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

IN THE HON'BLE SUPREME COURT OF MALTA

(APPELLATE JURISDICTION)

IN THE APPEAL UNDER SECTION 62 OF THE INSOLVENCY AND BANKRUPTCY

MR PIPARA……APPELLANT

V.

SINGHANIA GROUP OF COMPANIES…….……RESPONDENT

clubbed with

MR SHROFF……APPELLANT

V.

FU-SAM POWER SYSTEM LIMITED…….……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 PRIVATE LIMITED……APPELLANT

V.

DANOBE INFO TECHNOLOGY PRIVATE LIMITED…...…….……RESPONDENT

CODE AND ARTICLE 136 OF THE CONSTITUTION OF INDIA

MEMORANDUM ON BEHALF OF APPELLANT

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
¶	Paragraph
§	Section
Anr.	Another
Ors.	Others
Hon'ble	Honorable
SC	Supreme Court
SCC	Supreme Court Cases
v.	Versus
NCLT	National Company Law Tribunal
NCLAT	National Company Appellate Tribunal
MSMEs	Micro, Small and Medium Enterprises
IBC	Insolvency and Bankruptcy Code
SARFAESI	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest
IBBI	Insolvency and Bankruptcy Board of India
BLRC Report	Bankruptcy Law Review Committee Report
NPA	Non-Performing Asset
CIRP	Corporate Insolvency Resolution Process

INDEX OF AUTHORITIES

BOOKS REFERRED

S.NO	BOOK TITLE
1.	A Ramaiya, Guide to The Companies Act, 18th Edition, LexisNexis, Butterworths Wadhwa, Nagpur.
2.	Akaant Kumar Mittal, Insolvency and Bankruptcy Code Law and Practice,2nd Edition EBC
3.	R.P. Vats, Law & Practice of Insolvency & Bankruptcy, Taxmann's

STATUTES REFERRD

S.NO	STATUTES
1.	Insolvency and Bankruptcy Code, 2016.
2.	Liquidation Process Regulations, 2016
3.	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
4.	Companies Act, 2013.
5.	Indian Contract Act, 1872

CASES REFERRED

26.	M/s Vistra ITCL (India) Ltd. & Ors. v. Mr. Dinkar Venkatasubramanian & Anr	2023 SCC OnLine SC 570.	32
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STATEMENT OF JURISDICTION

The Appellants have approached this Hon'ble Court under Section 62 of the Insolvency and Bankruptcy Code 2016 and under Article 136 of the Constitution of India 1950. The relevant parts of the provisions have been extracted here.

"136. Special leave to appeal by the Supreme Court.—

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

"62. Appeal to Supreme Court.—

(1) 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.

(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within forty-five days, allow the appeal to be filed within a further period not exceeding fifteen days."

STATEMENT OF FACTS

SCENARIO I

Mr. Pipara, a promoter of the largest metallurgical coke manufacturing company in Malta, Deora NRE Coke Ltd. (DNCL) submitted a resolution plan before the Committee of Creditors on 1st October, 2020. The CoC did not approve any resolution plan due to paucity of time. Thus, the NCLT passed an order of liquidation on 11th December, 2020. This was challenged by Mr. Pipara which was dismissed in the NCLAT. He further appealed to the Supreme Court which issued a notice to DNCL on 19th June 2022.

Mr. Pipara had approached the NCLT during the same time with a scheme for compromise and arrangement. The NCLT had allowed this application under Sections 230 to 232 of Companies Act 2013 and issued directions for convening a meeting of shareholders. In an appeal filed by Singhania Group of Companies, the NCLAT *vide* order dated 24th September, 2022 established ineligibility under Section 29A of the IBC as it would extends to Section 230 of the 2013 Act.

Mr. Pipara challenged the order before this Hon'ble Court stating that Section 230 does not place an embargo on any person for the purpose of submitting a scheme.

SCENARIO II

Mr. Shroff is a promoter of Fu-Sam Power Systems Ltd. (Fu-Sam) which provides one stop solution for all types of power back up issues.

An application filed by one of the creditors of Fu-Sam was admitted by the NCLT *vide* its order dated 5th March, 2021. The Corporate Insolvency Resolution Process was initiated against Fu- Sam. Mr. Shroff submitted a Resolution Plan along with Allianz FRC Pvt Ltd. on 15th October, 2021, but was informed *via* email that the CoC found him to be ineligible under Section 29A(h) of the IBC and consequently annulled his resolution plan.

Mr. Shroff challenged this decision before the NCLT which was dismissed by an order dated 30th September, 2022. Mr. Shroff then moved to the NCLAT, wherein the court relied on the judgement dated 24th September, 2022 to hold that those ineligible for proposing a resolution plan under Section 29A of the IBC are also ineligible under Section 230 of the Companies Act, 2013. Due to the absence of any other resolution plan, the NCLT ordered the liquidation of Fu-Sam on 3rd March, 2022.

SCENARIO III

Axis Telecom Pvt. Ltd. (ATPL), a telecom service provider, has filed a Company Petition under Section 7 of the IBC alleging a default of Rs. 7,71,32,111/- by the Corporate Debtor, Danobe Info Technology Ltd (the Respondent herein). In the Company Petition, a consent term was executed between ATPL and the Respondent and it was placed before the Adjudicating Authority on 5th August, 2021. The NCLAT permitted the withdrawal of the appeal with liberty to move the NCLT for withdrawal of the Company Petition under Section 12 A of the IBC. The NCLT *vide* order dated 09.02.2022 allowed the withdrawal of the Company Petition following which, the Respondent defaulted in making payment towards the fourth tranche as per the consent term dated 5th of August, 2021. The petitioner filed an IA seeking revival of the Company Petition which was rejected by the NCLT on 21st December, 2022. The appeal against this order of the NCLT is now placed before this Hon'ble Court.

SCENARIO IV

Vntek Auto Ltd. (Corporate Debtor) approached VRS Malta Financial Services and M&N Finance Ltd. to extend a short-term loan facility to its group companies namely, Kapro Engineering Ltd., and MLD Investments Pvt. Ltd. for the end use of the Corporate Debtor.

A security trustee agreement was executed between Tipsara MSCL (India) Ltd. and MLD for an amount of Rs. 140 crores. Further 2 security trustee agreements were executed between Tipsara and Kapro for Rs. 140 crores and Rs. 200 crores and an amended and re-instated pledge agreement was executed on July 2016 between the Corporate Debtor, MLD, Kapro and Tipsara. On 24th June, 2020, CIRP was initiated by the Corporate Debtor for which Respondent No.1 was appointed as Resolution Professional. On, October 2, 2020, Tipsara filed a claimed for the principal amount of Rs. 700 crores which was rejected by Respondent No.1 and the rejection was not challenged by the Appellants.

Thereafter, the Appellants filed an application before the Adjudicating Authority claiming their right on the basis of pledged shares, which was dismissed. The Appellate Authority also dismissed the appeal by observing that the claim rejected by the RP was not challenged before the NCLT at the earlier stage. Thus, the Appellants have approached this Hon'ble Court in this appeal.

The Chief Justice of Malta constituted a 5-judge bench to decide on all the issues being dealt with in the matters of DNCL, SC, Fu-Sam, ATPL and Vntek.

STATEMENT OF ISSUES

1. 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?

2. 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'?

3. 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?

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

SUMMARY OF ARGUMENTS

1. 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 Appellants submit that in a liquidation proceeding, schemes of compromise and arrangement can be made under the Companies Act 2013 as such schemes would fulfil the object of the IBC which is to ensure revival and rehabilitation of companies and in the absence of such schemes, the company would lapse into liquidation. Tracing the development of Section 230 of the 2013 Act reveals that it was intended as a mechanism to enable debt restructuring to rehabilitate businesses. Moreover, such schemes have been admitted at this stage in previous cases, thereby highlighting that schemes for compromise and arrangement are indeed permissible during liquidation proceedings.

2. 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'?

It is submitted that the promoters in the instant case must not be disqualified under Section 29A for the purpose of proposing schemes of compromise and arrangement as the observation of the origin of Section 29A reveals that it is bad law made at the instance of a hard case, the exclusion of promoters in such a manner has been analysed and rightfully discouraged by the IBBI as well as the BLRC in their respective reports, there exists inadequate safeguard to protect promoters' interests in the current regime and the interplay between the impending Pre-Packaging Regulations and Section 29A would necessitate a

relaxation in the provision as well as an "exception clause" to allow promoters from submitting such schemes in at least certain circumstances.

3. 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?

It is respectfully submitted that the Appellants are not barred from filing the present application as there is no provision governing a limitation on such an application. Additionally, the rejection of the claim on the ground of delay is submitted to be unsustainable as it goes against the objectives of the IBC. Moreover, it is submitted that the Appellants are indeed financial creditors and if not recognised as such, their rights stand the risk of being infringed upon and would lead to the loss of security interest of the Appellants through no fault of their own. Furthermore, the current position of law which treats third-party security creditors as merely secured creditors and not financial creditors leads to an anomalous situation where the creditors are treated differently under CIRP and during liquidation. Therefore, the Appellants must be recognised as financial creditors, at least to the extent of the security interest.

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

It is deferentially maintained that the insolvency proceedings can be restored upon default by the debtor upon the consent term entered into between the parties. The consent term was brought on record before the Adjudicating Authority, which in turn equipped the withdrawal under Section 12 A of the IBC. It is further submitted that the appellant has a vested right to revive the proceedings when the consent term is brought on record before the Adjudicating Authority. Thus, it is contended that the Petitioner has a right to file an application before the Adjudicating Authority to revive the CIRP when the Corporate Debtor defaulted on the fourth tranche that was to be paid under the consent term.

ARGUMENTS ADVANCED

ISSUE 1: 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?

1. When contemplating the matter of whether schemes of compromise and arrangement under Sections 230 to 232 of the Companies Act 2013 (hereinafter **"2013 Act"**) can be entered into during liquidation under the Insolvency and Bankruptcy Code 2016 (hereinafter **"IBC"**), the Appellants contend that such schemes are indeed permissible during the liquidation process for the following reasons: fulfilling [A] object and purpose of IBC, drawing upon the [B] development of Section 230, and the meeting of requirements for [C] principles of sanctioning of schemes.

[A] Object and Purpose of IBC

2. It is submitted that an effective insolvency law must strike the balance between rehabilitation and liquidation by providing opportunities for genuine efforts aimed at restructuring of potentially viable businesses. The process must allow for easy conversion of proceedings from one form to another to allow for businesses in liquidation to resurrect wherever possible.[1]
3. Both the NCLAT[2] and the Hon'ble Supreme Court[3] have discussed the objectives and purpose of the IBC, *i.e.* it is not a mere recovery tool but also a beneficial tool in the hands of the Corporate Debtor to aid in its recuperation. It provides for liquidation only as a last resort[4] and can convert into liquidation proceedings only if the

[1] Ministry of Corporate Affairs, Report of the Expert Committee on Company Law, MCA, 1, 163, (2005).

[2] S.C. Sekaran v. Amit Gupta & Ors., Company Appeal, MANU/NL/0338/2019

[3] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17.

[4] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17.

Committee of Creditors (hereinafter **"CoC"**) so decides by requisite majority[5], if no resolution plan is approved by the CoC[6] or the National Company Law Tribunal[7] (hereinafter "**NCLT**"), or if an approved Resolution Plan is contravened by the corporate debtor[8].

4. Additionally, the Insolvency and Bankruptcy Board of India's (hereinafter "**IBBI**") proposed amendments to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter "**Liquidation Regulations**") require the suspension of the liquidation process after its commencement for a period of ten days. During this period, schemes for compromise and arrangement may be proposed.[9] It is thus apparent that the IBC envisages for revival and rehabilitation of businesses over their death or termination.

[B] Development of Section 230

5. Section 230 of the 2013 Act finds its corresponding equivalents in Section 391 of Companies Act 1956 and Section 153 of the Indian Companies Act 1913 and drew inspiration from UK law to play the role of a bail-out device for companies that would otherwise be liable to be wound up. The erstwhile Section 153 defined "company" in relation to compromise and arrangement as "a company liable to be wound up under this Act" and the definition can be traced to Section 390(a) of the 1956 Act.
6. Presently, liquidation proceedings have evolved into restructuring or rehabilitation proceedings by virtue of resorting to Section 230 of the 2013 Act. The provision allows for the liquidator to seek the NCLT's sanction for a scheme of compromise and arrangement.[10] Similar provisions can be observed in the Companies Act 2006 of the UK and the Companies Act 1967 of Singapore, which have been used for the purpose of debt restructuring. Its counterparts in Mata' jurisprudence have also been engaged for this purpose, such as in the case of ***S.C. Sekaran v. Amit Gupta and Ors.***[11] wherein the liquidator was directed to take steps in terms of Section 230 for the

[5] Insolvency and Bankruptcy Code, 2016, §33(2), No. 31, Acts of Parliament, 2016 (India).

[6] Insolvency and Bankruptcy Code, 2016, §33(1)(a), No. 31, Acts of Parliament, 2016 (India).

[7] Insolvency and Bankruptcy Code, 2016, §33(1)(b), No. 31, Acts of Parliament, 2016 (India).

[8] Insolvency and Bankruptcy Code, 2016, §33(4), No. 31, Acts of Parliament, 2016 (India).

[9] IBBI, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations*, (Nov. 3, 2019).

[10] Companies Act, 2013, §230(1), No. 18, Acts of Parliament, 2013 (India).

[11] S.C. Sekaran v. Amit Gupta and Ors., MANU/NL/0338/2019

revival of the Corporate Debtor prior to undertaking the sale of its assets. Similar orders have been passed in a plethora of other cases as well.[12]

[C] Principles for Sanctioning Schemes

7. The fundamental parameters for the sanctioning of such schemes was first propounded by the Hon'ble Supreme Court in ***Miheer H. Mafatlal v. Mafatlal Industries Ltd.***[13] whereby it was established that upon the satisfaction of the basic pre-requisites, the Court lacks the jurisdiction to adjudicate upon the commercial wisdom of the majority, thus laying down the principle of supervisory jurisdiction of courts in such matters. Various High Courts in cases such as ***Kashinath Dikshit And Anr. v. Surgicals and Pharmaceuticals***[14] and ***Rajeev S Mardia v. Official Liquidator of Mardia Steel Ltd.***[15] have underscored the need for Courts to ensure the *bona-fides* and the financial viability of the persons proposing schemes of compromise and arrangement, while emphasising that such schemes would indeed fall within the legal framework of the 2013 Act and the IBC. In a similar vein, this position of law was affirmed by the Apex Court in the landmark case of ***Meghal Homes Pvt. Ltd v. Shree Niwas Girni K.K.Samiti & Ors.***,[16] wherein a company in liquidation for an extended period of time was revived based on schemes of arrangement and the onus was placed upon the Court to contemplate upon proposed schemes during the liquidation stage.
8. Therefore, it is transparent that the possibility for schemes of compromise and arrangement during the liquidation period have been opened up by jurisprudence. Although the overlap of Section 230 and the liquidation proceedings may not have been envisaged at the time of drafting the IBC, the subsequent amendment permitting the application for proposing schemes of compromise and arrangement by the liquidator appointed under the IBC[17] indicate legislative approval of the same. Drawing a parallel with the situation at hand, it is submitted that regardless of the

[12] Ajay Agarwal & Anr. v. Ashok Magnetic & Ors., MANU/NL/0082/2019; Rajesh Balasubramanian v. M/s Everon Castings Pvt. Ltd. & Anr., MANU/NL?0082/2019; Y. Shivram Prasad v. S. Dhanapal, 2019 SCC Online NCLAT 172; Daiyan Ahmed Azmi v. Rekha Kantilal Shah, Liquidator & Ors., MANU/NL/0079/2019

[13] Miheer H. Mafatlal v. Mafatlal Industries Ltd., (1997) 1 SCC 579.

[14] Kashinath Dikshit And Anr. v. Surgicals and Pharmaceuticals, ILR 2002 KAR 5191.

[15] Rajeev S Mardia v. Official Liquidator of Mardia Steel Ltd, Civil Application No. 138 of 2009

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

[17] Insolvency and Bankruptcy Code, 2016, §230(1), No. 31, Acts of Parliament, 2016 (India).

passing of orders for liquidation[18], there exists no embargo upon the proposal of such schemes by the Appellants and schemes of compromise and arrangement can indeed be made in terms of Sections 230 to 232 of the Companies Act 2013 while the business is in liquidation under the IBC.

[18] ¶11 and 19, Moot Proposition.

ISSUE 2: 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'?

9. Section 29A of the IBC lays down that persons who are not eligible to be resolution applicants, thereby disqualifying, among other persons, the promoter of the company from submitting resolution plans to revive the company. The prerequisites for ineligibility include being a wilful defaulter, an undischarged solvent, having control over an account that has been declared as a Non-Performing Asset (hereinafter "**NPA**") for over a year or being a guarantor for a debtor against whom IBC proceedings have been initiated. With regard to the present factual matrix, Section 29A(c) appears relevant as it declares any person who is a promoter, director, or key managerial personnel, holding a NPA for over a year to be ineligible to submit resolution plans. In essence, the incumbent management of the company is barred from participating in the attempted revival of the company during the Corporate Insolvency Resolution Process (hereinafter "**CIRP**").
10. With regard to the case at hand, the Hon'ble NCLAT held the Appellant-Promoter to be ineligible to propose a scheme for compromise and arrangement under Sections 230 to 232 of the Companies Act 2013. This disqualification was on the ground of ineligibility to submit resolution plan under Section 29A of the IBC extending to declare ineligible any such persons ineligible to submit scheme of compromise and arrangement as well. At this juncture, the Appellants submit that the disqualification under Section 29A(c) is far too wide in its scope and must not create an absolute ouster of promoters for the following reasons: the dubious circumstances behind the [A] origin of Section 29A, recommendations given by the [B] discussion papers by IBBI and BLRC of MoF, [C] the inadequate safeguards for protection of promoters' interests in the current regime, and [D] the interplay between Pre-Packing Regulations and Section 29A.

[A] Origin of Section 29A

11. When analysing the origin of Section 29A to understand the backdrop against which the IBC was amended to include this provision, it comes to light that Section 29A was the result of a dubious case[19], Synergies Dooray, wherein parties related to the corporate debtor were enabled to engage as a part of the Committee of Creditors as a result of the assigning of claims and divesting of interests shortly before the commencement of the insolvency resolution process. The 2018 Amendment to IBC inserting Section 29A occurred shortly after the NCLT delivered its judgment in the aforementioned case. A perusal of the statement of objects and reasons of the Insolvency and Bankruptcy Code (Amendment) Bill 2017 portrays that quintessential purpose of the amendment was to reduce participation of promoter's in the revival and rehabilitation of the corporate debtor.
12. However, in order to seal the gaps in the legal framework that enabled the purported misconduct in the Synergies Dooray case, less invasive changes to the IBC could have been contemplated such as stricter rules surrounding the transfer of debts prior to the filing for insolvency, similar to the rules already in existence with respect to undervalued transactions and transaction which result in the preference towards one creditor over another.[20]
13. It is thus submitted that the absolute bar upon promoters to partake in the resolution process is indeed the instance of a hard case making bad law and an amendment to the provision must be considered in order to restore this right of the promoters.

[B] Discussion Papers of IBBI and BLRC by MoF

14. The IBBI published a discussion paper in April 2019[21] wherein it was noted the application of the ineligibilities carved out under Section 29A of the IBC must not be applied to the Companies Act as the latter is a broader legislation with application outside the liquidation framework. In November 2019, the IBBI circulated another discussion paper[22] inviting stakeholder comments on whether Section 29A would be

[19] Edelweiss Asset Reconstruction Company Ltd v. Synergies Dooray Automotive Ltd. & Ors., 2018 SCC OnLine NCLAT 845.

[20] Insolvency and Bankruptcy Code, 2016, §43, §45, No. 31, Acts of Parliament, 2016 (India).

[21] IBBI, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations* , (Apr. 27, 2019).

[22] IBBI, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations*, (Nov. 3, 2019).

attracted towards the Companies Act 2013 for which a majority of the public comments were against such application.

15. Drawing upon the majority of view of the stakeholder community, the Appellants contend that reorganisation under the Companies Act after liquidation is the final chance at revival and rehabilitation of the corporate debtor. Therefore, no such extreme restrictions should be imposed at this stage, which in turn would help realise the objectives of the IBC, *viz.* protecting the surplus value of the company and preventing its piecemeal liquidation.
16. Furthermore, the Ministry of Finance has published the Bankruptcy Law Review Committee report (hereinafter "**BLRC Report**") prior to the enactment of the IBC, which contains findings and recommendations to be implemented in the IBC. The Report contains the design of the IBC[23] and highlights that limited liability corporations are an important mechanism to foster risk-taking, thereby highlighting the necessity for bankruptcy law to protect the concept of limited liability.[24] The report also seeks to draw the line between malfeasance and business failure[25] and sets forth that in weak insolvency regimes, default is tantamount to malfeasance and promoters should be personally financially responsible for the defaults of the firms they control. However, such an approach can hamper risk-taking by firms, in turn affecting the economic growth. Therefore, the Report identifies that bankruptcy law must enshrine business failure as a normal and legitimate part of the working of the market economy.[26] Therefore, in the absence of malfeasance, the company can be granted a chance at revival under the same management.[27] However, with the introduction of Section 29A, promoters are entirely disabled from doing so.

[23] TK Viswanathan et al., *The Report of the Bankruptcy Law Reforms Committee*, 1, BLRCR, 1, 30, (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

[24] TK Viswanathan et al., *The Report of the Bankruptcy Law Reforms Committee*, 1, BLRCR, 1, 23, (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

[25] TK Viswanathan et al., *The Report of the Bankruptcy Law Reforms Committee*, 1, BLRCR, 1, 22, (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

[26] TK Viswanathan et al., *The Report of the Bankruptcy Law Reforms Committee*, 1, BLRCR, 1, 23, (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

[27] TK Viswanathan et al., *The Report of the Bankruptcy Law Reforms Committee*, 1, BLRCR, 1, 23, (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

[C] Inadequate Safeguards In Current Regime

17. The proviso to Section 29A(c) allows resolution applicants a period of one year to clear their dues and regain eligibility to submit resolution plans, if their ineligibility was a consequence of having control over a NPA. However, financially distressed companies facing liquidity issues may find it challenging to pay their outstanding dues. As a result, the existing management and promoters of such companies remain disqualified. The one-year period provided for these persons to pay off NPAs essentially puts them in a position where they wouldn't have needed to undergo the insolvency resolution process in the first place. This stems from the fact that if the company could have actually repaid its dues, it is unlikely that the company or its creditors would have initiated the insolvency process due to default.
18. To substantiate, reliance is placed upon the Insolvency law Committee Report published by the Ministry of Corporate Affairs in 2018. The Report recognises that the one-year time period provided in the current regime is inadequate and proposed to increase the same to three years as the downturn in a business cycle would most likely extend past a period of one year. However, the Report further went on to highlight that there is no conclusive way to determine the ideal time period for existence of an NPA in order for disqualification to apply.[28]
19. Additionally, Section 29A(c) does not strike a difference between wilful default with the intention of doing so and default as a result of external factors. The RBI has defined "wilful default" as default that is accompanied by the siphoning of funds for a purpose not sanctioned by the creditor, disposal of assets given as security to the creditor, or a default despite having the capacity to honour obligations towards the creditor, carried out deliberately and with intention.[29] While Section 29A(b) recognises wilful default, it is contended that the ineligibility that arises from Section 29A(c) would be a result of non-payment of dues for any reason regardless of whether the default was wilful or not. Essentially, a promoter is automatically disqualified for holding a NPA account for the stipulated period without taking into consideration the element of intention.

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[28] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, MCA, 1, 51, (2018).

[29] Reserve Bank of India, *Master Circular on Wilful Defaulters*, DBR.No.CID.BC.22/20.16.003/2015-16, https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9907#21.

20. Considering the case of ***Sunrise Denmark v. Muskan Power Infrastructure***[30] wherein the sole resolution application was from a disqualified person under Section 29A, the NCLT passed an order for liquidation of the corporate debtor. This is a direct parallel to the case at hand where it is only the promoters or the incumbent management willing to submit resolution plans. Nonetheless, the company faces liquidation owing to the lack of eligible resolution applicants. It is thus the contention of the Appellants that regardless of whether the resolution application could garner the necessary support of the creditors, the CoC must at least have the opportunity to consider such proposals so as to retain the integrity of the IBC which aims not at dismantling a distressed debtor, but rather facilitate its rehabilitation by whatever means possible.[31]

[D] Interplay Between Pre-Packaging Regulations and Section 29A

21. Prior to the commencement of insolvency proceedings, the corporate debtor, its creditors, and the purchaser may all agree on a resolution plan through means of pre-packaged insolvency. Pre-Packaging Regulations are also a part of the UK insolvency jurisprudence and allows for the assets of the corporate debtor to be sold by administrator (analogous to the resolution professional under IBC) without the approval of the majority of creditors.
22. Malta is also in the process of formulating its own Pre-Packaging Regulations and the IBBI's Report on Pre-Packaged Insolvency has been published in this regard. The Report identifies that pre-packaged insolvency process is to be initiated by the corporate debtor under Section 10 of the IBC. The Report further went on to identify reasons as to why the corporate debtor may abstain from invoking this provision – disabilities under Section 29A which rendered certain persons, such as promoters, ineligible; apprehension on part of the promoters that their resolution plan may not be as competitive as those submitted by other persons; absence of CoC's approval for any resolution plan necessarily resulting in liquidation of the company.[32] This trend

[30] Sunrise Denmark v. Muskan Power Infrastructure, 2018 SCC OnLine NCLT 4331.

[31] Bank of Baroda v.MBL Infrastructures Ltd., (2022) 5 SCC 661.

[32] Ministry of Corporate Affairs, Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process, MCA, 1, 40, (2020).

can also be observed in practice wherein only 3.2% of CIRPs that commenced in 2019-20, were initiated by the corporate debtors.[33]

23. It can thus be observed that if the promoters are hesitant to invoke Section 29A for the reason that their resolution plan may not be as effective as the competitors' which may lead to disqualification of the resolution plan by the CoC. Therefore, it is evident that regardless of the existence of Section 29A, the CoC chooses the most effective resolution plan available. Consequently, the rigidity of Section 29A only serves to discourage the use of Section 29A which necessitates invocation by the corporate debtor. A study in the UK reveals that most pre-packs were filed for companies that failed due to market condition.[34]
24. In this regard, the Appellants submit that a carve-out in Section 29A(c) exempting promoters from disqualified persons is necessary to facilitate adequate use of the pre-packaging insolvency framework. Such a relaxation has already been implemented for the benefit of corporate debtors identified as Micro, Small and Medium Enterprises (hereinafter "**MSMEs**") under Section 240A of the IBC. Thus, the imminent implementation of a pre-pack framework may warrant reconsideration of the ineligibilities imposed by Section 29A(c) and the need to place greater trust in the CoC's judgment.
25. The Appellants further submit that it would be judicious to introduce an "exception clause" into Section 29A by way of an amendment for the purpose of allowing ineligible persons from submitting Resolution Plans in cases where no other approved Resolution Plans. Such an exception clause will discourage ineligible Resolution Applicants from abusing the provision as they would be barred from submitting Resolution Plans for as long as any other persons contemplate to do so.
26. It is also contended that such an amendment will not be in contravention to the spirit of IBC as the statute envisages the survival and sustenance of the company and leaves liquidation as the last resort to pursue. Permitting the submission of Resolution Plans from erstwhile ineligible persons upon the absence of any other approved Resolution

[33] IBBI, Insolvency and Bankruptcy News, April-June, 2020.

[34] Peter Walton and Chris Umfreville, *Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration*, UNIVERSITY OF WOLVERHAMPTON, (Aug. 8, 2023, 7:10 PM), https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration.

Plans ensures the revival of the company, failing which the business would slip into liquidation.

27. The Appellants accede that while some caution is necessary to prevent misuse, the broad ineligibilities listed in Section 29A may not be entirely conducive to the IBC's primary objective of rehabilitating financially distressed companies. The introduction of this provision in the IBC in its nascent stage was heavily influenced by difficult cases such as that of Synergies Dooray and it is pertinent to note that such a provision does not find an equivalent in neither the US nor the UK insolvency regimes from where the IBC drew inspiration. Therefore, relaxing section 29A(c) could provide the CoC with additional resolution plans, potentially leading to successful rehabilitation. Striking the right balance between safeguards and opportunities for genuine rehabilitation is crucial for the continued success of the insolvency regime.

ISSUE 3: 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?

28. It is the contention of the Appellants that in the instant case, when a security interest is created upon the assets of a Corporate Debtor for a loan availed by a third-party, the lenders do indeed reserve the right to file an application claiming for their right over the assets during the liquidation proceedings of the Corporate Debtor for the following reasons: [A] not a barred application, [B] consequences of denying the position of financial creditors, [C] Appellants in the nature of financial creditors, [D] conflicting with provisions for liquidation, and [E] recognition as financial creditors to the extent of security interest.

[A] Not a Barred Application

29. The contention that the application is barred implies that there was a limitation to approach the Adjudicating Authority regarding the rejection of the claim. In this regard, it is submitted that, at the outset, no such limitation in law exists.
30. Upon reference to the IBC, it is evident that the IBC is lenient in imposing restrictions on the time for applications of such nature. While the IBC provides that the NCLT shall have jurisdiction to entertain or dispose any claim made by or against the Corporate Debtor[35], the IBC also allows for any person aggrieved by the order of the Adjudicating Authority to prefer an appeal to the National Company Law Appellate Tribunal[36]. It is thus contended that the Tribunals reserve the right and jurisdiction to decide on the matter. However, owing to the failure of the Tribunals to take these contentions into consideration, the matter has now been brought before this Hon'ble Supreme Court.
31. Assuming, but not conceding that the provisions of the Limitation Act 1963 (hereinafter **"Limitation Act"**) shall apply to the factual matrix of the instant case, reliance is placed upon the residuary provision[37] in the Schedule to the Limitation Act

[35] Insolvency and Bankruptcy Code, 2016, §60, No. 31, Acts of Parliament, 2016 (India).

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

[37] Limitation Act, 1963, Article 113, No. 36, Acts of Parliament, 1963 (India).

which stipulates a period of three years before which suits must be instituted for any cause of action which does not find its place elsewhere in the Limitation Act.

32. In the present case at hand, the debt is due from the Respondent to the Appellants and if the period of limitation stands at three years, it must be noted that the claim was filed on October 2, 2020, following which it was rejected by Respondent No.1[38]. Accordingly, the present Petition stands before this Hon'ble Court on 8th June 2023[39], which falls within the three-year period and hence, the Appellants are not barred by limitation.
33. With reference to the IBC, while the Resolution Professional is required to verify each claim within seven days from the receipt of the claims[40], neither the IBC nor the regulations running alongside it place a duty on the Adjudicating Authority to decide upon a challenge to the rejection of the claim within a specified time period. The IBC also does not provide a time limit for a creditor with a rejected claim to approach the Adjudicating Authority.
34. In this regard, it is maintained that there have been several instances wherein the Adjudicating Authority had admitted such claims even after CIRP had commenced and the CoC had approved the resolution plan.[41] It is thus submitted that the approval of Resolution Plans or the progress of CIRP in the present case may not be used to justify the hindrance of the right of the Appellant to the pledged shares. Moreover, as there is no active Resolution Plan[42] at the moment, the Appellants' claim certainly stands to be admitted at this stage.
35. Additionally, it is pertinent to note that the Hon'ble Supreme Court has held in ***Swiss Ribbons v. Union of India***[43], the Resolution Professional does not have quasi-judicial powers, but merely has administrative powers. This position has been expanded upon in ***Navneet Kumar Gupta v. Bharat Heavy Electricals Limited***[44] by observing that the Resolution Professional cannot reject a claim without taking the evidence which substantiates the claim into account. Due to the lack of quasi-judicial powers, every

[38] ¶34, Moot Proposition.

[39] ¶34, Moot Proposition.

[40] Insolvency and Bankruptcy Code, 2016, §42, No. 31, Acts of Parliament, 2016 (India).

[41] Credit Suisse Funds AG v. Kumar Kapadia, IA 427/2018 in CP(IB) 209/NCLT/AHM/2017, In re PRC International Hotels Pvt. Ltd., MANU/NC/5144/2019

[42] ¶35, Moot Proposition.

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

[44] Navneet Kumar Gupta v. Bharat Heavy Electricals Limited,

claim which requires judicial determination in order to be admitted has to be decided by the Adjudicating Authority. Thus, any creditor with a rejected claim, wishing to challenge such rejection, has to mandatorily approach the Adjudicating Authority who would make a *de novo* review on the validity of the claim.

36. Moreover, the determination of whether a creditor falls under the definition of operational creditor or a financial creditor has to be decided by the Adjudicating Authority even though the Resolution Professional could also make such a determination which can been seen in ***ICICI Bank Limited v. Anuj Jain,***[45] where the NCLT upheld the determination made by the resolution professional. Further, if the creditor is aggrieved by the determination made by the resolution professional, he may challenge the decision by approaching the Adjudicating Authority.

37. It must be reiterated that as observed in ***Umesh Saraf v. Tech India Engineers***[46], the IBC is a beneficial legislation. The entire process must be aimed at bringing the Corporate Debtor back on its feet. Therefore, it is most deferentially submitted that the Hon'ble Apex Court recognises the Appellants' right to file this application in its pursuit for justice.

[B] Consequences of Denying Position of Financial Creditor

38. In the backdrop of factual matrices similar to the case at hand, the Hon'ble Supreme Court[47] has recognised that third-party security creditors would fall within the ambit of secured creditors rather than financial creditors, thereby denuding these creditors of certain rights and protection such as that of partaking in the corporate insolvency resolution process (hereinafter "**CIRP**"). The forfeiture of this right affects the status of disposal of the assets of the Corporate Debtor which serve as the security that the creditors exercise over the debtor. The protection extended to dissenting creditors under Section 30(2)(b) of the IBC wherein objecting creditors would receive an amount as payable under Section 53 of the IBC[48], would also not be applicable in the case of third-party security creditors.

[45] ICICI Bank Limited v. Anuj Jain RP of Jaypee Infratech Ltd., (2018) SCC Online NCLT 17057

[46] Umesh Saraf v. Tech India Engineers, MANU/NL/0385/2020.

[47] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799; Jaypee Infratech Ltd. Through Its IRP v. Jaiprakash Associates Ltd., (2023) ibclaw.in 91 NCLT.

[48] IndiaResurgence ARC Private Limited v. M/s. Amit Metaliks Limited & Anr

39. The denial of third-party security creditors of the position of financial creditors consequently deprives them of the right to be included within the CoC in order to be involved in quintessential aspects of decision making for the Corporate Debtor, such as extension of resolution period, replacement of resolution professional, approval of resolution plan, initiating the liquidation process, etc.[49] Therefore, the Appellants in the instant case would also be incapacitated when decisions are made with respect to the abovementioned situations. The security interest that the Appellants hold over the Corporate Debtor's assets[50] may be wrongfully extinguished, leaving the Appellants remediless and diminishing their recovery, owing to no shortcoming on the part of the Appellants.

[C] Appellants in the Nature of Financial Creditors

40. It is submitted that the Appellants in the present case would indeed assume the position of financial creditors by virtue of the following reasons,

(i) Existence of a Direct Nexus

41. *Firsty*, a financial asset has been expansively defined under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter "**SARFAESI Act**") to include pledges.[51] This indicates that the owner of such an asset, who in the present case is the Appellant, the holder of the pledge, would be construed a financial creditor, thereby entitled to exercise its rights drawn from the position of the financial creditor.
42. However, the Apex Court[52] examined the nature of the debt under Section 5(8) of the IBC which defines "financial debt" and identified three necessary elements for the same, *viz.* the existence of borrowing or a state of indebtedness, disbursal or distribution of the debt, and a time value of money or interest for the use of the money over time.[53] Although the Court is of the view that disbursement is a necessary condition for a debt to be classified as financial debt[54], it is submitted that the IBC

[49] Insolvency and Bankruptcy Code, 2016, §21(2), §5(28), No. 31, Acts of Parliament, 2016 (India).

[50] ¶32, Moot Proposition.

[51] The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, §2(1)(l), No. 54, Acts of Parliament, 2002 (India).

[52] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

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

[54] Phoenix ARC v. Spade Financials, Civil Appeal No. 2842 of 2020.

does not explicitly necessitate that disbursement is required to be made towards the Corporate Debtor. Therefore, as this position of the Apex Court[55] has not been mandated by the IBC, it is contended that the existence of such a direct nexus between the disbursal of the debt and the receiver of the disbursal must not pose as an absolute necessity.

(ii) Interlinked Interests of Group Companies

43. *Secondly,* assuming, but not conceding that the disbursal of the debt amount must be directly towards the borrower in accordance with the concept of "direct nexus" as established by the Courts[56], it is submitted that the advancing of credit to a group company would serve as adequate consideration for another group company to create security interest for the benefit of the lender.

44. This reasoning stems from the fact that businesses often choose to carry out operations through various entities in order to facilitate administrative ease, to comply with legal requirements, minimise or insulate liabilities of assets of certain companies from activities of others, etc.[57] Owing to these factors, it would appear erroneous to allow businesses to consider a group company as integral to the business operation at the time of securing a loan, but when the lender seeks to enforce his interest upon such assets at the time of liquidation, the business disconnects itself from its group company.

45. In this regard, it is submitted that the approach of the Courts in bestowing the position of secured creditor upon beneficiaries of third-party security is not in consonance with the applied principles of functioning of business enterprises. The current interpretation of the law places the group company in an isolated position and disconnects it from the other entities in the business enterprise, when in fact, the debt amount disbursed towards the group companies was essentially for the ultimate use of the Corporate Debtor.[58] It is thus contended that the debt would indeed fall within the purview of "financial debt" and consequently, the Appellants must be construed as financial creditors.

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[55] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

[56] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799; Jaypee Infratech Ltd. Through Its IRP v. Jaiprakash Associates Ltd., (2023) ibclaw.in 91 NCLT.

[57] Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy,* CHICAGO UNBOUND, (Aug. 11, 2023, 7:24PM), https://chicagounbound.uchicago.edu/uclrev/vol42/iss4/2/.

[58] ¶31, Moot Proposition.

(iii) Existence of Obligation to Pay

46. In the present-day world of commerce, a person may not have sufficient security to offer for obtaining advances from lenders. In such cases, he draws upon resources of others by asking them to give a guarantee and also security for the performance of that guarantee, which is a legitimate and legally sound method of conducting such commercial transactions.[59]

47. However, in the landmark cases of ***Phoenix ARC Pvt. Ltd. v. Ketulbhai Ramubhai Patel***[60] and ***Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited***[61], the Apex Court undermined the commercial aspect of creating third-party security and opined that only if a definitive obligation to pay exists upon on the part of the security provider, it would lead to the classification of third-party security creditors as financial creditors. It was held that the Corporate Debtor must provide an explicit guarantee to pay, thus levying upon the guarantor-Corporate Debtor a direct obligation to pay in case of default by the borrower. The Court held that a pledge would not carry a direct obligation to pay and the third-party security creditor does not have the implicit right to enforce the security interest in the absence of such a guarantee.

48. In the case of ***Imperial Bank of India v. Bengal National Bank***[62], it was clarified that an obligation to pay would be fundamental to the concept of a security interest. A security interest which disallows the beneficiary of the interest from taking control of the asset over which the interest has been created or an independent interest lacking an underlying obligation to pay is of no value. Therefore, it is apparent that debt subsist within a security interest and is indeed an essential factor of security interest.[63] This recommendation was also propounded by the Insolvency Law Committee and the third-party security creditor was suggested to be considered a financial creditor of the Security Provider.[64]

49. Furthermore, the out-and-out ouster of third-party security not being in the nature of a guarantee stands the risk of contravening the settled position of law that a contract of

[59] State Bank Of India v. Smt. Kusum Vallabhdas Thakkar, (1994) 1 GLR 655.

[60] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

[61] Jaypee Infratech Ltd. Through Its IRP v. Jaiprakash Associates Ltd., (2023) ibclaw.in 91 NCLT.

[62] Imperial Bank of India v. Bengal National Bank, MANU/WB/0209/1930.

[63] Jasbir Singh Chadha v. U.P. Financial Corporation, ILR (2008) 2 Del 1321.

[64] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, MCA, 1, 20, (2020).

guarantee does not necessarily need be express and can also be understood to be implicit from the terms of agreement between the parties.[65] It is thus contended that due to the interlinked interests of group companies and as the pledge created for the benefit of the Appellants upon the assets of the Corporate Debtor encompasses an implicit obligation to pay, the Appellants must indeed be considered financial creditors.

[D] Conflict with Provisions for Liquidation

50. The current position of law which identifies third-party security creditors as merely secured creditors and not financial creditors creates an anomalous situation wherein they are treated differently under different stages of the insolvency process. Secured creditors are entitled to distribution during liquidation[66] and have the right to enforce their security while standing outside the liquidation process[67]. Moreover, the IBC classifies the creditors who are entitled to distribution of proceeds as stakeholders[68] as a result of which, upon approval of the resolution plan, the plan shall be binding on all stakeholders, including the secured creditors.
51. Such an interpretation leads to an anomalous situation wherein the creditors who benefit from the security interest by enforcing their security during liquidation are not entitled to partake in the resolution process. This contradiction creates a conundrum whereby the resolution plan would be open to attack by third-party security creditors who may have been deprived of their security through a resolution plan that lacked their approval. Lenders may choose to abstain from indulging in such forms of lending due to the inadequate protection of their interests. Furthermore, extinguishing of third-party security interest without permitting the participation of the third-party in the decision-making process was held to be a violation of the due process of law.[69]
52. In the present case, if the Appellants are to be considered secured creditors and not financial creditors, they run the risk of being unable to enforce their security interests although they are entitled to the same under the provisions of the IBC.

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[65] Lala Shanti Swarup v. Munshi Singh & Ors, 1967 AIR 1315.

[66] Insolvency and Bankruptcy Code, 2016, §53, No. 31, Acts of Parliament, 2016 (India).

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

[68] Insolvency and Bankruptcy Code, 2016, §31(1), No. 31, Acts of Parliament, 2016 (India).

[69] Jaypee Kensington Boulevard Apartments Welfare Association & Others v. NBCC (India) Limited and Others, 2021 SCC OnLine SC 253.

[E] Recognition as Financial Creditors to Extent of Security Interest

53. Efforts towards resolution of this conundrum were made in ***M/s Vistra ITCL (India) Limited v. Dinkar Venkatasubramanian***[70] (hereinafter "**Amtek Auto**") wherein the Hon'ble Apex Court made reference to the amended Section 30(2) of the IBC. The provision lays down that financial creditors who have not voted in favour of the resolution plan are to receive an amount no less than that which they are entitled to under Section 53(1) of the IBC in the event of liquidation. Consequently, the Court noted that the creditors would be bereft of the benefit under Section 30(2) of the IBC.
54. This anomaly was attempted to be cured by treating the third-party security creditor as a financial creditor of the Corporate Debtor to the extent of the value of the pledged shares, thereby bestowing upon the creditors entry into the CoC and voting rights. In light of these contentions, it is submitted that the Appellants in the case at hand must also be recognised as financial creditors and their claim must be admitted, following which, the Appellants would be bound by the Resolution Plan and would be entitled to the status of either dissenting or the approving creditors.
55. In conclusion, it is submitted that it would be erroneous to conclude that the security interest created on the assets of the Corporate Debtor are extinguished if the interest has been created for the loan not availed by the Corporate Debtor and instead, by a third party. It is essential to strike a balance between the protection of interests of involved parties, ensuring adequate enforceability of security interests as well as promotion of commercial development in the backdrop of financial transactions. In this regard, an equitable approach in the case at hand would be the classification of third-party security creditors as financial creditors and subjecting them to the same rights and obligations as all other creditors of the Corporate Debtor. Therefore, it is respectfully submitted that the Appellants must be considered financial creditors in order to submit their claims and realise the benefits of their securities.

[70] M/s Vistra ITCL (India) Ltd. & Ors. v. Mr. Dinkar Venkatasubramanian & Anr., 2023 SCC OnLine SC 570.

ISSUE 4: WHETHER INSOLVENCY PROCEEDING CAN BE RESTORED IN CASE OF DEFAULT WHEN CONSENT TERM IS ENTERED BETWEEN PARTIES?

56. It is submitted that insolvency proceeding instituted under Section 7 of the IBC in the instant case can indeed be restored upon default of the consent term on the part of the Respondent-debtor for the following reasons: [A] withdrawal of the application u/s 12A, [B] settlement agreement was brought on record, [C] reopening of insolvency application post-withdrawal, and [D] rejection resulting in violation of natural justice

[A] Withdrawal of Application under Section 12A

57. The introduction of Section 12A in the Code validated the idea of settlements between the creditors and the erstwhile management, accelerating the resolution process of the corporate debtor as there existed no explicit provisions for withdrawal in the IBC, prior to the introduction of the abovementioned provision. The Hon'ble Supreme Court under Article 142 of the Constitution of India passed orders for allowing the withdrawal of applications against the corporate debtor during CIRP.
58. In ***Uttara Foods & Feeds (P) Ltd v. Mona Pharmachem***[71], the Hon'ble Supreme Court issued directions to the Government to embody a provision under the IBC for allowing withdrawal of application after the commencement of CIRP in order to prevent such applications from being filed before the Apex Court. The Insolvency Law Committee had also made the recommendation of altering the law to allow for withdrawal.[72] Section 12A was thus inserted in 2018 by means of an amendment and thereupon, has been a choice for an expedient solution for the parties.
59. It is submitted that the withdrawal by the petitioner under Section 12A had been effected based on a Settlement Agreement containing a consent term. It is thus patently clear that the Petitioner had placed the Settlement Agreement on record before the Adjudicating Authority, on the basis of which the withdrawal took place.

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

[72] Amir Bavani et al., *Withdrawal under Section 12-A IBC: Remedial Mechanism in the Interest of Stakeholders*, SCC ONLINE BLOG (Aug. 11, 2023, 7:38PM), https://www.scconline.com/blog/post/2022/09/15/withdrawal-under-section-12-a-ibc-remedial-mechanism-in-the-interest-of-stakeholders/.

[B] The Settlement Brought on Record

60. The Consent term was agreed on by the Petitioner and the Respondent and the same was placed on record before the Adjudicating Authority which was then allowed by the adjudicating authority vide order dated 09.02.2022.[73]
61. When the consent term is brought on record before the adjudicating authority while requesting for withdrawal under Section 12A, it is understood that it is to serve a purpose. The reason for having brought it on record before the Adjudicating Authority was primarily owing to the fact that it would warrant the creditor with an implied right to revive the proceeding if there occurs any violation of consent term by the debtor.
62. This distinction was brought out in the ***SRLK case***[74] where the NCLAT had concurred with the NCLT's order which had rejected the application to revive the proceeding on the ground that the Settlement Agreement was not brought on record and the same was not a part of the order of withdrawal.
63. In this regard, it is contended that in the present case at hand, the settlement was brought on record before the Adjudicating Authority and it formed the basis for the withdrawal application filed by the petitioner. Resultantly, when a default is committed, the Petitioner has a vested right to revive the proceedings.
64. Thus, as the Respondent herein had failed to discharge its duty by not paying the fourth tranche as per the consent term, the petitioner is at liberty to file an application and revive the proceeding instead of filing a fresh application under Section 7 of the IBC.

[C] Reopening Insolvency Application Post-Withdrawal

65. In the case of ***Pooja Finlease v. Auto Needs (India) Pvt. Ltd.***[75], the Tribunal dealt with a similar factual matrix wherein, based upon consent terms, the Company Petition was withdrawn and when default was committed, an application was filed for revival of the Company Petition, which was rejected. The NCLAT overturned the decision and held that when an application for withdrawal is approved based upon the consent terms by taking the settlement agreement onto record, it should be considered

[73] ¶29, Moot Proposition.

[74] SRLK Enterprises LLP v. JALAN Transolutions (India) Ltd., (2021) ibclaw.in 189 NCLAT.

[75] Pooja Finlease v. Auto Needs (India) Pvt. Ltd., (2022) ibclaw.in 764 NCLAT.

as part of the order. That is, the creditor should be at liberty to revive the proceedings if there arises a default on the part of the debtor. Thus, the revival of the Company Petition was allowed in this particular case after the CIRP application was withdrawn.

66. Owing to the fact that the IBC and any rules framed therein do not contain any particular provision for revival of CIRP proceeding, the inherent jurisdiction of the NCLT can indeed be invoked by filing an application under Section 60(5)(b) of the IBC, read with Rule 11 of NCLT Rules.[76]

67. In the case of ***IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd.***[77] , the NCLAT, Delhi had categorically held that the application can be reopened in the case of default by the corporate debtor. The facts are very similar to that of the instant case and the learned tribunal held that the financial creditor can restore the CIRP when the debtor fails to make payment according to the settlement terms.

68. In the present case, consent terms were brought on record since they were part of the Application under Section 12A of the Code as recorded in the Order of the Adjudicating Authority, and the application of revival upon default of the debtor should be rightfully accepted by this Hon'ble Court.

[D] Rejection Resulting in Violation of Natural Justice

69. When the corporate debtor fails to act according to the settlement agreement, with respect to payment of the tranches due, the financial creditor would have a vested right to seek revival of the CIRP.[78]

70. The learned NCLAT had in the case of ***ICICI Bank Ltd. v. OPTO Circuits (India) Ltd.***[79]**,** held that the NCLT has committed a grave error by failing to allow the revival of the CIRP when the debtor had defaulted on the payment according to the settlement agreement. The NCLAT further went on to hold that it would be in violation of the principles of natural justice if the debtor's default does not give the right to the creditor to revive the application before the adjudicating authority.

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[76] Aman Gupta et al., *Revival of Insolvency Proceedings, Analysis and way forward*, LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS (Aug. 11, 2023, 7:44 PM), https://www.lakshmisri.com/insights/articles/revival-of-insolvency-proceedings-analysis-and-way-forward/.

[77] IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd., [2023] 238 CompCas 596.

[78] ICICI Bank Ltd. v. OPTO Circuits (India) Ltd., 2021 SCCOnline NCLAT, 1932.

[79] *Id.* at 77.

71. Under similar circumstances whereupon the NCLT had rejected the application to restore CIRP, the NCLAT overturned the decision and the creditor was given the liberty to restore the proceedings by an application before the NCLT where the debtor does not abide by the terms of the settlement agreement.[80]

[80] Vivek Bansal v. Burda Druck India (P.) Ltd., MANU/NL/0334/2020.

THE PRAYER ADVANCED

Wherefore in the light of the facts stated, issues raised, arguments advanced and authorities cited, it is most humbly prayed before this Hon'ble Court that it may be pleased:

1. To permit applications for compromise and arrangement made in terms of Sections 230 to 232 of the Companies Act during liquidation proceedings under Insolvency and Bankruptcy Code, 2016.
2. To permit promoters to file applications for compromise and arrangement even if they have been declared ineligible under Section 29A of the IBC by directing an Amendment to relax the provision and include an exception clause within its scope
3. To declare that security interest created on the assets of the Corporate Debtor have not been extinguished and extends at least to the extent of the value of the security interest created upon the assets of the Corporate Debtor
4. To restore insolvency proceedings in case of default by debtor upon the consent term entered into between the parties, and

To pass any such reliefs, orders or directions as this Hon'ble Court may deem fit in the interest of justice, equity and good conscience and for this act of kindness, the Appellant shall be duty bound and forever pray.

Sd/-

All of which is humbly prayed,

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Counsels for the Appellants