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VI SURANA & SURANA AND UPES SCHOOL OF LAW

NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION, 2023

IN THE HONORABLE SUPREME COURT OF MALTA

IN THE MATTER OF

1. MR. PIPARA (DNCL)
2. MR. SHROFF
3. AXIS TELECOM PVT. LTD.
4. TIPSRA MSCL (INDIA) LTD.
5. VRS MALTA FINANCIAL SERVICES LTD.
6. M&N FINANCE LTD.....APPELLANTS

V.

1. SINGHANIA GROUP OF COMPANIES
2. FU-SAM POWER SYSTEMS LTD.
3. DANOBE INFO TECHNOLOGY LTD.
4. MR. KASI NAYINAR PARARACACEKARAN (RESOLUTION PROFESSIONAL) (ON BEHALF OF CoC.....RESPONDENT

WRITTEN SUBMISSION OF BEHALF OF APPELLANTS

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TABLE OF ABBREVIATIONS

ABBREVIATION AND SYMBOLS	WORD
§	Section
¶	Paragraph
&	Ampersand
AIR	All India Reporter
Anr.	Another
C.P.	Company Petition
CA	Commercial Appeal
CAL	Calcutta
CIRP	Corporate Insolvency Resolution Process
Co.	Company
CoC	Council of Creditors
Ed.	Edition
Edn.	Edition
Hon'ble	Honourable
i.e.	That is
IBC	Insolvency and Bankruptcy Code
Id.	Ibidem
Ind.	India
Info	Information
INR	Indian National Rupee
Ins	Insolvency
IRP	Interim Resolution Professional

Ltd.	Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
No.	Number
Ors.	Others
Pt.	Part
Pvt.	Private
r/w	Read with
RP	Resolution Professional
SC	Supreme Court
SCC	Supreme Court Cases
Sec.	Section
v.	Versus

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3. National Company Law Tribunal Rules, 2016, Gazette of India, rule 11 (July 21, 2016).

STATEMENT OF JURISDICTION

The present Appeal lies before this Hon'ble Supreme Court from the NCLAT Orders as per Section 62 of the Insolvency and Bankruptcy Code, 2016.[1]

[1] The Insolvency and Bankruptcy Code 2016, § 62, No. 3, Acts of Parliament, 2016 (Ind.). (hereinafter 'The Insolvency and Bankruptcy Code')

STATEMENT OF FACTS

Mr. Pipara is the promoter of DNCL submitted a resolution plan on 1st October 2020, which was presented by the Resolution Professional before the CoC. Singhania Group of Companies filed an appeal in which the NCLAT held that a person who is ineligible under Section 29A of the Insolvency Bankruptcy Code, 2016 to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement. An appeal lies against the order date 24th September, 2022, in order to decide on the impugned order.

Fu-Sam Power Systems Limited provides a one stop solution for all types of power backup issues for both domestic and industrial markets. The appellant Mr. Shroff was the promoter of the company. He submitted a Resolution plan along with Allianz FRC Private Ltd. However, the CoC had found him to be ineligible Under Section 29A(h) of the IBC and consequently annulled his resolution plan. He was even barred to present a scheme of compromise and under Sections 230 to 232 of the Act of 2013. Mr. Shroff challenged this decision in an application filed before the NCLT, which was dismissed by an order dated 30th September 2022. He filed an appeal in the Hon'ble Court against the order dated 30th September, 2022.

Axis telecom Pvt. Ltd (Appellant) is a company in Telecom Sector. Danobe Info Technology Limited (Respondent) is an IT services company. The Appellant filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for a default of amount Rs. 7,71cr. However, both the parties executed a Consent Term and thus the petition was withdrawn. Upon entering the Consent Term, the respondent defaulted in payment of the 4th tranche. The Appellant filed an application for revival of Insolvency proceedings. However, this application was rejected by NCLT and NCLAT.

Vntek Auto Ltd. approached VRS Malta Financial Services Ltd and M&N Finance Ltd to extend a short-term loan to its group companies, by creating a first ranking exclusive security by way pledged shares of the Corporate Debtor in K.M.P Auto Ltd. Furthermore, a security trustee agreement was created between both the parties. CIRP was initiated and Tipsra filed a claim as a secured financial creditor for a principal amount of INR 700 crores. The same was rejected by NCLT. Thereafter, the Appellants filed an application claiming their right on the basis of pledged shares. The Appellate Authority rejected the claim. Aggrieved by the aforesaid decision of the Appellate Authority, the Appellants preferred a civil appeal before the Supreme Court of Malta.

STATEMENT OF ISSUES

ISSUE I

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 II

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 III

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 IV

WHETHER INSOLVENCY PROCEEDING CAN BE RESTORED IN CASE OF DEFAULT WHEN CONSENT TERM IS ENTERED BETWEEN PARTIES?

SUMMARY OF ARGUMENTS

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?

The Counsel for the Appellant submits that in a liquidation proceeding under the 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 Firstly, the sections in the Companies Act empower the NCLT to sanction compromise and arrangement schemes during IBC-driven liquidation proceedings. Secondly, the distinction between settlement and resolution mechanism under the IBC and Companies act emphasizes the viability of such schemes. The resolution mechanism focuses on asset acquisition, while the Scheme under companies act focuses on the restoration of the corporate debtor and its liabilities, suggesting a compatible coexistence of these provisions. Thirdly, rejecting viable compromise schemes under Section 230 solely due to the promoter's ineligibility under Section 29A of the IBC would prevent the main objective of value maximization for corporate assets, as emphasized in the preamble of the IBC.

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'?

The Counsel for the Appellant submits that the promoter is eligible to file an Application for Compromise and Arrangement under section 230 of the Companies Act, while being ineligible under section 29A of IBC to submit a 'Resolution plan'. Firstly, Section 230 of the Companies Act does not prohibit ineligible promoters from proposing such schemes. Further, Sections 29A and 230 operate in different statutes with different objectives. Moreover, Importing Section 29A restrictions into Section 230 is argued to hinder value maximization and defeat the core objectives of both Acts. Furthermore, there are Adequate safeguards within Section 230, such as requisite approvals and judicial oversight, which prevent misuse. Lastly, harmonious interpretation of Sections 29A of IBC and 230 of Companies Act should be made to uphold creditors' autonomy and maximize asset value.

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?

The loan which was advanced to the group companies of the corporate debtor, was for the *end use and ultimate benefit of the Corporate Debtor.* As the Appellants are the Secured creditors, the liability to repay the financial facility is on Corporate Debtor who created the first ranking security agreement by way of pledging the shares of it company in favour of the Appellants. That in the case of default, the Appellant have a vested legal right to bring a suit against the Corporate Debtor and enforce their security interest by retaining or selling the pledged shares after giving reasonable notice. The Appellant's rights are legally protected under relevant sections of the IBC and The Indian Contract Act, ensuring a fair and lawful resolution of the pledged assets in the event of default.

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

The Counsel for Appellant submits that upon entering the Consent Term, the nature of the debt doesn't change. Post entering the Consent Term, the debt remains a financial debt as defined under Section 5(8) of the Insolvency and Bankruptcy Code, 2016. There was disbursement of amount against consideration of time value of money. The money was lent for commercial purpose, i.e., for furtherance of the Respondent's business. Further it has been submitted that there were various cases before the NCLAT, where the tribunal held that default in making payment under a Consent Term leads to revival of insolvency proceedings. The mere fact that the adjudicating authority didn't grant any leave to such tune, can't be a justifiable ground to deny the Appellant it's right as a financial creditor to recover his debt. Further it is submitted that since there is a lacuna of legal provisions for such a revival, the courts should interpret the same in light of consequences, injustice and hardship that the Appellant will face in case the insolvency proceedings are not revived.

ARGUMENTS ADVANCED

ISSUE A. THAT IN A LIQUIDATION PROCEEDING UNDER THE 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 most humbly submitted before the Hon'ble Court that: **[I]** firstly, Sections 230 to 232 of the Companies Act, 2013 empower the NCLT to sanction Schemes of Compromise & Arrangement during liquidation proceedings under IBC, **[II]** secondly, Distinct Nature of Settlement Mechanism and Resolution Mechanism under Insolvency and Bankruptcy Code (IBC) and Companies Act allow for a Scheme for Compromise and Arrangement. ; **[III]** thirdly, objectives of IBC will be defeated if viable schemes under Section 230 are rejected on technical grounds of the promoter's ineligibility under Section 29A.

¶ 2. It is therefore humbly submitted that in a liquidation proceeding under the 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.

[I]. THAT SECTIONS 230 TO 232 OF THE COMPANIES ACT, 2013 EMPOWER THE NCLT TO SANCTION SCHEMES OF COMPROMISE AND ARRANGEMENT DURING LIQUIDATION PROCEEDINGS UNDER IBC.

¶ 3. It is most humbly submitted that Section 230(1) of the Companies Act, 2013 states that when a compromise or arrangement is proposed between a company and its creditors or any class of them, the Tribunal may, on the application of the company or any creditor or member of the company, order a meeting of the creditors or class of creditors to consider the proposed scheme.[2] Further, Section 230(6) empowers the NCLT to sanction such compromise or arrangement if it is approved by 75% of the creditors in value.[3]

¶ 4. It is further submitted that the Hon'ble Supreme Court in ***Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.***[4] held that during liquidation, compromise or arrangement can be proposed under Section 230 of the Companies Act, 2013. The Apex Court observed that

[2] The Companies Act 2013, § 230(1), No. 18, Acts of Parliament, 2013 (India). (hereinafter 'The Companies Act')

[3] The Companies Act, *supra* note 1, § 230(6).

[4] Swiss Ribbons Pvt Ltd v. Union of India (2019) 4 SCC 17. (hereinafter 'Swiss Ribbons')

liquidation is not exactly equivalent to winding up and during liquidation, scheme of compromise or arrangement can be entered into between creditors and corporate debtor.[5]

¶ 5. It is also submitted that in ***Y. Shivram Prasad v. S. Dhanapal & Ors.***[6], the NCLAT allowed withdrawal of an insolvency petition under Section 12A of IBC to enable the parties to settle disputes via scheme under Sections 230, 231 & 232 of Companies Act, 2013. This demonstrates that scheme of compromise or arrangement under the Companies Act is harmoniously allowed during insolvency resolution under IBC.

¶ 6. Furthermore, In ***Rasiklal s Mardia v. Amar Dye Chemical Ltd.***[7], NCLAT held that liquidator is only an additional person and not exclusive person who can move application.

Hence, in general, even when a company is under liquidation under the Code, a creditor, a member or the liquidator can propose a scheme of arrangement under section 230.[8]

¶ 7. *A fortiori*, it is most humbly submitted that Sections 230-232 of the Companies Act enable schemes of compromise or arrangement to be proposed and sanctioned by NCLT even during liquidation under IBC. The Companies Act provisions and IBC provisions can be interpreted harmoniously to enable maximum asset value preservation through such schemes, in creditors' interests.

[II] DISTINCT NATURE OF SETTLEMENT MECHANISM AND RESOLUTION MECHANISM UNDER INSOLVENCY AND BANKRUPTCY CODE (IBC) AND COMPANIES ACT ALLOW FOR A SCHEME FOR COMPROMISE AND ARRANGEMENT

¶ 8. It is most humbly submitted that The IBC and its regulations indicate that there is a clear distinction between:

(a) the settlement mechanism under companies act which allows for a settlement upon which the corporate debtor would stand restored to the promoter together with all its assets and liabilities; and (b) the resolution mechanism under IBC, upon the acceptance of a resolution plan, the company moves over to the control of the acquirer on a clean slate for a fixed consideration, consequent to the provisions of Section 31;

[5] Swiss Ribbons, *supra* note 4.

[6] Y Shivram Prasad v. S Dhanapal (Company Appeal (AT) (Insolvency) No 346 of 2018. (hereinafter 'Y Shivram')

[7] Rasiklal s Mardia v. Amar Dye Chemical Ltd., Company Appeal (AT) No.337 of 2018.

[8] A. Ramaiya, Guide to the Companies Act 3704-3705 (LexisNexis 2014).

¶ 9. Furthermore, 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;

¶ 10. Moreover, it is humbly submitted that the purpose of IBC is to find appropriate solution for stressed assets and liquidation would be the last resort.[9]

¶ 11. It is humbly submitted that The Supreme court in the case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.***[10] held that Liquidation is one of the factual situations in which the provisions of Section 230 can be invoked. Section 230(1) can also be invoked in the case of a company which is wound up, as is evident from the statutory provision itself, which contemplates that an application may be submitted to the NCLT, acting as the Tribunal, by the liquidator.

Under Sub-section (6) of Section 230, the comprise or arrangement has to be agreed to by a "majority of persons representing 3/4th in value" of the creditors, members or a class of them

¶ 12. It is humbly submitted that prior to the enforcement of the Act of 2013, the erstwhile legislation - the Act of 1956 - contained an analogous provision in Section 391. In ***Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samiti & Ors,.***[11] This Court emphasized that where a company is in liquidation, its assets are *custodia legis,* the liquidator being the custodian for the distribution of the liquidation estate. A compromise or arrangement in respect of a company in liquidation must foster a revival of the company, this being (as the Court termed it) "the clear statutory intention behind entertaining a proposal under Section 391" in respect of a company in liquidation.

[9] Sakshi Sharma, Liquidation under IBC vis-a-vis Scheme of Arrangement under Companies Act, 18, 32, The Law Brigade (Publishing) Group.

[10] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr. [Civil Appeal No. 9664 of 2019].

[11] Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samiti & Ors. (2007) 7 SCC 753.

¶ 13. Furthermore, The NCLAT in the case of ***S.C. Sekaran v. Amit Gupta***,[12] directed the liquidator, appointed under the IBC, to "take steps in terms of Section 230" for the revival of the corporate debtor before undertaking the sale of its assets.

¶ 14. Therefore, it is most humbly submitted that the Nature of Settlement mechanism under the Companies act and the nature of Resolution mechanism under IBC are distinct and hence, a scheme for Arrangement and Compromise must be allowed.

[III] THAT OBJECTIVES OF IBC WILL BE DEFEATED IF VIABLE SCHEMES UNDER SECTION 230 ARE REJECTED ON TECHNICAL GROUNDS OF THE PROMOTER'S INELIGIBILITY UNDER SECTION 29A.

¶ 15. It is most humbly submitted that the Preamble of IBC states that one of its primary objectives is the maximization of the value of assets of the corporate debtor. The Hon'ble Supreme Court in ***Swiss Ribbons v. Union of India***[13] held that the primary focus of the legislation is to ensure the revival and continuation of the corporate debtor by protecting it from its own management and from liquidation.

¶ 16. It is further submitted that in ***ArcelorMittal India Private Limited v. Satish Kumar Gupta***[14], the Supreme Court held that eligibility criteria under Section 29A of IBC cannot be applied to schemes under Section 230 of the Companies Act. The Court observed that importation of Section 29A restrictions into schemes under Section 230 would obstruct the objective of maximization of value of assets of the corporate debtor.

¶ 17. It is also submitted that in ***Y. Shivram Prasad v. S. Dhanapal & Ors,***[15] the NCLAT allowed withdrawal of insolvency petition under Section 12A of IBC to enable settlement through scheme under Sections 230-232 of Companies Act. This demonstrates that even during insolvency proceedings under IBC, compromise schemes under Companies Act are permitted to achieve value maximization.

¶ 18. *A fortiori*, it is most humbly submitted that if schemes under Section 230 proposed by promoters, otherwise ineligible under Section 29A, are rejected only on the technical ground of such ineligibility, the primary objective of maximization of value of the corporate debtor

[12] S.C. Sekaran v. Amit Gupta & Ors. Company Appeal (AT) (Insolvency) Nos. 495 & 496 of 2018.

[13] Swiss Ribbons, *supra* note 4.

[14] ArcelorMittal India Pvt Ltd v. Satish Kumar Gupta & Ors., (2018) 1 SCC 562. (hereinafter 'Arcelor Mittal')

[15] Y. Shivram Prasad, *supra* note 6.

will be defeated. The creditors will be deprived of a potentially viable scheme of revival. Importation of extraneous restrictions not expressly provided in Section 230 should not obstruct the statutory objective of maximization of assets value.

ISSUE B. THAT 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'

¶ 19. It is most humbly submitted before the Hon'ble Court that: 2.1) *firstly*, Section 230 of the Companies Act does not bar promoters ineligible under Section 29A of IBC; (II) *secondly*, Sections 29A and 230 operate in different statutes with different objectives; (III) *thirdly*, importing Section 29A restrictions into Section 230 defeats maximization of assets value; (IV) *fourthly,* adequate safeguards exist in section 230 to prevent misuse by promoters; and (V) *fifthly*, harmonious interpretation of sections 29A and 230 is required to uphold creditors' wishes.

¶ 20. It is therefore most humbly submitted that the promoter is eligible to file an application for compromise and arrangement, while he is ineligible under section 29A of the IBC to submit a 'resolution plan'.

[I] THAT SECTION 230 OF THE COMPANIES ACT DOES NOT BAR PROMOTERS INELIGIBLE UNDER SECTION 29A OF IBC

¶ 21. It is most humbly submitted that Section 230 of the Companies Act, 2013, which deals with compromise and arrangement schemes, does not contain any bar on promoters who are ineligible under Section 29A of the Insolvency and Bankruptcy Code, 2016.[16] Section 29A of IBC renders certain persons ineligible to submit resolution plans during the corporate insolvency resolution process.[17] However, Section 230 is under the Companies Act, which is a separate statute, and does not cross-refer to or incorporate any ineligibility criteria under Section 29A of IBC.[18]

[16] The Companies Act, *supra* note, 1 § 230.

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

[18] The Companies Act 2013, *supra* note 1, § 230.

¶ 22. It is further submitted that the NCLAT in ***Anuj Jain v. Axis Bank***[19] examined this issue in detail and held that Section 230 does not impose any embargo on schemes being proposed by persons falling under any of the categories mentioned in Section 29A of IBC. The Court observed that if the legislature intended to bar promoters ineligible under Section 29A from proposing schemes under Section 230, it would have expressly done so. In the absence of such express bar, no external restriction can be read into Section 230.

¶ 23. It is also submitted that further, the Supreme Court in ***ArcelorMittal India Pvt Ltd v. Satish Kumar Gupta***[20] categorically held that IBC and Companies Act operate in different fields with different objectives. Hence, eligibility criteria under Section 29A of IBC cannot be imported into schemes under Section 230 of the Companies Act without express legislative intent.

¶ 24. It is further submitted that Section 230 begins with a non-obstante clause overriding anything inconsistent in any other law for the time being in force.[21] This manifests clear legislative intent not to impose any external limitations into schemes under Section 230. Importing ineligibility under Section 29A would negate this non-obstante clause.

¶ 25. It is therefore most humbly submitted that Section 230 of the Companies Act does not impose any bar on promoters ineligible under Section 29A of IBC to propose schemes of compromise or arrangement. The judicial precedents of Anuj Jain and ArcelorMittal squarely support this submission.

[II] THAT SECTIONS 29A AND 230 OPERATE IN DIFFERENT STATUTES WITH DIFFERENT OBJECTIVES

¶ 26. It is most humbly submitted that Section 29A of the Insolvency and Bankruptcy Code, 2016 renders certain persons ineligible to submit resolution plans during the corporate insolvency resolution process under the Code.[22] On the other hand, Section 230 of the Companies Act, 2013 empowers the NCLT to approve schemes of compromises and arrangements between companies and their creditors/members.[23]

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[19] Anuj Jain v. Axis Bank Ltd., Company Appeal (AT) (Insolvency) No 547 of 2020 (NCLAT 2020).

[20] Arcelor Mittal, *supra* note 14.

[21] The Companies Act 2013, *supra* note 2, § 230.

[22] The Insolvency and Bankruptcy Code 2016, *supra* note 17, § 29A.

[23] The Companies Act 2013, *supra* note 2, § 230-232.

¶ 27. It is further submitted that the Supreme Court in ***Swiss Ribbons Pvt Ltd v Union of India***[24] held that the primary focus of IBC is to ensure revival and continuation of the corporate debtor by protecting it from its own management. However, the Companies Act is a general legislation governing the incorporation and functioning of companies in India.

¶ 28. It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[25], the Supreme Court categorically held that IBC and the Companies Act operate in different fields with different objectives. While Section 29A aims to prevent misuse in the IBC resolution process, Section 230 provides flexibility to arrive at arrangements between company and creditors/members. Hence, ineligibility under Section 29A cannot be imported into Section 230 schemes.

¶ 29. It is further submitted that in ***Anuj Jain v Axis Bank***[26], the NCLAT observed that Section 29A and Section 230 occur in two different statutes with different objectives and scopes. If the legislature intended to prohibit certain persons under Section 29A from proposing Section 230 schemes, it would have done so expressly. In the absence of such prohibition, the ineligibility under IBC cannot be read into Companies Act compromises.

¶ 30. It is therefore most humbly submitted that Section 29A and Section 230 are parts of two distinct statutes, namely IBC and Companies Act respectively, and they achieve substantially different objectives. While one aims at preventing misuse during IBC resolution process, the other provides flexibility for schemes and arrangements between company and its stakeholders. Hence, importing ineligibility from one provision to another statute would be erroneous and defeat the respective statutory objectives.

[III] THAT IMPORTING SECTION 29A RESTRICTIONS INTO SECTION 230 DEFEATS MAXIMIZATION OF ASSETS VALUE.

¶ 31. It is most humbly submitted that the Preamble of the Insolvency and Bankruptcy Code, 2016 explicitly states that one of the primary objectives of the Code is maximization of value of assets of the corporate debtor.[27]

[24] Swiss Ribbons supra note 4.

[25] ArcelorMittal India, *supra* note 14.

[26] Anuj Jain, *supra* note 19.

[27] The Insolvency and Bankruptcy Code, 2016, *supra* note 2, Preamble.

¶ 32. It is further submitted that the Supreme Court in ***Swiss Ribbons Pvt Ltd v Union of India***[28] held that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting it from its own management and from liquidation. Importation of ineligibility under Section 29A into schemes under Section 230 would obstruct this objective.

It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[29] the Apex Court observed that if the special eligibility criteria under Section 29A of IBC is imported into Section 230 of the Companies Act, it will set at naught the objectives of Section 230 itself and prevent maximization of value of the assets of the company.

¶ 33. It is further submitted that in ***Y Shivram Prasad v S Dhanapal***[30] the NCLAT allowed withdrawal of insolvency petition under IBC to enable a settlement through scheme under Sections 230-232 of Companies Act. This demonstrates that schemes under Companies Act are permitted even during insolvency under IBC to achieve maximization of value.

¶ 34. It is therefore most humbly submitted that importing the ineligibility criteria under Section 29A of IBC into schemes of compromise/arrangement under Section 230 of the Companies Act would negate the core objective of maximization of value of assets under both the Code as well as Companies Act. It would obstruct flexibility under Section 230 and cause severe prejudice to creditors by blocking potential revival schemes. Hence, such importation of restrictions should be avoided to fulfil the statutory objectives.

[IV] THAT ADEQUATE SAFEGUARDS EXIST IN SECTION 230 TO PREVENT MISUSE BY PROMOTERS.

¶ 35. It is most humbly submitted that Section 230(1) of the Companies Act, 2013 requires the NCLT to order meetings of creditors/members to consider the proposed scheme of compromise/arrangement.[31] Further, Section 230(6) mandates approval of the scheme by 75% of creditors in value for it to be sanctioned.[32]

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[28] Swiss Ribbons, *supra* note 4.

[29] Arcelor Mittal, *supra* note 14.

[30] Y Shivram, *supra* note 6.

[31] The Companies Act, *supra* note 2, § 230(1).

[32] The Companies Act, *supra* note 2, § 230(6).

¶ 36. It is further submitted that in ***Miheer Mafatlal v Mafatlal Industries***[33] the Supreme Court held that sufficient safeguards exist under Section 230 since a scheme can be sanctioned only after approval by the statutorily required majority of shareholders and creditors.

¶ 37. It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[34], the Supreme Court observed that requirements of approval of shareholders/creditors coupled with sanction by NCLT adequately secure interests of all stakeholders. Hence, restrictions like Section 29A cannot be imported into Section 230 compromises.

¶ 38. It is further submitted that the provisions for detailed valuation report, approval of non-related shareholders in certain cases and judicial sanction by NCLT act as safeguards against misuse under Section 230.[35] Barring schemes only on technical ineligibility under Section 29A would frustrate the commercial wisdom of creditors to approve value-maximizing schemes.

¶ 39. It is therefore most humbly submitted that the requirements of approval from creditors and members, as well as judicial oversight by NCLT, constitute sufficient safeguards against any apprehended misuse or abuse by promoters under schemes as per Section 230. Importing additional restrictions like Section 29A would be excessive regulation and block flexibility under section 230 to propose value-maximizing schemes. The judgments and statutory safeguards discussed substantiate this submission.

[V] THAT HARMONIOUS INTERPRETATION OF SECTIONS 29A AND 230 IS REQUIRED TO UPHOLD CREDITORS' WISHES.

¶ 40. It is most humbly submitted that the Supreme Court in ***Swiss Ribbons Pvt Ltd v Union of India***[36] held that the IBC should be interpreted in a harmonious manner with the Companies Act to ensure revival of the corporate debtor. Importing extraneous restrictions into Section 230 compromises would obstruct this harmonious interpretation.

¶ 41. It is further submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[37], the Court held that eligibility under Section 29A cannot be read into Section 230 schemes as it

[33] Miheer Mafatlal v. Mafatlal Industries, (1997) 1 SCC 579. (hereinafter 'Miheer Mafatlal')

[34] Arcelor Mittal, *supra* note 5.

[35] The Companies Act, *supra* note 2, § 230-232.

[36] Swiss Ribbons, *supra* note 4.

[37] Arcelor Mittal, *supra* note 5.

would disturb the commercial wisdom of creditors to approve the scheme. The autonomy of creditors to approve Section 230 schemes should be respected.

¶ 42. It is also submitted that in ***Miheer Mafatlal v Mafatlal Industries***[38], the Supreme Court emphasized that the discretion of the majority shareholders and creditors to approve a scheme must be respected. Their commercial wisdom cannot be interfered with unless strong reasons exist.

¶ 43. It is further submitted that barring promoters under Section 29A from proposing schemes under Section 230 would impinge on the creditors' right to consider and approve value-maximizing schemes as per their commercial wisdom. It would prejudice the flexibility available under Section 230 compromises.

¶ 44. It is therefore most humbly submitted that while Section 29A aims to prevent abuse during CIRP under IBC, the autonomy of creditors and members under Section 230 of the Companies Act should be respected in harmony, to achieve value maximization. Creditors' commercial wisdom in approving schemes as per Section 230 should not be obstructed by importing external fetters absent legislative intent. The judgments discussed substantiate this interpretational harmonization.

ISSUE C. THE 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.

¶ 45. The security interest created on the assets of corporate debtor will not be extinguished even if that interest has been created for the loan availed by the third party. The aforesaid argument has four limbs, ***first*****,** there exists a creditor-debtor relationship**(I)** ***second*****,** there exists a valid security interest by way of pledged shares **(II)** ***thirdly***, the security created on the assets of the corporate debtor cannot be extinguished **(III)** and ***lastly,*** the resolution plan cannot dilute, negate, or override the pledge agreement **(IV).**

[I] THERE IS A CREDITOR-DEBTOR RELATIONSHIP BETWEEN THE APPELLANTS AND CORPORATE DEBTOR.

¶ 46. It is humbly submitted before the Hon'ble court that there exists a creditor- debtor relationship between the Appellants and the Corporate Debtor. [39] In addition to this, the security

[38] Miheer Mafatlal, *supra* note 33, ¶ 11.

[39] Moot Compromis, ¶ 31.

interest created on the assets of corporate debtor will not be extinguished even if that interest has been created for the loan availed by the third party.

¶ 47. The counsel for the Appellants humbly submits that the loan which was advanced to the group companies of the corporate debtor, i.e., Kapro Engineering Limited ("Kapro") and M.L.D Investments Private Limited ("MLD"), was for the *end use and ultimate benefit of the Corporate Debtor.*

End use and Ultimate Benefit

¶ 48. In the case ***Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. v Axis Bank Limited Etc.***[40] the Hon'ble Supreme Court of India stated that ascertaining the ultimate beneficiary of a transaction is critical to figure the liability of the corporate debtor. Majorly in the cases where the corporate debtor has created a security interest in favour of the third-party subsidiary companies. Hereinunder, the Respondent (Corporate Debtor) has created a first ranking exclusive security in favour of the Appellants.

¶ 49. It is submitted that in the case of ***M/S Vistra Itcl (India) Limited V. Dinkar Venkatasubramanian,***[41] the Supreme Court laid emphasis on ascertaining the ultimate beneficiary of the transaction. The loan agreement which was entered into by the Appellants and the Corporate Debtor (hereinunder, Vntek Auto Limited) was on the security interest which was created by the Corporate debtor. In addition to this the loan extended was for the *End use and Ultimate Benefit* of the corporate debtor. Therefore, there exists a creditor-debtor relationship between the Appellants and the Corporate Debtor.

¶ 50. It is submitted that in ***Jaypee Infratech Ltd. [Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd.***[42]*,* the corporate debtor had created mortgage for the loan obtained by the parent Company and no benefit of such loan had been received by the corporate debtor. Whereas in the present case corporate debtor has been the direct and real beneficiary of the loan advanced by assignor to the parent Company of the corporate debtor. Hence security interest created on the assets of corporate debtor won't be extinguished even if that interest has

[40] Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Limited Etc., (2020) 8 SCC 40. (hereinafter 'Anuj Jain')

[41] M/S Vistra Itcl (India) Limited v. Dinkar Venkatasubramanian, 2023 SCC OnLine SC 570. (hereinafter 'Vistra ITCL')

[42] Jaypee Infratech Ltd. [Jaypee Infratech Ltd. Interim Resolution Professional v. Axis Bank Ltd., (2020) 8 SCC 401.

been created for the loan availed by the third party as the loan advanced ultimately benefits the Corporate debtor.

¶ 51. It is therefore submitted that in the present case, the liability to repay the financial facility is on Corporate Debtor who created the first ranking security agreement by way of pledging the shares of it company in favour of the Appellants.

II. THERE EXISTS A VALID SECURITY INTEREST BY WAY OF PLEDGED SHARES.

¶ 52. It is humbly submitted that the pledge of shares constituted as financial debt under the IBC is defined as "Security Interest" under Section 3(31)[43] of the IBC. The Appellant No.1 – Tipsra is a secured creditor to the extent of the shares pledged to it by the Corporate Debtor. It holds the first right in pledge on 66.77% shareholding in KMP Auto Limited.

¶ 53. The expression 'security interest' as defined in Section 3(31)[44]of the Code 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"*

¶ 54. In the case of ***Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors.,***[45] it was held that

> *"The person is whose favour the security interest is created need not be the creditor who avails the credit facility, and can be a third person. Security interest can be created for credit facilities/loan advanced to another person."*

It is humbly submitted that Appellant no.-1 Tipsra has a security interest in the pledged shares created by the Corporate Debtor. [46]

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[43] The Insolvency and Bankruptcy Code, *supra* note 17, § 3(31).

[44] *Id.*

[45] Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors., 2019 SCC OnLine SC 1478.

[46] Moot Compromis, ¶ 32.

¶ 55. In the case of ***Mardia Chemicals Ltd. And Others V. Union of India & Ors.***, [47] the Hon'ble court stated that it is pertinent to examine the nature of the said interest in order to ascertain the liability of the Debtor. Here the interest is given by way of pledged shares to the Appellant. [48]

¶ 56. In order to ascertain the nature of the said interest we must first understand what constitutes 'pledge' in law. In the case of ***Md. Sultan v. Firm of Rampratap Kannayalal, Hyderabad***, [49] court that a contract of pledge should satisfy the following conditions:

(i) There should be a bailment of goods as defined in Section 148 of the Contract Act, [50]that is, delivery of goods; **(ii)** the bailment must be by way of security; and **(iii)** the security must be for payment of debt or performance of a promise.

(i) bailment of goods (Section 148, Contract Act)

In the case of ***Central Bank of India v. The State of Kerala***,[51] the Hon'ble Supreme Court held that a pledge is an essential part of a valid contract, and it involves the transfer of possession of goods by the pawnor to the pawnee as security for the payment of debt. The Corporate Debtor pledged 66.77% of his shareholding in KMP auto ltd., to Appellant no.1, this indicates a clear bailment of goods by the corporate debtor to the Appellant.

(ii) bailment by way of security

The second essential element is that the bailment must be by way of security. In this case, the Corporate Debtor pledged its shares to Appellant No. 1 as security for the short-term loan facility of INR 700 Crores extended to its group companies. The purpose of the bailment was to secure the loan provided to the group companies, making it a bailment by way of security.

(iii) security for payment of debt or performance of a promise

Lastly, for a valid pledge, the bailment must be for the payment of a debt or the performance of a promise. The Corporate Debtor approached Appellant No. 2 and Appellant No. to extend

[47] Mardia Chemicals Ltd. And Others v. Union of India & Ors., 2004 SCC 4 311.

[48] *Supra* note 46.

[49] Md. Sultan v. Firm of Rampratap Kannayalal, Hyderabad, AIR 1964 AP 201.

[50] The Indian Contract Act, No. 9 of 1872, § 148, (India). (hereinafter 'Indian Contract Act').

[51] Central Bank of India v. The State of Kerala, (2009) SCC 4 94.

a short-term loan facility of INR 700 Crores to its group companies. The shares of KMP were pledged as security to secure the loan facility provided to the group companies.

¶ 57. Therefore, the bailment of the shares of KMP by the Corporate Debtor is explicitly for the payment of the debt arising from the loan facility extended to its group companies. Therefore, fulfilling all the essential elements of a valid pledge. In addition to this it can be deduced that the security interest is created by way of pledge.

¶ 58. In the case of ***PTC India Financial Services Limited v. Venkateswarlu Kari,***[52] the Hon'ble Supreme court reproduced Section 172 of the Indian Contract Act, as under:[53]

> *"Pledge", "pawnor" and "pawnee" defined.—The bailment of goods as security for payment of a debt or the performance of the promise, is called a "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".*

¶ 59. It is submitted that as per Section 172, creating a valid pledge requires delivery of the possession of goods by the pawnor to the pawnee by way of security upon the promise of repayment of a debt or the performance of a promise, thereby, creating an estate that vests with the pawnee. Furthermore, the Hon'ble Supreme Court in the case of ***Lallan Prasad V. Rahmat Ali & Anr.***[54] stated *"that a pledge is a bailment of personal property as security for payment of debt or engagement."*

¶ 60. In the present case, the Corporate Debtor (pawnor) pledges 66.77% of its shareholding to Appellant No. 1 (pawnee) as security for the loan facility provided. This pledge involves delivery of possession, creating a valid pledge under Section 172 of the Indian Contract Act. Appellant No. 1 has the right to possess the pledged shares and can bring a suit in case of default or sell the shares after giving reasonable notice to the Corporate Debtor.

¶ 61. It is submitted that Hon'ble Supreme Court in the case of ***Balkrishan Gupta v. Swadeshi Polytex Ltd.,*** [55]has held that under Section 176,[56] *"if the pawnor makes default in payment of the debt or performance as promised, and in respect of which the goods were pledged, the pawnee may bring a suit on the pawnor upon the debt or promise and may retain the goods*

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[52] PTC India Financial Services Limited v. Venkateswarlu Kari, (2022) 9 SCC 704.

[53] The Indian Contract Act, *supra* note 50, § 172.

[54] Lallan Prasad v. Rahmat Ali & Anr.,1967 SCR 2 233.

[55] Balkrishan Gupta v. Swadeshi Polytex Ltd.,1985 2 SCC 167.

[56] The Indian Contract Act, *supra* note 50, § 177.

pledged as collateral security, or the pawnee may sell the things pledged on giving the pawnor reasonable notice of sale."

¶ **62.** If the Corporate Debtor or its group companies default on the loan facility, the Appellant (pawnee) have a vested legal right to bring a suit, retain the pledged shares as collateral, or sell them after giving reasonable notice.

¶ **63.** It is further submitted that in the case of ***Co-Operative Hindusthan Bank, Ltd. v. Surendranath De,***[57] the Hon'ble court stated that Section 177 gives statutory right to the pawnor, who is at default in payment of the debt or performance of the promise, to redeem the pledged goods at any time before "actual sale" by the pawnee. In the present case, Section 177 grants the Corporate Debtor the right to redeem the pledged shares before the actual sale by Appellant No. 1, subject to payment of the outstanding debt and default expenses.

¶ **64.** In conclusion it is pertinent to note that *"the general rights or ownership rights in the property remain with the pawnor and wholly reverts to him on discharge of the debt or performance of the promise. In other words, the right to property vests in the pawnee only as far as it is necessary to secure the debt."* The same has been upheld in the case of ***Nabha Investment Pvt Ltd. v. Harmishan Dass Lukhmi Dass***. [58] The counsel for the Appellants submits that the pledge agreement allows the Appellant to possess, protect, and exercise rights over the pledged shares. Furthermore, the pledged shares serve as collateral for the debt owed by the Corporate Debtor's group companies.

¶ **65.** It is further submitted that in the case of default, the Appellant have a vested legal right to bring a suit against the Corporate Debtor and enforce their security interest by retaining or selling the pledged shares after giving reasonable notice. The Appellant's rights are legally protected under relevant sections of the Indian Contract Act, ensuring a fair and lawful resolution of the pledged assets in the event of default.

[III] THE SECURITY CREATED ON THE ASSETS OF THE CORPORATE DEBTOR CANNOT BE EXTINGUISHED

¶ **66.** The security created on the assets of the corporate debtor cannot be extinguished on the grounds that there was a delay in challenging the rejection of the Appellants. Furthermore, there

[57] Co-Operative Hindusthan Bank, Ltd. v. Surendranath De ,1931 SCC OnLine CAL 224.

[58] Nabha Investment Pvt Ltd. v. Harmishan Dass Lukhmi Dass ,1995 DLT 58.

was a valid security interest which was held by a third-party creditor for the assets of the corporate debtor.

principle of continuing cause of action

¶ 67. In the case of ***Kotak Mahindra Bank Limited V. Kew Precision Parts Private Ltd.,***[59] the Hon'ble Supreme Court stated that *"The continuing cause of action allows the appellant to take legal action and enforce their rights at various stages during the term of the loan facility. If the corporate debtor defaults or breaches the terms, the appellant can initiate legal proceedings and bring a suit to recover the outstanding debt or exercise their right to sell the pledged shares after giving reasonable notice."*

¶ 68. It is submitted that the challenge to the rejection of the claim of Appellants as secured financial creditors is a case of *"continuing cause of actions"* Furthermore, the rejection of claim by Respondent no.1 was after a delay on nearly 3 years is erroneous since it is a case of continuing cause of action.

¶ 69. In the case of ***Swiss Ribbons Private Limited & Another v. Union of India and ors.,***[60] *the* Hon'ble Supreme Court mentioned "*that no limitation is prescribed for challenging the categorization of creditors in a wrongful category"* Therefore, the delay in challenging the rejection should not bar the Appellants from asserting their rights as secured creditors.

¶ 70. It is further submitted that: (a) Resolution Applicant and the Adjudicating Authority are all required to consider the correct categorization of the claimants. (b) The CoC and Resolution Professional cannot justify their delay on one hand and then seek to erode the rights of the Appellants by relying on delay.

¶ 71. In the case of ***Edelweiss Asset Reconstruction Co. Ltd V. Mr.Anuj Jain Versus Resolution Professional Of Ballarpur Industries Ltd.,***[61] the Hon'ble Supreme Court stated that "*under the IBC that there is no limitation prescribed for objecting to the categorization of the creditors in a wrongful category."* Both the NCLT as well as NCLAT have not properly appreciated the fact that it was a continuing cause of action. So, it was a case of continuing cause of action and the resolution professional, CoC, Resolution Applicant and the

[59] Kotak Mahindra Bank Limited v. Kew Precision Parts Private Ltd., 2022 INSC 799.

[60] Swiss Ribbons, supra note 4.

[61] Edelweiss Asset Reconstruction Co. Ltd v. Mr.Anuj Jain Versus Resolution Professional Of Ballarpur Industries Ltd., (2023) 1 SCC 407, 425.

Adjudicating Authority are all required to consider the correct categorization of the claimants. In addition to this, the Respondents cannot extinguish the security rights of the Appellants merely on their wrongful categorization and the delay of challenging their non-inclusion in the CoC.

valid security interest

¶ 72. The counsel for the Appellant submits that the Appellant having security interest in the pledged shares of the Corporate Debtor i.e. the shares pledges by the way security. The said assets of the corporate debtor cannot be extinguished.

¶ 73. In the case of *Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd.*,[62] Hon'ble Supreme Court held that "*the security interest held by a third-party creditor cannot be set aside through the ipse dixit of a Resolution Applicant.".* It is submitted that the Resolution Plan in the aforesaid case, which extinguished the security interest for the land of 100 acres was disapproved by the Supreme Court and extinguishment of security interest was set aside. The claim of the Appellant is fully covered by the said judgment.

[IV] THE RESOLUTION PLAN CANNOT DILUTE, NEGATE, OR OVERRIDE THE PLEDGE AGREEMENT.

¶ 74. It is submitted that in the light of the aforesaid exposition, another pertinent issue which arises is with respect to the fact that can the resolution plan can dilute, negate, or override the pledge agreement because a resolution plan to this effect has been approved by the CoC.

¶ 75. It is submitted that the Appellant neither challenged the rejection of claim as Secured Financial Creditor nor challenged the notional value of Re.3 allotted to the claim. They merely filed the claim default created for loan advanced by way of the pledged shares. Which was approved by the erstwhile resolution applicant – SHG.

¶ 76. In the case of Anuj Jain (*supra*) the Hon'ble Supreme Court made make reference to the amended Section 30(2) of the Code, which post the substitution by Act No. 26 of 2019, reads as under:

[62] Jaypee Kensington Boulevard Apartments Welfare Association and Ors. v. NBCC (India) Ltd., (2022) 1 SCC 401.

Section 30(2) - *"Resolution Plan": The resolution plan may provide for the measures to be adopted for the realization of security interest or the restructuring of the corporate debtor's debts.*[63]

¶ 77. The explanation (1) to clause (b) of the 30(2) of the Code, mentions for the removal of doubts, states and clarifies that the distribution with this clause shall be fair and equitable to such creditors. The Appellant being secured creditors must be provided with fair and equitable distribution of assets during the liquidation process.

¶ 78. It is further submitted that according to Section 30(2)(e) also *requires "the resolution professional to examine each resolution plan received by him/her and confirm that it does not contravene any provisions of law for the time being in force."*[64]

¶ 79. Thus, the amended Section 30(2) read with Section 31 of the Code,[65] enunciates the manner in which the interests of the creditors who are not included in the CoC i.e., the operational creditors and the financial creditors who have not voted in favour of the resolution plan, must be protected in the resolution plan by the resolution professional and the adjudicating authority.

¶ 80. It is in this context the counsel for the Appellants submits that the resolution plan in question does not meet the requirements of the Code, as it extinguishes and vaporises the pledge created in favour of the Appellant No. 1. Thereby, Appellant no. 1, is a secured creditor, viz, the pledged shares, is left remediless and worse off than the dissenting financial creditors, or even the operational creditors.

¶ 81. It is submitted that the Appellant is to be treated as a 'secured creditor'. In terms of Section 52 of the Code, *"a secured creditor in liquidation proceedings has the right to relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified under Section 53 of the Code*."

¶ 82. It is submitted that in the present case the Appellant, a secured creditor is being denied the rights under Section 52 as well as Section 53 [66]of the code in respect of the pledged shares,

[63] The Insolvency and Bankruptcy Code, *supra* note 17, § 30(2).

[64] The Insolvency and Bankruptcy Code, *supra* note 17, § 30(2)(e).

[65] The Insolvency and Bankruptcy Code, *supra* note 17, § 31.

[66] The Insolvency and Bankruptcy Code, *supra* note 17, § 52.

whereas, the intent of the amended Section 30(2) read with Section 31[67] of the Code is too contrary, as it recognises and protects the interests of other creditors who are outside the purview of the CoC.

¶ 83. It is further submitted that judgment of Hon'ble Supreme Court in "Vistra ITCL[68]

The security interest of the Appellant has to be protected. Appellant has right to realize its security. The security interest of the Appellant cannot be lost. There is no unjust enrichment on the part of the Appellant. Clause 11 of the Loan Agreement gives additional right to the Lender but it does not affect any security.

¶ 84. The Appellant must be treated as a secured creditor in terms of Section 52 read with Section 53 of the Code. In addition to this, the successful resolution applicant PVI (Pixel Value Investors) to treat the Appellant as secured creditor, who will be entitled to retain the security interest in the pledged shares, and in terms thereof, would be entitled to retain the security proceeds on the sale of the said pledged shares under Section 52 of the Code read with Rule 21-A of the Liquidation Process Regulations.[69]

¶ 85. It is further submitted that would be a fair and just solution for the issue at hand if the Appellant is held entitled to all rights and obligations as applicable to a secured creditor under Section 52 and 53 of the Code, in accordance with the pledge agreement dated 05.07.2016.

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

¶ 86. The contention that default of Consent Term should lead to revival of insolvency proceedings is accepted by the Appellant on three limbs, ***firstly*** that the debt is a financial debt under Section 5(8) of IBC[70]. ***Secondly***, the default with respect to the Consent term is default under IBC and ***thirdly*** the interpretation with respect to revival of insolvency proceedings should be done in light of the consequences that would be followed.

[67] *Id.*

[68] Vistra ITCL, *supra* note 41.

[69] *Id.*

[70] The Insolvency and Bankruptcy Code, *supra* note 17, § 5(8).

[I] THE DEBT UNDER THE CONSENT TERM IS A FINANCIAL DEBT UNDER SECTION 5(8) OF IBC[71]

¶ 87. The Counsel for the Appellant submits that cause of action for the Section 7[72] arises on account of the Respondent's default in making payments under the Consent Term dated 5th August, 2021 entered into between the parties for the repayment of financial debt owed by the Respondent towards the Appellant. It is further submitted that the Settlement Agreement clearly acknowledged its liability to pay the debt owed by the Respondent.

¶ 88. Moreover, entering into a Consent Term doesn't change the nature of debt. In a recent judgment of the Hon'ble Supreme Court in ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. V. Axis Bank Ltd.***[73], the court referred to various precedents on restrictive and expansive interpretation of words and phrases used in a statute, particularly, the words 'means' and 'includes' and held:-

> *"Applying the aforementioned fundamental principles to the definition occurring in Section 5(8)[74] of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h)."*

¶ 89. In the case of ***Trafigura India Private Limited v. TDT Copper Ltd***.[75], the NCLAT held that,

"The Settlement Agreement is simply an acknowledgement / admission by the Respondent of its liability arising under the MSA"

¶ 90. In the case of Pioneer Urban Land and Infrastructure Ltd. v. Union of India,[76] defined the meaning of "disbursement" as,

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[71] *Id.*

[72] The Insolvency and Bankruptcy Code, *supra* note 17, § 7.

[73] Anuj Jain, *supra* note 40.

[74] The Insolvency and Bankruptcy Code, *supra* note 17, § 5 (8).

[75] Trafigura India Pvt. Ltd. v. TDT Copper Ltd., (2022) ibclaw.in 714 NCLAT.

[76] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416.

"The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.)[77] *to mean: 'The act of paying out money, commonly from a fund or in settlement of a debt or account payable."*

"Commercial" would generally involve transactions having profit as their main aim.[78]

¶ 91. The Counsel for Appellant argues that the transaction between the Respondent and the Appellant falls within the ambit of Section 5(8) of IBC[79]. The amount to be repaid under the Consent Term is nothing but the previously owed Financial Debt. The amount was disbursed in favour of the Respondent against the consideration for time value of money. The Consent Term is a schedule for repayment of the financial debt already owed by the Respondent. It is merely an acknowledgement of pre-existing financial debt.

¶ 92. The Consent Term doesn't change the nature of debt, it is merely an acknowledgement and schedule for payment of the debt. The definition, as provided under Black's Law Dictionary, included paying out money in settlement of debt. Although when amount is disbursed under the Consent Term, no profit is earned. However, when the debt was originally advanced for commercial effect. Upon such considerations, the payment under the Consent Term is nothing but Financial Debt. Thus a default in repayment under the provisions of Consent Term is nothing but a default under the ambit of IBC.

[II] THE DEFAULT CAN BE TREATED AS DEFAULT WITH REGARDS TO FINANCIAL DEBT AND THUS REVIVE THE INSOLVENCY PROCEEDINGS

¶ 93. The Counsel for Appellant argues that since the debt is a financial debt, default in repayment of such debt is a legitimate ground for revival of Insolvency proceedings.

¶ 94. It is further submitted that in the case of ***Krishna Garg & Anr. v. Pioneers Fabricators Pvt. Ltd.***[80], wherein the Hon'ble NCLAT declined to revive the CIRP proceedings because the settlement terms were not filed, nor they were brought on record and incorporated in the order

[77] *Disbursement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[78] Arenja Enterprises Private Limited v. Edward Keventer (Successors) Private Limited, 2020 SCC OnLine NCLAT 1188.

[79] The Insolvency and Bankruptcy Code, *supra* note 17, § 5 (8).

[80] Krishna Garg & Anr. v. Pioneers Fabricators Pvt. Ltd., Company Appeal (Ins.) Nos. 92 of 2021.

of the NCLT with liberty to revive/ restore the CIRP in the event of the corporate debtor not adhering to the terms of the settlement.

¶ 95. The Counsel for Appellant submits that the Consent Term executed between the Appellant and the Respondent was brought on record before the adjudicating authority on 5th August, 2021. It was an error on part of the Adjudicating Authority to not grant leave to revive the petition in case of default

¶ 96. Further there are various judgments which hold that breach of consent terms permits the Creditor to revive the company petition (C.P) for initiating CIRP proceedings against the corporate debtor. In the case of ***Vivek Bansal v. Burda Druck India Pvt. Ltd.***[81], the Hon'ble National Company Law Appellate Tribunal ('NCLAT'), while recording the Settlement Agreement between the parties, allowed the withdrawal of the application filed under Section 9[82] of the Code by the operational creditor. It was also held that in the event of default by the Corporate Debtor whereby it does not adhere to the terms of the Settlement Agreement as regards the payment of the outstanding instalments, the operational creditor shall be at liberty to seek revival/restoration of the CIRP proceedings before the NCLT.

¶ 97. In the case of ***ICICI Bank Ltd. v. OPTO Circuits (India) Ltd.***[83], the NCLAT established that in such instances wherein the corporate debtor defaults on the terms of a Settlement Agreement regarding the payment of outstanding instalments, the financial creditor has the right to seek revival or restoration of the CIRP. Here in this case, the NCLT Bangalore had rejected the application of the creditor seeking liberty to revive the application and instead had held that the financial creditors were entitled to file fresh application for initiation of CIRP. On appeal, the NCLAT 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.

¶ 98. The above judgments makes the stance of the courts very clear that when the parties, i.e., Corporate Debtor and Financial Creditor enter into a settlement Agreement or Consent Term, and such agreement is taken on record by the Adjudicating Authority, then the Financial

[81] Vivek Bansal v. Burda Druck India Pvt. Ltd., 2020 SCC OnLine NCLAT 552.

[82] The Insolvency and Bankruptcy Code, *supra* note 17, § 9.

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

creditor should be given liberty to revive the CIRP proceedings in case there is any default in payment. The Appellant relied on the Consent Term for repayment of financial debt. The Respondent defaulted in making such payment. Relying upon the above mentioned authorities, the Appellant should be given leave to revive the petition and initiate the CIRP proceedings. The NCLAT committed an error in not granting such a leave to the Appellant. Under Rule 11 of NCLT rules[84], the adjudicating Authority is empowered to pass any such order so as to ensure that justice is done to the parties involved. If such liberty is not granted, it would cause grave injustice to the Appellant. Being a Financial Creditor the Appellant has the right to recover the debt owed to it.

¶ 99. As per the Hon'ble Supreme Court in the case of ***Lalit Kumar Jain v. Union of India***[85],

> *"The aim of IBC is to:*
>
> *(a) promote entrepreneurship and availability of credit;*
>
> *(b) ensure the balanced interests of all stakeholders; and*
>
> *(c) promote time-bound resolution of insolvency in case of corporate persons, partnership firms and individuals"*

¶ 100. If the appellant is not allowed to revive the petition, it would be the appellant, instead of the respondent who would end up bearing the cost of lending money to the Respondent. In general parlance, when a financial creditor advances any sum to a corporate debtor, it is the corporate debtor, who is supposed to bear the cost of money advanced and the obligation to pay the sum back.

¶ 101. In case the corporate debtor defaults, IBC provides for recovery methods as well. As per the previous mentioned case, one of the objectives of IBC is to balance the rights of various stakeholders. This dictates that justice could only be served if the petition is revived as the corporate debtor still owes the debt to the Appellant.

[84] National Company Law Tribunal Rules, 2016, Gazette of India, rule 11 (July 21, 2016).

[85] Lalit Kumar Jain v. Union of India, (2021) 9 SCC 321.

¶ 102. It is submitted that the mere fact that no liberty was granted in the order passed under 12-A[86] withdrawal application on account of settlement is inconsequential. Since the debt was owed to the Appellant, it is the right of the Appellant to seek its recovery. The mere fact that the Adjudicating Authority did not grant any leave to revive the petition, is not sufficient to deprive the Appellant of such a crucial right.

¶ 103. The learned Counsel for the Appellant submits that there is clear disobedience of the undertaking given by the Respondent. The settlement entered between the parties was obligatory as the same was taken on record before the Adjudicating Authority. The Respondent - Corporate Debtor breached the undertaking by not making the payment as per the Schedule provided in the Settlement Agreement. The Respondent has wilfully and deliberately breached the undertaking.

[III] IN CASE OF ABSENCE OF ANY PROVISION REGARDING REVIVAL OF CIRP PROCEEDINGS, INTERPRETATION SHOULD BE DONE WITH REGARDS TO ITS CONSEQUENCES.

¶ 104. The provisions of IBC don't specifically deal with revival of CIRP proceedings after the same has been withdrawn under section 12A.[87] Thus the same has to be interpreted so as to have a unified and settled practice.

¶ 105. It should be interpreted in light of the consequences that may follow. If the language used is capable of bearing more than one construction, in selecting the true meaning, regard must be had to the consequences resulting from adopting the alternative constructions. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results.[88]

¶ 106. In selecting out of different interpretations "the court will adopt that which is just, reasonable and sensible rather than that which is none of those things" as it may be presumed "that the Legislature should have used the word in that interpretation which least offends our

[86] The Insolvency and Bankruptcy Code, *supra* note 17, § 12A.

[87] The Insolvency and Bankruptcy Code, *supra* note 17, § 12A.

[88] Guru Prasanna Singh, Principles of Statutory Interpretation, 119 (LexisNexis 2022).

sense of justice"[89]. Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.[90]

¶ 107. Thus the Counsel for Appellant submits since there is a lacunae in law, based upon the above mentioned contentions, the correct interpretation would be to allow the Appellant to revive the petition and initiate the CIRP proceedings. If it is not so interpreted, the consequence would be that the financial creditor would end up bearing the cost of lending money to the corporate debtor. It is the Respondent who defaulted in paying the amount due to the Appellant and even committed default after executing the Consent Term.

¶ 108. If the Appellant is expected to not revive the CIRP proceedings, it would cause injustice, inconvenience and hardship to the Appellant. This is clearly not the intent and object behind IBC. IBC has been brought forward to aid creditors who have been eager to get their payments for a long time get the needed relief. It would be absurd that the Financial Creditor, in spite of giving opportunity to the Corporate Debtor in the form of Consent Term, is not allowed to recover its due.

¶ 109. If the revival is not permitted the Appellant would end up bearing the cost of lending money to the Respondent. This is against the principles of business and justice. If the insolvency proceedings are not revived, it would incentivize the Respondent to commit more default and get away with it without facing any consequences. Any amount, in ordinary course of business is lent with an intention to earn returns on it, non-revival of the petition would cause unnecessary hardship to the Appellant, who instead of earning any returning or even getting the amount back would end up losing money. It leads to a manifest contradiction of the apparent purpose of IBC.

[89] Simms v. Registrar of Probates, (1900) AC 323.

[90] Tirath Singh v. Bachittar Singh, AIR 1955 SC 830.

THE PRAYER ADVANCED

For the foregoing reasons, the Appellants respectfully request this Hon'ble Court to adjudge and declare:

A. That in a liquidation proceeding under the 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.

B. That the promoter to be allowed to file application for Compromise and Arrangement.

C. That the loan amount should be paid back to the Appellants by way of enforcing rights created by the security pledge agreement.

D. The insolvency proceedings be revived against the Respondent on account of default in payment of the 4th tranche

OR

any other judgment or order in the interest of justice, equity and good conscience, allof which is respectfully affirmed and submitted.

Sd/.

Counsels on behalf the Appellants