

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Insolvency) No. 51/2023
(IA Nos. 175, 176, 177 & 178 and 413 / 2023)

(Arising out of the Impugned Order dated 09/11/2022 in
IA No. 1035/CHE/2022 & IA No. 1036/CHE/2022 in TCP/141/IB/2017, passed
by the ‘Adjudicating Authority’, National Company Law
Tribunal, Chennai Bench)

In the matter of:

1. JoinUp Corporation

2- 31, Shimorenjyaku,
4- Chome, Mitaka City,
Tokyo, Japan.
Email ID: info@joinup.com

...Appellant

Versus

1. Mr. R. Sugumaran

(Interim Resolution Professional of
Safire Machinery Company Private Limited)
9A, Block 2, Ceebros Shyamala Garden,
136, Arcot Road, Saligramam,
Chennai- 600093
Contact Number- 99401 64435
Email: rsmaran@yahoo.co.in

...Respondent No.1

2. Safire Machinery Company Private Limited

New No.16, Old.No. 31, Balaji Nagar,
1st Street, Royapettah,
Chennai, Tamil Nadu - 600014
Email: guna@safireguna.com

...Respondent No. 2

3. A. Gunasekran

New No.16, Old.No. 31, Balaji Nagar,
1st Street, Royapettah,
Chennai, Tamil Nadu - 600014
Email: guna@safireguna.com

...Respondent No. 3

4. Tamilnad Mercantile Bank Limited

37, TTK Road, Royapettah, Chennai-600014

...Respondent No. 4

Present :

For Appellant : Mr. Vivek Kohli, Senior Advocate
For Ms. Nishtha Grover, Advocate .
For Respondents : Mr. R. Sugumaran, Respondent No. 1 /
Resolution Professional (in person)
Mr. E. Om Prakash, Sr. Advocate
For Mr. V. John Acquinas,
Advocate, For R2 & R3.

J U D G M E N T
(Hybrid Mode)

[Per: Ajai Das Mehrotra, Member (Technical)]

1. The present Appeal has been filed by Joinup Corporation, (hereinafter called Appellant) aggrieved by the impugned order dated 09.11.2022 of National Company Law Tribunal, Division Bench-1, Chennai in IA No. 1035/CHE/2022 and IA No. 1036/CHE/2022.

2. The facts of the case in brief are that Company Petition being No. 186 of 2015 was filed by the appellant before Madras High Court seeking winding up of Safire Machinery Company Private Limited (hereinafter called Corporate Debtor/ Respondent no.2) on account of inability of the respondent no.2 to make payment of Rs.118,751,000/- (including interest) for the goods supplied by the appellant to respondent no.2. After establishment of NCLT, the matter was transferred to the Adjudicating Authority and was numbered as TCP-141/(IB)/2017 to be treated as an application under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called IBC, 2016).

2.2 During the pendency of the petition before the Adjudicating Authority (AA) the settlement was agreed upon on 25.07.2017 and signed on 10.08.2017 between the appellant and the corporate debtor. Vide order dated 10.08.2017, the adjudicating authority disposed of the petition with liberty to the appellant to revive the petition in case there was default on the part of the corporate debtor to

pay the amount under the settlement agreement. The corporate debtor defaulted in its obligation to pay and the Adjudicating Authority revived the petition on the basis of an application filed by the applicant. Vide order dated 28.04.2022 the Adjudicating Authority initiated Corporate Insolvency Resolution Process (hereinafter called CIRP) against the corporate debtor and appointed Mr. R. Sugumaran as an Interim Resolution Professional.

3. The Interim Resolution Professional (hereinafter called IRP) invited claims from the creditors and the appellant submitted its claim in Form-B dated 13.05.2022 as under:-

Particulars	Amount (Japanese Yen)	Amount (approx.in INR)
Principal	30,000,000	1,81,23,807
Interest	33,743,215	2,03,85,183
Total	63,743,215	3,85,08,990

4. The IRP admitted only the principal amount of 30 million yen (Rs.1,76,64,787) and put the interest component of the claim under verification. Subsequently, on 27.10.2022, the IRP rejected the claim of interest of the appellant.

5. The IRP collated the claims from creditors and constituted the CoC on 23.05.2022 with sole secured Financial Creditor, namely Tamilnad Mercantile Bank Limited. In its first meeting, CoC on 30.05.2022 decided to initiate Liquidation as it was found that the corporate debtor is not a going concern. In its second meeting held on 10.06.2022 the IRP was authorised to file liquidation application which was filed and was numbered as IA No. 786/CHE/2022.

6. An application along with Form “FA”, along with settlement agreement dated 09.09.2022 was filed before NCLT seeking withdrawal of CIRP under 12A of IBC, 2016.

7. The settlement agreement dated 09.09.2022 was entered between Financial Creditor (Tamilnad Mercantile Bank Limited) and the corporate debtor and was placed before the 5th CoC meeting on 12.09.2022 and was approved by the CoC with 100% voting. As a consequence to the application under Section 12A, the Adjudicating Authority through the impugned order allowed withdrawal of CIRP and the main petition TCP-141/(IB)/2017 was treated as “*dismissed as withdrawn*”. The adjudicating authority has relied upon the order of the Hon’ble Supreme Court in the case of ***Swiss Ribbons Private Limited & Anr. Vs. Union of India & Ors. (2019) 4 SCC 17*** to hold that Section 12A application can be allowed even till liquidation proceedings. The IA for liquidation namely IA No. 786/CHE/2022 was also dismissed as infructuous. The Adjudicating Authority also allowed IA No. 1035/CHE/2022 and removed the restrain order passed by it on 04.07.2019 in respect to the property held by the corporate debtor in the registration district of South Chennai.

8. The main contention of the appellant is that as per the provisions of Section 12A of IBC, 2016, CIRP can be withdrawn only on the application of the applicant who had filed the application under Section 7, Section 9 or Section 10 of the ‘Code’. The learned counsel of the appellant has also referred to Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 which also specifies that the application for withdrawal under Section 12A is to be made to the Adjudicating Authority by the applicant. The appellant has contended that it had never filed the application under

Section 12A of IBC, 2016 read with Regulations 30A of IBBI (CIRP) Regulations and the Adjudicating Authority has erred in allowing withdrawal of CIRP.

9. For ready reference the provisions of Section 12A of IBC, 2016 and Regulation 30A of IBBI (CIRP) Regulations, 2016 are produced below:-

“Section 12-A, 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 percent voting share of the committee of creditors, in such manner as may be specified.

“30A. (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 3[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 sub-regulation (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 alongwith 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 sub-regulation (3) or (5).

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

10. The learned counsel for the appellant submits that the ‘applicant’ has been defined in Clause (a) of Sub-Regulation (1) of Regulation 2 of IBBI (CIRP) Regulations, 2016 as follows:

“APPLICANT” means the person(s) filing an application under sections 7, 9 or 10, as the case may be;

11. It was submitted by the appellant that it had not signed Form ‘FA’ and the adjudicating authority has erred in accepting Form ‘FA’ which was not signed by the Applicant and has erred in allowing withdrawal of CIRP. It was submitted that the appellant had objected to the submission of Form ‘FA’, which was duly recorded in the minutes of the meeting of 5th CoC. The appellant relied upon the decision of NCLAT in the case of ***Francis John Kattukaran vs. The Federal Bank Limited & Anr., CA(AT) (Ins) No.242/2018*** and ***Harish Raghavji Patel vs. Shapooriji Pallonji Finance Private Limited & Another, CA(AT)(Ins) No. 391 of 2021*** to emphasize that application for withdrawal of CIRP proceedings under Section 12A of the Code can be made only by the applicant.

12. The respondent no.1, who is discharged Interim Resolution Professional of the corporate debtor stated that the application under Section 12A was in line with the recent Supreme Court judgment in the case ***Vallal Rick vs. M/s. Shiva Industries and Holding Limited in Civil Appeal No. 1811- 1812 of 2022***, that

when 90 per cent and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake holders to permit the settlement and withdrawal of CIRP. In its submission dated 10.08.2023 the IRP further requested to remit the matter back to NCLT, Chennai as the Director and Corporate Debtor have failed to honour settlement agreement by not paying the Operational Creditor, i.e, Joinup Corporation (*appellant herein*) and had failed to provide the bank guarantee to the Assistant Commissioner Sales Tax as per the ‘Settlement Agreement’.

13. The relevant portion of the reply of Respondent no.1 is reproduced below:

“To remit the matter back to Hon’ble NCLT, Chennai as the Director and the Corporate Debtor have failed to honour the settlement agreement by not paying the Operational Creditor i.e; Joinup Corporation of Rs,1,76,64,788/- and failed to provide the Bank Guarantee to the Assistant Commissioner (Sales Tax) for Rs.1,35,37,021/- thereby, have failed in their commitment of settling the admitted claims of the Operation Creditors as per the agreement which is part of Form FA filed under Section 12A of the IBC, 2016 which was the basis of approval of 12A petition by the Hon’ble NCLT, Chennai, in order to pursue the Liquidation Process as the CIRP period was over on 24.10.2022. ”

14. Respondent no.2 (Corporate Debtor) and Respondent no.3 (Ex-Director) have filed common reply and written statements. Their main submissions are that the Hon’ble Supreme Court in the matter of ***Brilliant Alloys Pvt. Limited Vs. Mr. S. Ralagopal***, has taken a view that Regulation 30A of IBBI (CIRP) Regulations, 2016 *"Is only Directive and not Declarative"* and therefore the submission of the appellant that the Form ‘FA’ ought to be filed only by them is not sustainable in law. R2 and R3 have also relied upon the decision in ***Vallal Rick VS. M/s. Shiva Industries and Holding Limited in Civil Appeal No. 1811- 1812 of 2022*** and stated that where the CoC has approved withdrawal of CIRP the Adjudicating Authority or NCLAT have limited powers and they cannot sit over the commercial

wisdom of CoC. R2 and R3 have relied upon the decision of NCLAT, New Delhi in *Mr. K. Srinvas Krishna VS. Shyam Arora* in Company Appeal (AT) No. 221 of 2021 and *Sukhbeer Singh Vs. Dinesh Chandra Agarwal* in Company Appeal (AT) (Insolvency) No. 259 of 2019 in support of their claim that it is not essential that the applicant of the application under Section 9 should have signed Form 'FA'.

15. No reply/ written statement have been made by respondent no.4, i.e, Tamilnad Mercantile Bank.

16. We have gone through the submissions made by the appellant and the respondents and the judgments relied upon by them. After initiation of CIRP, the enabling provisions for withdrawal of CIRP are contained only in Section 12A of IBC, 2016. Section 12A is reproduced below for ready reference:-

“Section 12A, 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 percent. Voting share of the committee of creditors, in such manner as may be specified.

From the plain reading of Section 12A it is clear that withdrawal of CIRP has to satisfy twin requirements of an application by the applicant which then needs approval of CoC by atleast 90% voting share. The word applicant is defined in Regulation 2(1)(a) of IBBI (CIRP) Regulations, 2016 as under:-

“APPLICANT” means the person(s) filing an application under sections 7, 9 or 10, as the case may be;

Regulation 30A of IBBI (CIRP) Regulations, 2016 specifies the procedure and form in which application for withdrawal of CIRP has to be made. As per the provisions of IBBI (CIRP) Regulations, 2016 the application for withdrawal of CIRP under Section 12A of IBC, 2016 may be made to the Adjudicating Authority through IRP by the applicant in Form-A, specified in the Schedule accompanied

by a bank guarantee towards the estimated expenses made by the IRP. The application for withdrawal as per the Regulation 30A read with Section 12A has to be necessarily made by the applicant who has initiated CIRP by filing application under Section 7, Section 9 or Section 10 of IBC, 2016. The provisions of the Code and IBBI (CIRP) Regulations, 2016 regarding this are sufficiently clear.

17. The respondents have relied upon the decision of the case *Mr. K. Srinivas Krishna Vs. Shyam Arora & Others* cited supra wherein NCLAT, New Delhi has accepted withdrawal of CIRP where application was not signed by the applicant.

18. We have gone through the facts of the above case and are of the opinion that the said judgment applies to peculiar facts of the said case. In the said case the applicant had two claims of Rs.50,32,028/- and Rs.3,67,200/-. The second claim was admitted by the IRP and was fully paid. The first claim of Rs.50,32,028/- was not admitted by the IRP and it was contested by the applicant right up to Supreme Court. The NCLT, NCLAT and Hon'ble Supreme Court had not accepted the said claim and thus it had become final that 'this amount is not payable to the applicant'. The applicant, after receiving the full amount admissible as per law had refused to sign Form 'FA'. However, in the present case, the appellant had objected to withdrawal of CIRP and its claim over interest had not attained finality.

19. The issue for consideration in the case of *Sukhbeer Singh Vs. Dinesh Chandra Agarwal* cited supra was altogether different and CoC had not approved the proposal under Section 12A with 90% voting share and the appellant has submitted that the CoC should have examined the viability and feasibility of the resolution plan while considering Section 12A proposal, and this suggestion was rejected by the NCLAT.

20. We find that the proposal to file Form 'FA' and seek withdrawal of CIRP was considered as item no.5 in 5th CoC meeting held on 12.09.2022. Even in the said meeting Mr. Monish Surendran representing the operational creditor/appellant (Joinup Corporation) had submitted his objection on signing of Form 'FA' and on the non-consideration of interest portion due to the appellant in the admitted claims. The minutes also recorded that the Form 'FA' was submitted by Tamilnad Mercantile Bank Limited. Thus, the respondents were well aware that the applicant of the application under Section 9 of IBC, 2016 was not willing to sign Form 'FA' and that Form 'FA' has been signed by the Financial Creditor (Tamilnad Mercantile Bank Limited). The impugned order in Para-6 has recorded as under, which is not factually correct, as Form 'FA' was not signed or submitted by the Operational Creditor.

“6. Pursuant thereto, it is averred that the applicant received Form 'FA' along with Settlement Agreement dated 09.09.2022 from the Operation Creditor and the same is annexed at Page Nos 8 to 13 of the application typeset.”

21. The Form “FA” submitted by the IRP in the proceedings before NCLT, Chennai is scanned below which shows that it was signed by the sole CoC Member and not the “applicant”:-

FORM FA**APPLICATION FOR WITHDRAWAL OF CORPORATE INSOLVENCY
RESOLUTION PROCESS**

[Under Regulation 30A of the Insolvency and Bankruptcy Board of India
(Insolvency Resolution Process for Corporate Persons) Regulations, 2016]

September 9.9., 2022

To

The Adjudicating Authority
National Company Law Tribunal, Chennai Bench – I,
Chennai,

Through

Mr. R. Sugumaran
Interim Resolution Professional
Safire Machinery Company Private Limited under CIRP.

**Subject: Withdrawal of Application admitted for corporate
insolvency resolution process of M/s.Safire Machinery
Company Private Limited (Corporate Debtor)**

1. M/s. Joinup Corporation, the Operational Creditor, originally filed C.P. No. 185 of 2005, before the Hon'ble High Court of Judicature at Madras for Windingup of the Corporate Debtor under Section 433 (e) and Section 433 (f) of the Companies Act. On passing of the IBC code the above petition got to be transferred to Hon'ble NCLT, Chennai and it was renumbered as TCP /141/IB of 2017.

For TAMILNAD MERCANTILE BANK LTD

Chief Executive Officer
(K.Raj Kumar) (929)

It is therefore prayed to the Hon'ble Tribunal:

- i. To accept the Settlement Plan which was approved by the committee of creditor in the 4th COC held on 09.09.2022 and to withdraw the CIRP.

For TAMILNAD MERCANTILE BANK LTD

 Chief Manager
 (K. Raj Kumar)

For Tamilnad Mercantile Bank Limited, representing COC

Date: 09.09.2022

Place: Chennai

The Adjudicating Authority has over looked and ignored the fact that Form 'FA' has not been signed by the applicant of application under Section 9 of IBC, 2016. No finding in this regard has been given in the impugned order.

22. We have also considered the submissions of IRP requesting that the case may be remitted back to NCLT, Chennai as the corporate debtor has failed to honour the settlement agreement. We hereby hold that the Form 'FA' was not proper, and was not as prescribed under the provisions of Regulation 30A of IBBI (CIRP) Regulations, 2016 and Section 12A of IBC, 2016 and hold that withdrawal of CIRP was not correct as per Law. The impugned order dated 09.11.2022 is set

aside. Consequently, TCP-141(IB)/2017 and the connected IAs 1035/CHE/2022 and IA No. 1036/CHE/2022 are revived and restored to the file of NCLT, Chennai for appropriate action. Company Appeal (AT) (CH) (Insolvency) No. 51 of 2023 is accordingly allowed. All the connected IAs pending, if any, are closed. No orders as to cost.

[Justice M. Venugopal]
Member (Judicial)

[Ajai Das Mehrotra]
Member (Technical)

27.02.2024
HK/ TM