

2022 LiveLaw (SC) 259

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
M.R. SHAH; B.V. NAGARATHNA, JJ.
CIVIL APPEAL NO. 3778 OF 2020; MARCH 03, 2022
Amit Katyal *Versus* Meera Ahuja and others

Insolvency and Bankruptcy Code, 2016 - The object and purpose of 14 the IBC is not to kill the company and stop/stall the project, but to ensure that the business of the company runs as a going concern. (Para 12)

Insolvency and Bankruptcy Code, 2016; Section 12A - Regulation 30A of the CIRP Regulations, 2016 - This provision is held to be directory depending on fact of case. [Referred to *Brilliant Alloys Pvt. Ltd. v. S. Rajagopal* 2018 SCC Online SC 3154] (Para 7)

Insolvency and Bankruptcy Code, 2016; Section 12A - At any stage before a COC is constituted, a party can approach NCLT/Adjudicating Authority directly and the Tribunal may in exercise of its powers under Rule 11 of the NCLT Rules, allow or disallow an application for withdrawal or settlement - In an appropriate case and where the case is being made out and the NCLT is satisfied about the settlement, may permit/allow an application for withdrawal or settlement. [Referred to *Swiss Ribbons Private Limited and Another v. Union of India and others*, reported in (2019) 4 SCC 17] (Para 7.1)

Summary: The Court allowed withdrawal of Corporate Insolvency Resolution Process against a builder in an application filed by three homebuyers in view of a settlement plan agreed upon by the majority of them. In the larger interest of the homebuyers, the Apex Court exercised power under Article 142 to permit withdrawal of the CIRP proceedings and set aside all matters pending between the parties.

WITH IA NO. 105732/2021(for Impleadment) IA NO. 18679/2022 (for directions on behalf of Respondent Nos. 1-3)

For Appellant(s) Ms. Sheena Taqui Adv Dhvanit Chopra, Adv. Akansha Saini, Adv. Shiv Vinayak Gupta, Adv. Mrs. Bina Gupta, AOR

For Respondent(s) Mr. Nakul Dewan, Sr. Adv. Mr. Kapil Shankla, Adv. Mr. Shyam D. Nandan, AOR Ms. Meghna Shankla, Adv. Ms. Radhika Gupta, Adv. Mr. Hrishikesh Baruah, AOR Mr. Archit Upadhayay, AOR Mr. Randhir Kumar Ojha, AOR Mr. K. V. Viswanathan, Sr. Adv. Bhargavi Kannan, Adv. Pracheta Kar, Adv. Rahul Sangwan, Adv. Amartya Sharan, Adv. Mr. Siddhant Buxy, AOR Mr. Amarjeet Singh, AOR MR. Shiv Kumar Pandey, Adv. MR. Chandrashekhar A. Chakalabbi, Adv. MR. Awanish Kumar, Adv. MR. Anshul Rai, Adv. MR. Abhinav Garg, Adv. MR. D. Girish Kumar, Adv. MR. Kumar Vinayakam Gupta, Adv. MR. Batra Shubham Parveen, Adv. M/S. Dharmaprabhas Law Associates, AOR

J U D G M E N T

M.R. SHAH, J.

1. Interlocutory Application No. 105732/2021 (for impleadment) is allowed in terms of the prayer made and they are ordered to be impleaded as respondents in the instant appeal.

1A. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 09.11.2020 passed by the National Company Law Appellate Tribunal, New Delhi (hereinafter referred to as the 'NCLAT/Appellate Authority') in Company Appeal (AT) (Insolvency) No. 1380 of 2019, by which the Appellate Authority has dismissed the said appeal preferred by the appellant herein – Promoter/Majority Shareholder of the Corporate Debtor – Jasmine Buildmart Pvt. Ltd. and has confirmed the order passed by the National Company Law Tribunal, New Delhi (hereinafter referred to as the 'NCLT/Adjudicating Authority') in admitting the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short, 'IBC'), the appellant – Promoter/Majority Shareholder of the Corporate Debtor has preferred the present appeal.

2. That respondent no. 4 herein – Corporate Debtor – Jasmine Buildmart Pvt. Ltd. had come out with a Gurgaon based housing project, namely, Krrish Provence Estate (hereinafter referred to as the 'Project'). That respondent no.4 herein – Corporate Debtor could not complete the project even after a period of eight years. Therefore, respondent nos. 1 to 3 herein (hereinafter referred to as the 'original applicants') who were the home buyers preferred Section 7 application before the Adjudicating Authority/NCLT, Delhi being CP No. 1722/ND/2018 seeking initiation of CIRP against respondent no. 4 – Corporate Debtor. That the original applicants sought refund of an amount of Rs.6,93,02,755/- due to an inordinate delay in the completion of the project and failure to handover possession within the stipulated time. The said application was filed on 06.12.2018, i.e., prior to the amendment to Section 7 of the IBC, which now permits 100 or 10% of the home buyers/allottees to apply under Section 7 of the IBC.

2.1 That the NCLT/Adjudicating Authority admitted Section 7 application on 28.11.2019 and appointed the Interim Resolution Professional (for short, 'IRP') and declared a moratorium. That the appellant herein challenged the order of admission of Section 7 application before the NCLAT/Appellate Authority being CA (AT) (Insolvency) 1380 of 2019. It appears that during the hearing before the NCLAT/Appellate Authority, the appellant herein tried to settle the matter with the original applicants, however, the settlement did not go through. That by the impugned judgment and order, the NCLAT has dismissed the said appeal and has upheld the admission order and directed commencement of CIRP.

2.2 The IRP issued the public announcement on 10.11.2020 and constituted the Committee of Creditors (for short, 'COC') on 23.11.2020. In the meantime, the appellant preferred the present appeal. By order dated 03.12.2020, this Court, while issuing notice in the appeal, stayed the operation and implementation of the impugned order, subject to the appellant depositing the amount of Rs.2,75,55,186/- plus interest at the rate of 6%

per annum in the Registry of this Court within two weeks from that date. It is reported that the appellant had deposited an amount of Rs. 3,36,02,000/- on 17.12.2020 with the Registry of this Court, which has been invested in a Fixed Deposit Receipt, which is to mature on 9.3.2022.

2.3 Krrish Provence Flat Buyers Association had filed a caveat before this Court apprehending that if any order is passed in the present proceedings, it may affect them as home buyers. Three other home buyers, namely, Sanjiv Puri, Akshat Seth and Kaustav Mukherjee have preferred IA No. 105732 of 2021 for impleadment.

2.4 The present appeal was adjourned from time to time on the ground that the dispute between the appellant and respondent Nos. 1 to 3 herein (original applicants) is being settled and that the appellant/Corporate Debtor is prepared to complete the project within a period of nine months, if the home buyers make payments, as scheduled.

2.5 When the present appeal was taken up for further hearing on 04.02.2022, it was reported by the learned Senior Advocates/counsel for the respective parties including the impleaders and the Association that the original applicants/respondent Nos. 1 to 3 herein as well as 79 other home buyers have settled the dispute with the Corporate Debtor and a settlement has been entered into, under which, it is agreed that the Corporate Debtor shall complete the entire project and hand over the possession to the home buyers (who want the possession), within a period of one year. It was also submitted on behalf of the original applicants that they have also settled the dispute with the appellant/Corporate Debtor and the appellant had agreed to refund the amount of Rs.3,36,02,000/- with applicable/accrued interest to the original applicants. Therefore, it was requested to record the settlement and permit the original applicants to withdraw CIRP proceedings pending before the NCLT/Adjudicating Authority. This Court passed the following order on 04.02.2022:

“IA Nos. 131763/2020 and 130570/2021 stand disposed of with liberty in favour of the applicant(s) to avail any other remedy which may be available to them, as permissible under the law to protect their rights.

It is reported that out of 128 home buyers of 176 units, 79 + 3 (i.e. 82) home buyers have settled the dispute with the corporate debtor including the original applicants/respondent nos. 1 to 3 herein who have initiated the IBC proceedings. It is reported that the original applicants/respondent nos. 1 to 3 herein as well as 79 home buyers have settled the dispute with the corporate debtor and a settlement has been entered into under which it is agreed that the corporate debtor shall complete the entire project and hand over the possession to the home buyers (who wants the possession) within a period of one year from today.

In that view of the matter, it is requested to dispose of the matter. As the respondent nos. 1 to 3 want to withdraw the original proceedings in view of the settlement and in the peculiar facts and circumstances of the case and considering the fact that the order passed by the NCLT has been stayed by this Court pursuant to the earlier interim order dated 3.12.2020 and the corporate debtor has deposited the entire amount as directed by this Court which is lying with the Registry and considering the provisions of Section 12-A of the IBC read with Section 2 (11), let the respondent

nos.1 to 3 herein/original applicants before the NCLT who has initiated the proceedings under Section 7, file an application for withdrawal of the proceedings.

Put up on 16.02.2022.”

2.6 Pursuant to order dated 4.2.2022, the original applicants have preferred IA No. 18679 of 2022 under Article 142 of the Constitution of India read with Rules 11 and 12 of the National Company Law Tribunal Rules, 2016, praying for permitting the original applicants to withdraw CIRP proceedings on their being paid a sum of Rs.3,36,02,000/- along with applicable interest, out of the amount deposited by the appellant in the Registry of this Court. It is also further prayed to dismiss all matters pending between the appellant and respondent Nos. 1 to 3 herein (original applicants) mentioned in paragraph 7 of IA No. 18679 of 2022 and close the CIRP proceedings of respondent No. 4 – Corporate Debtor initiated by respondent Nos. 1 to 3 herein (original applicants).

3. Shri Kapil Sibbal, learned Senior Advocate has appeared on behalf of the appellant, Shri Lokesh Bhola, learned Advocate has appeared on behalf of respondent Nos. 1 to 3 herein, Shri K.V. Vishwanathan, learned Senior Advocate has appeared on behalf of the three impleaders (IA No. 105732/2021), Shri Nakul Diwan, learned Senior Advocate has appeared on behalf of the Krrish Provence Flat Buyers Association, Mr. Yogesh Mittal, learned Advocate has appeared on behalf of the Resolution Professional and Ms. Radhika Gupta, learned Advocate has appeared on behalf of the intervenors.

3.1 Shri K.V. Vishwanathan and Shri Nakul Diwan, learned Senior Advocates appearing on behalf of the three impleaders – respective home buyers and the Association and Shri Kapil Sibal, learned Senior Advocate appearing on behalf of the appellant have jointly submitted that a majority of the home buyers and the appellant and Corporate Debtor have settled the disputes and a joint statement regarding proposed settlement plan signed by the respective parties is filed under which, the appellant and respondent No.4 (Corporate Debtor) have undertaken that they shall complete the entire project within one year from the date of settlement and offer possession of the flats to the home buyers. Under the said agreement, the appellant and respondent No.4 (Corporate Debtor) have undertaken before this Court as under:

“That the appellant and respondent No.4 (Company) shall undertake before the Hon'ble Court the following: -

1. Complete the entire project within 1 year from the date of settlement and offer the possession to the Homebuyers.
2. Complete the entire project including all the apartments, common areas, amenities, etc. as specified in the ABA.
3. All demands be raised and timely paid, strictly in terms of ABA.
4. Company commits to continue the provisions of all maintenance services as per the ABA.
5. Company will make the application for obtaining Occupancy Certificate within 6 months, before the Competent Authority.

4. Learned counsel on behalf of the respective parties have reported that out of the total 128 home buyers of 176 units, 79 + 3 home buyers have settled the dispute with the Corporate Debtor and have accepted the joint statement regarding proposed settlement plan dated 3.2.2022 and have agreed to the proposal/undertaking by the appellant and the Corporate Debtor that they shall complete the project and hand over the possession to the home buyers within a period of one year. Learned counsel appearing on behalf of the respective parties therefore have prayed to exercise the powers under Article 142 of the Constitution of India read with Rules 11 and 12 of the National Company Law Tribunal Rules, 2016 and permit the original applicants to withdraw the CIRP proceedings which shall be in the larger interest of the majority of the home buyers who want the possession and under the settlement they will get now the possession after waiting for eight to nine years.

4.1 Learned counsel appearing on behalf of the respective parties have also submitted that after the COC was constituted on 23.11.2020 by the IRP, no further steps are taken either by the IRP and/or even the COC and even the first meeting of the COC has also not been convened and before any further CIRP proceedings are proceeded, this Hon'ble Court has stayed the impugned order. It is submitted therefore that there shall not be any impediment in permitting the original applicants to withdraw the CIRP proceedings.

4.2 Learned counsel for the respective parties have heavily relied upon paras 82 to 87 of the decision of this Court in the case of *Swiss Ribbons Private Limited and Another v. Union of India and others*, reported in (2019) 4 SCC 17 and one another order passed by this Court in the case of *Kamal K. Singh v. Dinesh Gupta & Another (Civil Appeal No. 4993 of 2021, decided on 25.08.2021)*, in which this Court has permitted the original applicants before the Adjudicating Authority to withdraw the CIRP proceedings in view of the settlement entered into between the parties.

5. We have heard learned counsel for the respective parties at length.

5.1 The original applicants (respondent Nos. 1 to 3 herein) now have moved before this Court by way of an interlocutory application No. 18679/2022, praying for permitting them to withdraw the CIRP proceedings initiated by them against respondent no.4 – Corporate Debtor by submitting, *inter alia*, that the appellant has agreed to pay to the original applicants Rs.3,36,02,000/- with applicable/accrued interest thereon and they do not propose to thereafter proceed further with the insolvency proceedings. Similarly, 82 (79+3) home buyers out of the total 128 home buyers, who are also represented before this Court, have stated that they are satisfied with the undertaking given by the appellant and respondent no.4 before this Court recorded in the joint statement regarding the proposed settlement plan dated 3.2.2022, under which the appellant and respondent No.4 (Corporate Debtor) have undertaken to complete the project within a period of one year and to hand over the possession to them. Thus, out of 128 home buyers of 176 units, 82 home buyers + three original applicants have agreed to the settlement and agreed to withdraw the CIRP proceedings and/or have no objection if the CIRP proceedings initiated by respondent Nos. 1 to 3 herein are permitted to be withdrawn.

6. As observed hereinabove, immediately on constitution of COC, this Court has stayed the impugned order. No further steps are taken by the IRP/COC pursuant to the admission of the CIRP proceedings except the IRP was appointed and the COC was constituted. Under Section 12A of the IBC which has been inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 06.06.2018, 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 COC, in such manner as may be specified. The rationale behind the insertion of Section 12A is contained in the Insolvency Law Commission Report, which is as under:

“29.1 Under Rule 8 of the CIRP Rules, NCLT may permit withdrawal of the application on a request by the applicant before its admission. However, there is no provision in the Code or the CIRP Rules in relation to permissibility of withdrawal post admission of a CIRP application. It was observed by the Committee that there have been instances where on account of settlement between the applicant creditor and the corporate debtor, judicial permission for withdrawal of CIRP was granted. [...] Thus, it was agreed that once CIRP is initiated, it is no longer a proceeding only between the applicant creditor and the corporate debtor but is envisaged to be a proceeding involving all creditors of the debtor. The intent of the Code is to discourage individual actions for enforcement and settlement to the exclusion of the general benefit of all creditors.”

7. It is true that the procedure for preferring an application under Section 12A of the IBC is contained in Regulation 30A of the CIRP Regulations, 2016. However, as per the decision of this Court in the case of *Brilliant Alloys Pvt. Ltd. v. S. Rajagopal*, 2018 SCC Online SC 3154, the said provision is held to be directory, depending on the facts of each case.

7.1 In the case of *Swiss Ribbons Pvt. Ltd. (supra)*, it is held that at any stage before a COC is constituted, a party can approach NCLT/Adjudicating Authority directly and the Tribunal may in exercise of its powers under Rule 11 of the NCLT Rules, allow or disallow an application for withdrawal or settlement. Therefore, in an appropriate case and where the case is being made out and the NCLT is satisfied about the settlement, may permit/allow an application for withdrawal or settlement.

8. In the present case, as observed hereinabove, although the COC was constituted on 23.11.2020, there has been a stay of CIRP proceedings on 3.12.2020 (within ten days) and no proceedings have taken place before the COC. It is to be noted that the COC comprises 91 members, of which 70% are the members of the Flat Buyers Association who are willing for the CIRP proceedings being set aside, subject to the appellant and the Corporate Debtor – company honouring its undertaking given to this Court as per the settlement plan dated 3.2.2022.

9. Therefore, in the peculiar facts and circumstances of the case, where out of 128 home buyers, 82 home buyers will get the possession within a period of one year, as undertaken by the appellant and respondent No.4 – Corporate Debtor, coupled with the fact that original applicants have also settled the dispute with the appellant/Corporate

Debtor, we are of the opinion that this is a fit case to exercise the powers under Article 142 of the Constitution of India read with Rule 11 of the NCLT rules, 2016 and to permit the original applicants to withdraw the CIRP proceedings. We are of the opinion that the same shall be in the larger interest of the home buyers who are waiting for the possession since more than eight years.

10. If the original applicants and the majority of the home buyers are not permitted to close the CIRP proceedings, it would have a drastic consequence on the home buyers of real estate project. If the CIRP proceedings are continued, there would be a moratorium under Section 14 of the IBC and there would be stay of all pending proceedings and which would bar institution of fresh proceedings against the builder, including proceedings by home buyers for compensation due to delayed possession or refund. If the CIRP is successfully completed, the home buyers like all other creditors are subjected to the pay outs provided in the resolution plan approved by the COC. Most often, resolution plans provide for high percentage of haircuts in the claims, thereby significantly reducing the claims of creditors. Unlike other financial creditors like banks and financial institutions, the effect of such haircuts in claims for refund or delayed possession may be harsh and unjust on homebuyers.

On the other hand, if the CIRP fails, then the builder-company has to go into liquidation as per Section 33 of the IBC. The homebuyers being unsecured creditors of the builder company stand to lose all their monies that are either hard earned and saved or borrowed at high rate of interest, for no fault of theirs.

11. Even the legislative intent behind the amendments to the IBC is to secure, protect and balance the interests of all home buyers. The interest of home buyers is protected by restricting their ability to initiate CIRP against the builder only if 100 or 10% of the total allottees choose to do so, all the same conferring upon them the status of a financial creditors to enable them to participate in the COC in a representative capacity. Being alive to the problem of a single home buyer derailing the entire project by filing an insolvency application under Section 7 of the IBC, the legislature has introduced the threshold of at least 100 home buyers or 10% of the total home buyers of the same project to jointly file an application under Section 7 of the IBC for commencement of CIRP against the builder company. The Insolvency Bankruptcy Code (Second Amendment) Bill, 2019 that proposed the amendment to Section 7 contained a statement of object and reasons, *inter alia*, stated as follows:

“2. A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors, to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions, and in order to fill the critical gaps in the corporate insolvency framework. It has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016.”

12. In the present case, as observed hereinabove, out of the total 128 home buyers of 176 units, 82 homebuyers are against the insolvency proceedings and the original applicants have also settled their dispute with the appellant and corporate debtor. Even the object and purpose of the IBC is not to kill the company and stop/stall the project, but to ensure that the business of the company runs as a going concern.

13. In view of the aforesaid facts and circumstances, more particularly when the withdrawal of the CIRP proceedings initiated by the original applicants is allowable by the NCLT in exercise of its powers under Rule 11 of the NCLT rules, 2016 and in the peculiar facts and circumstances of the case, instead of relegating the original applicants to approach the NCLT/Adjudicating Authority by moving an application under Section 12A of the IBC, we are of the opinion that this is a fit case to exercise powers under Article 142 of the Constitution of India as the settlement arrived at between the home buyers and the appellant and corporate debtor – company shall be in the larger interest of the home buyers and under the settlement and as undertaken by the appellant/corporate debtor, out of 128 home buyers, 82 home buyers are likely to get possession within a period of one year, for which they are waiting since last more than eight years after they have invested their hard earned money. This shall be in furtherance of the object and purpose of IBC.

14. In view of the above and for the reasons stated above, IA No. 18679/2022 in Civil Appeal No. 3778/2020 filed by respondent Nos. 1 to 3 herein (original applicants before the NCLT/Adjudicating Authority) is allowed.

As agreed, respondent Nos. 1 to 3 shall be paid an amount of Rs.3,36,02,000/- along with accrued interest, out of the amount deposited by the appellant, pursuant to the earlier order passed by this Court dated 3.12.2020. Respondent Nos. 1 to 3 herein (original applicants before the Adjudicating Authority) are permitted to withdraw the application filed by them under Section 7 of the IBC, 2016 bearing CP No. 1722/ND/2018 pending before the NCLT, New Delhi. Hence, CP No. 1722/ND/2018 pending before the NCLT, New Delhi stands dismissed as withdrawn. Consequently, all the orders passed by the NCLT, New Delhi, including appointment of IRP and constitution of COC are hereby quashed and set aside. Consequently, the impugned judgment and order passed by the NCLAT also stands quashed and set aside. As agreed between respondent Nos. 1 to 3 herein, the appellant and the corporate debtor, Consumer Case bearing CC No. 984 of 2019, filed by respondent Nos. 1 to 3 herein, which is pending before the National Consumer Disputes Redressal Commission, New Delhi and Criminal Complaint being Case No. 540/2021 filed by respondent Nos. 1 to 3 herein, pending before the learned Chief Metropolitan Magistrate, SED, New Delhi are hereby dismissed as withdrawn/quashed. Either of the parties to place a copy of the present order before the National Consumer Disputes Redressal Commission, New Delhi and in the Court of Chief Metropolitan Magistrate, SED, New Delhi to complete the record of the Courts.

15. The joint statement regarding the settlement plan dated 27.01.2022/03.02.2022 along with the list of the members of the Krrish Provence Flat Buyers Association who

have accepted and agreed to take possession of the respective apartments, signed by the appellant, impleaders Akshat Seth, Sanjiv Puri & Kaustav Mukherjee and the office bearers of the Krrish Provence Flat Buyers Association are directed to be taken on record. It is directed that if the original of the joint statement regarding the settlement plan dated 27.01.2022/3.2.2022 signed by the respective parties and their advocates is not placed on record, the same be placed on record of the present proceedings, within a period of one week from today. The appellant herein and respondent No.4 – Jasmine Buildmart Pvt. Ltd. are directed to file separate undertakings before this Court, within a period of one week from today, specifically stating and undertaking that:

- (1) they shall complete the entire project within one year from 01.03.2022 and offer the possession to the respective home buyers;
- (2) they shall complete the entire project including all the apartments, common areas, amenities, etc. as specified in the ABA;
- (3) all demands be raised and timely paid, strictly in terms of ABA;
- (4) Company shall continue the provisions of all maintenance services as per the ABA; and
- (5) Company will make the application for obtaining Occupancy Certificate within six months, before the competent authority.

The aforesaid undertakings shall be backed by the Resolution of the Company, which shall also be placed on record along with the undertakings.

15.1. The appellant and respondent No.4 – Jasmine Buildmart Pvt. Ltd. shall abide by the settlement plan recorded hereinabove and the undertakings to be filed within a period of one week from today. Any breach on the part of the appellant and respondent No.4 – Jasmine Buildmart Pvt. Ltd. shall be viewed very seriously. Liberty is reserved in favour of the home buyers and the Krrish Provence Flat Buyers Association to approach this Court, in case of any difficulty.

16. To do the complete justice in the matter and considering the fact that after the admission of the CIRP proceedings, IRP was appointed and COC was constituted by the IRP and it is reported by the IRP that he had incurred some expenditure, we direct the appellant to pay a sum of Rs.6,00,000/- to the IRP, to be paid towards the expenditure that might have been incurred by the IRP and also the litigation costs, which shall be paid to the IRP by way of a Demand Draft within a period of two weeks from today.

17. The present proceedings stand disposed of accordingly, in terms of the above order. All other pending Interlocutory Applications stand disposed of.