

Settlement Default and Restoration of CIRP

Section 12A of the Insolvency & Bankruptcy Code, 2016 provides for the withdrawal of Corporate Insolvency Resolution Process (CIRP) with permission of the Adjudicating Authority i.e., National Company Law Tribunal (NCLT). Applicant can apply for such permission shall be through the interim resolution professional or the resolution professional (IRP)¹. Any application of withdrawal of CIRP needs to be made only with the approval of 90% voting share of the committee of creditors (CoC).

This provision enables withdrawal of CIRP where the creditors have reached a settlement agreement with the Corporate Debtors (CD) and such withdrawal has received 90% voting share of CoC. However, breach of settlement agreement after withdrawal of CIRP raises few pertinent questions like:

- a) whether the CIRP can be revived, or creditor is required to file a fresh application?
- b) If the CIRP is revived, should the applicant be entitled to claim the entire amount claimed or the amount as agreed in the settlement agreement?

a) Revival of CIRP:

In a recent judgment in **ICICI Bank Limited vs OPTO Circuits India Limited and Ors.**², National Company Law Appellate Tribunal (NCLAT), Chennai Bench has held that CIRP can be revived in case of breach of settlement agreement.

In this case, after initiation of CIRP, the Corporate Debtor and Bank had agreed on one time settlement (OTS). Based on the settlement, application for withdrawal of CIRP was filed with a prayer that the instant matter be disposed of as settled by giving liberty to the Bank to resume the CIRP in case of non-compliance of the terms of the OTS. The Bank also filed a memo before Adjudicating Authority seeking liberty to resume the CIRP in case of non-compliance of the terms of the OTS.

NCLT instead of giving liberty to revive the CIRP, had given liberty to the Bank to file a fresh Company Petition in accordance with the provisions of the IBC, which was challenged before NCLAT, Chennai Bench.

NCLAT-Chennai decided in favour of Bank and quashed the order of the NCLT with respect to the observation/liberty to file a fresh Company Petition by the Bank. It also relied on the judgment of NCLAT, New Delhi in the matter of **Vivek Bansal vs. Burda Druck India Pvt. Ltd.**³ Wherein it was specially held that 'in the event of default not adhering to the terms of 'settlement agreement' as regards the payment of the outstanding instalments, the 'Operational Creditor' shall be at liberty to seek revival/restoration of the 'Corporate Insolvency Resolution Process' proceedings before the Adjudicating Authority."

¹ Rule 30 A of IBBI (CIRP) Regulations, 2016 [Amended upto 14.06.2022]

² NCLAT-Chennai, CA (AT) (Ins) No. 146 of 2021

³ NCLAT-Delhi, CA (AT) (Ins) No. 552 of 2020

In this regard, it is also important to note NCLAT, New Delhi's order in ***Himadri Foods Ltd. Vs. Credit Suisse Funds AG***⁴ wherein financial creditor was given the liberty to report any non-compliance with the settlement terms, and NCLAT observed and held that

- *The object of reporting default qua Terms of Settlement to the Adjudicating Authority can be interpreted on no hypothesis other than that it was to take action in the event of non-compliance with the terms of the order even if it has not been specifically recorded in the order that non-compliance would warrant revival/ restoration of the CIRP proceedings”.*
- *“Terms of Settlement providing a repayment schedule was incorporated in the order thereby making it an order/ decree of the Court and once this was the position, giving liberty to the Financial Creditor to come back can be interpreted on no hypothesis other than that the revival of CIRP would be sought for non-compliance with the Terms of Settlement”.*

b) Claim Amount: entire amount or amount as agreed in the settlement?

In the matter of ***Kapa Srinivasa Rao Vs. Tulasi Seeds Private Limited***⁵, the CIRP process was withdrawn with liberty to come back in case of default by the Corporate Debtor. Corporate Debtor contended that settlement between the parties by way of MoU was executed outside the Tribunal and has no provision for default. Further, MoU is a fresh binding contract superseding all the earlier transactions between the parties. Therefore, Corporate Creditor is not entitled to claim the entire amount mentioned in the claim petition in view of the fresh MoU.

NCLT rejected the contention and held that “MoU came into picture only to put an end to the issue and once the parties failed to comply with the terms of the MoU the situation as before the MoU would get revived in toto”, thereby allowing the Corporate Creditor to claim the entire amount under the revived CIRP.

Therefore, if a CIRP is withdrawn with liberty to comeback in case of default in settlement agreement/ reporting the default, the CIRP process will resume as if there was no settlement. The entire amount mentioned under the claim petition and not the amount agreed under the settlement agreement will become due. Absence of provision of default, superseding provision under the settlement agreement will not hinder the restoration of the CIRP.

⁴NCLAT-Delhi, CA (AT) (Ins) No. 1060 of 2020

⁵ I.A. No. 5 of 2021 in CP (IB) No. 28/9/AMR/2020