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National Company Law Appellate Tribunal, New Delhi

Principal Bench

I.A. No. 815 of 2021
in
COMPANY APPEAL (AT) (Insolvency) No. 298 of 2021
With
I.A. Nos. 941, 956, 957, 1082, 1083, 1084, 1085, 1086, 1094, 1116 of 2021 and Diary Nos. 27487 & 27488 dtd. 23.06.2021.

(Arising out of Order dated 30th March, 2021 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, Court 2 in C.P No.- 40/NCLT/AHM/2020).

IN THE MATTER OF:

Anuj Tejpal
Director, of the Suspended Board of Directors
OYO Hotels and Homes Private Limited
Flat No. 505, Mangalayatan,
Jain mandir Raod, Bhimganj Mandi
Kota Junction, Kota 324002 **...Appellant**

Versus

1. Rakesh Yadav
S/o Shri Malkhan Singh Yadav
Residing at
Penthouse No. 1, Tower D
The Villas, DLF Phase 2
Gurgaon 122 002 **...Respondent No. 1**

2. OYO Hotels and Homes Private Limited
Through J. Shah
Interim Resolution Professional,
OYO Hotels and Homes Private Limited
Having his office at
408, Chitrarath Complex,
Off. C.G. Road, Navrangpura,
Ahmedabad 380 009, Gujarat **...Respondent No. 2**

Appellant: **Mr. Mukul Rohatgi, Sr. Advocate alongwith Mr. Abhijeet Sinha, Mr. Jeevan Ballav Panda, Ms. Shalini Sati Prasad, Ms. Meher Tandon, Mr.**

	Satish Padhi, Mr. Gaurav Sharma, Ms. Shreya Agarwal, Mr. Ishan Nagar, and Mr. Harsh Kaushik.
Respondents:	**Mr. Rakesh Yadav (in person), Mr. Kumar Anurag Singh, Mr. Srinivas Kotni, Mr. Shantam Gorawara and Mr. Zain A Khan, for R-1.** **Mr. Keyur J. Shah and Ms. Noopur K Dalal, for IRP (R-2).**
Proposed Intervenors:	**Mr. Pankaj Jain, for I.A. 941 of 2021.** **Ameya Ranade, for I.A. 956 of 2021.** **Mr. Mohit Chaudhary and Ms. Garima Sharma, for I.A. 957 of 2021.** **Mr. Ramchandra Madan and Mr. Rahul Gupta, for I.A. 1082, 1083, 1084, 1085 & 1086 of 2021.** **Mr. Krishnendu Datta, Sr. Advocate alongwith Mr. Samer Parekh, Mr. Sumit Goel, Ms. Sonal Gupta and Ms. Malvika Bhenot, for I.A. 1094 of 2021.** **Mr. Salvador Santosh Rebello, for I.A. 1116 of 2021.** **Mr. Debesh Panda, for Diary No. 27487 & 27488.** **Ms. Mithali Gupta, Mr. Raghav Sharma, Ms. Anukriti Dua, Mr. Mukesh Suhkhija, Mr. P.S. Ghai, Mr. Paras Mithal and Mr. Carlos De Sousa.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The Appellant erstwhile Director of 'OYO Hotels and Homes Private Limited' (the 'Corporate Debtor') has preferred the instant Appeal against the Order of Admission of Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short, the **'Code'**) filed by Mr. Rakesh Yadav/the 'Operational Creditor'. The Order of Admission passed on 30.03.2021 by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) and the consequential directions in the nature of passing of moratorium and appointment of Interim Resolution Professional (IRP) has been assailed through this Appeal on the following grounds:-

- In absence of any Agreement subsisting at the time of filing of the Petition between the Appellant and the second Respondent there is no privity of Contract between the two; the Learned Adjudicating Authority has considered the existence of a 'Pre-Existing Dispute'; the second Respondent (erstwhile Alcott Town Planners Private Limited) had executed the Management Service Agreement (MSA) dated 16.11.2018, with the first Respondent (hereinafter referred to as the 'Operational Creditor') to manage and operate Hotel Yellow White Residency situated at Gurgaon for which the 'Operational Creditor' received a Security Deposit of ₹ 13,50,000/- in addition to the investment made by the second Respondent of approximately ₹ 14,25,098/- as capital expenditure; during the subsistence of MSA all rights and liabilities were transferred to Mypreferred Transformation and Hospitality Private Limited (MTH) a distinct legal entity with effect from 01.06.2019; MTH revised the term of commercial arrangement last on 17.07.2019, wherein the benchmark revenue payable to the 'Operational Creditor' was modified; there was no objection raised at that point of time; MTH had made the payments as per modified commercial terms; the concerns of the 'Operational Creditor' raised on 09.09.2019 to the generic 'OYO Office' was sought to be resolved amicably; pending the negotiations, MTH paid the revised benchmark revenue to the 'Operational Creditor' for the period July and August 2019; Section 8 Demand Notice was issued on 13.09.2019 by the 'Operational Creditor'

to Alcott Town Planners Private Limited demanding payment of ₹ 7,02,000/- pertaining to the period July 2019 to September 2019 another Demand Notice was issued on 11.11.2019 in terms of Section 8 of the Code now demanding an amount of ₹16,02,000/- pertaining for the period July 2019 to November 2019; both Demand Notices were incorrectly addressed to R-2 when all the rights and obligations under MSA were vested with MTH.

- Learned Adjudicating Authority having observed in the Impugned Order that payments were remitted by MTH and accepted by the 'Operational Creditor' for the relevant period, ignored the factual position that the 'Corporate Debtor' and MTH are two separate and distinct legal entities.
- The dues under the present MSA if payable to the 'Operational Creditor' can only be claimed against MTH and not against R-2 and therefore the Learned Adjudicating Authority ought not to have admitted the Petition under Section 9 ignoring the factum that the Application was filed against incorrect legal entity and also the existence of 'Pre-Existing Dispute'.

2. This Tribunal on 08.04.2021 based on the submission of the Learned Counsel that the 'Operational Creditor' has wrongly proceeded against the 'Corporate Debtor' instead of the sister concern and that the sister concern has already paid all the amounts claimed by the 'Operational Creditor' and that the Committee of Creditors has not yet been constituted, issued notice and suspended the Constitution of the Committee of Creditors. The Counsel

for the Appellant further submitted that all efforts would be made to settle with the 'Operational Creditor' under Section 12-A of the Code.

3. Subsequently, the Appellant filed IA No. 815 of 2021 under Rule 11 read with Rule 31 of the National Company Law Appellate Tribunal Rules, 2016 (NCLAT Rules) seeking a direction to set aside the Impugned Order dated 30.03.2021, in exercise of the inherent powers of this Tribunal under Rule 11, in view of the settlement arrived at between the parties. It is stated that all disputes, claims and counter claims of the 'Operational Creditor' *qua* both R-2 OYO Hotels and Homes Private Limited as well as MTH stand settled to the full satisfaction of the parties and the 'Operational Creditor' has issued a letter dated 23.04.2021 to that effect. It is also submitted that the IRP has received the payment towards the total expenses incurred by him and there is no further amount outstanding in this regard.

4. The Respondent/'Operational Creditor' vide a communication dated 23.04.2021, confirmed as follows:-

> *'d. That Mypreferred Transformation and Hospitality Private Limited has, paid to me, a sum of INR 16,02,000 vide Demand Draft No. 714502 dated 03 April 2021 drawn on Citi Bank, being the total operational debt amount as per my Petition under Section 9 of the Code.*
>
> *e. Consequently, all the disputes/claims and counterclaims of the Applicant qua both Oyo Hotels and Homes Private Limited as well as Mypreferred Transformation and Hospitality Private Limited stand settled to the full satisfaction of the Parties and the Parties have agreed that they shall not claim or raise any dispute against each other which is subject matter of the Application bearing No. CP (IB) No.*

40/NCLT/AHM/2020 pending before the Hon'ble NCLT or otherwise in view of the amicable settlement.'

5. During the pendency of IA No. 815 of 2021, the following Intervention Applications have been filed by the proposed Intervenors, which are detailed as hereunder:-

I.A. No.	**Intervenor**
I.A. No. 941 of 2021	Madhu Choudhary (Proprietor of Sher Singh Palace).
I.A. No. 956 of 2021	M/s. Max Heights Infrastructure Ltd.
I.A. No. 957 of 2021	M/s. Regalia Retreat.
I.A. No. 1082 of 2021	M/s. Monish Investment Pvt. Ltd.
I.A. No. 1083 of 2021	Ghai Hotels & Investment Co. Pvt. Ltd.
I.A. No. 1084 of 2021	M/s. Lovely Hotels Pvt. Ltd.
I.A. No. 1085 of 2021	M/s. Hotel Samrat.
I.A. No. 1086 of 2021	Rajdoot Hospitality LLP.
I.A. No. 1094 of 2021	Federation of Hotel and Restaurant Association of India.
I.A. No. 1116 of 2021	Hotel Horizon.
Diary No. 27487 dtd. 23.06.2021	Dost Hospitality Services Pvt. Ltd.
Diary No. 27488 dtd. 23.06.2021	Karmyogi Properties Pvt. Ltd.

6. **The Intervention Application IA 957 of 2021 is preferred by M/s. Regalia Retreat on the following grounds:-**

- The Applicant is a partnership concern carrying on the business of Hotels, Restaurants, Guest Houses in 2006 in the name and style of

Hotel Regalia Retreat. While so, the agents of an entity named M/s. Oravel Stays Pvt. Ltd., merged into the Corporate Debtor Company with effect from 01.11.2019, approached the Applicant with a proposal to run Hotel Regalia Retreat under the label of 'OYO Homes'.

- The Applicant entered into a contract with the 'Corporate Debtor' on 15.02.2018, as per the terms of which, the 'Corporate Debtor' agreed to provide assured benchmark revenue of ₹12,00,000/- per month and charge a fee of 2.5% and commission of 12.5% on the total revenue generated in a month.
- The parties entered into a new contract dated 11.12.2018 whereby, the assured benchmark revenue was reduced to ₹10,00,000/- per month, but 'Corporate Debtor' failed to honor its part of obligation since 11.12.2018 despite modifying the terms of the contract with respect to minimum guarantee.
- As on 01.04.2021, the 'Corporate Debtor' owes an amount of ₹ 50,04,391/- to the Applicant and hence pursuant to the paper publication dated 03.04.2021, this Applicant submitted their claims on 10.04.2021, under Form B to the IRP.

Submissions on behalf of the Learned Counsel for the proposed Intervenor/Applicant in IA No. 957 of 2021:

- The Learned Counsel submitted that this Tribunal cannot grant the relief of 'withdrawal of CIRP Proceedings' on account of settlement

between the Appellant and the 'Operational Creditor'; that as per the ratio of ***'Swiss Ribbons Pvt. Ltd. and Ors.' Vs. 'Union of India and Ors.' (2019) 4 SCC 17,*** *'a party can approach NCLT directly where the Committee of Creditors is not yet constituted, and the Tribunal may, in exercise of inherent powers under Rule 11 of NCLT Rules, 2016, allow and disallow an Application'* and hence only NCLT is empowered to allow withdrawal of cases by resorting to Rule 11 and not this Tribunal; that an Application for withdrawal has to be as per the provisions of Regulations 30(A) which has not been followed in this case and hence sought for dismissal of the Appeal filed by the Appellant herein.

7. **IA 1086 of 2021 is preferred by M/s. Rajdoot Hospitality LLP on the following grounds:-**

- The Applicant executed a Management Services Agreement (MSA) on 30.03.2019, as per the terms of which, the Hotel premises would be maintained by the service provider for a fee equivalent to 90% of the net room revenue; Applicant was entitled to 10% of the net room revenue with the benchmark of ₹ 14,00,000/- in return of giving full control of the Hotel to the service provider.
- The Corporate Debtor defaulted in payment of benchmark revenue from 2020 onwards and hence, the Applicant in response to the public announcement dated 03.03.2021, filed a claim for an amount of ₹ 1,49,83,597/- before the IRP.

Submissions on behalf of the Learned Counsel appearing for the Applicant in IA No. 1086 of 2021:

- Learned Counsel submitted that Rule 11 of the NCLAT Rules, 2016, cannot be resorted to in this case as Section 12-A of the I&B Code read with Regulation 30-A govern settlement of withdrawal of CIRP Proceedings and the Appellant cannot bypass the said procedure; that the Interim Order dated 08.04.2021 was obtained on the grounds that the Appellant would settle under Section 12-A and hence sought for dismissal of the Application and the Appeal.

8. **Mr. Madhu Choudhary, proprietor of Sher Singh Palace preferred IA No. 941 of 2021** seeking intervention on the ground that the Applicant has rendered Lease Rent Services of Sher Singh Palace to the 'Corporate Debtor' and entered into a Lease Agreement on 05.09.2019; that despite service of Demand Notice dated 01.01.2021, the 'Corporate Debtor' failed to pay the debt amount of ₹ 1,53,85,851/- and hence pursuant to the paper publication dated 03.04.2021, a claim was preferred before the IRP.

Submissions on behalf of the Learned Counsel appearing for the Applicant in IA No. 941 of 2021:

- The Learned Counsel submitted that the Applicant does not have locus standi to file the withdrawal Application and placed reliance on the ratio of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** to buttress his argument that CIRP are Proceedings in *Rem* and hence withdrawal Application under Rule 11 cannot be entertained.

9. **M/s. Lovely Hotels Pvt. Ltd. preferred IA No. 1084 of 2021, seeking to intervene in the present Proceedings** on the ground that the Applicant entered into a Lease and License Agreement (LLA) dated 11.07.2017, with the 'Corporate Debtor' who undertook to run the Hotel as part of OYO Platform and generate revenue therefrom and undertook to pay a fee of ₹ 16,00,000/- per month to the Applicant but the 'Corporate Debtor' has committed multiple defaults to the tune of ₹ 1,57,58,429/-.

Submissions on behalf of the Learned Counsel in IA No. 1084 of 2021:

10. The Learned Counsel opposed the withdrawal Application on the following grounds:-

- Once CIRP Proceedings is initiated, it cannot be withdrawn without a settlement of claims of creditors as it is a proceeding in *'Rem'* and placed reliance on the following Judgements in support of his contention:-
    - ***'Mother Pride Dairy India Pvt. Ltd.' Vs. 'Portrait Advertising and Marketing Pvt. Ltd.', 2017 SCC OnLine SC 1789.***

    a. ***'Swiss Ribbons Pvt. Ltd. and Ors.' Vs. 'Union of India and Ors.' (2019) 4 SCC 17.***

    b. ***'Indus Biotech Pvt. Ltd.' Vs. 'Kotak India Venture' (2021) SCC OnLine SC 268.***

    c. ***'Pioneer Urban Land and Infrastructure Ltd.' Vs. 'Union of India', (2019) 8 SCC 416.***

- Learned Counsel strenuously argued that NLCAT has always rejected Applications of Withdrawal at the stage of Appeal and relied on the following Judgements in support of his contentions:-
    a. ***'Sintex Plastics Technology Ltd.' Vs. 'Zielen Industries Pvt. Ltd.' (2021) OnLine NCLAT 7.***
    b. ***'Sandeep Kukkar' Vs. 'Vijay Kumar Todi & Anr.', 2020 SCC OnLine NCLAT 897.***
    c. ***'Francis John Kattukaran' Vs. 'The Federal Bank Ltd.' Company Appeal (AT) (Insolvency) No. 242 of 2018.***
- Learned Counsel sought for dismissal of the Application otherwise it would cause great prejudice to the Intervenor and it would be an exercise in futility.

11. **M/s. Hotel Samrat preferred IA No. 1085 of 2021, seeking Intervention** on the ground that the Applicant executed an MSA with the 'Corporate Debtor' on 15.07.2018, whereby the 'Corporate Debtor' was to operate, manage and provide accommodation services under the name of 'OYO Town House' for a payment of fee, but has defaulted making the said payments since March 2020 to the tune of ₹ 5,56,53,927/- and hence submitted its claim for the said amount before the IRP.

Submissions of the Learned Counsel in IA No. 1085 of 2021:

- The Learned Counsel opposed the Withdrawal of Application at the Appellate stage based on the ratio laid down by the Hon'ble Supreme Court in ***'Mother Pride Dairy India Pvt. Ltd.' Vs. 'Portrait***

Advertising and Marketing Pvt. Ltd.' and ***'Swiss Ribbons Pvt. Ltd. and Ors.' Vs. 'Union of India and Ors.'.***

12. **Federation of Hotel and Restaurant Association of India preferred IA No. 1094/2021 seeking intervention, on behalf of its hotelier Members**: Learned Senior Counsel for the Applicants in IA No. 1094 of 2021, vehemently opposed this withdrawal Application as not maintainable on the following grounds:-

- Despite the insertion of Section 12-A of the Code, there was no provision which dealt with the situation where withdrawal, Application was sought for 'after Admission but before Constitution of CoC'. Such a situation was dealt with by the Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra).*** Subsequent to the above Judgment, Regulation 30-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 was substituted with effect from 25.07.2019, which provides for Application for withdrawal of Proceedings under Section 9 after its Admission but before the Constitution of the CoC provided

  i. has to be filed before the NCLT;
  ii. by the Applicant to the IRP;
  iii. in Form FA accompanied with Bank guarantee;

- After Regulation 30-A was substituted on 25.07.2019, an Application for withdrawal, cannot be filed before NCLAT by invoking inherent powers under Rule 11 and such Application could be filed only before NCLT as per the ratio of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra).***

- Prayer for withdrawal on the basis of settlement with one Creditor ought to be rejected as it is ultra-virus to the scope and intent of the Code.
- The Intervenor FHRAI represents Hotels and Restaurant across the country and pursuant to the Admission of the Insolvency Proceedings, IRP invited the claims and 46 numbers of Members of FHRAI have already filed their respective claims against the 'Corporate Debtor' amounting to ₹ 96.44 Crs.
- Though the CoC has not been yet constituted, it is only NCLT which is required to hear all the concerned parties and it *may* in its discretion either allow or disallow the Application. In support of his submission, Learned Counsel placed reliance on the following Judgements:-
    a. ***'Sh. Sushil Ansal' Vs. 'Ashok Tripathi and Ors.', 2020 SCC OnLine NCLAT 680.***
    b. ***'Jai Kishan Gupta' Vs. 'Green Edge Build Tech LLP and Ors.' 2019 SCC OnLine NCLAT 916***
    c. ***'Bhaskar Biswas' Vs. 'Devi Trading and Holding Pvt. Ltd. and Anr.' in 2019 SCC OnLine NCLAT 1072.***
- Learned Senior Counsel further contended that the 'Corporate Debtor' did not file any financial statements in the last two years and owes large amounts of money to the Members of FHRAI.
- Learned Sr. Counsel concluded that Application of Withdrawal is not as per Regulation 30-A; that the Applicant is a Non-Profit Registered Company representing the interests of its Members, who are hoteliers

and that the 'Corporate Debtor' cannot strictly be construed as a 'start up' as the turnover of the entity has exceeded 100 Crs. and as per the definition of 'start up' issued in the notification by the Ministry of Commerce and Industry, the turnover of the entity should not exceed 100 Crs.

13. **IA No. 956 of 2021 is preferred by Intervenor Applicant M/s. Max Heights Infrastructure Ltd. on the following grounds:-**

- It is stated that the Intervenor/Applicant is representing the following Applicant/'Operational Creditors' as their authorized representative

S.	***Operational Creditor***	***Agreement***	***Total Claim (In ₹)***
1.	*M/s. HOTEL GOLDEN SWAN, Mumbai*	*Management and Service Agreement*	*2,37,45,705*
2.	*M/s. SONA HOTELS, Goa*	*Management and Service Agreement*	*1,26,30,388*
3.	*M/s. Vikas Mineral Food Pvt. Ltd., Chandigarh*	*Management and Service Agreement*	*6,50,00,000*
4.	*M/s. PB Ventures LLP, Mumbai*	*Marketing and Operational Consulting Agreement*	*14,58,87,870*
5.	*M/s. SAAG VENTURES, Bangalore*	*Marketing and Operational Consulting Agreement*	*48,62,081*
6.	*M/s. ARMA HOSPITALITY, Mumbai*	*Management and Service Agreement*	*4,87,24,193*
7.	*M/s. AIRPORT RESIDENCY, Bangalore*	*Marketing and Operational Consulting Agreement*	*25,60,195*
8.	*M/s. Samaroh Hospitality, LLP, Indore*	*Marketing and Operational Consulting Agreement*	*41,08,997*
9.	*M/s. OCEANS 7 Hotels and Resorts, Goa*	*Management and Service Agreement*	*3,23,51,780*

10.	*M/s. Aildasani Hotels & Resorts, Indore*	*Marketing and Operational Consulting Agreement*	*27,37,708*
11.	*Max Heights Infrastructure Ltd., New Delhi*	*Lease Agreement*	*74,41,533*
TOTAL CLAIM AMOUNT			*₹ 35,00,50,450*

- It is stated that the Applicants and the 'Corporate Debtor' entered into Lease Agreements and MSAs wherein the 'Corporate Debtor' *interalia* agreed to use and run the properties on various terms and conditions on payment of rental and license fee, but has defaulted to the tune of ₹ 35,00,50,450/- for which various notices were sent, but there was no response.
- The Applicant filed an Application before the National Company Law Tribunal, New Delhi Bench which stood transferred to National Company Law Tribunal Ahmedabad Bench on account of change in the address of the 'Corporate Debtor'.
- Applicant/'Operational Creditors' in order to secure the rights and without prejudice to their own independent Applications before different fora, including the NCLT, submitted their claims before the IRP.

Submissions of the Learned Counsel appearing on behalf of the proposed Intervenor/Applicant in IA No. 956 of 2021:

- The present Proceedings are hit by Section 65 as the said transaction is being carried out only to defraud the Creditors.

- Once CIRP is initiated, it cannot be withdrawn without settlement of claims of all the Creditors as it is a Proceeding in *Rem.*
- NCLAT in ***'Mother Pride Dairy India Pvt. Ltd.' Vs. 'Portrait Advertising and Marketing Pvt. Ltd.'*** held that once an Application is admitted, it cannot be withdrawal.
- The Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** has laid down that only NCLT has jurisdiction to entertain 'Applications of withdrawal'.

14. **IA No. 1116 of 2021 is preferred by M/s. Hotel Horizon seeking directions on the following grounds:-**

- Hotel Horizon Goa is a unit of M/s. De Sousa Leisures Pvt. Ltd. and has entered into an MSA with the 'Corporate Debtor' on 28.07.2018 as per the terms of which, revenue generated ought to be shared by the 'Corporate Debtor' with the Applicant, but has defaulted to the tune of ₹ 2,47,95,929/-.
- The 'Corporate Debtor' on 28.03.2020 and 25.04.2020 expressed their inability to perform the obligations under MSA due to the pandemic and altered the terms of the Agreement.
- As a counter blast, a notice was sent by Mypreferred Transformation and Hospitality Private Limited (sister concern of the 'Corporate Debtor') to the Applicant on 24.08.2020 for recovery of outstanding dues asserting that certain licenses of the Applicant have not been renewed.

- A default notice was sent to the 'Corporate Debtor' on 11.11.2020 to pay the outstanding amount due, but there was no response.
- The Applicant submitted their claim to the IRP in the prescribed Form B.

Submissions of the Learned Counsel appearing on behalf of the proposed Intervenor/Applicant in IA No. 1116 of 2021:

- Learned Counsel submitted that this Tribunal in ***'Mother Pride Dairy India Pvt. Ltd.' (Supra)*** has laid down that once an Application is admitted cannot be withdrawn since, other Creditors are entitled to raise their claims.
- Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** has observed that the Proceedings before the Adjudicating Authority is a collective Proceeding and that a party can approach NCLT directly for exercise of inherent powers under Rule 11 of NCLT Rules, 2016.
- NCLAT cannot permit withdrawal of an admitted Insolvency Application.
- The Application must necessarily be filed through IRP only before the NCLT. Allowing the IA and vacating the stay on the Constitution of Committee of Creditors would prejudice their rights.
- In support of his contention, the Learned Counsel placed reliance on the following Judgements:-

Sr. No.	*Case Name*
i.	*'Jai Kishan Gupta' (Supra).*

ii. *'Samarth Lifters Pvt. Ltd.' Vs. 'DBM Geotechnics and Constructions Pvt. Ltd' CP(IB) 1798 of 2018.*
iii. *'Abhishek Singh' Vs. 'Huhtamaki PPL Ltd.' Company Appeal (AT) (Insolvency) No. 235 of 2021.*
iv. *'Hadi Mohd. Taher Badri' Vs. 'Neeraj Gupta' Company Appeal (AT) (Insolvency) No. 107 of 2019.*
v. *'Javitri Estates Pvt. Ltd.' Vs. Chryso India Pvt. Ltd. and Anr.' Company Appeal (AT) (Insolvency) No. 888 of 2019.*
vi. *'Chitra Sharma' Vs. 'Union of India' WP (Civil) No. 744 of 2017.*
vii. *'Ghanshyam Mishra and Sons Private Limited' Vs. 'Edelweiss Asset Reconstruction Company Limited' Civil Appeal No. 8129 of 2019.*

15. **The Intervenor Applicant M/s. Monish Investment Pvt. Ltd. preferred IA No. 1082 of 2021 seeking intervention on the following grounds:-**

- The Applicant and the 'Corporate Debtor' entered into an MSA on 30.03.2019, whereby the 'Corporate Debtor' was to operate and provide accommodation services under the brand name OYO Rooms for which the Applicant was entitled to 10% of the net room revenue with the benchmark revenue of ₹ 17,00,000/-.
- The 'Corporate Debtor' defaulted in making payments from August 2019 onwards.
- The Applicant invoked Arbitration by way of a Petition under Section 11 of the Arbitration and Conciliation Act 1996, which is pending Adjudication before Hon'ble High Court of Bombay.

- After CIRP was initiated against the 'Corporate Debtor', 6 'Operational Creditors' submitted their claims before the IRP to the tune of ₹ 2,60,51,180/-.

Submissions of the Learned Counsel appearing on behalf of the Intervenor/Applicant in IA No.1082 of 2021:

- NCLAT cannot permit the withdrawal of an admitted Insolvency Application.
- Once CIRP is initiated it cannot be withdrawn without settling of claims of all Creditor as it is a Proceeding in *Rem.*

16. **Ghai Hotels and Investment Company Pvt. Ltd. is the Intervenor/Applicant in IA No. 1083 of 2021.** The Applicant is seeking intervention on the following grounds:-

- The Applicant is an 'Operational Creditor' as they have entered into an MSA with the 'Corporate Debtor' on 15.07.2018, whereby Hotels would be run by the 'Corporate Debtor' with sharing of 37% of the revenue to a minimum benchmark revenue of ₹ 10,00,000/- from the 'Corporate Debtor'.
- The 'Corporate Debtor' deposited the benchmark revenue from October 2018 till March 2020 and thereafter defaulted.
- On 15.04.2021, the Applicant issued a Legal Notice, but there was no response.
- The Applicant approached the Hon'ble High Court of Bombay by way of Arbitration Application (L) No. 3107 of 2020. By Order dated

21.09.2020, the Hon'ble High Court of Bombay preferred all disputes under MSA to a sole Arbitrator and the matter was listed on 26.09.2020. On 30.10.2020, the sole Arbitrator recorded the consent of the Applicant and the 'Corporate Debtor' to continue operating under revenue sharing model till February, 2021.

- On 12.04.2021, in light of the public announcement made on 03.03.2021, this 'Operational Creditor' preferred their claim before the IRP to the tune of ₹ 5,74,09,620/-.

Submissions of Learned Counsel appearing on behalf of the proposed Intervenor/Applicant in IA No. 1083 of 2021:

- It is submitted that a withdrawal of CIRP Process can be carried out any stage but only before the NCLT and after submission of claims of all the Creditors.
- Section 12-A read with Regulation 30-A is a complete Code governing settlement and the Appellant herein is trying to bypass the provisions of the Code.

17. **Diary No. 27487 is preferred by the proposed Intervenor Applicant/ Dost Hospitality Services Pvt. Ltd.; a sister concern of Karmyogi Properties Pvt. Ltd. (Diary No. 27488) both seeking similar directions on the following grounds:-**

- It is the case of the Proposed Intervenor Applicants that only a direction to conduct a forensic Audit would bring to light the fraud being

committed by the 'Corporate Debtor' with respect to suppression of material/invoices in the Monthly Booking Dump Data.

- That both the Applicant and its sister concern invoked Arbitration Proceedings against the 'Corporate Debtor' and a sole Arbitrator was appointed by the Hon'ble High Court of Delhi in OMP(I) 212/2021 and the matter has already reached the stage of final hearing.
- That only the IRP can file the Withdrawal Application as per the procedures in terms of Regulation 30-A(1)(a).
- Seek for investigation to be conduced by the Central Government in the interest of Justice to bring to light the malpractices indulged in by the 'Corporate Debtor'.

18. The IRP filed the list of Creditors and their claims by way of reply before this Tribunal.

Submissions of the Learned Sr. Counsel appearing for the Appellant:-

19. Learned Counsel appearing for the Appellant vehemently contended that since settlement was arrived at *prior* to the Constitution of Committee of Creditors, the question of applicability of Section 12-A does not arise in this case; that NCLAT has exercised its inherent power in Rule 11 in several cases keeping in view the scope and objective of the ILC Report and therefore it cannot be said that only NCLT has the inherent powers of exercise of Rule 11 and not NCLAT; that this is not an Application under Section 12-A and therefore Regulation 30-A and the procedure thereunder is not applicable to

the facts of this case; that para 82 of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** cannot be read in isolation and has to be read together with paras 79 to 81, to correctly interpret the scope and intent of the Code; that the Intervention Applications are not maintainable at this stage of Appeal having regard to the settlement arrived at between the parties and the fact that CoC has not yet been constituted; that Law of Land under Article 141 of the Constitution can only be replaced by a validating law and hence Rule 11 remains and Regulation 30-A cannot run counter to Rule 11 when the CoC has not yet been constituted and that whenever there is a conflict, substantive parent law is to be followed. Learned Sr. Counsel submitted that the scope of the Code Code is meant for 'revival' and not for 'recovery of dues', if any.

20. **As regarding the Intervention Application No. 1094 of 2021 preferred by Federation of Hotel and Restaurant Association of India,** Learned Senior Counsel contended that FHRAI is filing the present Application on behalf of its Members, the details of which has not been given; that the Application is devoid of material and has been filed on behalf of unknown number of Members with unknown amount of claims and no details of Members who are yet to prove their case and hence the Intervention Application is devoid of merit and ought to be dismissed at the threshold.

21. He further contended that the proposed Intervention Applications are contrary to the settled principles of law laid down in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra);*** that the proposed Intervenors are not allowed to contest the merit of the Appeal or contest the settlement of the subject dispute as

Proceedings under the Code are not debt recovery Proceedings; that the proposed Intervenors can come into existence only on the confirmation of CoC under the Code and have no locus standi to object a settlement between the 'Operational Creditor' and a third party; that Section 14 of the Code bars the filing of any Application against the 'Corporate Debtor' under Sections 7 and 9 during the moratorium period and that the proposed Intervenors have not placed any documents on record to substantiate any 'debt' or 'default'. He placed reliance on the following Judgements to buttress his argument that in view of the settlement between the 'Operational Creditor' and MTH, no other purported claimant can object to the setting aside of the CIRP against the 'Corporate Debtor'.

Sr. No.	***Case Name***	***Relevant Paragraph***
1.	*Swiss Ribbons Private Limited and Anr. vs. Union of India and Ors. 2019 4 SCC 217*	*Para 79-82*
2.	*Narayan Singh Pathania vs. Valuelabs LLP and Anr. Company Appeal (AT) (Insolvency) No. 1415 of 2019 [Order dated 09.02.2021]*	*Para 31-34*
3.	*Gajendra Sharma vs. Dinesh Sanitary Store, Company Appeal (AT) (Insolvency) No. 119 of 2020 [Order dated 03.02.2020]*	*Para 5-6*
4.	*Phool Chand Goyal vs. Avneet Goyal and Ors. Company Appeal (AT) (Insolvency) No. 1393 of 2019 [Order dated 07.02.2020]*	*Para 7*
5.	*Sunil Tandon vs. Manoj Kumar Anand, I.R.P. & Ors. Company Appeal (AT) (Insolvency) No. 289 of 2019 [Order dated 15.04.2019]*	*Para 6-9*
6.	*Janak Dhawan vs. Famous Innovations Digital Creative Pvt. Ltd. & Ors. Company Appeal (AT) (Insolvency) No. 769 of 2019 [Order dated 20.12.2019]*	*Para 8-11*

7.	*Gouri Prasad Goenka vs. Surendra Kumar Agarwal & Anr. Company Appeal (AT) (Insolvency) No. 105 of 2020 [Order dated 30.01.2020]*	*Para 6-10, 13,14*

22. Learned Counsel concluded that great prejudice would be caused to the 'Corporate Debtor' in view of the subsistence of the CIRP Proceedings despite having settled the matter between 'Operational Creditor' leading to loss of goodwill and reputation, loss of perspective investments and irreparable losses apart from serious administrative difficulties in collection of revenue from the existing Hotel partners, disbursement of payments of nearly 5,000 dependent Hotel owners together with disbursal of payments to vendors and employees. He further submitted that approximately 65 properties run by the 'Corporate Debtor' have been accommodating patients for quarantining and isolating in this pandemic.

23. The brief points which fall for consideration are:-

a. Whether NCLAT can exercise powers under Rule 11 & entertain Applications seeking withdrawal, prior to Constitution of CoC.

b. Whether procedure under Regulation 30-A(1)(a) is applicable to this Application.

c. Whether the Intervention Applications filed by the proposed Intervenors, during the pendency of the Appeal, be allowed having regard to the settlement arrived at between the Appellant and the 'Operational Creditor'/Respondent herein, prior to the Constitution of CoC.

Assessment:

24. For better understanding of the case, paras 79 to 82 of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** are being reproduced as hereunder:-

> ***'Section 12-A is not violative of Article 14***
>
> ***79.*** *Section 12-A was inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. It reads as follows:*
>
> > ***"12-A. Withdrawal of application admitted under Sections 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."*
>
> ***80.*** *The ILC Report of March 2018, which led to the insertion of Section 12-A, stated as follows:*
>
> > *"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 [Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP[57]; Mothers Pride Dairy India (P) Ltd. v. Portrait Advertising and Marketing (P) Ltd.[58]; Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem[4]]. This practice was deliberated in light of the objective of the Code as encapsulated in the BLC Report, that the design of the Code is based on ensuring that "all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their*

liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution." 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.

29.2. On a review of the multiple NCLT and NCLAT judgements in this regard, the consistent pattern that emerged was that a settlement may be reached amongst all creditors and the debtor, for the purpose of a withdrawal to be granted, and not only the applicant creditor and the debtor. On the basis read with the intent of the Code, the Committee unanimously agreed that the relevant rules may be amended to provide for withdrawal post admission if the CoC approves of such action by a voting share of ninety per cent. It was specifically discussed that Rule 11 of the National Company Law Tribunal Rules, 2016 may not be adopted for this aspect of CIRP at this stage [as observed by the Hon'ble Supreme Court in Uttara Foods and Feeds (P) Ltd. v. Mona Pharmachem[4]] and even otherwise, as the issue can be specifically addressed by amending Rule 8of the CIRP Rules."

(emphasis in original)

Before this section was inserted, this Court, under Article 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT.

***81.** Regulation 30-A of the CIRP Regulations states as under:*

***"30-A. Withdrawal of application.–** (1) An application for withdrawal under Section 12-A shall be submitted to the interim resolution professional or the resolution professional, as the case may be, in Form FA of the Schedule before issue of invitation for expression of interest under Regulation 36-A.*

(2) The application in sub-regulation (1) shall be accompanied by a bank guarantee towards estimated cost incurred for purposes of clauses (c) and (d) of Regulation n31 till the date of application.

(3) The committee shall consider the application made under sub-regulation (1) within seven days of its Constitution or seven days of receipt of the application, whichever is later.

(4) Where the application is approved by the committee with ninety per cent voting share, the resolution professional shall submit the application under sub-regulation (1) to the adjudicating authority on behalf of the applicant, within three days of such approval.

(5) The adjudicating authority may, by order, approve the application submitted under sub-regulation (4).

This Court, by its order dated 14-12-2018 in Brilliant Alloys (P) Ltd. v. S. Rajagopal[59], has stated that Regulation 30-A(1) is not mandatory but is directory for the simple reason that on the facts of a given case, an application for withdrawal may be allowed in exceptional cases even after issue of invitation for expression of interest under Regulation 36-A.

82. *It is clear that once the Code gets triggered by admission of a creditor's petition under Sections 7 to 9, the proceeding that is before the adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. A question arises as to what is to happen before a Committee of Creditors is constituted (as per the timelines that are specified, Committee of Creditors can be appointed at any time within 30 days from the date of appointment of the interim resolution professional). We make it clear that at any stage where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and*

considering all relevant factors on the facts of each case.

83. *The main thrust against the provision of Section 12-A is the fact that ninety per cent of the Committee of Creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12-A also passes Constitutional muster.'*

(Emphasis Supplied)

25. The Learned Counsels for the Intervention Applicants strenuously contended that as per para 82 of the aforenoted Judgement, a party seeking withdrawal should necessarily approach NCLT directly, which Tribunal may, in exercise of its inherent power under Rule 11 allow or disallow an Application for withdrawal or settlement and therefore this Tribunal cannot entertain such Applications of Withdrawal.

26. At this juncture, it is material to study the observations made by the Hon'ble Apex Court in ***'Committee of Creditors of Essar Steel India Limited' Vs. 'Satish Kumar Gupta & Ors.' reported in (2020) 8 SCC 531***

in para 82 wherein the Hon'ble Apex Court has referred to the Judgement of the Federal Court in ***'Lachmeshwar Prasad Shukul' Vs. 'Keshwar Lal Chaudhuri' AIR 1941 FC 5*** and in ***'Shiv Shakti Coop. Housing Society Nagpur' Vs. 'Swaraj Developers and Ors.' MANU/SC/0335/2003 (2003)6SCC 659*** and noted that *'an Appeal is essentially a continuation of the original Proceeding. This being so, a change in law can always be applied in an original or Appellate Proceeding'.* It is also apposite to note the observations in paras 42 and 43 of the aforenoted judgment, ***Committee of Creditors of Essar Steel India Limited (Supra),*** wherein the Hon'ble Apex, Court while examining the jurisdiction of the Adjudicating Authority and the Appellate Tribunal, primarily, with respect to Section 30 (2) and 61 (3) placed reliance on the ratio of ***K. Sashidhar Vs. Indian Overseas Bank & Anr. (2019) 12 SCC 150*** and observed, *'For the same reason, even the jurisdiction of the NCLAT being in continuation of the proceedings would be circumscribed in that regard and more particularly on account of Section 32 of the I & B Code, which envisages that any appeal from an order approving the resolution plan shall be in the manner and on the grounds specified in Section 61 (3) of the I&B Code which reads thus: ……'*

Exercise of inherent powers under Rule 11 by NCLAT:

27. Rule 11 of NCLAT Rules, 2016 reads as follows:-

> ***'11. Inherent Powers.–*** *Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders as may be necessary for meeting the ends of justice or*

to prevent abuse of the process of the Appellate Tribunal.'

28. This Tribunal in ***'Jogender Kumar Arora' Vs. 'Dharmendar Sharma and Ors.' Company Appeal (AT) (Insolvency) No. 94, 95 of 2019*** decided on 12.02.2019 has held as follows:-

> *'3. Mr. Dharmender Sharma, Proprietor of 'ADP Interiors and Contractors' (Operational Creditor) appears in person and submits that the parties have settled and he has received the settled amount. Mr. Sandeep Chandna, Resolution Professional submits that he has performed duties for about 20 days and pursuant to publication of notice he has collating the claims. He had quoted the fees of Rupees Ten Lakhs for 30 days and incurred Rs. 4.5 lakhs for publication of notice etc.*
>
> *4. Mr. A.M. Ranjan Kumar, Advocate wanted to intervene on behalf of the Eight Financial Creditors to oppose the prayer. He submitted that the Eight Financial Creditors have already submitted their claim before the 'Resolution Professional'. However, parties having settled the matter prior to Constitution of 'Committee of Creditors', we are not inclined to entertain any application for creditors.*
>
> *5. Further in view of the decision of the 'Swiss Ribbons Pvt. Ltd. & Anr', and in exercise our inherent powers under Rule 11 of the NCLAT Rules, 2016, allow the prayer made by Mr. Dharmender Sharma for withdrawal of the application in view of the settlement already reached. We accordingly set aside the impugned order dated 10th January, 2019 and dismiss the C.P. (IB) No. 158/Chd/Hry/2018 as withdrawn'.*

29. In the aforenoted Judgement though eight Financial Creditors wanted to intervene opposing the settlement and have contended that they have already submitted their claims before the Resolution Professional, this

Tribunal, taking into consideration that the parties have settled the matter *prior to the Constitution of Committee of Creditors* did not entertain the Intervention Applications and has allowed the Application of Withdrawal in exercise of inherent power under Rule 11 of the NCLAT Rules, 2016 and closed the Proceedings.

30. This Tribunal in ***'Avishek Roy' Vs. 'Diamond Steel Enterprise and Ors.'*** in ***Company Appeal (AT) (Insolvency) No. 794 of 2018*** dated 12.03.2019 placed reliance on the principle laid down by the Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** and has set aside the Admission Order under Section 9 passed by the Adjudicating Authority, holding that the parties agreed to a settlement *prior* to the Constitution of the CoC. Though this Judgement was rendered prior to the amendment, the scope & intent of the Code is clear. It is pertinent to mention that the Hon'ble Supreme Court in ***Civil Appeal No. 1778 of 2020*** has dismissed the Appeal confirming the Order passed by this Tribunal in ***'Ashok Kumar Tibrewala' Vs. 'Diamond Steel Enterprise & Ors.'.***

31. This Tribunal in ***'Vishal Gupta' Vs. 'M/s. Anav Construction & Anr.' in Company Appeal (AT) (Insolvency) No. 1016 of 2019*** dated 23.01.2020, in pursuant to the settlement between the parties, exercised power conferred by Rule 11 of NCLAT Rules, 2016 and set aside the Admission Order under Section 9 of the Code.

32. In ***'Mr. Vivek Verma' Vs. 'M/s. IRPO Sugar Engineering Pvt. Ltd.',*** in ***Company Appeal (AT) (Insolvency) 967 of 2019*** dated 16.10.2019, a three

Member Bench of this Tribunal allowed the Appeal preferred by the Suspended Director of the 'Corporate Debtor', exercising powers under Rule 11 and observed as follows:-

> *'4. As per the Terms of Settlement, both the parties agreed to share the cost and fee of the 'Interim Resolution Professional'. Learned Counsel for the parties state that cost and fee of 'Interim Resolution Professional' has already been paid, which is also accepted by the Learned Counsel appearing on behalf of the 'Interim Resolution Professional'.*
>
> *5. In the facts and circumstances and in exercise of inherent powers conferred upon this Appellate Tribunal under Rule 11 of the NCLAT Rules 2016, we accept the Terms of Settlement and set aside the impugned order dated 3rd September, 2019 and release the 'Corporate Debtor' from rigour of 'Corporate Insolvency Resolution Process'. The 'Interim Resolution Professional' will handover the assets and records to the 'Corporate Debtor'/'Promoter'.*

33. In another occasion, a three Member Bench of this Tribunal in ***'Gajendra Sharma' Vs. 'M/s. Dinesh Sanitary Store and Anr.' Company Appeal (AT) (Insolvency) No. 119 of 2020*** decided on 03.02.2020 has held as follows:-

> *'5. Although the CoC got constituted on 21.01.2020, when the matter had come up before this Tribunal on 23.01.2010, the fact of prior settlement was brought to the notice of this Tribunal. It appears that Financial Creditor Prema Gupta has filed Intervention Application and filed claim with the IRP. We are disposing the present Appeal on the basis of the compromise referred. It will be open to the Financial Creditor Prema Gupta to initiate proceedings of her own.*
>
> *6. In view of the settlement reached before formation of CoC between the parties, in exercise of powers*

conferred under Rule-11 of NCLAT Rules, 2016, we set aside the Impugned Order dated 04.1.2020 whereby 'Corporate Insolvency Resolution Process' was initiated against Krishna Estate Developers Private Limited (Corporate Debtor) and the Application under Section 9 IBC filed by M/s Dinesh Sanitary Store stands disposed of as withdrawn.'

(Emphasis Supplied)

34. This Tribunal has consistently exercised powers conferred under Rule 11 on a case-to-case basis in view of the settlement reached *prior to formation of CoC.* Subsequent to the Amendment i.e. 25.07.2019 this Tribunal had the occasion of exercising Rule 11 in the following matters:-

- *'Janak Dhawan' Vs. 'Famous Innovations Digital Creative Pvt. Ltd. & Ors.' in Company Appeal (AT) (Insolvency) in 769 of 2019 dated 20.12.2019.*
- *'Gouri Prasad Goenka' Vs. 'Surender Kumar Agarwal & Anr.' in Company Appeal (AT) (Insolvency) No. 105 of 2020 dated 30.01.2020.*
- A three Member Bench of this Tribunal in ***'Sunil Tandon' Vs. 'Manoj Kumar Anand, I.R.P & Ors.' Company Appeal (AT) (Insolvency) No. 283 of 2019*** based on the ratio in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** and keeping in view that the settlement has been reached between the parties prior to the Constitution of CoC did not entertain the Intervention Applications filed on behalf of the Financial Creditor.

35. **The Judgements relied upon by the Learned Counsel appearing for the Intervention Applicant FHRAI 1094 of 2021 and other Applicants are not applicable to the facts of this case for the following reasons:-**

- In ***'Sh. Sushil Ansal' (Supra) and 'Bhaskar Biswas' (Supra)*** the settlement was between an Allottee i.e. a Home Buyer and the 'Corporate Debtor' i.e. a Developer. This Tribunal has used its discretion in not exercising its inherent powers under Rule 11 as the facts of those cases related to Financial Creditors (Home Buyers) and a private settlement with any one Home Buyer is necessarily intertwined with the interests of other Home Buyers and also with the entire Tower/Project. Likewise, ***'Hadi Mohd. Taher Badri' (Supra)*** and ***'Chitra Sharma' (Supra)*** too are matters where Home Buyers are the Financial Creditors and this Tribunal has dealt with these matters as a case-to-case basis, keeping in view the ratio of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** wherein the Hon'ble Supreme Court has observed that the discretion to allow or disallow lies with the Tribunal.
- The ratio of ***'Jai Kishan Gupta' (Supra)*** is also not applicable to the facts of the attendant case as *CoC was already constituted* prior to the second Order of Adjudicating Authority having been passed, and this Tribunal took note of the developments, the conduct of the 'Corporate Debtor', recorded by the IRP in the Minutes of the first CoC Meeting and dismissed the Appeal preferred by the Director of this 'Corporate Debtor'.

- The Intervenor Applicants in IA Nos. 1084, 1085, 1116 of 2021 have relied on the decision of this Tribunal in ***'Mother Pride Dairy India Pvt. Ltd.' (Supra)*** which is not relevant today as the said decision is dated 28.07.2017 and precedes the inclusion of Section 12-A under the Code and the decision of the Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** dated 25.01.2019 and also precedes the insertion of Regulation 30-A in the Regulations dated 25.07.2019.
- The Counsel for the Intervenor Applicants have also relied on the Judgement of this Tribunal in ***'Mr. K.C. Sanjeev' Vs. 'Mr. Easwara Pillai Kesavan Nair & Ors.'*** in ***Company Appeal (AT) (Insolvency) No. 1427 of 2019*** dated 28.02.2020, which is also not applicable to the facts of this case for the fundamental reason that CoC was already constituted and Section 12-A comes into play.

36. Applicability of Regulation 30-A(1)(a) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Process) Regulation, 2016 to the facts of this case:-

37. We note that in exercise of the Appellate jurisdiction, we are bound to consider any change in law affecting the question involved in the Appeal and which was effected subsequent to the decision of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra).*** For better understanding of the case, Section 12-A is reproduced as hereunder:-

> ***'[1][12-A. Withdrawal of Application admitted under section 7, 9 or 10. –***

The Adjudicating Authority may allow the withdrawal or 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.]'

38. Regulation 30-A was amended by inserting clause(a) in sub-Regulation 1 of Regulation 30-A effective from 25.07.2019. Form FA has also been amended in conformity with Regulation 30-A. The amended Regulation 30-A is reproduced as hereunder:-

"30A. Withdrawal of Application

(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 Schedule 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 along with 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."

(Emphasis Supplied)

39. Form FA dated 25.07.2019 reads thus:-

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]

[Date]

To
The Adjudicating Authority

[Through the Interim Resolution Professional/Resolution Professional]
[name of corporate debtor]

Subject: Withdrawal of Application admitted for corporate insolvency resolution process of [name of corporate debtor]

I, [Name of applicant], had filed an application bearing [particulars of application, i.e., diary number/case number] on [Date of filing] before the Adjudicating Authority under [Section7/Section 9/Section 10] of the Insolvency and Bankruptcy Code, 2016. The said application was admitted by the Adjudicating Authority on [date] bearing [case number].

2. I hereby withdraw the application bearing [particulars of application, i.e., diary number/case number] filed by me before the Adjudicating Authority under [Section 7/Section 9/Section 10] of the Insolvency and Bankruptcy Code, 2016.

3. I attach the required bank guarantee as per sub-regulation (2) of regulation 30A.

(Signature of the applicant)

Date:
Place:
[Note: In the case of company or limited liability partnership, the declaration and verification shall be made by the director/manager/secretary/designated partner and in the case of other entities, an officer authorized for the purpose by the entity]

40. Section 12-A read together with amended Regulation 30-A effective from 25.07.2019 provides that stage of pre-Constitution of CoC which is now covered in Regulation 30-A(1)(a). It is evident that Section 12-A deals with the situation of Withdrawal of Application admitted under Sections 7, 9 or 10, *on an Application made by the Applicant with the approval of 90% voting share of the Committee of Creditors, in such manner as may be specified',* meaning thereby that Section 12-A refers to a situation ***Post Constitution of CoC,*** whereas Regulation 30-A(1)(a) deals with procedure to be followed ***Pre-Constitution of CoC.*** It is stated by the Learned Sr. Counsel that the language of the Section, whereunder IBBI has been empowered to frame Regulations is clear that the said Regulation should be consistent with the I&B Code. We refrain from making any such observations. The Apex Court clarified in ***'Brilliant Alloys Pvt. Ltd.' Vs. 'Mr. S. Rajagopal & Ors.', SLP (Civil) No. 31557/2018*** dated 14.12.2018 that Regulation 30-A *is not mandatory but is directory for the simple reason that on the facts of a given case, an Application for withdrawal may be allowed in exceptional cases even after issuing the invitation for expression of interest under Regulation 36-A.*

41. Rule 11 of NCLAT Rules, 2016 provides that *'Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.'* The Hon'ble Apex Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** has clearly discussed the stage and has observed that *'we make it clear that at any stage*

where the Committee of Creditors is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case'. It is a well settled proposition of law that substantive law takes precedence over a Regulation and Section 12-A clearly refers to withdrawal of an Application under Section 7, 9 or 10 after the Constitution of the Committee of Creditors, seeking approval of 90% of the voting share of the CoC. Keeping in view the ratio of the Hon'ble Supreme Court in ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra)*** and the aforenoted reason, we hold that in the facts and circumstances of the attendant case before us, we do not find force in the contention of the proposed Intervenor Applicants that the Application for Withdrawal, filed, prior to Constitution of CoC ought to be mandatorily dealt with the provisions under the Regulation 30-A(1)(a). We find it just and proper to exercise our inherent powers under Rule 11 in this case.

42. **It is relevant to note that in the list of claims, totaling to 113, filed by the IRP, 110 are 'Operational Creditors'. The claims of two Financial Creditors' have been rejected.**

43. It is also pertinent to mention that all the Intervenors/Applicants before us have filed the aforenoted IA Nos. 941, 956, 957, 1082, 1083, 1084, 1085, 1086, 1094, 1116 of 2021 and Diary Nos. 27487 & 27488, in their capacity as 'Operational Creditors'. It is also not out of place to mention that the

Intervenors/Applicants in IA No. 1083 of 2021, Ghai Hotel Investments Company Pvt. Ltd. have invoked the Arbitration clause and approached the Hon'ble High Court of Bombay. Further, Monish Investment Pvt. Ltd. who is the Intervenor/Applicant in IA No. 1082 of 2021 has also invoked Arbitration clause and approached the Hon'ble High Court of Bombay by way of a Petition which is pending Adjudication before the Hon'ble High Court.

44. The Applicants in and Diary Nos. 27487 & 27488 have also invoked Arbitration Proceedings and a sole Arbitrator has been appointed by the Hon'ble High Court of Delhi in OMP(I)212/2021.

45. It is not the case of the Intervenors that Demand Notice under Section 8 is pending. It is only their case that money is due. We are of the considered view that before Constitution of Committee of Creditors mere filing of a 'Claim' does not constitute default per se. It is only on the basis of the 'Claims' that the CoC is constituted. In a catena of Judgements the Hon'ble Supreme Court has reiterated that the prime objective of the Court is not recovery, but revival. This Tribunal in numerous Judgements cited in the aforenoted paras, has observed that after 'Admission', this Tribunal, on a case to case basis can exercise its inherent power under Rule 11 if parties are interested to settle the matter **prior** to Constitution of CoC. To reiterate, we are of the view that in the interest of Justice, the inherent powers under Rule 11 can be exercised by both NCLT and NCLAT which may allow or disallow the Application of Withdrawal keeping in view the interest of the concerned parties and the facts of each case.

46. The communication filed by the operational Creditors evidences that all amounts due and payable by the Corporate Debtor to the Operational Creditor, who filed the Section 9 Application, have been paid in full and final satisfaction, to the parties concerned in that Application, together with the IRP Costs. Keeping in view the ongoing discussions, the aforenoted Judgements, the ratio of ***'Swiss Ribbons Pvt. Ltd. and Ors.' (Supra),*** the facts of the attendant case, we allow the Application of Withdrawal in exercise of inherent powers under Rule 11. We note that Regulation 30-A(1)(a) is not applicable to the present Application. The Intervenor Applications filed during the pendency of the Appeal, prior to the Constitution of CoC, are disallowed.

47. For all the aforenoted reasons, the Proposed Intervention Application Nos. 941, 956, 957, 1082, 1083, 1084, 1085, 1086, 1094, 1116 of 2021 and Diary Nos. 27487 & 27488 are dismissed. IA 815 of 2021 is allowed, consequently *Company Appeal (AT) (Insolvency) 298 of 2021* is allowed and we set aside the Impugned Order dated 30.03.2021. In effect, Order(s) passed by Ld. Adjudicating Authority appointing 'Interim Resolution Professional', declaring moratorium, freezing of account and all other Order(s) passed by Adjudicating Authority pursuant to the Impugned Order, are set aside. The Adjudicating Authority will now close the proceedings. The 2nd Respondent Company is released from all the rigours of law and is allowed to function independently through its Board of Directors with immediate effect.

48. This Order will not come in the way of any Financial/Operational Creditors to move an Application for CIRP before the Learned Adjudicating

Authority, Which shall hear the matter, uninfluenced by observations, if any, made in this Judgement and proceed in accordance with law.

49. Needless to add, having regard to the fact that the Hospitality and the Tourism Industry has been bruised in this Pandemic, with travel being significantly curtailed, it is also open to the Creditors to approach the 'Corporate Debtor' for settlement and the 'Corporate Debtor' may choose to settle the same, if so advised.

50. In the result, Proposed Intervention Application Nos. 941, 956, 957, 1082, 1083, 1084, 1085, 1086, 1094, 1116 of 2021 and Diary Nos. 27487 & 27488 are dismissed. IA 815 of 2021 is allowed. Consequently, the Appeal is allowed with the aforenoted directions.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
07th July, 2021

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