TC-22

**VI SURANA & SURANA AND UPES SCHOOL OF LAW, NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION, 2023**

**IN THE SUPREME COURT OF MALTA**

*CIVIL APPELLATE JURISDICTION u/s 62(1) of IBC,2016*

**MR. PIPARA…………………………………………………………...…APPELLANT**

***V.***

**SINGHANIA………………………………………………………………RESPONDENT**

**CLUBBED WITH**

**MR. SHROFF……………………………....……………………………….APPELLANT**

***V.***

**FU-SAM POWER SYSTEMS LTD…………………………….………..RESPONDENT**

**CLUBBED WITH**

**TIPSRA MSCL (INDIA) LIMITED……….....………………………. APPELLANT NO. 1**

**VRS MALTA FINANCIAL SERVICES LIMITED……………… APPELLANT NO. 2**

**M&N FINANCE LIMITED……….........…………………...……… APPELLANT NO. 3**

***V.***

**MR KASI NAYINAR PARARACACEKARAN…….….…………..RESPONDENT NO. 1**

**CLUBBED WITH**

**AXIS TELECOM PVT. LTD………………………………………………..…APPELLANT**

***V.***

**DANOBE INFO TECHNOLOGY LIMITED…………………………RESPONDENT**

**MEMORIAL FOR APPELLANT**

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| ABBREVIATION | CORRESPONDING EXPANSION |
|---|---|
| ¶ | Paragraph |
| **AIR** | All India Reporter |
| **Anr.** | Another |
| **SCC** | Supreme Court Cases |
| **Art.** | Article |
| **v.** | Versus |
| **Hon'ble** | Honourable |
| **i.e.,** | That is |
| **Ors.** | Others |
| **Sec.** | section |
| **NCLT** | National Company Law Tribunal |
| **NCLAT** | National Company Law Appellate Tribunal |
| **SC** | Supreme Court |
| **RP** | Resolution Professional |

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## STATEMENT OF JURISDICTION

APPELLANTS in the instant case have the honour to submit this dispute before this Hon'ble Court which has jurisdiction under sec. 62(1) of the Insolvency and Bankruptcy Code, 2016.

The section reads as follows: Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

## STATEMENT OF FACTS

**SCENARIO 1**: As the appellant, Mr. Pipara (promoter) became ineligible under sec. 29A of IBC, to submit a resolution plan, no plan was approved by the CoC. After NCLT ordered liquidation and while an appeal to NCLAT was still pending, the appellant proposed a scheme for compromise and arrangement under sections 230-232 of the Companies Act, 2013, which was approved by the NCLT but rejected by NCLAT which held that a person ineligible under sec. 29A of IBC cannot propose a scheme for compromise and arrangement. The appellant has appealed before the SC against this judgment.

**SCENARIO 2**: Fu-Sam Power Systems Limited faced insolvency proceedings. Mr. Shroff, promoter of the company, submitted a resolution plan with Allianz FRC Private Limited, but was declared ineligible due to Section 29A(h) of the IBC. The NCLT ordered Fu-Sam's liquidation as no suitable resolution plan emerged. A Liquidator was appointed, and Mr. Shroff expressed interest in presenting a compromise plan, but was informed by the Liquidator of his ineligibility under Section 230 of the Companies Act due to IBC ineligibility. His appeals to the NCLT and NCLAT were dismissed. This led to the current appeal challenging the NCLAT's decision.

**SCENARIO 3**: After the withdrawal of the Company Petition, Danobe Info Technology Limited failed to fulfil the payment obligations as per the consent term. In response, the Petitioner Axis Telecom Pvt. Ltd. (ATPL) submitted an Interim Application to revive the Company Petition, which was dismissed by the Adjudicating Authority. They observed that there is no specific provision within the IBC 2016 for restoring the Company Petition.

**SCENARIO 4**: The corporate Debtor i.,e Vntek Auto Limited sought loans from VRS Malta (Appellant No. 2) and M&N Finance (Appellant No. 3) for its group of companies viz, pledging 66.77 % OF KMP Auto’s shares. In June 2020, CIRP was initiated against the corporate debtor. In October 2020, Appellant No.1 filed a claim as a secured financial creditor which was rejected by the RP but went unchallenged. The appellant filed an application before the AA claiming his right based on pledged shares but this contention was rejected by both the NCLAT and NCLAT with the reasoning that the appellant is not a secured financial creditor. Thus, the appeal before the SC.

## STATEMENT OF ISSUES

### ISSUE A

Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act?

### ISSUE B

If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible Under Section 29A of the IBC to submit a 'Resolution Plan'?

### ISSUE C

Whether security interest created on the assets of corporate debtor be extinguished even if that interest has been created for the loan availed by the third party, not necessarily by the corporate debtor?

### ISSUE D

Whether Insolvency proceeding can be restored in case of default when Consent term is entered between parties?

## SUMMARY OF ARGUMENTS

### ISSUE A: IN A LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT.

The Appellant humbly submits that a scheme for compromise and arrangement in terms of Section 230 and 232 of the Companies Act can be proposed during liquidation proceedings. This assertion is made in light of the object with which Insolvency and Bankruptcy Code was put forth. The survival of a distressed debtor ought to be be given utmost priority and hence, measures ensuring the revival of a corporate debtor should be allowed even if it's during the last stage of the proceedings. Many precedents have upheld the notion that if the company's revival requires a scheme of compromise or arrangement to be proposed, the liquidator should forward with it

### ISSUE B: THE PROMOTER IS ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, WHILE HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'.

The appellant humbly submits that the promoter is eligible to file an application for compromise and arrangement even though he is ineligible under section 29A of the IBC to submit a resolution plan. Section 230 does not disqualify the promoter to propose a scheme of compromise or arrangement. The promoter is a member of the company, it is no doubt that he is eligible to bring a proposal for a scheme and arrangement under Section 230 of the concerned act. Further, the SC has emphasised that commercial wisdom should be given higher status without any judicial intervention. The counsel moreover argues that the applicability and extent of Section 29A is limited.

### ISSUE C: SECURITY INTEREST CREATED ON THE ASSETS OF CORPORATE DEBTOR CANNOT BE EXTINGUISHED EVEN IF THAT INTEREST HAS BEEN CREATED FOR THE LOAN AVAILED BY THE THIRD PARTY, NOT NECESSARILY BY THE CORPORATE DEBTOR.

IT is humbly submitted that since pledge of shares does fall under the definition of 'financial debt' under the IBC, the appellant is a secured financial creditor. The words 'means and includes' as stated in the definition are not restrictive in nature. The Limitation Act of 1963 too gives a period of 3 years to raise any money claims. Thus, the appellant cannot be debarred from filing an application before the AA just because they did not challenge the rejection of their claim by the RP. Further, the claim was still undecided and as a third-party security holder, the appellant's right over the security interest cannot be extinguished before paying the prescribed amount of money.

**ISSUE D: INSOLVENCY PROCEEDING CAN BE RESTORED IN CASE OF DEFAULT WHEN CONSENT TERM IS ENTERED BETWEEN PARTIES.**

It is humbly submitted that the appellant ATPL has moved to this Hon'ble Court to revive the insolvency proceeding. It is humbly put forth before the court that in light of the prevailing circumstance, it is the obligation of the court to restore the proceeding. When an insolvency application is withdrawn by placing the consent terms on record, it is liable to be restored in case of default by the financial debtor. The non-revival of the insolvency proceeding in case of default in the consent term can be seen as against the principles of natural justice as it is not a reasoned decision. Moreover, CIPR can be revived in case of failure to abide by the terms of the settlement agreement executed between the parties.

## ARGUMENTS ADVANCED

### ISSUE A: IN A LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT.

**¶ 1.** It is submitted that in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the scheme for compromise and arrangement can be made in terms of sections 230 to 232 of the Companies Act as. The above argument is based on the following contentions: Survival of a distressed company has always been preferred over the corporate death of the company **[A.1];** IBC does not make any provision for the conversion of liquidation proceedings into rehabilitation proceedings **[A.2];** and Liquidation is the last resort under IBC **[A.3]**

### [A.1] SURVIVAL OF A DISTRESSED COMPANY HAS ALWAYS BEEN PREFERRED OVER THE CORPORATE DEATH OF THE COMPANY.

**¶ 2.** The insolvency & Bankruptcy Code, 2016 was brought with the object of salvaging distressed companies from getting wound up and eventually affecting the health of the commercial ecosystem. Simply speaking, in the end, the effort is to add another layer of opportunity to revive the company and balance the interests of various stakeholders instead of straightaway placing it under liquidation.

**¶ 3.** Accordingly, the IBC has clear restructuring/rehabilitation proceedings (in the form of corporate insolvency resolution processes (**CIRPs**)).These can only convert into liquidation proceedings if the committee of creditors so decides by requisite majority, if no resolution plan is approved by the committee of creditors or the National Company Law Tribunal (**NCLT**), or if an approved resolution plan is contravened by the corporate debtor.

**¶ 4.** Saving a debt ridden company by way of a scheme of compromise or arrangement is not a new concept, and schemes have always been considered as an alternative to pending winding-up proceedings. Early decisions of the various High Courts and the Supreme Court as well as the recent decisions of the NCLAT all unanimously observe that schemes of

compromise or arrangement can be proposed during winding-up/liquidation proceedings as long as the scheme contemplates the revival of the company. [1]

**¶ 5.** In light of the aforementioned, it is to be noted that in accordance with the priority that has been provided to the revival of a company, the scheme of compromise & arrangement in terms of Section 230[2] and 232[3] of the Companies Act has been allowed by the law during winding up proceedings. Liquidation proceedings have been encouraged by the courts to be evolved into rehabilitation proceedings to ensure the survival of a company.

**¶ 6.** The 2005 Report of the Expert Committee on Company Law (JJ Irani Committee Report) had noted that an effective insolvency law: "should strike a balance between rehabilitation and liquidation. It should provide an opportunity for genuine effort to explore restructuring/ rehabilitation of potentially viable businesses with consensus of stakeholders reasonably arrived at. Where revival / rehabilitation is demonstrated as not being feasible, winding up should be resorted *to.* [4]

**¶ 7.** As per the facts of scenario-I, even if the company has been ordered to undergo liquidation, a scheme of compromise and arrangement in accordance of Section 230 and 232 of the Companies Act, 2013 should be allowed to be put forward to seek the revival of the company.

**¶ 8.** The aforementioned arguments have time and again found support in multiple judgements which have upheld that schemes were a substitute or alternative to the winding up or bankruptcy proceedings which were actually pending, in the sense that a scheme averted the winding up.

**¶ 9.** In a certain case, the question that came up before the court was whether the compromise put forward could be accepted by the court without reference to the fact that it was a company in liquidation. The court contended that nothing stands in the way of the company court before the ultimate step is taken or before the assets are disposed of to accept

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[1] L. Viswanathan, Bharat Vasani. Gaurav Gupte, Is Liquidation Irreversible? Schemes of Compromise or Arrangement for Companies in Liquidation, CYRIL AMARCHAND BLOGS (August 12, 2023, 6:48 PM), https://corporate.cyrilamarchandblogs.com/2019/06/liquidation-irreversible-schemes-compromise-arrangement-companies/>

[2] The Companies Act, 2013, § 230, No. 18, Acts of Parliament, 2013 (India).

[3] The Companies Act, 2013, § 232, No. 18, Acts of Parliament, 2013 (India).

[4] Dr. Jamshed J. Irani, Report On Company Law, PRIMEDIRECTORS (May 31, 2005), http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf>.

a scheme or proposal for revival of the company and hence, upholding the primary principle of the Insolvency & Bankruptcy Code which is to save a company from winding up.

**¶ 10.** The argument that Section 391(5)[5] would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. If we substitute the definition in Section 390(a) of the Act, this would mean a company liable to be wound up and which is being wound up. It also does not appear to be necessary to restrict the scope of that provision considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Section 391 of the Companies Act, 1956 has since been replaced by Section 230 of the Companies Act, 2013.[6]

## [A.2] IBC DOES NOT PROVIDE EXHAUSTIVE PROVISIONS FOR THE CONVERSION OF LIQUIDATION PROCEEDINGS INTO REHABILITATION PROCEEDINGS AND HENCE THE CODE REFERS TO THE COMPANIES ACT

**¶ 11.** It is humbly submitted that the Insolvency & Bankruptcy Code does not contain any provision to revive the company during the liquidation process. The provision of calling for Resolution Plans, under Section 5(26)[7] of the Insolvency & bankruptcy Code, is a part of the Corporate Insolvency Resolution Process (CIRP). In case no Resolution Plan is approved by the Class of Creditors (CoC), the company gets pushed into liquidation. Once the process of liquidation initiates, there is no recourse provided by the Insolvency and Bankruptcy Code, 2016 to rescue the company from corporate death.

**¶ 12.** It is to be noted that the primary object of the Code, as discussed above as well, is the survival of the company and hence, the courts and tribunals have time and again adjudged to resort to the schemes proposed by debtors for compromise and arrangement, even if it lacks mention in the Code. The intent of the Code has been upheld, even if it requires going beyond the purview of the Insolvency & Bankruptcy Code, 2016.

**¶ 13.** The applicability of section 230 schemes under IBC arises out of amendments made to section 230 of the Companies Act by way of section 255 of the IBC[8] read with the 11th

[5] The Companies Act, 1956, § 230, No. 1, Acts of Parliament, 1956 (India).

[6] Meghal Homes (P) Ltd. v. Shree Niwas Girni K.K. Samiti, (2007)7 SCC 753.

[7] Insolvency and Bankruptcy Code, 2016, § 5, No. 31, Acts of Parliament, 2016 (India).

[8] Insolvency and Bankruptcy Code, 2016, §255,, No. 31, Acts of Parliament, 2016 (India).

schedule thereto[9]. Furthermore, through the regulation 2B of the Company Liquidation Regulations, schemes of compromise and arrangement have been given mention in the Insolvency & Bankruptcy Code as well now. Considering that the corporate debtor is under liquidation it shall be governed by provisions of IBC as well as Companies Act. Once the liquidation order has been passed as per Section 33 of the code[10], a scheme of compromise and arrangement as per provisions of section 230 of the Companies Act, 2013 can be proposed to seek the revival of the company.

**¶ 14.** In light of the aforementioned, the judicial position has been testimonial to the fact that saving a company from corporate death has to be treated as the utmost priority.

**¶ 15.** In a certain case which involved two companies wherein the CIRP had failed and the National Company Law Tribunal (NCLT) has passed orders for liquidation of the companies. To arrive at its decisions, the NCLAT relied on the landmark case of Swiss Ribbons (P) Ltd. v. Union of India[11] wherein it was held that the primary focus of the IBC is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Adjudicating Authority permitted the proposal of schemes of compromise and arrangement during liquidation proceedings.[12]

**¶ 16.** In another landmark case, Gujarat NRE Coke Limited, the corporate debtor ran into financial crisis and was driven to filing an insolvency application under Section 10 of the IBC. However, in the absence of a resolution plan and after the expiry of 270 days, the NCLT passed a liquidation order against the corporate debtor. Thereafter, the promoter (respondent) of the corporate debtor filed an application before the NCLT under Sections 230 to 232 of the Companies Act, 2013 to obtain the sanction for a scheme of compromise. Aggrieved by the said order, the unsecured creditor filed an appeal before the NCLAT contesting the same.

**¶ 17.** The challenge in the above case was on the question that whether in a liquidation proceeding under the IBC, a scheme for compromise and arrangement can be made in terms of Sections 230 to 232 of the Companies Act? And if so permissible, whether the promoter is eligible to file an application for compromise and arrangement, while he is ineligible under Section 29-A of the IBC to submit a resolution plan? The NCLAT answered the first question

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[9] Sikha Bansal, A Case for Exclusion of Schemes of Arrangement from Liquidation, INDIA CORPLAW (Last visited on August 12, 2023).

[10] Insolvency and Bankruptcy Code, 2016, §33, No. 31, Acts of Parliament, 2016 (India).

[11] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

[12] S.C. Sekaran v. Amit Gupta, (2019) SCC NCLAT 517.

in the affirmative.[13] It relied on Y. Shivram Prasad and S.C. Sekaran , to say that in a liquidation proceeding under IBC, a petition under Sections 230 to 232 of the Companies Act, 2013 is maintainable.

**¶ 18.** It was also contended in another case that it will be open to the members of M/s. Ashok Magnetics Limited or the creditors to contact the liquidator for Compromise or Arrangements in terms of Section 230. If it is found that the scheme is viable, feasible and maximise the assets of the 'Corporate Debtor' and balance the creditors, the liquidator will move application under Section 230 before the National Company Law Tribunal for appropriate order and directions.[14]

## [A.3] LIQUIDATION IS THE LAST RESORT UNDER IBC.

**¶ 19.** As per the jurisprudence of insolvency law, liquidation is to be opted as the last resort only in cases where revival is not possible. In furtherance of this objective, the IBC has laid down a clear restructuring/ rehabilitation mechanism—the Corporate Insolvency Resolution Process (CIRP). This CIRP is intended to rehabilitate the financially distressed company. Only in the event that this CIRP fails should liquidation proceedings be initiated and is seen as the last resort. Irreversibility of the liquidation process was a feature recommended in the *Report of the Bankruptcy Laws Reform Committee*.

**¶ 20.** Hence, in order to revive the company from winding up, recourse has to be taken to Section 230 and 232 of the Companies Act.

**¶ 21.** Lastly, as has been noted by a landmark judgement, the objective of the Insolvency and Bankruptcy Code, 2016 (**IBC**) is "*to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation*"and provides for liquidation only as a last resort.

**¶ 22.** In S.C. Sekaran v. Amit Gupta and Ors., it was held that sale of assets in liquidation should be the last step, which should be taken only on failure of the revival of the corporate debtor as a 'going concern.

**¶ 23.** During the liquidation process, step required to be taken for its revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from a death by liquidation. Thus, the steps which are required to be taken are as follows: By compromise or arrangement with the creditors, or class of creditors or

[13] Arun Kumar Jagatramka v. Jindal Steel & Power Ltd. & Anr., (2021) 7 SCC 474.

[14] Ashok Agarwal v. Ashok Magnetics Ltd., (2019) SCC NCLT 29868.

members or class of members in terms of Section 230 of the Companies Act, 2013. On failure, the liquidator is required to take step to sell the business of the 'Corporate Debtor' as going concern in its totality along with the employees. The last stage will be death of the 'Corporate Debtor' by liquidation, which should be avoided.[15]

**¶ 24.** Ends of justice will be served by giving liberty to the Appellant to submit a scheme of comprise/arrangement as contemplated under section 230 of The Companies Act.[16]

**¶ 25.** Further, it is open to the Adjudicating Authority to grant more than 90 days' time period for approval of a scheme of arrangement and the sale of assets may be done only if the Liquidator fails to revive the company by pursuing the proceedings under section 230 of The Companies Act, 2013.[17]

## ISSUE B: THE PROMOTER IS ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, WHILE HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'.

**¶ 26.** It is humbly submitted before this Hon'ble Court that the promoter is eligible to file an application for compromise and arrangement[18], even though he is ineligible under section 29A of the IBC[19] to submit a 'resolution plan' in view of the arguments presented herein.

**¶ 27.** ***Firstly***, section 230 of the Companies Act 2013 must be applied as posited in the statute **[B.1]**. ***Secondly***, consumer wisdom should be prioritised over judicial wisdom **[B.2]**. ***Thirdly***, the applicability and extent of Section 29A is limited **[B.3]**.

### [B.1] THAT SECTION 230 OF THE CA 2013 MUST BE APPLIED AS POSITED IN THE STATUTE

**¶ 28.** Section 230[20] provides for filing of the scheme by a creditor (or class of creditors) or a member (or class of members) or by the liquidator himself. If approved, then the scheme becomes binding on the company, its creditors and members. A literal interpretation of Section 230 will suggest that there are no ineligibilities described for bringing a scheme for

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[15] Y. Shivram Prasad v S. Dhanapal & Ors, Company Appeal (AT) (Insolvency) No.224 of 2018.

[16] Bharat Sharma v. Reshma Mittal, RP & Anr., Company Appeal (AT) (Insolvency) No. 1275 & 1276 of 2022.

[17] Abhishek Corporation Ltd.) v. Asset Reconstruction company (India) Limited and Ors., (2019) SCC NCLAT 1455.

[18] R. Anil Bafna v. Madhu Desikan, 2019 SCC OnLine NCLAT 387.

[19] Insolvency and Bankruptcy Code, 2016, §29A, No. 31, Acts of Parliament, 2016 (India).

[20] Companies Act, 2013, §230, No. 18, Acts of Parliament, 2013 (India).

compromise and arrangement under Section 230 like those which are present in Section 29A of IBC.

**¶ 29.** It is humbly submitted that importing these ineligibilities to the concerned provision without the statutory mandate is in violation of the 'sources' thesis[21]. Section 230 does not disqualify the promoter to propose a scheme of compromise or arrangement. The promoter is a member of the company, it is no doubt that he is eligible to bring a proposal for a scheme and arrangement under Section 230 of the concerned act.

**¶ 30.** Under this provision, once an application is submitted, the NCLT may call for a meeting between the different classes of creditors or members who will then decide by voting on the adequacy of the proposal. If the proposed scheme is approved by the required number of votes, the NCLT will give a stamp of validity to the accepted proposal and thereby it becomes binding.

**¶ 31.** There is no equivalent of section 29A with respect to section 230 of the Companies Act, 2013[22]. Further, the scheme would need the approval of each class of creditors, unlike resolution plans, as well as shareholders. Hence, the scheme will not be hit by section 29A.

**¶ 32.** It is humbly submitted that a law requires a source to gain authoritativeness or validity. All law is source-based, and anything which is not source based is not law. This is generally referred as the source thesis. The purpose of law should be to settle the debate. Hence, it becomes crucial for judges to apply the law as it is posited in statutes. However, when judges make judgments based on moral considerations and go against the posited law, they re-settle such debates which cause unnecessary difficulties.

## [B.2] THAT CONSUMER WISDOM SHOULD BE PRIORITISED OVER JUDICIAL WISDOM

**¶ 33.** The Supreme Court has consistently emphasised that there is a need for minimal judicial interference by the National Company Law Appellate Tribunal (NCLAT) and the National Company Law Tribunal (NCLT). They further noted that commercial wisdom should be given higher status without any judicial intervention.

**¶ 34.** It is humbly submitted that making promoter ineligible under the Section 230 of CA 2013 will result in the creditors being devoid of the extra price offered by the promoters. In

[21] OXFORDACADEMIC, https://academic.oup.com/book/10820/chapterabstract/158976297?redirectedFrom=fulltext (last visited Aug. 8, 2023).

[22] Companies Act, 2013, §230, No. 18, Acts of Parliament, 2013 (India).

such case, the judiciary is interfering with the commercial wisdom of creditors. By taking a purposive interpretation and reading the ineligibilities to the Section 230 is favouring commercial morality rather than commercial wisdom. The task of judges is to apply laws as it is before them; they are not supposed to use moral acumen to make judgments.

**¶ 35.** In this case, the court by ignoring the literal interpretation relied on the grounds like commercial morality to prohibit promoters from proposing a scheme of compromise and arrangement which was not supported by the law on the same. This is clearly against the exclusive legal positivists' understanding of judges' role or power in adjudication.

**¶ 36.** It is to be noted that the reorganisation under Section 230 of CA 2013 may be the last possible option available for the revival of a distressed company. Hence, there should be minimum restrictions imposed at this stage and the commercial wisdom of the creditors or the members as the case may be should be revered. This will also help in realising one of the objectives of IBC which is to protect the surplus value of the corporate entity and prevent it from piecemeal liquidation. Although the liquidation proceeding has started, there should always be an effort to revive the company and Section 230 of the Companies Act provides that opportunity.

**¶ 37.** It is humbly argued before this court that at a stage when it is the last possible opportunity for the revival of the company and preventing it from foreseeable corporate death, making such comprehensive ineligibilities can effectively restrict the chances of revival of the company, which encourages entrepreneurship leading to higher economic growth, as some important stakeholders will be debarred from bringing a proposal to save it which will also not be in line with the objectives of the IBC.

**¶ 38.** Hence, the judiciary should limit its interference to the extent of ensuring that the sanctity of the process is not compromised. It should allow the creditors and the proposer to negotiate amongst themselves a proposal which benefits the creditors as well as the company.

## [B.3] THE APPLICABILITY AND EXTENT OF SECTION 29A IS LIMITED

**¶ 39.** Section 230 of the Act of 2013 is a part of the settlement mechanism and is at par with the provisions of Section 12-A. The impact of a compromise or arrangement is also that company is restored to the promoters with all its liabilities. While Section 12-A of the IBC permits withdrawal of an application, Sections 230 and 230-A of the Act of 2013 envisage a compromise or arrangement. As such, they both form a part of the settlement mechanism and

are not part of the resolution mechanism, to which alone the ineligibility under Section 29A applies. Hence, this ineligibility cannot now be engrafted into Section 230;

**¶ 40.** The NCLAT, in *Shivram Prasad Case*[23], held that if any member or creditor of the corporate debtor proposes a scheme through the liquidator, such liquidator must make an application on behalf of the company under section 230 of the Act, even if such member or creditor is otherwise prohibited under section 29A of the IBC.

**¶ 41.** In the case of *Rasiklal S. Mardia*[24], the NCLAT held that the promoter is the eligible person to apply for a scheme of arrangement and also concluded that the liquidator is the additional person and not the exclusive person to apply to Section 391 of the Companies Act, 1956. On the similar line, the Hon'ble NCLAT in one of the case held that the promoters of the companies can go roundabout and can take advantage of the benefits given under Section 230 of the Act if there is any liquidation order passed by the NCLT[25].

**ISSUE C: SECURITY INTEREST CREATED ON THE ASSETS OF CORPORATE DEBTOR CANNOT BE EXTINGUISHED EVEN IF THAT INTEREST HAS BEEN CREATED FOR THE LOAN AVAILED BY THE THIRD PARTY, NOT NECESSARILY BY THE CORPORATE DEBTOR**.

**¶ 42.** Appellant No.1 who was a party to the security trustee agreement filed its claim during the insolvency proceeding against the corporate debtor. However, this claim was rejected by the RP after which Appellant No.1 filed an application before the AA (NCLT) claiming their right on the basis of pledged shares. Both the NCLT and NCLAT rejected the appellant's contention by holding that the appellant would not come under the purview of financial creditor.

**¶ 43.** It is submitted that the security interest created on the assets of corporate debtor cannot be extinguished as the present case is that of continuing cause and thus not challenging the rejection by RP would not bar the Appellant from filing an application before the AA **[C.1]**; Pledge of shares falls under the definition of financial debt and therefore the appellant is a secured financial creditor **[C.2];** and the appellant as a third party security holder should be considered a financial creditor **[C.3].**

[23] Y. Shivram Prasad v. S. Dhanapal, 2019 SCC OnLine NCLAT 172.

[24] Rasiklal S. Mardia v. Amar Dye Chem Limited, 2019 SCC OnLine NCLAT 243.

[25] R. Anil Bafna v. Madhu Desikan, 2019 SCC OnLine NCLAT 387.

## [C.1] THE PRESENT CASE IS A MATTER OF CONTINUING CAUSE OF ACTION

**¶ 44.** The ratio of the limitation is connected with the principle of cause of action. The schedule to the Limitation Act,1963 states that money claims cannot be raised beyond a period of 3 years from the date on which cause of action arises. sec. 29 of the Limitation Act[26] inter alia states that:

**¶ 45.** *"(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."*

**¶ 46.** Further sec. 433 of the Companies Act, 2013[27] states that 'The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be'. A preliminary reading of the above statutes indicates that Limitation Act, 1963 is applicable to IBC.

**¶ 47.** There is broad indication implicit in the Code for the application of the Limitation Act, itself.[28] In the absence of any specific bar on the application of the Limitation Act to proceedings under the Code, and given that sec. 433 makes the Limitation Act applicable to the NCLT, the provisions thereof would be applicable even in relation to proceedings under the Code.[29] Thus it is a settled position that the provisions of the Limitation Act would be applicable to proceedings under the Code[30].

**¶ 48.** Appellant No. 1 filed its claim as a secured financial creditor of the Corporate Debtor for a principal amount of INR 700 Crores on October 2, 2020 and the aforesaid claim was rejected by the Respondent No. 1 in 2020. The Appellants filed an application before the Adjudicating Authority claiming their right on the basis of pledged shares immediately somewhere after June 25, 2021. Hence, the limitation period of 3 years is not exhausted and

[26] Limitation Act, 1963, §29, No. 36, Acts of Parliament, 1963 (India).

[27] Companies Act, 2013, §433, No. 18, Acts of Parliament, 2013 (India).

[28] Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd., 2017 SCC OnLine NCLAT 351.

[29] Deem Roll-Tech Limited v. R.L. Steel Energy Limited, Company Application No. (I.B.) 24/PB/2017.

[30] M/s. Prowess International Private Limited v. Action Ispat and Power Private Limited, Company Appeal (AT) (Insolvency) No. 223 of 2017.

the appellant is not debarred from filing an application before the AA for the reason that they did not challenge the rejection of their claim within the given time period.

**¶ 49.** Lastly, the RP, Coc, Resolution Applicant and the AA are all required to consider the correct categorization of the claimants. And there no limitation prescribed for objecting to the categorization of the creditors in a wrongful category

## [C.2] 'PLEDGE OF SHARES' FALLS UNDER THE DEFINITION OF 'FINANCIAL DEBT'.

**¶ 50.** The bailment of goods as security for payment of a debt or performance of a promise is called "pledge" according to sec 172 of the Indian Contract Act, 1972.

**¶ 51.** The term "Security Interest" has also been defined under sec. 3(31) of the Code.[31] It means right, title or interest or a claim to property created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. And a secured creditor is defined under sec. 3(30) of IBC[32] as a creditor in favour of whom security interest is created, thereby making the Appellant a secured creditor as pledge of shares amount to a security interest. Security interest can be created for credit facilities/loan advanced to another person.

### *[C.2.1] Appellant is a secured financial creditor*

**¶ 52.** The definition of security interest is based on the "payment or performance of any obligation of any person",[33] regardless of whether such obligation falls within the definition of a 'financial debt' or an 'operational debt', a person receiving acollateral would be considered as a 'secured creditor' of the security provider.

**¶ 53.** Now, according to sec. 5(7)[34] "Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

**¶ 54.** Under sec. 5(8) of IBC[35], "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes … (f)

[31] Insolvency and Bankruptcy Code, 2016, §3(31), No. 31, Acts of Parliament, 2016 (India).

[32] Insolvency and Bankruptcy Code, 2016, §3(30), No. 31, Acts of Parliament, 2016 (India).

[33] Insolvency and Bankruptcy Code, 2016, §3(31), No. 31, Acts of Parliament, 2016 (India).

[34] Insolvency and Bankruptcy Code, 2016, §5(7), No. 31, Acts of Parliament, 2016 (India).

any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing ….

**¶ 55.** Sec. 5(8)(f) of the Code[36] is a 'residuary' and 'catch-all provision' and would cover all transactions which have the commercial effect of borrowing 'Security Deposit' and the interest thereon would fall within the ambit of the definition of 'Financial Debt'[37]. "Financial Debt therefore, can be segmented into two types: One is disbursed against the consideration for the time value of money. The second is any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing'.

**¶ 56.** A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument.[38] The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money.[39] Even though the short-term loan of Rs. 700 Crore was extended to the corporate debtor's group of companies, it was ultimately meant for the end use of the corporate debtor.[40]

**¶ 57.** Further, for transaction to have a 'commercial effect of borrowing, money must be lent and/or received by the Corporate Debtor for temporary use with 'profit as the main aim'.[41] Thus, for a debt to be termed as 'Financial Debt', the basic elements that are to be seen is whether (a) there is disbursal against consideration for the time value of money; and (b) whether it has a commercial effect of borrowing.[42]

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[35] Insolvency and Bankruptcy Code, 2016, § 5(8), No. 31, Acts of Parliament, 2016 (India).

[36] Insolvency and Bankruptcy Code, 2016, § 5(8)(f), No. 31, Acts of Parliament, 2016 (India).

[37] Sach Marketing (P) Ltd. v. Resolution Professional of Mount Shivalik Industries Ltd., 2021 SCC OnLine NCLAT 2666.

[38] B.V.S. Lakshmi (Dr.) v. Geometrix Laser Solutions Private Limited, 2017 SCC OnLine NCLT 458.

[39] Pioneer Urban Land and Infrastructure Ltd. v. UOI & Ors, 2019 SCC OnLine SC 1005.

[40] Moot proposition, ¶31.

[41] Pioneer Urban Land and Infrastructure Ltd. v. UOI & Ors, 2019 SCC OnLine SC 1005.

[42] Sach Marketing (P) Ltd. v. Resolution Professional of Mount Shivalik Industries Ltd., 2021 SCC OnLine NCLAT 2666.

***[C.2.2] The expression means and includes is not exhaustive in nature***

**¶ 58.** It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted. Where we are dealing with an inclusive interpretation, it would be inappropriate to put a restrictive interpretation upon words of wider denotation. [43] The words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes, the Legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive.[44]

**¶ 59.** "Financial debt" includes any amount raised under any other transaction, having the commercial effect of borrowing[45] and the term 'include' is used to broaden the scope of a definition.[46] Further, pledge of shares as being a financial debt has not been expressly excluded from the definition. Hence, the expression 'means and includes' also comprises in itself pledge of shares as a financial debt.

***[C.2.3] Appellant as a third party security holder should be considered a financial creditor***

**¶ 60.** A creditor should be treated as a financial creditor of the third-party security provider because it would be contrary to the objectives of the Code to exclude such a creditor from the CoC of the security provider and since, by way of providing a security, the security provider had made itself liable to the creditor for repaying the underlying debt.[47]

**¶ 61.** A 'security interest' is provided for securing the due performance or payment of such obligation, it is inextricably linked to the underlying debt or obligation.[48] Therefore, debt is an essential element of a security interest and it subsists within a security interest.[49] By

[43] State of Bombay v. Hospital Mazdoor Sabha and Others, 6 AIR 1960 SC 610.

[44] Kotak Mahindra Bank Limited v. A. Balakrishnan & Anr., (2022) 9 SCC 186.

[45] Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd., (2023) 3 SCC 753.

[46] Dilworth v. Commissioner of Stamps, (1899) AC 99.

[47] SREI Infrastructure Finance Limited v. Sterling International Enterprises Limited, 2019 SCC OnLine NCLT 68.

[48] BRIAN A. BLUM, SAMIR D. PARIKH, EXAMPLES & EXPLANATIONS FOR BANKRUPTCY AND DEBTOR/CREDITOR, (Brian A. Blum, Samir D. Parikh, Examples & Explanations for Bankruptcy and Debtor/Creditor SECTION 1.4.3 (Wolters Kluwer 2018).

[49] Jasbir Singh Chadha v. U.P. Financial Corporation, 2008 SCC OnLine Del 848.

creating a security interest in favour of the creditor, the security provider undertakes to repay the debt owed to the creditor to the extent of the security interest, in the event that the borrower fails to do so. Therefore, just like the borrower, the security provider should also be considered as a debtor of the creditor.[50]

**¶ 62.** The status of the creditor vis-à-vis the security provider (and the borrower) should be determined on the basis of the underlying debt that is secured by the security provider and therefore, where the underlying debt falls under the definition of a 'financial debt', the creditor should be regarded as a financial creditor of both the borrower and the security-provider.

## [C.3] THE SECURITY INTEREST CREATED ON THE ASSETS OF THE CORPORATE DEBTOR IS NOT EXTINGUISHABLE

It is submitted that the security interest created on the assets of the corporate debtor, even though the loan is availed by a third party, does not extinguish the right of the creditor over that security interest as in this case the claim put forth by the secured creditor was still undecided as the a new resolution plan was being considered and the creditor is entitled to payment as given under sec. 52 of the Code[51].

### *[C.3.1] The appellant's claim was still undecided*

**¶ 63.** The NCLAT permitted the continuation of proceedings between the Creditor and the Corporate Debtor even after the withdrawal of the CIRP under sec. 12A of the Code. The Creditor had initially filed a claim during the IRP, but the CIRP was later withdrawn using the procedure outlined in sec. 12A of the Code[52], without any consideration of a resolution plan. Since the Creditor's claim was pending and unresolved due to the withdrawal of the CIRP, they were granted the right to pursue all available legal remedies to recover the claim. The fact that the claim verification process didn't reach the conclusion achieved by resolution plan approval allowed for the continuation of proceedings between the Creditor and Corporate Debtor.[53]

[50] Ministry of Corporate Affairs, https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf (last visited Aug. 12, 2023).

[51] Insolvency and Bankruptcy Code, 2016, §52, No. 31, Acts of Parliament, 2016 (India).

[52] Insolvency and Bankruptcy Code, 2016, §12(A), No. 31, Acts of Parliament, 2016 (India).

[53] Go Airlines (India) Ltd. v. Sovika Aviation Services (P) Ltd., 2021 SCC OnLine NCLAT 5439.

**¶ 64.** In the present case, the appellant's claim, though rejected had not been fully decided upon as the resolution plan put forth by SHG was approved initially by the AA, but since SHG failed to fulfil its obligations as committed in terms of the approved, resolution plan, the AA passed an order directing the CoC reconsider the resolution plan of PVI.[54] Since, the RP has to now reconsider the whole plan from beginning, the claim put forth by the appellant needs to be considered again.

***[C.3.2] Appellant is entitled to certain payable amount***

**¶ 65.** Sec. 30(2)(b)[55] ensures that the operational creditors under the resolution plan should be paid the amount equivalent to the amount which they would have been entitled to, in the event of liquidation of the corporate debtor under sec. 53 of the Code. Sec. 31 of IBC, 2016 mandates that the Adjudicating Authority needs to be satisfied that the resolution plan has been approved by the committee of creditors under sub-section (4) of sec. 30 meets the requirements as referred to in sub-sec. (2) of sec. 30. Thus, sec. 30(2)(b) read with sec. 31 recognises and protects the interests of other creditors who are outside the purview of the CoC.

**¶ 66.** It has been held that the secured creditor is entitled to all rights and obligations applicable to the secured creditor under sections 52 and 53 of the IBC[56]. Under sec. 52[57], after the commencement of liquidation proceedings, a secured creditor can exercise any one of the following rights to recover its debt i.e., a) Secured creditor can either relinquish its security interest to the liquidation estate under sec. 52(1)(a) or b) The secured creditor can realize the security interest in the manner specified under sec. 52(1)(b).

**¶ 67.** Thus, the security interest cannot be out rightly extinguished and the appellant is entitled to an amount which they would have been entitled to, in the event of liquidation of the corporate debtor under Section 53 of the Code.

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[54] Moot proposition, ¶35

[55] Insolvency and Bankruptcy Code, 2016, §30(2)(b), No. 31, Acts of Parliament, 2016 (India).

[56] Vistra ITCL (India) Ltd. v. Dinkar Venkatasubramanian, 2023 SCC OnLine SC 570.

[57] Insolvency and Bankruptcy Code, 2016, §52, No. 31, Acts of Parliament, 2016 (India).

## ISSUE D: INSOLVENCY PROCEEDING CAN BE RESTORED IN CASE OF DEFAULT WHEN CONSENT TERM IS ENTERED BETWEEN PARTIES.

**¶ 68.** After the withdrawal of the Company Petition, Danobe Info Technology Limited failed to fulfil the payment obligations as per the consent term. In response, the Petitioner submitted an Interim Application to revive the Company Petition, which was dismissed by the Adjudicating Authority. They observed that there is no specific provision within the IBC 2016 for restoring the Company Petition.

**¶ 69.** The counsel humbly submits that the appellant ATPL has moved to this Hon'ble Court to revive the insolvency proceeding. It is humbly put forth before the court that in light of the prevailing circumstance, it is the obligation of the court to restore the proceeding.

**¶ 70.** ***Firstly***, the consent term done on record can be restored in case of default **[D.1]**. ***Secondly,*** it is the object of the IBC Code to protect the financial creditor and public interest **[D.2]**. ***Thirdly***, the court has the inherent power to pass such an order which is necessary for meeting the end of justice **[D.3]**.

### [D.1] THAT RESTORING THE INSOLVENCY PROCEEDING HAS BEEN A PRECEDENT

**¶ 71.** Under section 7 of the IBC Code 2016[58], a financial creditor can file an application to initiate Corporate Insolvency Resolution Process (CIRP) before the concerned Adjudicatory Authority, which the applicant may also withdraw if certain conditions are met.

**¶ 72.** CIRP is the process of resolving the corporate insolvency of a corporate debtor in accordance with the provisions of the Code. The trigger for initiating the CIRP is the act of default by the corporate debtor. It aims to resolve the defaulting companies in a time-bound manner and maintain the company as a going concern status.

#### *[D.1.1] Consent Term done on record is liable to be restored*

**¶ 73.** It is submitted that when an insolvency application is withdrawn[59] by placing the consent terms on record, it is liable to be restored in case of default by the financial debtor. The court has previously distinguished in the cases where the settlement agreement was done on record and outside the purview of NCLT .A simple withdrawal stating that the parties have

[58] Insolvency and Bankruptcy Code, 2016, §7, No. 31, Acts of Parliament, 2016 (India).

[59] Insolvency and Bankruptcy Code, 2016, §12A, No. 31, Acts of Parliament, 2016 (India).

settled and wherein the Settlement Agreement has been brought on record and had been made part of the order of withdrawal. The latter allows for the restoration of proceedings in case of default[60].

**¶ 74.** In the instant case, a consent term was executed between the Financial Creditor[61] and the Respondent DITL. The consent term was materialised on record before the Adjudicating Authority, and the withdrawal of the company petition under section 12A of the IBC Code 2016[62] was allowed.

**¶ 75.** In ***IDBI Trusteeship Case***[63], the National Company Law Appellate Tribunal (**NCLAT**) has held that when an insolvency application is withdrawn by placing the consent terms on record, which provide for the revival of the application upon any event of default, then the application is liable to be revived.

***[D.1.2] That CIPR can be revived in case of non-adherence to the consent terms***

**¶ 76.** It is humbly submitted that the CIPR can be revived in case of failure to abide by the terms of the settlement agreement executed between the parties. The debtor's failure to abide by the agreed terms invalidates the Settlement Agreement and entitles the financial creditor to revive the insolvency proceedings to seek a lawful resolution of the matter.

**¶ 77.** In the instant case[64], the respondent Danobe Info Technology Limited (DITL) subsequent to the withdrawal of the Company Petition ‘defaulted’ in making a payment towards the fourth tranche as per consent term.

**¶ 78.** In ***M/s. ICICI Bank Limited vs. M/s. OPTO Circuits (India) Limited***[65], the National Company Law Appellate Tribunal, Chennai Bench, held that the CIRP can be revived in case of failure to abide by the terms of the settlement agreement executed between the parties.

**¶ 79.** The court in a similar case which was in respect of proceedings initiated by an operational creditor under IBC and it was held that in the event of default by the Corporate Debtor and not adhering to the terms of 'settlement agreement', the 'Operational Creditor' shall be at liberty to seek revival of the CIRP[66].

[60] SRLK Enterprises LLP v. Jalan Transolutions (India) Ltd., 2021 SCC OnLine NCLAT 4577.

[61] Insolvency and Bankruptcy Code, 2016, §5(7), No. 31, Acts of Parliament, 2016 (India).

[62] Insolvency and Bankruptcy Code, 2016, §12A, No. 31, Acts of Parliament, 2016 (India).

[63] IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd., 2021 SCC OnLine NCLT 17943.

[64] Moot Proposition, ¶30.

[65] ICICI Bank Ltd. v. OPTO Circuits (India) Ltd., 2022 SCC OnLine NCLAT 186.

[66] Vivek Bansal v. Burda Druck India Pvt. Ltd., CA (AT) (Ins) No. 552 of 2020.

**¶ 80.** It is humbly put forth that the Adjudicating Authority has set a precedent for allowing petitioner seeking restoration of the original petition in case of non-compliance with the consent terms[67]. The said petition was disposed of earlier in view of the settlement between the parties after taking consent terms on record. In a similar case, ***JFE Shoji Steel India Private Limited v. Danke Technoelectro Pvt. Ltd.***[68], NCLT, Ahmedabad Bench, allowed the Operational Creditor to revive and restore the application in case of any default committed by the Corporate debtor in adhering to the terms of the settlement agreement.

**¶ 81.** Thus, it is humbly submitted that the Hon'ble Tribunal committed a grave error by ignoring the precedent settled in the various judgment[69] and refusing to give liberty to the Appellant to restore the Insolvency Proceeding.

## [D.2] THAT OBJECT OF THE IBC CODE IS TO PROTECT ALL THE STAKEHOLDERS

**¶ 82.** It is humbly submitted that the main objective of the IBC Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up the insolvency process. When parties involved in the insolvency process know that failure to adhere to the agreed-upon terms will result in the restoration of insolvency proceedings, they are more likely to comply.

### *[D.2.1] Non-revival will be against the creditor protection*

**¶ 83.** Respondent can resort to different methods to avoid payment to the applicant like not adhering to the consent terms. The possibility of the insolvency process being reinstated can encourage the parties to take their obligations seriously and cooperate in resolving the matter promptly. This may lead to a more efficient resolution of disputes and negotiations, avoiding unnecessary delays.

**¶ 84.** It is humbly put forth that the underlying objective of the Insolvency and Bankruptcy Code is to protect the interests of all stakeholders including creditors. While settlements are encouraged under the IBC, they should not come at the cost of undermining creditor protection. It is crucial to recognize that the right of financial creditors and ensure their protections.

[67] Himadri Foods Ltd. v. Credit Suisse Funds, 2021 SCC OnLine NCLAT 48.

[68] JFE Shoji Steel India (P) Ltd. v. Danke Technoelectro (P) Ltd., 2022 SCC OnLine NCLT 199.

[69] Pooja Finlease Ltd. v. Auto Needs (India) (P) Ltd., 2022 SCC OnLine NCLAT 3339.

**¶ 85.** In the case of Pooja Finlease Ltd[70], it was held that the order by which the NCLT accepted the withdrawal of the application filed for CIRP on the basis of a Settlement Agreement containing a clause that allows for revival of CIRP in case of default will be as good as NCLT granting the liberty of revival of the insolvency proceedings in case of default or non-adherence of the Settlement Agreement. When such application was approved based on the consent terms by taking on record the Settlement Agreement, it should be considered as part of the order. In a nutshell, it implies that the creditor has the authority to revive the petition in case any default in consent terms arise.

***[D.2.2] Revival of the proceeding ensures public interest***

**¶ 86.** Reviving the insolvency proceedings is in the broader public interest, as it ensures that the insolvency resolution process remains fair and transparent. It prevents any potential abuse of the settlement process by errant corporate debtors who may enter into agreements without any genuine intention to comply with the terms.

**¶ 87.** Though IBC Code 2016 doesn't provide an explicit provision for the revival of the insolvency proceeding in case of default when a consent term is entered between the parties. In the ***Sree Bhadra Parks and Resorts Ltd Case*[71]**, the Hon'ble NCLAT has confirmed the order passed by the Kochi Bench wherein the Hon'ble Bench has taken the view that technicalities cannot come in the way of justice and ALLOWED THE REVIVAL OF THE CIRP

## [D.3] THAT THE COURT HAS THE INHERENT POWER TO ENSURE NATURAL JUSTICE

**¶ 88.** It is humbly submitted before this Hon'ble Court that the non-revival of the insolvency proceeding in case of default in the consent term can be seen as against the principles of natural justice as it is not a reasoned decision.

***[D.3.1] Not in compliance with the principle of natural justice***

**¶ 89.** It's essential to balance natural justice principles with the need for efficient insolvency resolution. Defaults that impact the fairness and efficacy of the process should be addressed appropriately to uphold the principles of natural justice.

[70] Pooja Finlease Ltd. v. Auto Needs (India) (P) Ltd., 2022 SCC OnLine NCLAT 3339.

[71] Sree Bhadra Parks and Resorts Ltd. v. Ramani Resorts and Hotels Pvt. Ltd., 2021 SCC OnLine NCLAT 129.

**¶ 90.** In the instant case, the respondent Danobe Info Technology Limited subsequent to the withdrawal of the Company Petition 'defaulted' in making a payment as per the consent term. The court in a similar case, where the respondent made default in the payment, of Vivek Bansal v. Bruda Druck India Pvt. Ltd[72] had held that the decision of the Adjudicating Authority was erroneous, and against the principles of natural justice. Allowing such a contention that a petition cannot be revived if no liberty of the Court has been sought, would cause injustice to a creditor who has diligently exercised his rights and filed the Company Petition and thereafter this restoration of the main petition[73].

**¶ 91.** Similarly, in ***ICICI Bank Ltd Case***[74], it has been held that the order passed by the NCLT granting the liberty to file a fresh application for CIRP was erroneous and was passed without application of mind and without following the principles of natural justice. The NCLAT, therefore, granted the financial creditors with the liberty to revive the CIRP proceedings.

***[D.3.2] Inherent power of the court for meeting the end of justice***

**¶ 92.** It is humbly submitted that Rule 11 of the National Company Law Tribunal Rules, 2016[75] provides inherent power to the tribunal to pass such an order which is necessary for meeting the end of justice. The instant case where the corporate debtor didn't comply with the consent term and failed to fulfil his obligation forms an appropriate case for invoking Rule 11 of NCLT Rules 2016. It will ensure justice for the financial creditor by restoring the insolvency proceeding.

**¶ 93.** The decision of the Hon'ble Supreme Court in Swiss Ribbons Put. Ltd. v. Union of India[76] squarely applies to the facts of the present case. It was made clear that at any stage where the 'Committee of Creditors' is not yet constituted, a party can approach National Company Law Tribunal directly, which 'Tribunal' may in exercise of its 'inherent powers' under Rule 11 of the National Company Law Tribunal Rules, 2016 and it cannot be said by any stretch of imagination that the 'Adjudicating Authority' cannot pass an order to restore and revive the petition.

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[72] Vivek Bansal v. Burda Druck India Pvt. Ltd., CA (AT) (Ins) No. 552 of 2020.

[73] Pawan Putra Securities (P) Ltd. v. Wearit Global Ltd., 2019 SCC OnLine NCLT 35575.

[74] ICICI Bank Ltd. v. OPTO Circuits (India) Ltd., 2021 SCC OnLine NCLAT 1932.

[75] NCLAT Rules 11, 2018.

[76] Swiss Ribbons Put. Ltd. v. Union of India, 2019 SCC OnLine SC 73.

**¶ 94.** Further, the Hon'ble Supreme Court has also the requisite power under Art. 142 of the Constitution of India to adjudge such order which prefers equity and fairness over the technicalities of law[77]. It vests inherent constitutional power to pass any order in the public interest to do complete justice[78].

***[D.3.3] Non-compliance amounts to contempt of court***

**¶ 95.** It is humbly submitted before this Hon'ble Court that backing out of the terms of settlement as the failure to honour the settled agreement may not lead to the revival of the resolution process, the same shall also result in the initiation of contempt proceedings[79].

**¶ 96.** It was also directed by the instant Tribunal that in case of non-compliance with the terms of settlement by respondents, it was open to the operational creditor to file an application for contempt[80] against the respondents and liberty was also granted to the operational creditor to revive prayer of the CIRP[81]. The Adjudicating Authority allowed restoring the insolvency petition to the stage at which it was withdrawn.

**¶ 97.** Hence, in view of these arguments presented herein, it is humbly submitted before this Hon'ble Court that insolvency proceeding can be restored in case of default when consent term is entered between parties.

[77] Uttara Foods & Feeds (P) Ltd. v. Mona Pharmachem, (2018) 15 SCC 587.

[78] Lokhandwala Kataria Construction (P) Ltd. v. Nisus Finance and Investment Managers LLP, (2018) 15 SCC 589.

[79] Sunil Choudhary v. Hubergroup India (P) Ltd., 2019 SCC OnLine NCLAT 428; Rajneesh Nagar v. Anuj Saxena, 2018 SCC OnLine NCLAT 159.

[80] Contempt of Court Act, 1971, §12, No. 70, Acts of Parliament, 1971 (India).

[81] Sojitz India (P) Ltd. v. Rizwan Ahmad, 2022 SCC OnLine NCLAT 1351.

## THE PRAYER ADVANCED

***In light of the above submissions, APPELLANTS respectfully requests this Court to adjudge and declare that:***

I. IN A LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTIONS 232 OF THE COMPANIES ACT.

II. PROMOTER IS ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, EVEN THOUGH HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A RESOLUTION PLAN.

III. SECURITY INTEREST CREATED ON THE ASSETS OF CORPORATE DEBTOR CANNOT BE EXTINGUISHED EVEN IF THAT INTEREST HAS BEEN CREATED FOR THE LOAN AVAILED BY THE THIRD PARTY AND NOT NECESSARILY THE CORPORATE DEBTOR..

IV. INSOLVENCY PROCEEDING CAN BE RESTORED IN CASE OF DEFAULT WHEN THE CONSENT TERM IS ENTERED BETWEEN THE PARTIES.

**AND/OR**

Pass any order/declaration that the Hon'ble Court may deem fit in the interest of justice, equity and good conscience.

*All of which is most humbly prayed.*

Respectfully submitted

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On behalf of the Appellants,