mr. Ashish Rana, Advocate for R-2 (CoC).

The Judgment of the Court was delivered

BANSI LAL BHAT, ACTING CHAIRPERSON:— Vide order dated 3rd July, 2020 the Adjudicating Authority, National Company Law Tribunal, New Delhi, Special Bench Court-II rejected IA 1679/2019 filed in IB-940(ND)/2018, *inter alia*, on the ground that it would not be appropriate for the Adjudicating Authority to deal with an issue which is already sub-judice before the Hon'ble Apex Court. Through the medium of this Appeal the Appellant-Kundan Care Products Ltd., who has emerged as the Successful Resolution Applicant in Insolvency Resolution Process of M/s Astonfield Solar (Gujarat) Pvt. Ltd. ('Corporate Debtor') assails the impugned order rejecting its Application for withdrawal of its Resolution Plan and cancellation/revocation/return/refund of the Performance Bank Guarantee, on the ground that there is no legal basis or justification for holding that an application for withdrawal of a Resolution Plan post approval is not maintainable and that the matter pending consideration before Hon'ble Apex Court viz IA No. 9682/2020 in Civil Appeal No. 9241/2019 was filed by the Appellant invoking Article 142 of the Constitution of India seeking specific relief in alternate to the relief of withdrawal of the Plan and same had no bearing on IA No. 1679/2019 pending before the Adjudicating Authority.

2. It is submitted on behalf of Appellant that there is no basis or justification for the finding that the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 has no power or jurisdiction to allow withdrawal of a Resolution Plan post approval from the Committee of Creditors (for short 'CoC'). It is submitted that the view adopted by the Adjudicating Authority runs parallel to the view taken by NCLT, Mumbai Bench in Deccan Value Investors LP case, which has been upheld by this Appellate Tribunal in Company Appeal (AT) No. 1276/2019 decided on 27th September, 2019. It is further submitted that I&B Code does not contain any provisions to compel specific performance of a Resolution Plan by an unwilling Resolution Applicant and a plea for withdrawal of a plan will have to be accepted, if the plan is found to be unviable, unfit for implementation or is either lacking provisions for its successful implementation or is based on incorrect assumptions. It is further submitted that the Adjudicating Authority has to be satisfied about the feasibility and viability of the Resolution Plan and in the event of these relevant factors found lacking the Adjudicating Authority may reject the Resolution Plan approved by CoC or remit the case to CoC for reconsideration. It is lastly submitted that in the instant case the

approved Resolution Plan has been rendered commercially unviable on account of delay in conclusion of CIRP and the Appellant could not be prevented from withdrawing the same.

3. Per contra it is argued on behalf of Respondent No. 1 ('Resolution Professional') that the Appeal is not maintainable in view of the same being squarely covered by the judgment of this Appellate Tribunal rendered in "*Committee of Creditors of Educomp Solutions Ltd. v. Ebix Singapore Pte. Ltd.*" wherein it was held that after approval of the Resolution Plan by the Committee of Creditors the Adjudicating Authority has no jurisdiction to entertain or permit the withdrawal application filed by the Resolution Applicant and that Adjudicating Authority cannot enter into the arena of the majority decision of the Committee of Creditors. It is further submitted that there is no provision in the Code which allows withdrawal of an approved Resolution Plan and provisions in the Regulations for submission of Performance Bank Guarantee by a Resolution Applicant while submitting its Resolution Plan is a provision to discourage the Resolution Applicant from withdrawing its Resolution Plan. The business decision of the CoC, based on their commercial wisdom is not open to judicial review before the Adjudicating Authority or even before this Appellate Tribunal. It is lastly submitted that the Resolution Plan of Appellant was approved in preference to two other Resolution Applicants for maximizing the value of Corporate Debtor and the Appellant cannot be permitted now to scuttle the Corporate Insolvency Resolution Process of the Corporate Debtor by walking away from its Resolution Plan which will have the effect of pushing the Corporate Debtor into liquidation.

4. On behalf of Respondent No. 2 (Committee of Creditors) it is submitted that the I&B Code does not prescribe any provision for withdrawal of Resolution Plan by the Resolution Applicant and the Adjudicating Authority is not bestowed with any power to allow withdrawal of the Resolution Plan. Allowing such prayer would be without jurisdiction. It is further submitted that once the Resolution Plan has been approved, it becomes a binding contract between the parties and the Successful Resolution Applicant cannot be permitted to withdraw the same which will have the effect of sending the Corporate Debtor into liquidation.

5. Heard learned counsel for the parties and considered their verbal and written submissions in the backdrop of facts of the case and the circumstances in which the impugned order came to be passed. It appears that in terms of the impugned order the Adjudicating Authority has rejected the prayer emanating from the Resolution Applicant seeking withdrawal of the Resolution Plan, which had been approved by the Committee of Creditors and in respect whereof application under Section 31 of the I&B Code filed by the Resolution Applicant was pending consideration before the Adjudicating Authority. The Adjudicating Authority was of the view that it had no jurisdiction to permit withdrawal of a Resolution Plan, which had been duly approved by the Committee of Creditors. It has also been influenced by the fact that an issue of similar nature was sub-judice before the Hon'ble Apex Court. It is brought to our notice by learned Counsel for Respondent No. 1 that the recent decision of this Appellate Tribunal in "*Committee of Creditors of Educomp Solutions Ltd. v. EBIX Singapore Pte Ltd. - Company Appeal (AT) (Insolvency) No. 203 of 2020*" squarely covers the present case where an Appeal filed against order of Adjudicating Authority permitting withdrawal of Resolution Plan by the Resolution Applicant, which had been approved by the Committee of Creditors on the ground of the Resolution Plan having been rendered commercially unviable on account of lapse of substantial time and inordinate delay in Corporate Insolvency Resolution Process was rejected by this Appellate Tribunal holding that the Adjudicating Authority cannot enter into the arena of the majority decision of the Committee of Creditors and once the Resolution Applicant has accepted the conditions of Resolution Plan, it was not open to it to make a U-turn and wriggle out of the liabilities imposed upon it under the Resolution Plan

approved by the Committee of Creditors. Para 95 of the aforesaid judgment rendered on 29th July, 2020 relevant for purposes of disposal of this Appeal may be extracted as under:—

"95. In the instant case, notwithstanding the fact only upon the approval of the 'Adjudicating Authority' the 'Resolution Plan' of the 'Resolution Applicant' would be binding on all the parties and further that the application for withdrawal was filed by the 1st Respondent/'Resolution Applicant' was filed earlier to the stage of 'Approval' by the 'Adjudicating Authority' yet this Court comes to an cocksure conclusion that the 'Adjudicating Authority', in law cannot enter into the arena of the majority decision of the 'Committee of Creditors' other than the grounds mentioned in Section 32 (a to e) of the 'I&B' Code. Moreover, after due deliberations, when the 1st Respondent/'Resolution Applicant' had accepted the conditions of the 'Resolution Plan' especially keeping in mind the ingredients of Section 25(2)(h) of the 'Code' to the effect that 'no change or supplementary information to the 'Resolution Plan' shall be accepted after the submission date of 'Resolution Plan' then it is not open to the 1st Respondent/'Resolution Applicant' to take a 'topsy turvy' stance and is not to be allowed to withdraw the approved 'Resolution Plan'."

6. Before approval of a Resolution Plan by the Committee of Creditors the Corporate Insolvency Resolution Process passes through various stages. After admission of the Application under Section 7, 9 or 10 of the I&B Code, IRP is appointed, moratorium is slapped prohibiting activities enumerated in Section 14, public announcement is made, claims are invited, received and collated by the Interim Resolution Professional, Committee of Creditors is constituted and after appointment of Resolution Professional Expression of Interest is floated inviting Resolution Plans whereafter the Resolution Professional places all Resolution Plans before the Committee of Creditors. After preparation of Information Memorandum and examination of each Resolution Plan conforming the conditions laid down in Section 30(2) of the I&B Code, the Resolution Professional is required to present such compliant Resolution Plans to the Committee of Creditors for its approval. The Committee of Creditors may approve a Resolution Plan by a vote of not less than 66% of voting share of the Financial Creditors after considering its feasibility and viability, the manner of distribution proposed and other requirements as specified by IBBI. This process is to be concluded within 180 days and in the event of extension granted by the Adjudicating Authority for sufficient reasons, the CIRP period may extend to 270 days with maximum outer limit of 330 days including the period which may have been consumed by the judicial intervention during the CIRP process. It is manifestly clear that I&B Code provides for insolvency resolution in a time bound manner, the object sought to be achieved, *iner alia*, being maximization of value of assets of corporate persons and balancing the interests of all stake holders. Primacy is given to the Committee of Creditors, who are empowered to take a business decision in regard to feasibility and viability of a Resolution Plan based on their commercial wisdom, which is not justiciable as by now well settled by a catena of rulings handed down by the Hon'ble Apex Court. Intervention by the Adjudicating Authority is limited to compliance of the Resolution Plan approved by the Committee of Creditors to requirements of Section 30(2) and by this Appellate Tribunal in Appeal to grounds embodied in Section 61(3) of the I&B Code. Reference in this regard may be made to law laid down by the Honb'le Apex Court in *K Shashidhar v. Indian Overseas Bank* reported in 2019 SCC OnLine SC 257.

7. Be it seen that the CIRP process undertaken involves filing of Expression of Interest by the prospective Resolution Applicants which may ultimately manifest in the form of prospective Resolution Plan after negotiations as regards improvement or revision in terms of the proposed Resolution Plan. This process is in the nature of a bidding process where, based on consideration of the provisions of a Resolution Plan

with regard to financial matrix, capacity of the Resolution Applicant to generate funds, infusion of funds, upfront payment, the distribution mechanism and the period over which the claims of various stake holders are to be satisfied besides the feasibility and viability of the Resolution Plan, a Resolution Applicant emerges as the highest bidder (H1) eliminating the Resolution Plans of Resolution Applicants, which are ranked H2 and H3. The approval of a Resolution Plan by the Committee of Creditors with requisite majority has the effect of eliminating H2 and H3 from the arena. Though, such approved Resolution Plan would be binding on the Corporate Debtor and all stake holders only after the Adjudicating Authority passes an order under Section 31 of the I&B Code approving the Resolution Plan submitted by Resolution Professional with the approval of Committee of Creditors in terms of provisions of Section 30(6) of the I&B Code, it does not follow that the Successful Resolution Applicant would be at liberty to withdraw the Resolution Plan duly approved by the Committee of Creditors and laid before the Adjudicating Authority for approval thereby sabotaging the entire Corporate Insolvency Resolution Process, which is designed to achieve an object. A Resolution Applicant whose Resolution Plan stands approved by Committee of Creditors cannot be permitted to alter his position to the detriment of various stake holders after pushing out all potential rivals during the bidding process. This is fraught with disastrous consequences for the Corporate Debtor which may be pushed into liquidation as the CIRP period may by then be over thereby setting at naught all possibilities of insolvency resolution and protection of a Corporate Debtor, moreso when it is a going concern. That apart, there is no express provision in the I&B Code allowing a Successful Resolution Applicant to stage a U-turn and frustrate the entire exercise of Corporate Insolvency Resolution Process. The argument advanced on behalf of the Appellant that there is no provision in the I&B Code compelling specific performance of Resolution Plan by the Successful Resolution Applicant has to be repelled on four major grounds:—

- (i) There is no provision in the I&B Code entitling the Successful Resolution Applicant to seek withdrawal after its Resolution Plan stands approved by the Committee of Creditors with requisite majority;
- (ii) The successful Resolution Plan incorporates contractual terms binding the Resolution Applicant but it is not a contract of personal service which may be legally unenforceable;
- (iii) The Resolution Applicant in such case is estopped from wriggling out of the liabilities incurred under the approved Resolution Plan and the principle of estoppel by conduct would apply to it;
- (iv) The value of the assets of the Corporate Debtor is bound to have depleted because of passage of time consumed in Corporate Insolvency Resolution Process and in the event of Successful Resolution Applicant being permitted to walk out with impunity, the Corporate Debtor's depleting value would leave all stake holders in a state of devastation.

8. We are of the considered opinion that the sanctity of resolution process has to be maintained and the Resolution Applicant whose Resolution Plan has been approved by Committee of Creditors cannot be permitted to withdraw its Resolution Plan. Provision for submission of a Performance Bank Guarantee by a Resolution Applicant while submitting its Resolution Plan, as required under the amended provisions of IBBI (Insolvency Resolution Process of Corporate Persons) Regulations, 2016 is a step in this direction but may not be deterrent enough to prevent a Successful Resolution Applicant from taking a U-turn. Reliance placed by the Appellant on judgment rendered by this Appellate Tribunal in "*Committee of Creditors of Metalyst Forging Ltd. v. Deccan Value Investors LP - Company Appeal (AT) (Insolvency) 1276 of 2019* decided on 7th February, 2020" is of no consequence as in that case the Resolution

Plan approved by the Committee of Creditors was found to be violative of Section 30 (2)(e) of the I&B Code. It is in the context of such infirmity that this Appellate Tribunal had observed that the Adjudicating Authority could not compel specific performance of a plan by an unwilling Resolution Applicant. Such observations cannot be treated as a ratio to be followed as a precedent. The facts were entirely different and contravention of Section 30(2)(e) was found to have been established in that case. Same has no resemblance or comparison with the facts of the instant case where the Resolution Plan approved by the Committee of Creditors is still awaiting approval of the Adjudicating Authority. Therefore, no reliance can be placed on the observations made in the aforesaid ruling. We may also add that the approved Resolution Plan admittedly does not have a provision which could be treated as a contract of personal service rendering the same unenforceable or of a nature in respect of which specific performance cannot be an appropriate remedy. This feature of the plan also distinguishes it from the one which was the subject matter in the aforestated Appeal decided by this Appellate Tribunal.

9. Having regard to the forgoing discussion, we find no merit in this Appeal. The Appellant has failed to demonstrate that the impugned order suffers from any legal infirmity. The Appeal being devoid of merit is dismissed. No order as to costs.

† New Delhi Bench

‡ [Arising out of Order dated 03rd July, 2020 passed by the National Company Law Tribunal, New Delhi, Special Bench, Court-II in I.A. No. 1679/2019 in C.P. No.(IB)- 940(ND)/2018]

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