WITHDRAWAL OF CIRP APPLICATION UNDER SECTION 12A OF IBC: A COMPREHENSIVE GUIDE

Yash Gupta
(An Advocate and a student of Graduate Insolvency Programme)

Introduction

The Insolvency and Bankruptcy Code (IBC) was enacted in 2016 to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner. The IBC aimed to create a mechanism for the resolution of stressed assets that would promote entrepreneurship and maximize the value of assets. However, soon after its enactment, concerns were raised that the IBC could lead to the liquidation of viable companies, which could have been resolved through other means. In response to these concerns, the government introduced several amendments to the IBC, including the insertion of Section 12A.

Genesis of the Section 12A

In the case of Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP [2017] ibclaw.in 04 SC, the Supreme Court allowed both parties to settle the matter by invoking its inherent powers under Article 142 of the Constitution of India. This Article enables the Supreme Court to pass any order or make any decree necessary to serve justice in any cause or matter before it. Moreover, the Supreme Court allowed the settlement between the parties and the case to be withdrawn even after insolvency proceedings have been started by invoking Article 142 and simultaneously held the NCLAT's view of not exercising its inherent powers under Rule 11 of the NCLAT Rules, 2016, to be correct position of law. Rule 11 provides tribunals with the power to issue orders or directions necessary to prevent abuse of the law or ensure justice.

The case of Uttara Foods & Feeds (P.) Ltd v. Mona Pharmachem [2017] ibclaw.in 10 SC presented a situation similar to the Lokhandwala Kataria Construction case. After both parties had agreed to reach an outside settlement, they appealed to the National Company Law Appellate Tribunal (NCLAT) to withdraw their application for Corporate Insolvency Resolution Proceedings. However, the Appellate Authority, in line with Rule 11 of the NCLAT Rules, 2016, refused to admit the appeal, thereby rejecting the withdrawal. In response, the parties approached the Supreme Court with the same issue. The Supreme Court, invoking its inherent powers under Article 142, approved the withdrawal of the application. The Supreme Court not only approved the withdrawal but also directed the competent authority to make necessary amendments to the Code.

Report of the Insolvency Law Committee- 2018

The Insolvency Law Committee, in March, 2018 report, observed that according to rule 8 of the AAA Rules, the NCLT can allow the withdrawal of an application if the applicant requests it before admission. However, there is no provision in the Code or CIRP Regulations that permits withdrawal after admission of a CIRP application. There have been cases where judicial permission was granted for withdrawal due to a
settlement between the applicant creditor and the corporate debtor. The Committee reviewed this practice in light of the objective of the Code to ensure that all key stakeholders participate in assessing viability and restructuring liabilities. Once the CIRP is initiated, it involves all creditors of the debtor, and the Code aims to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.

After reviewing several NCLT and NCLAT judgments, the Committee agreed that a settlement may be reached amongst all creditors and the debtor for a withdrawal to be granted, and not only the applicant creditor and the debtor. Therefore, the Committee unanimously agreed to amend the relevant rules to provide for withdrawal post-admission if the CoC approves such action by a voting share of ninety per cent. The Committee discussed that rule 11 of the NCLT Rules, 2016 may not be adopted for this aspect of CIRP at this stage, as observed by the Hon’ble Supreme Court in the case of Uttara Foods and Feeds Private Limited(supra).

Section 12A & Regulation 30A

Section 12A of the Indian Insolvency and Bankruptcy Code, 2016 (IBC) allows for the withdrawal of an insolvency application against a corporate debtor with the approval of at least 90% of the committee of creditors (CoC) in cases admitted under section 7 or section 9 or section 10. The Adjudicating Authority may permit the withdrawal of the application in the manner specified, as per the provisions of this Section. However, it is essential to consider Regulation 30A of the Corporate Insolvency Resolution Process (CIRP) Regulations, 2016 in conjunction with Section 12A. According to this Regulation, an application for withdrawal under Section 12A may be made to the Adjudicating Authority by the applicant through the interim resolution professional before the constitution of the committee, or by the applicant through the interim resolution professional or the resolution professional after the constitution of the committee, as the case may be.

Therefore, Section 12A and Regulation 30A provide a mechanism for the withdrawal of an insolvency application with the approval of the CoC, subject to certain conditions and in the manner specified by the Adjudicating Authority. The goal of this provision is to encourage resolution outside of the formal insolvency process and reduce the burden on the NCLT.

In the Swiss Ribbons Pvt. Ltd. v. Union of India (2019) ibclaw.in 03 SC case, the constitutionality of section 12A of the IBC was challenged on the basis that it violates the Uttara Foods and Feeds Ltd.(supra) case and gives the COC unbridled power, which violates Article 14 of the Indian constitution. However, the Supreme Court rejected this argument and held section 12A to be constitutional. The Court relied on the Insolvency Law Committee Report (2018) and stated that the 90% approval threshold by the COC before filing a settlement application is reasonable since it encourages settlement with all financial creditors.

Who can file the withdrawal Application under Section 12A

According to Section 12A of the Insolvency and Bankruptcy Code (IBC), an application for withdrawal of an admitted insolvency resolution process under Sections 7, 9, or 10 may be allowed by the Adjudicating Authority (AA) if the applicant files such an application with the approval of 90% of the voting share of the Committee of Creditors (CoC), as per the specified manner.

However, in the case of Sukhbeer Singh Vs. Dinesh Chandra Agarwal, (Resolution Professional), Maple Realcon Pvt.
Ltd. & Ors. (2019) ibclaw.in 354 NCLAT, the NCLAT held that the promoters could settle the matter with all financial and operational creditors, including allottees. In this case, a person other than the original applicant can propose the withdrawal of the insolvency resolution process under Section 12A, and the Resolution Professional is obligated to present the proposal to the CoC for consideration in light of the Section 12A. Therefore, Section 12A does not limit the applicant for withdrawal to only the original applicant, and any person can propose the withdrawal of an insolvency resolution process under this section.

Withdrawal before the constitution of Committee of Creditors

If an application for withdrawal under Section 12A of the Insolvency and Bankruptcy Code (IBC) is filed before the constitution of the Committee of Creditors (CoC), the Interim Resolution Professional (IRP) must present it directly before the Adjudicating Authority (AA) for approval.

In the case of Anuj Tejpal v. Rakesh Yadav (2021) ibclaw.in 303 NCLAT, the NCLAT held that Rule 11 of the NCLAT Rules, 2016 allows the Appellate Tribunal to make necessary orders for the ends of justice or to prevent the abuse of its process. The Supreme Court in Swiss Ribbons (P) Ltd. (supra) clarified that a party can approach the NCLT directly when the CoC is not yet constituted, and the NCLT may use its inherent powers under Rule 11 of the NCLT Rules, 2016 to allow or disallow an application for withdrawal or settlement. It is well established that substantive law takes precedence over regulations, and Section 12A of the IBC clearly pertains to the withdrawal of an application under Sections 7, 9 or 10 after the CoC is constituted and after seeking approval from 90% of the voting share of the CoC. In light of the Supreme Court’s decision in Swiss Ribbons(supra) and the foregoing reasons, the NCLAT held that an application for withdrawal filed before the constitution of the CoC need not be mandatorily dealt with under Regulation 30A(1), and the NCLAT may exercise its inherent powers under Rule 11 of the NCLAT Rules, 2016 in such cases.

Withdrawal after the Constitution of COC

According to the procedure prescribed by the Code, an application for withdrawal under Section 12A must be forwarded by the interim resolution professional to the CoC for approval. Approval requires a majority vote of 90%, and if the proposal is approved by the CoC, it is presented to the adjudicating authority, which can decide to allow or dismiss such applications. The requirement of a 90% majority vote for withdrawal is aimed at discouraging individual actions and encouraging collective actions, given that all creditors of a company undergoing CIRP are subject to the threat of financial loss. The decision of whether to allow withdrawal is to be taken by capable creditors who possess an interest in reviving the business of the corporate debtor.

In Vallal RCK v. Siva Industries and Holdings Ltd. (2022) ibclaw.in 63 SC, the Supreme Court emphasized that the requirements for withdrawal under Section 12A are more stringent than those for approving a resolution plan under Section 30(4). When 90% or more of the creditors find that permitting settlement and withdrawing CIRP is in the interest of all stakeholders, the adjudicating authority or appellate authority cannot sit in an appeal over the commercial wisdom of the CoC. Interference is warranted only when the decision of the CoC is capricious, arbitrary, irrational, or dehors the provisions of the statute or the rules. However, in certain cases question related to withdrawal is whether it is possible to withdraw an application after Form G (Expression of Interest) has been issued. In Swiss Ribbons (P) Ltd.(supra), the Supreme Court held that Regulation 30A(1) of the CIRP Regulations, 2016 is not mandatory but only directory. In exceptional cases, an application for withdrawal may be allowed even after the issuance of an invitation for Expression of
Interest under Regulation 36A of the CIRP Regulations, 2016.

This ruling was reaffirmed in *Brilliant Alloys (P) Ltd. v. S. Rajagopal* [2018] ibclaw.in 35 SC, where the Supreme Court clarified that the expression "shall" in Regulation 30A should be read as "may," making the provision only directory. Additionally, the NCLAT in *V. Navaneetha Krishnan v. Central Bank of India* [2018] ibclaw.in 298 NCLAT held that the application can be withdrawn only with the majority vote of 90% by the CoC. Hence Section 12A IBC and Regulation 30A(1) of the CIRP Regulations, 2016, an application filed under Sections 7, 9, or 10 can only be withdrawn after the issuance of Form G, provided that the proposal receives 90% of the majority vote of the CoC. However, if the application is made under clause (b) after the issue of the invitation for Expression of Interest under Regulation 36A, the applicant must provide reasons justifying withdrawal after the invitation has been issued.

**Withdrawal after approval of resolution plan**

In the case of *Hem Singh Bharana v M/s Pawan Doot Estate Pvt. Ltd. & Ors.* [2023] ibclaw.in 23 NCLAT, the NCLAT held that once the Committee of Creditors (CoC) approves a resolution plan, it is not possible to consider a withdrawal application under Section 12A of IBC. The NCLAT stated that when the CoC approves a resolution plan, the Resolution Applicant is prohibited from modifying or withdrawing from the plan. Similarly, the CoC is not allowed to change its position once it has made a decision. The NCLAT observed that the Regulation 30A of the CIRP Regulations states that an application for withdrawal under Section 12A can only be made after the issuance of an 'Expression of Interest' if there are sufficient reasons to justify the withdrawal. If Section 12A application was allowed even after the CoC had approved the Resolution Plan, then Regulations 30A(2)(a) and 30A(2)(b) should have included expenses under both Regulations 33 and 34. However, since the Resolution Professional costs are not mentioned in Regulation 30A(2), it indicates that a Section 12A Application cannot be filed after the CoC has approved the Resolution Plan.

**Withdrawal at the stage of liquidation**

IBC allows for the withdrawal of an insolvency application after its admission, but it does not specify the procedure for withdrawal after a liquidation order has been passed. However, the Hon'ble Supreme Court and NCLAT have permitted withdrawal during the liquidation stage with the approval of the COC.

In the case of *V. Navaneetha Krishna* (supra), the NCLAT observed that an application can be withdrawn under Section 12A even during the liquidation stage if the CoC approves it with 90% of votes. The NCLAT stated that if a person, who is not barred under Section 29A, satisfies the COC's demands during the liquidation period, they can offer to the Adjudicating Authority for consideration. If the COC approves the offer with a 90% voting share and decides to withdraw the application under Section 7 of IBC, the liquidation order passed by the Adjudicating Authority will not prevent it from making an appropriate order.

**Intersection between 12A & 29A**

The issue of whether resolution applicants who are ineligible under Section 29A of the Insolvency and Bankruptcy Code (IBC) can apply for withdrawal under Section 12A. The NCLAT settled the matter in the case of *Shweta Vishwanath Shirke v. Committee of Creditors* [2019] ibclaw.in 470 NCLAT by referring to the apex court's judgment in *Swiss Ribbons* (supra). The NCLAT held that promoters or shareholders of the Corporate Debtor are eligible to propose a settlement plan, and Section 29A's ineligibility cannot be a bar for considering applications under Section 12A. Both provisions have different objectives under the IBC.
Therefore, Section 29A’s ineligibility does not preclude a resolution applicant from seeking withdrawal under Section 12A of the IBC.

**Concluding Remarks**

It is important to note that the withdrawal of a company from the insolvency process is not a right, but a privilege, which is subject to certain conditions. The CoC must be convinced that the withdrawal is in the best interest of all stakeholders, including the financial creditors, operational creditors, and employees. If the CoC does not approve the withdrawal, the company must continue with the insolvency process. Further Section 12A of the IBC provides an opportunity for companies to withdraw from the insolvency process and seek resolution through other means. It is a welcome provision that prevents the unnecessary cost in resolution or liquidation of companies and ensures that all stakeholders are given a fair chance to resolve their issues.

**References:**

- The Insolvency and Bankruptcy Code, 2016
- Report of the Insolvency Law Committee
- Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP- [2017] ibclaw.in 04 SC
- Swiss Ribbons Pvt. Ltd. v. Union of India- (2019) ibclaw.in 03 SC
- Sukhbeer Singh Vs. Dinesh Chandra Agarwal - (2019) ibclaw.in 354 NCLAT
- Anuj Tejpal v. Rakesh Yadav - (2021) ibclaw.in 303 NCLAT
- Vallal RCK v. Siva Industries and Holdings Ltd- (2022) ibclaw.in 63 SC
- Brilliant Alloys (P) Ltd. v. S. Rajagopal- (2018) ibclaw.in 35 SC
- Hem Singh Bharana v M/s Pawan Doot Estate Pvt. Ltd. & Ors.- (2023) ibclaw.in 23 NCLAT
- Shweta Vishwanath Shirke v. Committee of Creditors – (2019) ibclaw.in 470 NCLAT