

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH (COURT – II)

I.A. – 188/2024

IN

C.P.(IB)-995 OF 2018

IN THE MATTER OF:

VMS Equipment Pvt. Ltd.

...Operational Creditor

Versus

Primrose Infratech Pvt. Ltd.

...Corporate Debtor

AND IN THE MATTER OF:

1. PRATHAM EXPOFAB PRIVATE LIMITED

THROUGH: BRIJ BHUSHAN GUPTA (DIRECTOR)

REG. OFFICE: FLAT NO. 251-B, 1st FLOOR

LIG FLATS, POCKET-12, JASOLA,

NEW DELHI- 110025

...Applicants/Shareholder of CD

2. DR. ASHISH NAITHANI

S/O S.P. NAITHANI

R/O GYAN PARK, KRISHNA NAGAR

DELHI-110051

...Applicants/Ex-Director of CD

VERSUS

1. ANIL MATTA

RESOLUTION PROFESSIONAL

M/S PRIMROSE INFRATECH PRIVATE LIMITED

HAVING HIS OFFICE AT:

RESIDENCY OF B-98, CHETAK SOCIETY

SECTOR 9, ROHINI, NEW DELHI-110085

I.A.-188/2024 in C.P.(I.B.)-995/2018

VMS Equipment Pvt. Ltd. Vs. Primrose Infratech Pvt. Ltd.

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2. NAVNEET ARORA

AR, CIRP OF PRIMROSE INFRATECH PVT. LTD.

...RESPONDENTS

Order delivered on: 28.08.2024

UNDER SECTION: 12A of IBC, 2016

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Suspended Board	:	Sr. Adv. P. Nagesh, Adv. Mrinal Harsh Vardhan, Adv. Kailash Ram
For RP	:	Adv. Sumant Batra, Adv. Nidhi Yadav, Adv. Sarthak Bhandari, Adv. Anuja Pethia, Adv. Rishabh Nigam, Adv. Rishabh Govil, Adv. Srikant Singh, Adv. Anil Matta

ORDER

1. This is an application filed on behalf of the ex-management of the Corporate Debtor with a prayer to allow the Applicants to place the settlement proposal under Section 12A of IBC, 2016 read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 before the CoC for voting and allow consequent withdrawal and suspension of CIRP admitted under Section 9 of IBC, 2016.
2. In the present case, an order dated 23.01.2024 was passed by this Adjudicating Authority with a direction to the RP to call a meeting of COC for examining the proposal made by the SRA, but the same was set aside by the order dated 28.02.2024 passed by Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 287 of 2024. It is informed by the Ld. counsel for the Applicant that the aforementioned order dated 28.02.2024 has been challenged before the Hon'ble Supreme Court.
3. The contentions of the Applicant and that of the Respondent RP have been outlined in great detail in our order dated 23.01.2024. The main contention of the Applicant is that the Resolution Plan had not attained finality at the time of our order dated 23.01.2024 directing the RP to consider the Section 12A application of the Applicant because the Plan was still open for consideration as addendum to the Plan was filed much later, i.e. on 03.05.2024. It is also contended that the application

under Section 12A of IBC, 2016 can be filed by suspended directors at any stage.

4. Ld. Sr. Counsel for the Applicant vehemently argued that the financial terms presented by the Applicant are much better in terms of value as well as the amount of equity invested in the plan filed by the Corporate Debtor. He further argued that the Applicant in the present petition has offered Rs. 20 crores for the revival of Corporate Debtor, while the offer by the SRA is only Rs. 15 crores. Furthermore, he has stated that out of this Rs. 15 crores, the equity of SRA will be only Rs. 01 lakh and Rs. 14.99 crores would be unsecured loan, while equity of Applicant would be Rs. 10 crores.

5. To support his contention that the application under Section 12A of IBC, 2016 can be filed by suspended Directors at any stage, the Ld. Senior Counsel has placed reliance upon several judicial precedents:

- 5.1 For filing Section 12A application after approval of Resolution Plan, reliance has been placed upon the Judgment of Hon'ble NCLAT in the matter of ***Shaji Purushothaman v. Union of India & Ors, Company Appeal (AT)(Ins) No. 921 of 2019*** wherein it has been held that it is for COC to decide whether the settlement proposal given by the Suspended director in terms of Section 12 A of the Code is better than the Resolution Plan approved by it. It has also been held by Hon'ble NCLAT that the decision to allow the

settlement plan submitted by the suspended Directors is strictly in the domain of the COC. The above view was affirmed by the Hon'ble Supreme Court.

5.2 ***In Sukbeer Singh v. Dinesh Chandra Agarwal (RP) , Maple Realcon Pvt. Ltd & Ors, Company Appeal (AT) (Ins) No. 259 of 2019*** it has been observed that it is the promoters who can settle the matter with all the Financial Creditors, Operational Creditors, including the allottees, and for that they may give their proposal and the RP is bound to place it before COC which is supposed to consider such an application in the light of Section 12A.

6. The Ld. Counsel for the RP, on the other hand, stated that the prayers made in the I.A. cannot be allowed as the CoC of CD has already approved the Resolution Plan and an application under Section 30(6) of IBC, 2016 being C.A. No. 1489 of 2020 for approval of the Resolution Plan was filed by the RP way back on 21.02.2020. It is further stated that the settled position of law is that once the CoC has approved a Resolution Plan under Section 30(4) of IBC, 2016, it does not have jurisdiction or authority to consider a settlement proposal.

6.1 To support his contention, reliance has been placed on the judgement of Hon'ble NCLAT in “***Hem Singh Bharana v. Pawan Doot Estate Pvt. Ltd.***”, [CA (AT) (Ins) No. 1481 of 2022] in which it has been held that after approval of the Resolution Plan, CoC

cannot entertain a settlement proposal. The order has also been affirmed by the Hon'ble Supreme Court on 30.01.2023 in “**Hem Singh Bharana v. Pawan Doot Estate Pvt. Ltd**”, [2023 SCC OnLine SC 769]. Further, it is submitted that in “**Nehru Place Hotels & Real Estates Pvt. Ltd. v. Sanjeev Mahajan & Ors.**” [CA (AT) (Ins) No. 1715 and 1716 of 2023], it has been held that a settlement proposal under Section 12A of the IBC, 2016 cannot be put before the CoC after the approval of the Resolution Plan by the CoC. This view has also been affirmed by the Hon'ble Supreme Court on 05.02.2024 “**Sanjeev Mahajan v. Nehru Place Hotels and Real Estates Pvt Ltd & Ors.**”, [Civil Appeal Nos 602-603 of 2024]. Further, in the matter of “**Union Bank v. Mr. Kapil Wadhwan & Ors.**” [(2022) ibclaw.in 88 NCLAT] also it has been held that there is no scope for negotiations once the CoC has approved the Resolution Plan. Relying on the above, the RP submitted that no such direction can be issued to the CoC.

- 6.2 It is further stated that there is no merit in the contention of the Applicant that, as the Addendum to the Resolution Plan was approved by the CoC on 26.08.2023, the Resolution Plan cannot be considered to have been approved on 13.02.2020 as the CoC has considered the Addendum submitted by SRA only to propose payment of dues to GNIDA under the Resolution Plan treating it a secured creditor.

6.3 It is also stated that the latest offer of the Applicant does not inspire confidence as way back in the year 2019 after constitution of the CoC, an application bearing CA-315/2019 was filed by ex-Director for withdrawal of the CIRP and the same was dismissed by this Adjudicating Authority on the ground that it was highly belated, and the decision of this Adjudicating Authority was upheld by the Hon'ble NCLAT in terms of the order dated 24.05.2019.

6.4 It is also submitted that another application bearing CA-1511/2019 was also filed by the ex-Director under Section 12A of the IBC, 2016 and the said application was rejected by this authority with observations that the present CIRP has been impeded at every stage by the Applicant by filing applications like CA-1511/2019. It is further submitted that the 9th meeting of the CoC was held on 19.02.2020 to discuss the proposal by the Applicant under Section 12A of the IBC, 2016, which was placed as item no. 6 of the agenda and the same was put to vote, but the proposal failed as it could get only 80.22% vote share. Thus, proposals for settlement made prior to approval of the Resolution Plan having already been considered by CoC and not approved, the CoC cannot again be directed repeatedly to consider the proposal and the Promoters cannot keep making applications, one after the other, as it is an abuse of the process of law.

7. We heard the parties at length and have considered the submissions made and also pursued the material on record(*ibid*).
8. A comprehensive look at the factual aspects and the orders previously passed in the matter makes it clear that right from the inception of CIRP in question, the erstwhile directors had made several attempts to invoke the provisions of Section 12A of the Code.
9. 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 a 90% voting share. The relevant provisions of the Code read as under:

“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 committee of creditors, in such manner as may be specified.”
10. In the present case, the Applicant has approached this Adjudicating Authority seeking our direction to the COC to consider resorting to process as per the above provision of law.
11. In this context, we note that this Adjudicating Authority has already dismissed two applications filed by the ex-Directors under Section 12A

of IBC, 2016. Furthermore, the CoC has once considered one such proposal in its meeting held on 19.02.2020 and rejected the same.

12. As we are now at the stage of consideration of the resolution plan, it is not deemed apt to give yet another opportunity to the Applicant to file a proposal under Section 12A as applicants have not shown bonafide for settlement earlier and it is just a repeated process to derail the approval of the Resolution Plan application.

13. Therefore, the IA is devoid of merits and deserves to be dismissed.
Ordered accordingly.

14. The Registry will send the copy of the order to the IBBI for its record.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)