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

BEFORE THE SUPREME COURT OF MALTA

In the matter of

MR. PIPARA *Versus* **DEORA NRE COKE LTD.**

WITH

MR. SHROFF *Versus* **FU SAM POWER SYSTEM LTD.**

WITH

AXIS TELECOM PVT. LTD. *Versus* **DANOBE INFOTECH LTD.**

WITH

TIPSRA MSCL (INDIA) LTD.

VRS MALTA FINANCIAL SERVICES LTD. *Versus* **VNTEK AUTO LTD.**

M&N FINANCE LTD.

Civil Suit No: -__/__/2023

(Under Section 62 of Insolvency and Bankruptcy Code, 2016 and Article 136 of the Constitution of Malta, 1949)

WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT/PETITIONER

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LIST OF ABBREVIATIONS

S. NO.	ABBREVIATIONS	EXPANSIONS
1	§	Section
2	¶	Paragraph
3	Adjudicating Authority	AA
4	Anr.	Another
5	Art.	Article
6	AT	Appellate Tribunal
7	CC	Corporate Creditor
8	CD	Corporate Debtor
9	CIRP	Corporate and solvent resolution process
10	COC	Committee of Creditor
11	Comm'n	Commission
12	Com	Company
13	DNCL	Deora NRE Coke Ltd
14	FC	Financial Creditor
15	Fu-Sam	Fu-Sam Power Systems Limited
16	Hon'ble	Honourable
17	i.e	That is
18	I&B Code	Insolvency and Bankruptcy Code
19	IBBM	Insolvency and Bankruptcy Board of Malta

20	IBC	Insolvency and Bankruptcy Code, 2016
21	ILC	Insolvency Law Committee
22	Kapro’	Kapro Engineering Limited,
23	LP	Liquidation Proceedings
24	Ltd.	Limited
25	M.L.D. Investments Private Limited	M.L.D
26	NCLAT	National Company Appellant Tribunal
27	NCLT	National Company Law Tribunal
28	No.	Number
29	Ors.	Others
30	Para	Paragraph
31	Pvt.	Private
32	RP	Resolution Professional
33	SARFAESI Act	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act
34	SC	Supreme Court
35	SCC	Supreme Court Cases
36	SCR	Supreme court report
37	U.K	United Kingdom
38	Vntek	Vntek Auto Limited
39	v.	Versus
40	WP	Writ petition

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STATEMENT OF JURISDICTION

The jurisdiction of this Hon'ble Court has been invoked under **Section 62 of the Insolvency and Bankruptcy Code, 2016 and Article 136 of the Malta Constitution.**

Section 62: Appeal to Supreme Court. –

*"**62.** (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"

Article 136: Special leave to appeal by the Supreme Court. –

*"**136(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."*

STATEMENT OF FACTS

NO.	FACTS OF THE SCENARIOS
Scenario I	Mr. Pipara, a promoter of DNCL, submitted a resolution plan for DNCL on , which was presented by the Resolution Professional before the Committee of Creditors. Due to the insertion of Section 29A, Mr. Pipara became ineligible to submit a resolution plan. In the absence of a resolution plan, the NCLT passed an order of Liquidation after the expiry of 270 days. Mr. Pipara moved an application under Sections 230 to 232 of the Companies Act of 2013 before the NCLT proposing a scheme for compromise and arrangement The Application was allowed by the NCLT. Singhania Group filed an appeal against the order of the NCLT before the NCLAT. On 24th September 2022. the NCLAT allowed the appeal of by Singhania Group and give the judgment on 24th September 2022 in case of *(Mr. Pipara v. Singhania Group of Companies) 2013*.The decision of the NCLAT dated 24th September 2022 is challenged in the appeal before this Court.
Scenario II	Mr Shoff Promotor of Fu-Sam. An application under Section 7 of the IBC was filed which was admitted by the NCLT. After which, the (CIRF) was initiated. Mr. Shroff submitted a Resolution plan. Mr. Shroff became ineligible Under Section 29A(h) of the IBC. NCLT passed an order, directing the liquidation. The Liquidator was also directed to accept applications under Sections 230 to 232 of the Act of 2013. Mr. Shroff was informed that he was ineligible to propose a scheme under Section 230 of the Companies Act, 2013 in view of his ineligibility under IBC.
Scenario III	Axis Company Pvt. Ltd. (Financial Creditor) and Danobe Info Technology Limited (Corporate Debtor) executed a Consent Term and the Company Petition against the CD was withdrawn. However, the CD failed to hold his end of the Consent Term and the FC is now looking for the revival of their Company Petition.
Scenario IV	Vntek Auto Limited (Corporate Debtor) is a Corporate Guarantor to VRS Malta Financial Services Limited, M&N Finance Limited and Tipsra MSCL (India) Limited (Appellants) for a loan granted and secured by the appellants in the name of Kapro Engineering Limited and M.L.D Investments Private Limited (Group Companies of CD). The CRIP proceedings have been started against the CD. The Appellants are now seeking the assets of CD holding their Security Interest.

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 THE 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

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.?

It is submitted before the hon'ble court that this court. It is humbly submitted to this Hon'ble Court that liquidation proceeding under Insolvency and Bankruptcy herein referred as (I&B), Code ,2016, the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act. Under the contention that Section 230 of the Companies Act, 2013 uphold the validity of (I&B), Code, 2016 during Liquidation Proceeding. Insolvency and Bankruptcy Board of Malta (IBBM) upholding the validity of Liquidity Proceeding in Section 230. Liquidation of the going concern must be last resort.

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'.?

It is humbly submitted to this Hon'ble Court that the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible Under Section 29A of the I&B, Code, 2016 to submit a 'Resolution Plan'. Under the Contention that Section 29A Insolvency and Bankruptcy Code, 2016 and Section 230 of the Companies Act, 2013 are the two separate provisions. There is distinction between the resolution mechanism and settlement mechanism in the I&B, Code, 2016. Regulation 2B of IBBI is Ultra Vires to the Provision of Section 230.

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. ?

The Appellants in the present issue (the Financial Creditors of the Corporate debtor, Tipsra MSCL (India) Limited, VRS Malta Financial Services Limited, M&N Finance Limited) humbly submit before

this Hon'ble Supreme Court that the Security Interest created on the assets of the Corporate Debtor (in the present issue, Vntek Auto Limited) can be realised even if that interest has been created for the loan availed by the third party (in the present case, group companies of the Corporate Debtor, M.L.D. Investments Private Limited and Kapro Engineering Limited. The same shall be presented in a fourfold fashion in the following manner: 1) There exists a creditor-debtor relationship between the appellants and the Corporate Debtor. 2) The Appellants are secured financial creditor of the Corporate Debtor. 3) The present claim is a continuing cause of action. 4) Even as a secured creditor, the appellants are entitled to realise their security interest.

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

The Petitioner (Axis Telecom Pvt. Ltd.), in the present issue, is the financial creditor of the Respondent (Danobe Info Technology Limited), alleging a default of Rs. 7,71,32,111/-. The Petitioner humbly submits that an Insolvency proceeding under the Insolvency and Bankruptcy Code, 2016 (referred to as 'IBC'), can be restored in case of default even when a Consent term is entered between parties. The petitioner here will present a four-fold submission before this Hon'ble Supreme Court of Malta: 1) Execution of a consent term does not bar a Financial Creditor from reviving Insolvency Proceedings, particularly when placed on record, 2) The default of the responding party is well-established before the Adjudicating Authority, 3) The liberty of the Adjudicating Authority is not necessary for revival of CIRP proceedings, 4) The nature of the debt does not change post the settlement of the debt.

ARGUMENTS ADVANCED

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.

1. It is humbly submitted to this Hon'ble Court that liquidation proceeding under Insolvency and Bankruptcy herein referred as IBC, the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act.
2. The Counsel of the Applicant is going to present this issue on following grounds: - 1) Section 230 of the Companies Act, 2013 uphold the validity of IBC during Liquidation Proceeding. 2) Insolvency and Bankruptcy Board of India (IBBI) upholding the validity of Liquidity Proceeding in Section 230. 3) Liquidation of the going concern must be last resort.

I.I Section 230 of the Companies Act, 2013 uphold the validity of IBC during Liquidation Proceeding.

3. The Counsel of the Applicant humbly submits that the bare reading of Section 230 (1) of the Companies Act 2013 also includes the essence of IBC, during Compromise and Arrangement. The Section 230 (1) States that: -

   "Where a compromise or arrangement is proposed—

   (a) between a company and its creditors or any class of them; or

   (b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, ***[appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be,]*** *order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs."*[1]

4. That the wording "***under the Insolvency and Bankruptcy Code, 2016, as the case may be," of the Section 230*** interpret that during the Liquidation Proceeding in IBC the, Scheme of Compromise and Arrangement under Section 230 to 232 of Companies Act, 2013.
5. The Counsel of the Applicant humbly submits that in the present case Mr. Pipara, a promoter of Deora NRE Coke Ltd herein referred as ('DNCL'), moved an application under Sections 230 to 232 of the Companies Act of 2013 before the Hon'ble NCLT proposing a scheme for compromise and arrangement between the erstwhile promoters and creditors. The Hon'ble NCLT in the Present case (*Mr. Pipara* v. *Singhania Group of Companies*), take the cognizance of the matter and the Application was allowed, and a direction was issued for convening a meeting among shareholders, secured creditors, unsecured creditors and FCCB holders for approval of the scheme of compromise and arrangement.[2]
6. It is humbly submitted that Liquidation represents a practical scenario wherein the stipulations outlined in Section 230 can be called upon. In case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr***[3]**.** The applicability of Section 230(1) is also discernible in instances where a company undergoes winding-up procedures, as indicated by the statutory provision itself. This provision envisions the submission of an application to the National Company Law Tribunal (NCLT), functioning as the Tribunal, by the appointed liquidator.
7. According to Section 230(1), it foresees the possibility of an application being submitted by a liquidator designated under either the 2013 Act or the IBC, in the event of a company undergoing the winding-up process. Notably, the enactment of Section 230 (excluding Sub-sections (11) and (12)) took effect on 7 December 2016. In situations where an arrangement has been established exclusively with a specific group of creditors, it will be legally binding for that particular group in accordance with the stipulations outlined in Section 230(6) states that: -

[1]Companies Act, 2013, § 230(1), No. 18, Acts of Parliament, 2013 (India).
[2] Moot Problem, para 12.
[3] *Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.***,** Civil Appeal No. 9664 of 2019*, Arun Kumar Jagatramka v. Union of India***,** Writ Petition (Civil) 269 of 2020 and *Kunwer Sachdev v. Su Kam Power Systems Limited,* Civil Appeal No. 2719 of 2020.

"(6) Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company."[4]

8. Within Sub-section (6) of Section 230, it is stipulated that the compromise or settlement should be endorsed by a 'majority of individuals representing three-fourths in terms of value' of the creditors, members, or a specific category among them. Once the NCLT grants approval to the said conciliation or arrangement, it becomes legally binding upon the company, the entirety of its creditors or members, or a designated category among them, as the case may be. This extends to instances where a company is undergoing the winding-up process, where the designated liquidator under the 2013 Act or the IBC, as well as the contributories, are similarly encompassed.[5]

I.I.1 Interpretation of Section 391 of the Company Act, 1956 in the Present Case.

9. The counsel humbly submits that Section 230 and its corresponding sections – Section 391 of the Companies Act, 1956[6] and section 153 of the Indian Companies Act, 1913 [7]– borrowed from laws of England (including the UK Act), which talks about Debt Restructuring. In case of ***Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors***.[8] the court by interpreting the Section 391 of the Company Act 1956, (which is Section 230 in the present Company Act 2013) held that:- "*The argument that Sections 391 would not apply to a company which has already been ordered to be wound up, cannot be accepted in view of the language of Section 391(1) of the Act, which speaks of a company which is being wound up. Section 391(1)(b) gives a right to the liquidator in the case of a company which is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a*

[4] Companies Act, 2013, § 230(6), No. 18, Acts of Parliament, 2013 (India).
[5] *Supra* note 3.
[6] Companies Act, 1956, § 391, No. 1, Acts of Parliament, 1956 (India).
[7] Indian Companies Act, 1913, § 153, No. 7, Acts of Parliament, 1913 (India).
[8] *Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors*, (2007) 7 SCC 753.

liquidator had been appointed. Equally, it does not appear to be necessary to go elaborately into the question whether in the case of a company in liquidation, only the Official Liquidator could propose a compromise or arrangement with the creditors and members as contemplated by Section 391 of the Act or any of the contributories or creditors also can come forward with such an application."[9]

10. In aforementioned case Hon'ble Court, made the contention that reviving of the company must be the first step which has to be taken rather than Corporate Death of the Company through Liquidation, which public interest and conforms to commercial morality.
11. It is humbly submitted that to a lay person, a *"company liable to be wound up"* meant a company that was either on the brink of bankruptcy or was already into liquidation (since section 391 the Companies Act, 1956 explicitly permitted a scheme to be presented by the liquidator, if the company was in winding up). It was only due to judicial interpretation of the expression "company liable to be wound up" that the expression includes every company which may be wound up under the Act following the procedure laid for winding up; healthy companies could also be covered under the chapter pertaining to schemes of compromise or arrangement.[10] The ruling of the Bombay High Court in ***Khandelwal Udyog and Acme Manufacturing Co Ltd.***,[11] marked a departure from the principle earlier held by the same court in ***Seksaria Cotton Mills Ltd. v. A.E. Naik***,[12] that the provision was meant only for a company on the brink of bankruptcy.

I.II Insolvency and Bankruptcy Board of India (IBBI) upholding the validity of Liquidity Proceeding in Section 230.

12. The Counsel Humbly submits that The Insolvency and Bankruptcy Board of India (**IBBI**) has also taken cognizance regarding the compromise or arrangement Scheme during Liquidation Proceeding and also published a discussion paper on the liquidation process for companies. [13] Wherein it has proposed amendments to the Insolvency and Bankruptcy Board of India

[9] *Supra* note 8.
[10] Vinod Kothari, *Scheme of Arrangement in Liquidation.* (2019). https://vinodkothari.com/wp-content/uploads/2019/06/Scheme-of-Arrabgement-in-Liquidation.pdf

[11] *Khandelwal Udyog and Acme Manufacturing Co Ltd* (1977) 47 Com Cases 503.
[12] *Seksaria Cotton Mills Ltd. v. A.E. Naik*, (1967) 37 Com Cases 656.
[13] Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Liquidation Process*, 2019, https://www.ibbi.gov.in/uploads/whatsnew/2309f5c72bbf7e41148d97670767d8f7.pdf.

(Liquidation Process) Regulations, 2016 (**Liquidation Regulations),** which require that the Liquidation process be suspended for a period of ten days from the liquidation commencement date, during which time schemes for compromise or arrangement may be proposed by the liquidator, a creditor (or class of creditors), or a member (or class of members).[14]

I.III Liquidation of the Going Concern must be Last Resort.

13. The Counsel humbly submit that the Applicant by moving an application under Section 230 to 232 of the Companies Act of 2013 has the motive to save the DNCL, from Liquidation through the process of Compromise and Arrangement between the promotor and creditor. The Hon'ble Supreme Court in case of ***Kridhan Infrastructure Pvt. Ltd. (now known as Krish Steel and Trading Pvt. Ltd.) v Venkatesan Sankaranayan*****,** wherein at para 3(9)*[15]* it is observed that — "*Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding."*
14. The intension of legislature for enacting IBC, 2016 is to prioritizes the revival of the debtor company over liquidation. This is because the revival of a going concern debtor is more beneficial to all stakeholders, including creditors, debtors, and employees. In case of ***Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors*****,** [16]The Hon'ble Supreme Court held that "*the primary focus of the IBC 2016 is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors."*
15. It is humbly submitted to this Hon'ble Court that the primary aim of IBC, 2016 is to revive the going concern before undertaking the sale of its assets.[17] Section 230 to Section 232 of the

[14] L. Vishvanathan , Bharat Vasani and Gaurav Gupte, *Is Liquidation Irreversible? Schemes Of Compromise or Arrangement for Companies in Liquidation - Shareholders – India,* MONDAQ, (Aug. 9, 2023, 5:00 AM).https://www.mondaq.com/india/shareholders/819864/is-liquidation-irreversible-schemes-of-compromise-or-arrangement-for-companies-in-liquidation.

[15] *Kridhan Infrastructure Pvt. Ltd. (now known as Krish Steel and Trading Pvt. Ltd.) v. Venkatesan Sankaranayan* Civil Appeal No. 3299 of 2020.

[16] *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.,* Writ Petition (Civil) No. 99 of 2018.

[17] *Ajay Agarwal & Anr. v. Ashok Magnetic & Ors., Company Appeal* (AT) (Insolvency) No. 793 of 2018*), Rajesh Balasubramanian vs. M/s Everon Castings Pvt. Ltd. & Anr., Company Appeal* (AT) (Insolvency) No. 182 of 2019.), *Y.*

Companies Act, are one of the provisions by which corporate death of the going concern can be safed. The NCLAT in the case of ***S.C. Sekaran v. Amit Gupta & Ors.***[18] –held that During proceeding under Section 230, if any, objection is raised, it is open to the Adjudicating Authority (National Company Law Tribunal) which has power to pass order under Section 230 to overrule the objections, if the arrangement and scheme is beneficial for revival of the 'Corporate Debtor' (Company). While passing such order, the Adjudicating Authority is to play dual role, one as the Adjudicating Authority in the matter of liquidation and other as a Tribunal for passing order under Section 230 of the Companies Act, 2013. As the liquidation so taken up under the 'IBC', the arrangement of scheme should be in consonance with the statement and object of the 'IBC'. Before approval of an arrangement or Scheme, the Adjudicating Authority (National Company Law Tribunal) should follow the same principle and should allow the 'Liquidator' to constitute a 'Committee of Creditors' for its opinion to find out whether the arrangement of Scheme is viable, feasible and having appropriate financial matrix. It will be open for the Adjudicating Authority as a Tribunal to approve the arrangement or Scheme in spite of some irrelevant objections as may be raised by one or other creditor or member keeping in mind the object of the Insolvency and Bankruptcy Code, 2016.

16. The Counsel humbly submit that the compromise and arrangement under section 230 is the primary steps, in the liquidation proceeding which must be taken to protect the going concern from the death of liquidation. The Hon'ble NCLAT Delhi[19] held in the similar factual basis of the present case held that the: -

the liquidation process, step required to be taken for its revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from a death by liquidation. Thus, the steps which are required to be taken are as follows:

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

Shivram Prasad vs. S. Dhanapal, Company Appeal (AT) (Insolvency) No. 224 of 2018), and *Daiyan Ahmed Azmi vs. Rekha Kantilal Shah, Liquidator & Ors., Company Appeal* (AT) (Insolvency) No. 271 of 2019).

[18] *S.C. Sekaran v. Amit Gupta & Ors.,* Company Appeal (AT) (Insolvency) Nos.495 & 496 of 2019.

[19] *Renaissance Steel India Pvt. Ltd. v. Electrosteels Steels Ltd.*, Company Appeal (AT) No. 221 of 2018:

17. The Hon'ble NCLAT Delhi [20] on relaying on aforesaid decision in ***Y Shivram Prasad*** *v.* ***S Dhanapal*** [21]of this Appellate Tribunal also held that liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement under Sections 230 to 232 of the Companies Act is maintainable.

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'.

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18. It is humbly submitted to this Hon'ble Court 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. The Counsel of the Applicant is going to present the issue on the following that; - 1) Section 29A Insolvency and Bankruptcy Code, 2016 and Section 230 of the Companies Act, 2013 are the two separate provisions. 2) There is distinction. Between the resolution mechanism and settlement mechanism in the IBC. 3) Regulation 2B of IBBI is Ultra Vires to the Provision of Section 230.

II.I Section 29A Insolvency and Bankruptcy Code, 2016 and Section 230 of the Companies Act, 2013 are the two separate provisions.

20. It is humbly submitted to this hon'ble that the Section 29A Insolvency and Bankruptcy Code, 2016 and Section 230 of the Companies Act, 2013 are the two separate provisions. In the present case The Appellant- Mr. Shroff, the promotor of Fu-Sam Power Systems Limited (Fu-Sam) Mr. Shroff submitted a plan along with Allianz FRC Private Limited on 15th October 2021.However, Mr. Shroff was informed by an email dated 27th November 2021 issued by the RP, that the CoC had found him to be ineligible Under Section 29A(h) of the IBC and consequently annulled his resolution plan. In the interim, due to the absence of any other resolution plan, the NCLT passed an order dated 3rd March 2022, under Section 34(1) of the

[20] *Supra* note 19.
[21] *Y Shivram Prasad v. S Dhanapal,* 2019 SCC OnLine NCLAT 172.

IBC, directing the liquidation of Fu- Sam and appointing a Liquidator. The appointment of the Liquidator was challenged before the NCLAT in an appeal, which was disposed of by an order dated 29th March 2022 upholding the appointment of the Liquidator. The Liquidator was also directed to accept applications for schemes of compromise and arrangement under Sections 230 to 232 of the Act of 2013. [22]

21. Its is humbly submitted to hon'ble court that there is no reference in the body of the IBC to a scheme of compromise or arrangement under Section 230 of the Act of 2013.

Section 29A: Persons not eligible to be resolution applicant.

***"29A**. A person shall not be eligible[1A] to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—*

(a) is an undischarged insolvent.

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949.

(c) [2][at the time of submission of the resolution plan has an account,] or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 [3][or the guidelines of a financial sector regulator issued under any other law for the time being in force,] and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor"[23]

22. The wording of Section 29 A does not anywhere about the mention about Section 230 of the Companies Act, 2013. Hence it is imperative to note that in is ineligible Under Section 29A of the IBC to submit a 'Resolution Plan' cannot be applied to promotor **to file application for Compromise and Arrangement, Under Section 230 to 232 of the Companies Act, 2013.**
23. The Counsel humbly submits that the it is a widely accepted principle of law that *lex specialis* should prevail over *lex generali*. As far as Section 230 of the Companies Act is concerned, which provides that company in case of liquidation, a liquidator can only apply for the scheme but NCLAT in its previous order ***Rasiklal s Mardia v. Amar Dye Chemical Ltd.***[24] has held that liquidator has a general power to propose scheme of compromise but that

[22] Moot proposition, para 18.
[23] Insolvency and Bankruptcy Code, 2016, § 28A, No. 31, Acts of Parliament, 2016 (India).
[24] *Rasiklal s Mardia v. Amar Dye Chemical Ltd*., Company Appeal (AT) No.337 of 2018.

will not forbid the promoter, creditor and the company who had special power to move an application under section 230 of Companies act.

24. The Counsel also submits that the schemes under Section 230 of the Companies Act, 2013 cannot be said to be "surrogate" route for the defaulting promoters to acquire the Corporate Debtor after a failed resolution.[25] Hence in the present case the applicant is not taking any surrogate action to make any back door entry into the management of the (Fu-sam) rather filling an application is for the revival of the going concern.
25. It is humbly submitted to the court that the application under Section 230 of the Companies Act, 2013 of the applicants must be accepted due to the rational that, if Creditor and Shareholder has posed trust in the scheme and any misuse of the law is not apparent to the NCLT then there is no need to disqualify the whole class of promoters from presenting a scheme under Section 230 of Companies. [26]
26. It is humbly submitted that the Schemes under Section 230 of the Companies Act, 2013 are an agreement between company's promoters and its creditors and if they decide to revive the company it should be allowed as it serves the object of the IBC which is not the liquidation of the company but the revival of the companies which encourage entrepreneurship leading to higher economic growth.[27]

II.II There is distinction Between the Resolution Mechanism and Settlement Mechanism in the IBC.

27. The Counsel acknowledges that there is differentiation. In the IBC, there is a distinction between the resolution process and the settlement mechanism. According to the IBC and its regulations, there is a clear distinction between:

- The **Settlement Mechanism**, which allows for a settlement in which the corporate debtor is restored to the promoter along with all of its assets and liabilities; and
- The **Resolution Mechanism**, which allows for the company to be transferred to the control of the acquirer on a clean slate for a fixed consideration upon acceptance of a resolution plan.

[25] Shikha Bnasal, *Schemes under Section 230 with a pinch of section 29A – Is it the final recipe?,* VINODKOTHARI, (Aug. 8, 2023, 6:48PM), https://vinodkothari.com/?p=25511.
[26] Krrishan Singhania and Vaibhav Pasi, *India: Maintainability Of Application For Compromise And Arrangement During Liquidation Proceeding,* MONDAQ, (Aug. 10, 2023, 2:19 PM), https://www.mondaq.com/india/corporate-and-company-law/869090/maintainability-of-application-for-ompromise-and-arrangement-during-liquidation-proceeding.
[27] *Supra* note 5.

28. The Counsel respectfully submits that Section 29A of the IBC[28] is a component of the resolution mechanism, the intent and purpose of which is to prevent the promoter from taking benefit of their own mistake. Despite the fact that the appellant fits within the forbidden category under Section 29A, the prohibition is intended to prevent the promoter from submitting a resolution plan in accordance with the provisions of Sections 30 and 31 of the IBC[29]. The Chapter III of the IBC, commencing with Section 33, deals with the liquidation process and Regulation 32 of the Liquidation Process Regulations deals with "sale of assets etc. by the liquidator".[30] In the course of the liquidation under Chapter III, the liquidation estate is to be formed under Section 36 and the sale under Regulation 32 is an intrinsic part of the liquidation estate. The consequence is that acquirer begins on a clean slate. The ineligibility under Section 29A which attaches for the purpose of Chapter II, in the context of a resolution plan, can't be extended to the Section 35(1)(f) to Chapter III[31] on the basis of the above rationale to maintain resolution mechanisms.

II.II.I The Section 12 A of IBC and Section 230 of Companies Act, 2013 are the part of Resolution Mechanism.

29. It is humbly submitted that a withdrawal of the application under Section 12A[32] under Sections 7, 9, or 10[33] results in the corporate debtor being returned to the promoter. As a result, Section 29A does not render the settlement mechanism. On the withdrawal of ineligible. When the application is withdrawn, the corporate debtor returns to the same promoter, even if they are disqualified under Section 29A to submit the resolution plan. Section 230(1) refers to a liquidator appointed under the IBC because, if the provisions of Sections 7, 9, or 10 are invoked and an order of admission is issued, liquidation will occur under the terms of Section 35 of the IBC.
30. The Counsel contends that Section 230 of the Act of 2013 is part of the settlement mechanism and is equivalent to Section 12-A's provisions. A compromise or arrangement also has the effect of returning the company to the promoters with all of its liabilities. While Section 12-A

[28] Insolvency and Bankruptcy Code, 2016, § 29A, No. 31, Acts of Parliament, 2016 (India).
[29] Insolvency and Bankruptcy Code, 2016, § 30, 31, No. 31, Acts of Parliament, 2016 (India).
[30] Insolvency and Bankruptcy Board of India, *Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020,* (2020), https://ibbi.gov.in/uploads/legalframwork/672273de085acc7678468590d0f981e6.pdf
[31] Insolvency and Bankruptcy Code, 2016, § 35 (1)(f), No. 31, Acts of Parliament, 2016 (India).
[32] Insolvency and Bankruptcy Code, 2016, § 12A, No. 31, Acts of Parliament, 2016 (India).
[33] Insolvency and Bankruptcy Code, 2016, § 7,9,10, No. 31, Acts of Parliament, 2016 (India).

of the IBC allows for the withdrawal of an application, Sections 230 and 230-A of the Act of 2013 allow for a compromise or arrangement. As such, they are both a part of the settlement mechanism and a part of the resolution process, to which only Section 29A applies. As a result, this ineligibility can no longer be engrafted into Section 230.

31. The ineligibility under Section 29A, which forms a part of Chapter II of the IBC, is only during the resolution process; The rationale for imposing an ineligibility under Section 29A in the resolution process is that the successful resolution applicant under Section 31 of the IBC obtains the company on a clean slate, as indicated in the decision of this Court in ***Committee of Creditors of Essar Steel India Limited*** *v.* ***Satish Kumar Gupta.***[34] This benefit is not available where an application is *simpliciter* withdrawn under Section 12-A.
32. The Counsel humbly submits that on November 15, 2016, Section 230 was changed, and under Sub-Section (6), the compromise or solution becomes binding if 3/4th of the creditors or class of creditors or members agree to it and it is sanctioned by the NCLT. The compromise or agreement is thereafter binding on the liquidator appointed under the IBC in its entirety. Section 230's provisions, however, are not limited to liquidation. They are not governed by the IBC. Section 230 functions independently of the IBC. Following the change to Section 230(1) on November 15, 2016, the liquidator appointed under the I&B, Code can also make an application for a compromise.

II.III Regulation 2B of IBBI is Ultra Vires to the Provision of Section 230 to Section 232 of the Companies Act 2013.

33. It is humbly submitted to this Hon'ble court that the Regulation 2B of IBBI is Ultra Vires to the provision of Section 230 to Section 232 of the Companies Act 2013. The proviso to Regulation 2B was notified by the IBBI Insolvency and Bankruptcy Board of India).[35] on 6 January 2020 to stipulate that a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor shall not be a party to such compromise or arrangement. Regulation 2B is *ultra vires* the provisions of Section 230 of the Act of 2013. IBBI had no statutory authority to make the Regulation 2B, through which it has effectively provided a disqualification under the Act of 2013, even though the mandate of IBBI is confined only to the IBC; and.

[34] *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta,* (2020) 8 SCC 531.
[35] *Supra* note 30.

34. It is humbly submitted that Regulation 2B is violative of Articles 14, 19 and 21 of the Constitution as it seeks to import an ineligibility under the provisions of the IBC to a dissimilar provision in the Act of 2013. Moreover, when ineligibility is not attracted under Section 12-A of the IBC, imposing this ineligibility under Section 230 of the Act of 2013 is arbitrary.
35. Under Sub-Section (1) of Section 240[36], the power to frame regulations is conditioned by two requirements: first, the regulations have to be consistent with the provisions of the IBC and the rules framed by the Central Government; and second, the regulations must be to carry out the provisions of the IBC. Regulation 2B meets both the requirements, of being consistent with the provisions of IBC and of being made in order to carry out the provisions of the IBC, for the reasons discussed earlier in this judgment.
36. The Counsel humbly submits that the primary ground of challenge to Regulation 2B is that the regulation violated IBBI authority by introducing a disqualification or ineligibility for the submission of an application for a scheme of compromise or arrangement under Section 230 of the Act of 2013. It has been argued that IBBI, as a body created by the IBC, lacked statutory authority to change the requirements of Section 230 of the Act of 2013 or impose a restriction that falls within the scope of Section 230.
37. A judicial decision cannot be used to establish the legislature. In this matter, the applicant claims that Section 29A does not specifically state that it applies to Section 230 of the Act of 2013. According to him, Section 230 is a 'separate section in a different enactment' to which the ineligibility under Section 29A of the IBC cannot be applies.
38. The Counsel humbly submits to this Hon'ble Court that with reference to the above contentions of the Applicant 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'.

[36]Insolvency and Bankruptcy Code, 2016, § 240, No. 31, Acts of Parliament, 2016 (India).

ISSUE III: Whether security interest created on the assets of the 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.

39. The Appellants in the present issue (the Financial Creditors of the Corporate debtor, Tipsra MSCL (India) Limited, VRS Malta Financial Services Limited, M&N Finance Limited, hereafter referred to as 'The Appellants") humbly submits before this Hon'ble Supreme Court that the Security Interest created on the assets of the Corporate Debtor (in the present issue, Vntek Auto Limited, hereafter referred to as 'Vntek') can be realised even if that interest has been created for the loan availed by the third party (in the present case, group companies of the Corporate Debtor, M.L.D. Investments Private Limited and Kapro Engineering Limited, hereafter referred to as 'M.L.D.' and 'Kapro' respectively).

40. The Appellants in the present issue shall present their contentions in a fourfold fashion in the following manner: 1) There exists a creditor-debtor relationship between the appellants and the Corporate Debtor. 2) The Appellants are secured financial creditor of the Corporate Debtor. 3) The present claim is a continuing cause of action. 4) Even as a secured creditor, the appellants are entitled to realise their security interest.

III.I There exist a creditor-debtor relationship between the appellants and the Corporate Debtor.

41. The Counsel for the Appellants humbly submits that the debt arising out of the pledge of shares owed to the Appellants by the Corporate Debtor amounts to financial debt by virtue of the definition of "Security Interest" envisaged under Section 3(31) of the IBC.
42. That the Section 3(31) of the IBC, 2016, states that:

'(31) "security interest" 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: Provided that security interest shall not include a performance guarantee;'[37]

43. It is submitted that the liability of the Corporate Debtor, who is the surety, was co-extensive to that of the Borrower under Section 128 of the Indian Contract Act, 1872.[38]
44. It is humbly submitted that there is a debt owed to the Appellants in the present case by the corporate debtor. The Appellants stepped in the shoes of Lender by the virtue of the agreement between the parties.

III.II The Appellants is a secured financial creditor.

45. The Appellants submit that the Insolvency Law Committee (hereafter referred to as 'ILC') (*constituted by the Government of India to recommend amendments to the IBC*) in its report dated February 20, 2020, in relation to the status of a creditor in the insolvency process of a Security Provider stated that: (a) A security interest' is provided to secure the due performance or payment of an obligation and is thus inextricably linked to the underlying debt or obligation; (b) debt is an essential element of a security interest and it exists within a security interest; and (c) by creating a security interest in favour of the creditor, the Security Provider undertakes to repay the debt owed by the borrower to the creditor to the extent of the security interest, in the event that the security interest is not As a result, the lender, like the borrower, should be considered a 'financial creditor' of the Security Provider.[39]
46. That in order to understand the status of a beneficiary of third-party security (the Appellants) in the insolvency process of a Security Provider (herein the corporate debtor), it is important to evaluate the following definitions under the IBC:

    Financial creditor '*means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to*;'[40]

    Financial debt '*means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes:*

[37] Insolvency and Bankruptcy Code, 2016, § 3(31), No.31, Acts of Parliament, 2016 (India).
[38] Indian Contract Act, 1872, § 128, No. 09, Acts of Parliament, 1872 (India).
[39] Ministry of Corporate Affairs Government of India, *The Report of Insolvency Law Committee*, (2020), https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf .
[40] Insolvency and Bankruptcy Code, 2016, § 5(7), No.31, Acts of Parliament, 2016 (India).

(a) money borrowed against the payment of interest….

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause."[41]

Secured creditor '*means a creditor in favour of whom security interest is created*.'[42]

Security interest *'means right, title or interest or a claim to the 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. Provided that security interest shall not include a performance guarantee.'*[43] as explained under the IBC. It can also be understood as '*means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, or assignment other than those specified in Section 31 of the Act,'* as per the SARFAESI Act.[44]

47. It is submitted that the Appellants are the financial creditor within the meaning of Section 5(7) of the IBC. The Borrower borrowed a financial facility, and as a result, Corporate Debtor assumed accountability by establishing a security interest in the form of a share pledge in the K.M.P. Auto Limited.
48. That, the main requirement for a creditor to become a financial creditor is there must be a financial debt owed to that person under Part II of the Code. He may be the primary creditor to whom the debt is owed or, according to the definition's expanded meaning, he may be an assignee, but the requirement of a debt being owed still has to exist.
49. The Appellants further argue that a mortgage loan is a "debt" as defined by Section 3(11) of the Code and that a debt might be categorised as being due from "any person" and not just the borrower. It is also contended that a third-party mortgagor who mortgages the property to

[41] Insolvency and Bankruptcy Code, 2016, § 5(8), No.31, Acts of Parliament, 2016 (India).
[42] Insolvency and Bankruptcy Code, 2016, § 2(30), No.31, Acts of Parliament, 2016 (India).
[43] *Supra* note 37.
[44] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 2(1)(zg), No. 54, Acts of Parliament, 2002 (India).

protect the debt of another party assumes the role of a guarantor, making the mortgagee the third-party mortgagor's creditor.

50. It is submitted that when a company becomes insolvent, there is an insufficiency of funds with the corporate debtor to satisfy everyone and the basic principle of insolvency law is that of 'equality in misery' or equal treatment of creditors, i.e., *pari passu* distribution of assets among creditors. [45]
51. The Counsel for the Appellants raises a concern that if the Appellants are not accepted as financial creditors as per the provisions of the IBC, the Appellants would not enforce the assurance while the moratorium was in effect, it would render them helpless. The Appellants would also suffer severe harm if the resolution plan had been approved without providing any compensation to them, as recovering the claim amount from the Corporate Debtor would be impossible.
52. It is submitted that the Corporate Debtor's obligation as a guarantor cannot be discharged by the simple fact that it has not borrowed money from the Appellant. The term "guarantee" should not be used in a restrictive sense but rather widely to cover any security produced by a third party to guarantee the repayment of financial debt, including a pledge of shares.
53. The Appellants further also submit that the judgment of the Hon'ble SC in the case of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and others***[46], which may also be relied upon by the Respondent, had been rendered in a specific fact's scenario.
54. The counsel of the Appellants finally submits that Since the CIRP process was overseen by the Resolution Professional and CoC itself was beyond the timeline of 330 days as specified under the IBC, the issue of delay on the part of the Appellants does not arise and cannot be raised by the Respondents either. Because of this, the CoC and Resolution Professional cannot defend their delay while also attempting to undermine the appellants' rights through delay.

[45] Shruti Sethi, *The Third-Party Security Conundrum Under IBC: Whether 'Financial' or Just 'Secured,* NLSBLR, (Aug. 10, 2023, 6:26 PM), https://www.nlsblr.com/post/the-third-party-security-conundrum-under-ibc-whether-financial-or-just-secured .

[46] *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited and others,* (2020) 8 SCC 401.

III.III The present claim is a continuous cause of action.

55. The Appellants in the present issue humbly submit to this Hon'ble Supreme Court that the application before the Adjudicating Authority claiming their right on the basis of Pledged Shares is a continuing cause of action.
56. It is submitted that under the IBC there is no limitation prescribed for objecting to the categorization of the creditors in a wrongful category. It is submitted that it is a case of continuous cause of action as the resolution professional, CoC, Resolution Applicant and the Adjudicating Authority are all required to consider the correct categorization of the claimants.
57. The Counsel further submits that the Appellants could not have challenged the rejection of the respondent to their initial claim of recovering the debt due to the provisions of the IBC regarding the moratorium as under Section 14.[47]

III.IV As a secured creditor as well, the appellants are entitled to realise their security interest.

58. The Appellants in the present issue, humbly submits that even as a secured creditor, they are entitled to realise their security interest in the assets of the respondent.
59. It is submitted that a security interest as per Section 3(31) is a right, title, interest, or claim of property created in favour of or provided for a secured creditor by a transaction that secures payment for the purpose of an obligation. It includes, among other things, a mortgage. A secured creditor is defined by Section 3(30) as a creditor in whose favour a security interest is created. Any mortgage that is created in a creditor's favour results in the creation of a security interest, making the creditor a secured creditor.
60. It is submitted that as per Section 128 of the IBC even a bankruptcy order *cannot affect the right of any secured creditor to realise or otherwise deal with his security interest in the same manner as he would have been entitled if the bankruptcy order had not been passed.*[48]

[47] Insolvency and Bankruptcy Code, 2016, § 14, No.31, Acts of Parliament, 2016 (India).
[48] Insolvency and Bankruptcy Code, 2016, § 128, No.31, Acts of Parliament, 2016 (India).

61. It is submitted that in the case of ***Vistra ITCL (India) Limited and Others v. Mr. Dinkar Venkatasubramanian and Another*** [49] this Hon'ble Supreme Court observed that the Appellants in that case, not being a financial creditor may be treated as a secured creditor in terms of Section 52[50] read with Section 53[51] of the IBC.
62. That the Hon'ble SC in the above-mentioned case also stated that, *as a secured creditor, Appellant No. 1 will be entitled to retain the Security Interest in the pledged shares and would be entitled to retain the security proceeds on the sale of the said pledged shares under Section 52 of the IBc read with the Rule 21A of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.*
63. That in the above-mentioned case, the Hon'ble SC finally decided that the Secured Creditor will be entitled to all rights and obligations as applicable to a secured creditor in terms of Sections 52 and Section 53 of the IBC and in accordance with the Pledge Agreement. The Court also stated that though the assets of the Corporate Debtor would not be encumbered in any way, except for shares given as security and the Pledge Agreement specifically restricted and limited the liability of the Corporate debtor to the extent of the pledged shares, which is precisely what the Appellants are seeking in this case.[52]

[49] *Vistra ITCL (India) Limited and Others v. Mr. Dinkar Venkatasubramanian and Another*, Civil Appeal No. 3606 of 2020.
[50] Insolvency and Bankruptcy Code, 2016, § 52, No.31, Acts of Parliament, 2016 (India).
[51] Insolvency and Bankruptcy Code, 2016, § 53, No.31, Acts of Parliament, 2016 (India).
[52] *Operational Creditors must be paid equivalent amount as per Section 53 of the IBC in case of liquidation of Corporate Debtor: SC*, SCCONLINE, (Aug. 6, 2023, 5:43 PM) https://www.scconline.com/blog/post/2023/05/13/operational-creditor-be-paid-equivalent-amount-under-sec-53-ibc-in-liquidation-of-corporate-debtor-legal-news/.

ISSUE IV: Whether Insolvency proceeding can be restored in case of default when Consent term is entered between parties.

64. The Petitioner (Axis Telecom Pvt. Ltd.), (hereafter referred to as 'the Petitioner') in the present issue is the financial creditor of the Respondent (Danobe Info Technology Limited) (hereafter referred to as 'the Respondent'), alleging a default of Rs. 7,71,32,111/-.
65. The Petitioner humbly submits that an Insolvency proceeding under the Insolvency and Bankruptcy Code, 2016 (referred to as 'IBC'), can be restored in case of default even when a Consent term is entered between parties. The petitioner here will present a four-fold submission before this Hon'ble Supreme Court of Malta: 1) Execution of a consent term does not bar a Financial Creditor from reviving Insolvency Proceedings, particularly when placed on record, 2) The default of the responding party is well-established before the Adjudicating Authority, 3) The liberty of the Adjudicating Authority is not necessary for revival of CIRP proceedings, 4) The nature of the debt does not change post the settlement of the debt.

IV. I Execution of the Consent Term does not bar a Financial Creditor from reviving Insolvency Proceedings, particularly when placed on record.

66. The Petitioner in the present issue, humbly submits that the Petitioner and the Respondent executed a Consent Term in the Company Petition, which was placed on record before the Adjudicating Authority on 5th August 2021.
67. It is humbly submitted that the Corporate Insolvency Resolution Process (hereafter referred to as CIRP) proceedings cannot be revived after they have been withdrawn under the IBC, and any rules or regulations framed thereunder. Therefore, by filing an application under Section 60(5)(b) of the IBC[53], coupled with Rule 11 of the NCLT Rules[54], it is possible to invoke the inherent jurisdiction of the National Company Law Tribunal (hereinafter referred to as 'NCLT'/ 'Adjudicating Authority').

[53] Insolvency and Bankruptcy Code, 2016, § 60(5)(b), No.31, Acts of Parliament, 2016 (India).
[54] National Company Law Tribunal Rules, 2016, § 11, No.507, Acts of Parliament, 2016 (India).

68. That the Petitioner is the Financial Creditor of the Respondent under the purview of Section 5(7) of the IBC.[55]
69. That in the case of ***ICICI Bank Ltd. v. OPTO Circuits (India) Ltd.***[56] 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.*
70. That in the case of ***Pooja Finlease Ltd. Vs. Auto Needs (India) Pvt. Ltd. & Anr***[57] the Hon'ble NCLAT relying on the judgement of ***Krishna Garg and Anr. vs. Pioneer Fabricators Pvt. Ltd.***[58] observed that as in that case, *the Consent Terms were filed and also were taken on record by the Adjudicating Authority. When the Adjudicating Authority allowed the application filed, the Consent Terms were also taken record and the Financial Creditor was fully entitled to seek revival of the Section 7 petition in the event of default of consent terms.*

IV. II The default of the responding party is well-established before the Adjudicating Authority.

71. The Petitioner submits that the default of the Responding Party is well-established before the Adjudicating Authority in the present issue, which is a major reason why the current Company Petition must be revived and restored.
72. It is humbly submitted that Section 7[59] of the IBC lays down the root for an application by a financial creditor for the commencement of the CIRP in respect of a Corporate Debtor (CD). As per Section 7(5), when an Adjudicating Authority is satisfied that the CD has committed default and other requirements for the procedure are fulfilled, it is required to admit the application and initiate the CIRP.
73. That in the case of ***M. Suresh Kumar Reddy v. Canara Bank & Ors***[60] this Hon'ble SC held that once the NCLT is satisfied with the occurrence of a default in payment by the CD, the

[55] *Supra* note 40.
[56] *ICICI Bank Ltd. v. OPTO Circuits (India) Ltd.*, 2021 SCC OnLine NCLAT 1932.
[57] *Pooja Finlease Ltd. Vs. Auto Needs (India) Pvt. Ltd. & Anr* , (2022) ibclaw.in 764 NCLAT.
[58] *Krishna Garg & Anr vs Pioneer Fabricators Pvt Ltd*, Company Appeal (AT) (Insolvency) Nos. 92 of 2021.
[59] Insolvency and Bankruptcy Code, 2016, § 7, No.31, Acts of Parliament, 2016 (India).
[60] *M. Suresh Kumar Reddy v. Canara Bank & Ors*, CIVIL APPEAL NO. 7121 OF 2022.

NCLT is mandatorily required to admit applications filed by the financial creditors under Section 7.

74. That in the above-mentioned case, the Hon'ble SC clarified that the decision in ***Vidarbha Industries Power Limited v. Axis Bank Limited***[61] was limited to the circumstances and facts of that case.
75. That the reliance can be made for the above contentions on ***Innoventive Industries Limited v. ICICI Bank and Anr.***[62] and ***E.S. Krishnamurthy Judgement***[63]**.**
76. That the legislative intent, in this regard, was also clarified in the Notes on Clauses to Clause 7 of the Insolvency and Bankruptcy Code Bill, 2015, when the law was originally introduced in Parliament.[64]
77. The Petitioner therefore contends that the mere fact that the Company Petition filed by him was admitted by the Adjudicating Authority on 8th September 2021, clearly portrays that the AA recognized merit in the claim of default by the petitioner.[65]
78. That the recognition of default is a reason enough for the application of a Financial Creditor to be admitted by the AA under the IBC and such recognition is granted to the Petitioner's application in the present issue.
79. That when in the case of ***Sri Ramani Resorts and Hotels Pvt. Ltd. v. Sree Bhadra Parks and Resorts Limited***[66] the petitioner filed an application to restore the dismissed petition rather than filing a fresh petition, the NCLT observed that merely owing to technical reasons, the petitioner cannot be barred from restoring the petition and the CD cannot wash away their hands from their liability.
80. That even though a consent term was executed between the Petitioner and the Respondent, the Respondent did not fulfil his obligation under the same and the default still persists.

[61] *Vidarbha Industries Power Limited v. Axis Bank Limited,* CIVIL APPEAL NO. 4633 OF 2021.
[62] *Innovative Industries Limited v. ICICI Bank and Anr.*, CIVIL APPEAL NOs. 8337-8338 OF 2017.
[63] *Supra* note 60.
[64] Insolvency and Bankruptcy Code Bill, 2015, § 7, No. 42, Acts of Parliament, 2015 (India).
[65] Moot Proposition, para 28.
[66] *Sri Ramani Resorts and Hotels Pvt. Ltd. v. Sree Bhadra Parks and Resorts Limited*, 2021 SCC OnLine NCLT 2587.

IV. III The liberty of the Adjudicating Authority is not necessary for the revival of CIRP Proceedings.

81. The Petitioner humbly submits that at this juncture it is important to understand that seeking liberty of the court to revive the CIRP proceedings is not necessary and can be sought as a matter of right by invoking the inherent jurisdiction of the NCLT.
82. That in the case of ***SRLK Enterprises LLP v. Jalan Tran Solutions India Ltd.***[67] it was held that the distinction between a simple withdrawal stating that the parties have settled and a withdrawal where the Settlement Agreement/Consent Terms has been brought on record is what makes the difference while the revival of a case is considered. A similar contention was observed in the case of ***IDBI Trusteeship Services Limited v. Nirmal Lifestyle Limited***[68]**.**
83. That in the case of ***Himadri Foods Ltd. v. Credit Suisse Funds AG***[69] it was observed that *'Given that the repayment schedule from the Terms of Settlement appears to have been incorporated into the order, making it an order or decree of the Court, allowing the Financial Creditor the freedom to return can only be understood as allowing for the revival of CIRP to be requested for non-compliance with the Terms of Settlement. As a result, even on merit, we find the immediate appeal to be without merit.'*
84. That a simple withdrawal, or *withdrawal simplicitor*, is when an application is withdrawn by stating that the parties have settled and the Adjudicating Authority is informed of the same, however, this is not the present scenario and is neither the ground for a revival of a petition.
85. It is finally submitted that the court in the above-mentioned case clearly stated that having the Consent Term on record where they have contributed in the withdrawal order allows for the restoration of proceedings in case of default as the IBC is not a recovery proceeding where parties can repeatedly come to court due to non-payment of debt.

[67] *SRLK Enterprises LLP v. Jalan Tran Solutions India Ltd.*, Company Appeal (AT) (Ins) No. 264/2021.
[68] *IDBI Trusteeship Services Limited v. Nirmal Lifestyle Limited*, Company Appeal (AT) (Insolvency) No.117 of 2023.
[69] *Himadri Foods Ltd. v. Credit Suisse Funds AG*, Company Appeal (AT) (Insolvency) No. 1060 of 2020.

IV. IV Whether the nature of Debt changes post the settlement of the debt.

86. The Petitioner humbly submits that once a Settlement Agreement is entered into between the Financial Creditor and the Corporate Debtor the nature of debt does not change from Financial Debt.
87. That the Hon'ble NCLAT in the case of ***Priyal Kantilal Patel v. IREP Credit Capital (P) Ltd.***[70] held that- *the breach of consent terms in an earlier company petition does not wipe out the financial debt claimed by the financial creditor, nor does it change the nature and character of the financial debt.*
88. That the Hon'ble NCLAT further also stated that, *allowing such an interpretation would provide the corporate debtor who violated the consent requirements an unfair advantage. It would also result in the extinguishment of the remedies provided under the Code to the creditors who agreed to settle the debt and afterwards dropped the CIRP proceedings if the opposing interpretation, according to which the Settlement Agreement affects the nature of the obligation, is accepted.*
89. Therefore, it is the humble submission of the Petitioner in the present case that the nature of debt does not change after the settlement agreement is entered, that the liberty of the Adjudicating Authority is not necessary for the revival of CIRP proceedings, that the default of the responding party is well established and it is under the inherent powers of the Adjudicating Authority to entertain this petition and that the execution of the consent terms does not bar financial creditor from reviving insolvency proceedings especially when such consent terms are placed on record before the Adjudicating Authority.

[70] *Priyal Kantilal Patel v. IREP Credit Capital (P) Ltd.*, 2023 SCC OnLine NCLAT 51.

PRAYER

Wherefore, in light of facts stated, issues raised, arguments advanced and authorities cited, it is humbly requested that the Hon'ble Supreme Court of Malta may be pleased to hold, adjudge and declare,

1. That in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act;
2. 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;
3. That the security interest created on the assets of corporate debtor cannot be extinguished;
4. That the Insolvency proceeding can be restored in case of default when Consent term is entered between the parties;

AND/OR

Pass any other order it may deem fit in the interest of Justice, Equity, and Good Conscience.

All of which is most respectfully prayed and humbly submitted.

(Signed)

Place:

Date:

Counsel for the Appellant/Petitioner