 DOI: *https://doij.org/10.10000/IJLMH.116784*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 1

2024

Restoration of CIRP Process Once Withdrawn u/s 12A of the IBC 2016

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 was enacted in furtherance of the India's stance on "Ease of Doing Business Index" of the World Bank. IBC 2016 is an umbrella legislation that deals with the cases of corporate insolvency. The legislation was enacted with the objective of speedy resolution of insolvency proceedings by way of providing a unified corporate insolvency resolution process. To aid the process of speedy resolution of corporate insolvency the corporate creditor and the debtor at times are also allowed entering into a consent agreement. The creditor as well as the debtor in such scenarios enters into settlement agreement where the debtors promise to pay the debt amount to the creditor against the withdrawal of the CIRP. A CIRP application can be withdrawn u/s 12-A of the Insolvency and Bankruptcy Code 2016. However, once withdrawn cannot be revived again. CIRP once withdrawn pursuant to the settlement agreement, if debtor fails to repay the debt amount or adhere with the consent terms the code lacks any provision for the revival of the application. This article explores a scenario whether a CIRP application that was filed and subsequently withdrawn due to a consent term can be revived with the help of case laws. The authors further in the article also made certain suggestions in relation to the code.

Keywords: *Insolvency and Bankruptcy Code (IBC), Corporate Insolvency Resolution Process, Settlement, NCLT.*

I. INTRODUCTION

With the intention of achieving reorganization and revival of corporate people, partnership businesses, and that of individuals in a time bound manner, the Insolvency and Bankruptcy Code, 2016, was enacted. IBC was passed in order to bring about a law that was friendly to business owners and to include specialized dispute resolution procedures. In the event of a repayment default, the IBC also provides provisions governing the Corporate Insolvency Resolution Process. CIRP under IBC can be initiated under section 7, 9, 10 by financial creditor, operational Creditor and by corporate debtor respectively, detailed procedure of which is

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explained in further chapters of this paper. Upon initiation of the CIRP the existing management ceases to exist and the authority thereafter vests with the Interim resolution professional. This leads to adversely affecting the interests of the corporate debtor[3]. Therefore, to corporate debtors usually tend to enter into a settlement with the creditors with respect to the repayment of the defaulted amount. Such settlement which allows the parties to resolve the dispute without indulging into insolvency resolution process has been duly recognized by the adjudicating authority in number of judicial pronouncements. In case parties enter into a settlement agreement after application regarding initiation of the CIRP is admitted by the NCLT, the parties have to then make an application for the withdrawal of the same under section 12-A of the code.

When the law was first established, there was no provision regarding the withdrawal of a CIRP application that had already been accepted by the NCLT (The Adjudicating Authority). Only the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 allowed for the insertion of section 12-A into the code, which allowed for the withdrawal of a CIRP application after admission. Once the application is withdrawn the resolution process proceeds as per the terms of the settlement agreement. However, there have been instances when the debtor breaches the terms of the settlement agreement and fails to repay the defaulted amount. In such a scenario the creditors being left with no other alternative rather than to go ahead with the CIRP process again. It must be noted that the Insolvency and Bankruptcy Code does not contain any provision for restoration of an application that is once withdrawn u/s 12-A of the code. The creditors in such a scenario are expected to proceed with filing of a fresh application for the initiation of CIRP which is bound to take time. This leads to delaying in the completion of the insolvency resolution process. Filing of a fresh application directly contradicts this objective behind the enactment of the code.

Therefore, in the present paper the authors aims to focus on highlighting these issues and how in the absence of any provision under the code for the revival of once withdrawn application u/s 12-A, renders the entire objective of the legislation to be futile.

II. CIRP PROCESS- PROCEDURE FOR INITIATION OF APPLICATION

When insolvency is triggered under the Insolvency and Bankruptcy Code, there are essentially two possible outcomes: either the Corporate Debtor (CD) is revived or, as a last resort, the process of liquidation is initiated. The principal aim of the Code is unquestionably directed towards the revival of the financially troubled corporate entity, protection of the interests of all

[3] 11 RMLNLUJ (2019) 52

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parties concerned, and maintenance of business operations. Upon the initiation of insolvency proceedings, great care is taken to investigate and put into action strategies that may lead to the revival of the CD. Conversely, liquidation is the last resort and is only used when all other options for resolution have failed. The assets of the CD are sold during liquidation, with the proceeds going to the creditors. Fundamentally, the Code's central tenet is its dedication to the revitalization and rescue of the Corporate Debtor, with liquidation serving as the last resort in the event that all other approaches to ending the insolvency prove fruitless.

The Corporate Insolvency Resolution Process, or CIRP for short, is a carefully designed process designed to handle a corporate entity's financial insolvency while adhering to the rules set forth in the Insolvency and Bankruptcy Code. This crucial mechanism starts the process when a corporate debtor can no longer afford to pay its debts and defaults on them, starting the CIRP. Initiating CIRP is a crucial first step in resolving financial difficulties inside a corporate entity. The Financial or the Operational Creditor may make an application with the Adjudicating Authority in accordance with the guidelines provided in Chapter II of Part II of the Code in order to begin this process. apply with the corporate debtor. Among the ways to begin CIRP are:

1. Financial Creditor (FC) under Section 7: If the corporate debtor has fallen behind on its financial obligations to the creditor, a financial creditor—such as a bank or other financial institution—may start CIRP by submitting an application. Usually, this refers to unpaid loans, debentures, or other debts.

2. Operational Creditor (OC) under Section 9: By submitting an application, an operational creditor—who may be a vendor, supplier, or service provider—may also start the CIRP. When a corporate debtor doesn't pay its operational debts—like paying for goods or services rendered—this happens.

3. Corporate Debtor's Corporate Applicant under Section 10: In certain situations, the corporate debtor may decide to start the CIRP after realizing its own financial instability. A corporate applicant, which is essentially a self-application for insolvency resolution, can be used to accomplish this.

III. WITHDRAWAL OF APPLICATION PURSUANT TO A SETTLEMENT AGREEMENT

Initially withdrawal of application was dealt by Rule 8 of the Insolvency and Bankruptcy Rules, 2016. The rule only provided for the withdrawal of the application before it is admitted by the

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adjudicating authority. By 2018 amendment section 12-A[4] for withdrawal of application post admission came to be inserted in the IBC 2016. Parties generally tend to withdraw an application u/s 7, 9, 10 under this provision in case they enter into a settlement agreement. Settling a dispute with respect to repayment of the default amount has become common practice as it benefits both the proponents as well the opponents. The proponents in a settlement agreement are corporate debtors as the control and management would continue to vest with the company itself allowing them to proceed with managing the affairs of the company and dealings accordingly and for the opponents without being involved in CIRP which is a collective the creditors entering into a settlement can decide on the terms which is best suited for them[5].

On the one hand, it can also be contended that though the practice of settling disputes under Section 12-A of the Insolvency and Bankruptcy Code 2016 is a positive development in facilitating the resolution of financial issues efficiently; however, such a practice may cast a shadow of uncertainty over the rights and interests of other creditors involved. This ambiguity could potentially open the door to the misuse of settlement procedures. Furthermore, a scenario may arise wherein the corporate debtor fails to adhere with the terms of the settlement after the parties have withdrawn the application under section 12-A, which was admitted by the adjudicating authority for settling the dispute u/s 7, 9, 10 as the case may be. In such circumstances, creditors find themselves unable to revive and restore the previously withdrawn application, placing them in a precarious position once again. This situation raises questions about the enforcement of claims under the Insolvency and Bankruptcy Code 2016, causing confusion and giving rise to concerns regarding the validity of such settlement agreements. The validity of these agreements has also been a subject matter in various judicial pronouncements.

IV. RECOGNITION OF SETTLEMENT AGREEMENTS BY THE ADJUDICATING AUTHORITIES

Settlement of an insolvency application post its admission was first witnessed in the case of Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance & Ors[6]. In this case the NCLAT dismissed the application of withdrawal stating only an application before getting admitted can be withdrawn, since the application in the present scenario is already admitted and so the same cannot be withdrawn. Furthermore, the NCLAT also held that Rule 11 of the NCLAT Rules, 2016 cannot be invoked for the withdrawal of application as the subject matter pertains to the

[4] Insolvency and Bankruptcy Code, 2016
[5] 5.2 RFMLR (2018) 345
[6] (2018) 15 SCC 589

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claims under the IBC, 2016 and that Rule 11 has not been adopted by the code.

Aggrieved by the said order the parties approached the Hon'ble Supreme Court wherein, the Honorable Supreme Court exercising its inherent jurisdiction under Article 142 *"allowed the settlement between the corporate debtor and the creditor and set aside the CIRP however, while observing that the view taken by the Hon'ble National Company Law Appellate Tribunal that the inherent powers under Rule 11 of the NCLAT Rules 2016 cannot be utilized appears to be the correct position in law"*

The question with respect to the validity of the settlement agreement post admission has been thereafter dealt in a number of other cases laws as well. It was finally in the case of Uttara Foods and Feeds (P) Ltd. v. Mona Pharmahcem[7] where the hon'ble Supreme Court in light of number of appeals being made to the apex court regarding withdrawal of application post admission after settlement between the parties observed, *"necessity of the relevant rules in the code to be amended so as to include such inherent powers that can be exercised by the competent authority to allow the settlements under the IBC 2016"*

In furtherance of this Section 12-A came to be inserted in the code allowing post admission withdrawal of the application pursuant to settlement. However, it must be noted that the wordings of the provision under 12-A provided a pre requisite of obtaining approval of committee of creditors with 90% of voting share. Thus a question arises as to whether an application be withdrawn after admission however, prior to the constitution of the COC. This question also forms subject matter of several cases. In the case of Arjun Puri v. Kunal Prasad[8]; it was observed by the hon'ble NCLAT that even prior to the constitution of the COC post admission of application u/s 7, 9, 10 withdrawals may happen under section 12-A of the code and accordingly the appellate tribunal allowed the withdrawal of an application which was admitted under section 7. The appellate tribunal also dismissed the CIRP that was initiated against the corporate debtor in this case.

Further similar observation was also made by the Honorable Supreme Court in the case of Abhishek Singh v Huhtamaki PPL Ltd. & Anr.[9] Wherein the apex court held that the requisite to obtain the approval of the COC by 90% of the voting share is only required in a scenario where COC has been constituted. They further went ahead to state that section 12-A in no ways debar the parties to make an application for the withdrawal prior to the constitution of the COC and is not violative of Regulation 30A of the CIRP regulation. The Apex court in this case also

[7] (2018) 15 SCC 587
[8] 2019 SCC OnLine NCLAT 5
[9] 2023 LiveLaw (SC) 250

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allowed withdrawal of the CIRP u/s 30A of the CIRP regulations.

V. FAILURE TO ADHERE WITH THE TERMS OF THE SETTLEMENT AGREEMENT

By now we have seen the how with the course of time the courts have evolved in recognizing the validity of the settlement agreement under the IBC. As we have mentioned earlier that there is another lacunae that persists that is the lack of provisions in the code for the revival/ restoration of an application, which was already once withdrawn u/s 12-A of the code. There might arise a situation of failure on part of the debtor to adhere with the terms of the settlement agreement and the creditor wishes to proceed with the CIRP again from the stage where it was withdrawn in order to avoid any further delay. However, in the absence of any provision in this regard makes it complicated for even the adjudicating authorities to allow such restoration of applications. This had restricted the adjudicating authorities in their approach as well.

The courts have taken varied stands while dealing with the question of revival of a withdrawn application. In the case of Vivek Bansal vs. Burda Druck India Pvt. Ltd. the operational creditors sought restoration of CIRP before the adjudicating authorities. For the very first time the hon'ble NCLAT granted liberty for the restoration of the insolvency process. However, when similar question arose in the case of ICICI Bank Limited vs. OPTO Circuits (India) Limited and others, the adjudicating authority took a deviation in its judgment by not allowing the financial creditor's application for revival of CIRP. But later the NCLAT in the appeal reversed the same and held that in the event of default by the corporate debtor w.r.t the payment of the outstanding dues, the FCs shall have the liberty to seek revival of the CIRP.

In a very recent judgment of IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd.[10], the NCLAT in its observations made a distinction in two categories of settlement:

1. When the parties generally make a statement that they have settled, and
2. When the parties actually bring the settlement on record

The NCLAT held that out of the two categories revival of CIRP is only allowed for the second category of settlement and since the present case falls in the category where settlement has been brought on record and because the agreement itself contained the terms regarding the withdrawal of the CIRP in the event of default in repayment, the tribunal granted the FC with the liberty of restoration.

The other factors that also affect the restoration of an application are the nature of debt. If the nature of debt pursuant to breach of consent terms remains the same, it is only then that

[10] 2023 SCC OnLine NCLAT 225

restoration could be allowed and this could be gathered by placing reliance on the case of Priyal Kantilal Patel v. IREP Credit Capital Pvt. Ltd.[11]

For determination of all these factors it is the adjudicating authority on whom the powers vests. And at times when these authorities' fails to exercise their discretion the aggrieved parties left with no other option are bound to approach the courts to exercise their inherent jurisdictions. This simply prolongs the entire procedure for repayment and revival of corporate persons, individuals etc.

VI. CONCLUSION

Thus, the Insolvency and Bankruptcy Code is a key piece of legislation that has improved lenders' ability to recoup overdue credit, strengthened India's bankruptcy laws, and been essential in addressing non-performing loans. When it comes to restructuring a Corporate Debtor (CD), it follows a "creditor in control" methodology. The Interim Resolution Professional (IRP) and subsequently the Resolution Professional (RP) wield some degree of control over this process during the Corporate Insolvency Resolution Process (CIRP).

The Insolvency and Bankruptcy Code by its Amendment Act 2018 and the various judgments of the Hon'ble Supreme Court of India as mentioned above brought in a paradigm shift in the IBC with regards to the introduction of a mechanism for the corporate debtor to settle with its creditors at any stage after the admission and in case of any further default to proceed again with the insolvency resolution process by either restoring it or by filing a fresh application.

However, in the absence of certain important provisions such as restoration of an application which was already withdrawn u/s 12-A of the code, the objective of the enactment of the code is not seen to have been met. To avoid the number of court interferences that prolongs the procedure, several amendments are required to be made to the code. The provision relating to filing of a revival application to the adjudicating authority, within 30 days from the date of default, on part of the debtor to comply with the settlement agreement, must be included within the code. Further the powers of the adjudicating authorities must also be extended in order to ensure that there is minimum court interference and that the objective behind the act is not left futile.

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[11]2023 SCC OnLine NCLAT 51

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