

# **Insolvency and Bankruptcy Law in India**

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**Week 07**

**Lecture 33**

Welcome, everyone.

Today, as part of the course on insolvency and bankruptcy law in India. Today, we will discuss the concept of withdrawal and settlement under Section 12A of the Code. In the previous classes, we discussed the filing of the resolution plan and how to file it. Then, the approval of the resolution plan by the NCLT is required. What are all the considerations to be taken by the NCLT while approving the resolution plan? Then we discussed that the resolution plan of CD will be taken over based on what is currently in place.

That means they are supposed to take over as it is. So the resolution plan should provide the solution as it is. The consequences of approval, such as the moratorium doctrine of a clean slate, were discussed in the previous classes. Then, liability for prior offenses before the resolution plan is approved, as well as how you will address the offenses committed by the company and its individuals, should be considered. Then, approval from the statutory authorities is required. We have discussed the concept of approval from statutory authorities, where you are expected to obtain approval from them after the resolution plan is approved, within a one-year period. However, there is an exception in the case of the Competition Commission of India, specifically CCI approval, which must be obtained before the CC COC. The power of NCLT to modify the resolution plan, whether NCLT has any power to modify the resolution plan, and the immunity of resolution professionals and obligations of resolution professionals to preserve the record. So, once the resolution plan and CRP process are completed, the resolution professional has an obligation to preserve the record. These are all the various points we discussed in the previous class. In this class, we will discuss the withdrawal of the application.

So, when a CD is admitted into the CRP corporate insolvency resolution process, there are four possible outcomes. Therefore, we may first have a revival, during which the COC will be appointed, and you will approve the resolution plan. Therefore, you will revive the company. This is one consequence. The second consequence can be settlement and consequent withdrawal. So, you may have the settlement. Once the CRP process starts, and before the approval of the resolution plan, there is a possibility that the

corporate debtor may have a settlement agreement with the COC, allowing them to file an application for withdrawal under Section 12A. That is what we will discuss today. Another possibility is to revive the scheme or conduct a going-concern sale in a liquidation. Perhaps you could consider a scheme or hold a sale as part of the liquidation process. Therefore, there is another solution or outcome that can be dissolved under Section 54 of the IBC. In the previous classes, we have already discussed the resolution plan and how you will revive through it in detail.

In today's class, we will discuss how to settle and withdraw an application made under Section 7, 9, or 10 of the IBC. Subsequently, in the next classes, you will discuss, as a going concern, how you will sell in the process of liquidation or how you will dissolve under Section 54. Everything you are going to discuss in the subsequent lessons. So, these four outcomes you may have.

Then let us discuss Section 12a. Therefore, before discussing Section 12a, let us examine the position prior to Section 12a, as it was amended and inserted through the Amendment Act. Before that, we didn't have the provision for withdrawing applications. Once an application for CRP is started, there is no possibility of withdrawal. However, how did they use to deal with it? So, if you observe Rule 8 of the Insolvency and Bankruptcy Application to Adjudicating Authority Rules 2016, it is stated that withdrawal is permitted only at the pre-CIRP stage. So, when you can go for withdrawal as per the application to the adjudicating authority rules, withdrawal is possible only before the CRP status. That means once the application is admitted by the NCLT, which is the adjudicating authority, there is no possibility of withdrawal.

That was the provision: once it is admitted for CRP, there is no concept of withdrawal. So, suppose we consider a company where the CRP process has already started, but the promoter group or the corporate debtor wants to propose a scheme or a settlement that is more viable than the resolution plan. Therefore, the primary objective of IPC is to maximize asset utilization. Okay, and to ensure that the company is a going concern. Okay, to achieve that. In the case of Lokhandwala Kataria Construction Private Limited versus Nisus Finance and Investment Managers, the Supreme Court, under the Constitution of India, invoked Article 142 to permit the withdrawal. Under the Constitution of India, the Supreme Court has constitutional powers to take any decision. Consequently, the Supreme Court has allowed the withdrawal of applications made under sections 7, 9, or 10 of the IBC Code.

In another case, Uttara Foods and Feeds Private Limited versus Mona Pharmachem, the Supreme Court recommended the withdrawal of proceedings. Why? Because the basic objective of IBC is to maximize profit. Therefore, when the corporate debtor is able to reach a settlement that protects the creditor's interests, that is the primary objective of the IBC. Therefore, this is why the Supreme Court opined that you are required to introduce

the provisions relating to the withdrawal of proceedings. Accordingly, Section 12A and Regulation 30A were introduced in the CIRP regulations. Following the judgments issued by the Supreme Court, the legislature introduced Section 12A and Regulation 30A. Today, we will discuss Section 12A and Regulation 30A in detail. In another case, Brilliant Alloys Pvt Ltd v. Mr. S. Rajagopal, the Supreme Court held that CIRP may be withdrawn even after the issuance of an Expression of Interest. So, can I withdraw after the expression of interest? Yes, even after expressing interest, you can withdraw your application; the CRP can also be withdrawn.

Now, let us discuss the section. How are you providing the exit mechanism? If you observe section 12A, it clearly provides that the adjudicating authority may allow the withdrawal of applications admitted under section 7, 9, or 10: 7 for financial creditors, 9 for operational creditors, and 10 for corporate debtors. Therefore, on an application submitted by the applicant with the approval of, and this is very important, 90% of the voting share of the committee of creditors. So, once you initiate the process of CRP, a committee of creditors will be formed. Therefore, whenever you wish to withdraw as per this section, you are expected to have obtained 90% approval from the COC. Suppose COC is not formed, so CRP Plus is admitted, but COC is not formed; then, in such cases, how should we deal with that scenario? We will discuss it subsequently. Regulation 30A of the CRP regulations outlines the procedure for withdrawal under Section 12A, and we also have Form FA. Let us examine Form FA; this is the Form FA application for withdrawal from the Corporate Insolvency Resolution Process.

So, once the CRP process has started, how can one withdraw from it? Therefore, to the adjudicating authority, you will write a letter. I, so and so, had filed an application bearing so and so number, diary number, case number, and date of filing before the adjudicating authority under section, maybe 7, 9, or 10, depending on the circumstances of the IBC. The said application was admitted by the adjudicating authority. Therefore, since the commencement date has been admitted, I hereby withdraw the application bearing the name of so and so from the IBC. I have attached this; it is very important. I attach the required bank guarantee. In accordance with Regulation 30A, whenever a person wishes to withdraw an application under Section 7, 9, or 10, the person who made the application under Section 7, 9, or 10 must provide a guarantee to the bank if they intend to withdraw the application under Section 12A. A bank guarantee must be given. In Form Number FA, you will submit an application, okay?

Let us then examine Regulation 30A of the CRP regulations. An application for withdrawal under Section 12A may be made to the adjudicating authority before the committee is constituted by the applicant through the interim resolution professional. So, before the committee is constituted, how will you make an application? It has to be routed through the interim resolution professional. Suppose it is after the committee has been constituted; there is a possibility that the application will be admitted, but the

committee has not yet been formed. Therefore, if you are making an application for withdrawal during that time, it must be done by the interim resolution professional. After the COC is formed, in such cases, the applicant must do so through the interim resolution professional or the resolution professional, as applicable. In both cases, you are required to submit an application through the interim resolution professional or the resolution professional, as applicable. Before the committee is formed, the interim resolution professional will be present; after the committee is formed, a resolution professional will be present. Therefore, the interim resolution professional or resolution professional can submit an application, provided that the application is made under clause B after the issue of an invitation for expressions of interest. This implies that the committee has already been formed and the invitation for expressions of interest has been issued. Then, subsequently, you have decided to come to one settlement and withdraw your application. In such cases, the applicant shall state the reasons justifying the withdrawal. So why do you want to go for the withdrawal? You have to provide the justification. Then, even for this, you have to submit an application in Form F-A only.

Now, let us examine the current scenario: withdrawal under Section 12A. So, once section 12A is inserted through the amendment tab, what is the current scenario? In the case of Shaji Purushothaman versus S. Rajendran, the NCLT Chennai bench held that where the petitioning bank did not file Form FA and no bank guarantee was furnished to cover CRP costs, there can be no settlement or withdrawal. One of the prerequisites for filing an application for withdrawal under Section 12A is that, as we have already seen in Form FA, the applicant must provide a guarantee to the bank covering the CRP cost. Why? Because the CRP has already started. When the CRP process begins, you will incur certain expenses. Therefore, anyone applying for withdrawal must provide a guarantee that the CRP cost will be covered. Until you provide the bank guarantee or submit an application in form FA, you must follow the procedure. Whenever you wish to withdraw the application under Section 12A, you must submit an application in Form FA along with the bank guarantee. Therefore, if you don't follow the procedure, please note that there can be no settlement or withdrawal. For the compulsory withdrawal procedure, you are expected to follow the procedure. Then, in another case, Ashok G. Rajani versus Beacon Trusteeship Limited, the Supreme Court held that withdrawal is allowed even before the constitution of the COC.

As we have already discussed, there is a possibility that a withdrawal may occur before or after the COC constitution. After the COC constitution, the resolution professional will make an application. However, before the constitutional COC is constituted, the resolution professional will make an application when the COC is not constituted; in this case, there is no possibility of 90% approval. Therefore, if you examine Section 12A, which requires approval by 90% of the voting, it is clear that 90% of the voting is not possible without the COC. However, even without 90% approval, you can still go for

withdrawal; that is possible. So, when you are filing an application for withdrawal, what is the role of NCLT? Here, in various judgments, it was held that the commercial wisdom of the COC will be supreme, so you have to consider commercial wisdom.

Let us examine the provisions. Regulation 30A, Sub-regulation 6 of the CRP Regulations, provides that the adjudicating authority may, by order, approve the application submitted under Sub-regulation 3 or 5, as applicable. So, before the constitution of the COC and after the constitution of the COC, in two scenarios, you can make an application. Once the application is made, the adjudicating authority may approve it, provided all the conditions are satisfied. Therefore, when he approves what he is supposed to verify in the case of Valla RCK versus Siva Industries and Holdings Limited, the Supreme Court held that the application is received after the constitution of the COC. So, where there is a settlement in the nature of business restructuring, you have to consider the commercial wisdom of the COC because they have made the decision. Therefore, the court has to accept it. So, in this judgment, the NCLAT actually held that when there is any disqualification under Section 29A, whether it will be applicable or not. Therefore, the NCLAT ruled that disqualifications under Section 29A would be applicable; however, the Supreme Court overruled the NCLAT's decision.

So, the commercial wisdom of the COC is supreme; you need not consider section 29A. We have previously discussed the meaning and contents of Section 29A in our previous classes. Now, section 12A can be invoked at any point in time, so prior to the approval of the resolution plan. So, can I withdraw after the constitution of the CoC? Yes, even after the constitution of the CoC, even if an invitation for expression of interest is given, you can invoke Section 12A at that point in time. However, the only condition is that it must be before the approval of the resolution plan. Once the resolution plan is approved, you cannot withdraw the application or proceed with the CRP process. So, if the post is also a reason to be given, even after an invitation for expression, you can proceed with Section 12A, but the only condition is that you must provide the reasons for withdrawal. So, in the case of Shaji Purushottaman versus Union Bank of India, the NCLAT held that settlement can be considered at any time prior to the approval of the resolution plan.

Therefore, settlement can occur at any point in time, but it must be made before the approval of the resolution plan. Now, let us look at section 29A. Is it applicable in the case of Andhra Bank versus Sterling Biotech Limited? The NCLAT held that section 29A would not apply to the settlement proposed under section 12A of the IBC. Therefore, Section 12A states that when you are considering a withdrawal, it is a matter of commercial wisdom and a decision of this EOC. Therefore, Section 29A will not be applicable in such cases. Can I then go for a settlement during the liquidation? Can you consider a settlement during the liquidation? There is no clarity, but if you examine the section, it is clear that withdrawal is only allowed before the approval of the resolution plan. Therefore, when the resolution plan fails or the committee of creditors is unable to

reach a resolution plan, the NCLT will issue an order for liquidation. So, can you settle at the time of liquidation? Therefore, if you examine the section, you will understand that there can be no withdrawal under Section 12A because Section 12A clearly states that when the CRP process is ongoing before the approval of the resolution plan, the CRP process cannot be initiated once liquidation has commenced.

If the CRP process is already a failure, then the concept of liquidation comes into play. So, if you look at the section plainly, you will come to the conclusion that withdrawal is not allowable; it cannot be done. However, surprisingly, in the case of Navaneetha, the NCLAT held that withdrawal during liquidation is also permitted, exercising judicial discretion. It was held that during the liquidation process, withdrawal is allowable. In another case, V. S. Varun, Liquidator, Aradhya Wire and Rope Pvt. Ltd. vs. South India Bank, the NCLT, Bengaluru bench held that withdrawal during liquidation is permissible, following the Navneeta case. But my personal opinion is that that is not the intention of the legislation. Why? Because section 12A clearly states that the withdrawal is allowable only before the approval of the resolution plan.

Then, withdrawal and settlement under Section 12A, pending approval of the resolution plan. Suppose the same resolution plan is placed before the COC but is not yet approved; then, in such cases, can you do that? In the case of Hem Singh Bharana versus Pavan Doot Estates Private Limited, the NCLAT held that a proposal under section 12 cannot be made during the pendency of an application for approval of the resolution plan. This means that an application for the approval of the resolution plan has already been made. Therefore, once the application is made before the NCLT, please note that you cannot file an application for withdrawal or settlement under Section 12A. In another case, Shaji Purushottaman versus Union Bank of India, the NCLAT directed the COC to consider a settlement plan proposed by the promoter, pending consideration of the application for approval of the resolution plan.

When the resolution approval is pending, the NCLAT directed the COC to consider the settlement plan instead of a resolution plan. If a settlement plan can be pursued, it is more viable, which is why the NCLAT directed the COC. Therefore, a settlement proposed under Section 12A cannot be considered by the COC after it approves the resolution plan. If you examine the section, the settlement under Section 12A cannot be considered once the resolution plan has been approved. However, the court of law held that when an application for approval of the resolution plan is pending, an application for withdrawal can also be made.

Now, let us examine the doctrine of a clean slate and its applicability. In the case of Arun Kumar Jagatramka versus Jindal Steel and Power, the Supreme Court held that the doctrine of a clean slate is not applicable. Because when you are withdrawing, or when you are coming for the settlement, or when you are making an application for the

withdrawal under section 12A, it is not a resolution plan; it is a withdrawal. Therefore, the concept of a clean slate is applicable, or the doctrine of a clean slate is applicable only in the case of a resolution plan. Therefore, only in the case of a resolution plan will the corporate debtor be exempt; otherwise, the clean slate theory will apply, whereby the corporate debtor will not be liable for its previous activities. Anyway, in previous classes, we discussed that a corporate debtor is not liable; however, an officer in default will always be liable, even after the approval of the resolution plan. In this case law, it was held that because it is not a resolution plan, the doctrine of a clean slate is not applicable in the case of an application under Section 12A. Then, once you make an application for withdrawal under section 21A, any creditor can raise an objection. In the case of *Abhishek Singh versus Hathamaki PPL*, the Supreme Court held that the other creditor would not have the right to object to the settlement under Section 12A and, instead, has the right to avail themselves of other legal remedies. So once the CRP process starts when you file an application for withdrawal, other creditors don't have any rights, because they have other remedies under other legislation. Therefore, based on the contract, you may be able to pursue legal action in civil court. Other remedies are always available, so that's why the objectors cannot raise objections for the settlement under section 12A.

Then, whether the resolution applicant can invoke section 12A means that once the resolution plan is approved, the resolution applicant can withdraw from the resolution plan. No. In the case of *Maharashtra Seamless versus Padmanabhan Venkatesh*, the Supreme Court held that the exit route prescribed under Section 12A is only available during the CRP process. So, it is not applicable to the resolution applicant. Why? Because in the case of the resolution applicant, he has already proposed a resolution plan, which has also been approved. Now, he is expected to implement it. Therefore, once the resolution plan is approved, there is no scope for Section 12A. Therefore, the resolution applicant cannot invoke Section 12A.

Then, the duty to pay CRP costs continues until the date of approval of withdrawal under Section 12A. As we have already discussed, whenever you are making an application for withdrawal, it is the applicant's duty to ensure that they are paying the CRP cost. That's why, if you look at the form FA, the third point is that he must provide the bank with a guarantee. The bank guarantee must be provided to cover the CRP cost. So if you look at regulation 30A, which clearly provides that, where the application is approved under sub-regulation 6, the applicant shall deposit an amount towards the actual expenses incurred for the purpose of the CRP until the date of approval by the adjudicating authority, then, within three days of such approval, he is supposed to deposit it in the bank account. In the event that this is not possible, the bank guarantee received under sub-regulation 2 shall be invoked. He should have already given the bank guarantee; then, within three days, he is

expected to make the payment. Additionally, if he fails to make the payment, the bank guarantee already provided during the withdrawal application form can be exercised.

Let's recap what we have discussed today. In this lesson, we have discussed the concept of withdrawal, which refers to settlement during the CRP process under Section 12A. We have discussed the position before section 12A; because section 12A was added subsequently, what was the position? We learned that the Supreme Court, by exercising its jurisdiction under the Constitution of India, allowed the withdrawal of dual applications under CRP. Then, subsequently, how was Section 12A introduced? What is the procedure under Section 12A that we have discussed? We then discussed the applicability of Section 12A in the case of withdrawal. So, whether section 29A is applicable or not, we have discussed the applicability of section 29A. Then, whether withdrawal is allowed during the liquidation. In a few judgments, it was held that withdrawal is allowed even during liquidation; however, the court's opinion differs because it has yet to be decided by the Supreme Court. Because the withdrawal is applicable only in the case of the CRP process, once the company goes into liquidation, there is no question of the CRP process being applicable.

This question of law is yet to be decided by the Supreme Court. Therefore, whether the right of objection is available to other creditors, we have discussed that it is not available to the creditor. Can the resolution applicant invoke section 12A? No, the answer is no. Okay, so these are all the various points that we have discussed in section 12A.

Thank you.