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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

CIVIL APPELLATE JURISDICTION

UNDER SECTION 62 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

CIVIL APPEAL NO. XX/2023

Mr. Pipara …Appellant No. 1

versus

Singhania Group of Companies and Anr. …Respondent No. 1

Heard along with

CIVIL APPEAL NO. XX/2023

Mr. Shroff …Appellant No. 2

versus

Fu-Sam Power Systems Ltd. …Respondent No. 2

Heard along with

CIVIL APPEAL NO. XX/2023

Axis Telecom Pvt. Ltd. …Appellant No. 3

versus

Danobe Info Technology Ltd. …Respondent No. 3

Heard along with

CIVIL APPEAL NO. XX/2023

Tipsara MSCL India Ltd. and Ors. …Appellant No. 4

versus

Mr. Kasi Nayinar Pararacacekaran **…**Respondent No. 4

MEMORIAL ON BEHALF OF THE APPELLANTS

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TABLE OF ABBREVIATIONS

ABBREVIATION	ACTUAL TERM
&	And
S.	Section
AIR	All India Reporter
Anr.	Another
CoC	Committee of Creditors
CompCas	Company Cases
Corpn	Corporation
CIRP	Corporate Insolvency Resolution Process.
Ed.	Edition
GDP	Gross Domestic Product
Hon'ble	Honorable
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
ILC	Insolvency Law Committee
Ld.	Learned
LLP	Limited Liability Partnership
Ltd.	Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
No.	Number
NPA	Non-Performing Assets

Pvt.	Private
SC	Supreme Court
SCC	Supreme Court Cases
Regd.	Registered
RP	Resolution Professional
V.	Versus
Vol.	Volume

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STATEMENT OF JURISDICTION

This Hon'ble Court is vested with jurisdiction to hear the present matter under Section 62 of Insolvency and Bankruptcy Code, 2016.

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.

STATEMENT OF FACTS

Malta, the world's largest democracy with the 2nd largest economy and GDP, faces obstacle in economic growth due to NPA, which has prompted the enactment of the IBC, 2016 to enhance insolvency resolution framework.

SUMMARY OF SCENARIO I

Deora NRE Coke Ltd. ("Respondent No.1"), in liquidation, is one of the largest coke manufacturers in Malta. On 1.10.2020, Mr. Pipara, the promoter of DNCL ("Appellant No. 1") proposed a resolution plan for the company. Before it could be put to vote, he became ineligible under s. 29A of IBC. He also became ineligible to move an application under s. 230 of Companies Act due to the judgment in *Mr. Pipara v. Singhania Group of Companies.*

SUMMARY OF SCENARIO II

Fu-Sam Power Systems Ltd. ("Respondent No. 2") is one of the biggest names in the power backup industries. CIRP started against Fu-Sam on an application of a financial creditor. On the invitation of resolution plans by the RP, Mr. Shroff (promoter; "Appellant No. 2") submitted his plan; however, he was informed that he is ineligible under s. 29A(h) of IBC to submit a plan. Thereafter, a liquidation process was directed by NCLT. Mr. Shroff expressed his interest to present a scheme on invitation by Liquidator. However, the liquidator informed him of his ineligibility under s. 230 of the Act. His appeal was rejected by NCLAT.

SUMMARY OF SCENARIO III

Axis Telecom Pvt. Ltd. ('Financial creditor'; "Appellant No. 3") had filed a Company Petition under s. 7 of IBC, alleging a default of Rs. 7,71,32,111/- by Danobe Info Technology Ltd. ("Respondent No. 3"), which is an IT services company. After a consent term was executed, the Petition was permitted to be withdrawn. However, Respondent No. 3 committed a 'default' toward making payment per the consent term. Appellant has approached this Hon'ble Court with the prayer to revive the Company Petition.

SUMMARY OF SCENARIO IV

An amount of INR 700 crores was lent to group companies of Vntek Auto Ltd. ('Corporate Debtor'; "Vntek") by VRS Malta Financial Services Ltd. and M&N Finance Ltd. on pledged shares of KMP Auto Ltd.("KMP") held by Vntek. The group companies of Vntek entered into a security trustee agreement with Tipsara MSCL Ltd. and shares of KMP held by them were pledged to secure the loan through a pledge agreement. CIRP was initiated and a RP was appointed. The AA rejected the Appellants' claim as 'financial creditors', which is challenging before this Hon'ble Court.

STATEMENT OF ISSUES

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

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

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

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

SUMMARY OF ARGUMENTS

ISSUE A: In a liquidation proceeding under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC'), it is 'permissible' to make a scheme for compromise and arrangement through the provisions of sections 230 to 232 of the companies act because:

i. *Firstly,* Facilitating a Scheme for Compromise and Arrangement aligns with the Core Objective of IBC, 2016, i.e., to revive the corporate debtor and safeguard it from liquidation.

ii. *Secondly,* the Amendment to Section 230 forges a nexus with the Insolvency and Bankruptcy Code (IBC), thereby rendering it permissible to invoke the provision of Section 230 in the context of a liquidation proceeding.

iii. *Thirdly,* every attempt must be made to Revive a Company from its Corporate death and Section 230 serves to advance precisely this Objective.

ISSUE B: It is humbly submitted that the promoters are eligible to file an application for compromise and arrangement under section 230 of the companies act, whether or not they are ineligible under section 29A of the IBC to submit a 'resolution plan' because:

i. *Firstly*, the objectives of IBC, (i.e., maximization of assets and revival of a Company from Corporate Death) would be defeated if a Promoter is not allowed to submit a scheme for compromise and arrangement.

ii. *Secondly,* Section 230 must be given a source-based literal interpretation. Supreme Court's decision in ***Jagatramka***[1] potentially contravenes the essence of the source thesis and ostensibly disregards a literal interpretation in favour of notion of commercial morality as opposed to 'commercial wisdom' of CoC. Disqualification under section 29A cannot be transposed into section 230 in the absence of a statutory mandate and intention of the legislature.

iii. *Thirdly,* Section 35(1)(f) of the Code cannot form a premise for reading disqualification under 29A of IBC into Section 230 of the Act.

iv. *Fourthly,* there is no express provision which makes a 'Promoter' disqualified under section 29A ineligible to submit a scheme for compromise and arrangement.

ISSUE C: Appellants ought to be held entitled for security interest created on the assets of corporate debtors even if that interest has been created for the loan availed by the third party, not necessarily by corporate debtors, because:

i. *Firstly*, there is a continuing cause of action. Appellant No. 1 have entered in security trustee agreement with corporate debtors for the loan availed from Appellants No. 2 & 3. In addition,

[1] Arun Kumar Jagatramka vs Gujarat NRE Coke Ltd, Company Appeal (AT) (Insolvency) Nos. 55-56 of 2018.

there is no provision under IBC which prescribes limitation to file such claim. Moreover, the schedule of Limitation Act, 1963 is not applicable on IBC.

ii. *Secondly*, there is a Financial Creditor and Financial Creditor Debtor Relationship. The Appellants No. 2 & 3 have given financial debt to corporate debtors and Appellant No. 1 is the trustee of the loan. In addition, the debt comes under the purview of section 5(8) of the IBC.

iii. *Thirdly,* proof of interest-free debt is not essential. The debt availed by corporate debtors from the Appellants is secured by pledged shares. In addition, section 5(8) of IBC does not expressly exclude interest free debts from the ambit of financial debts.

iv. *Thirdly,* it is imperative that the judgments rendered for reconsideration in the ***Vistra***[2] case undergo a process of reconsideration and subsequent overruling. This Court refrained from annulling the verdicts pronounced in the cases of ***Phoenix ARC Pvt. Ltd.***[3] and ***Anuj Jain***[4] due to the necessity of a larger bench to effectuate such overturning. Pertinently, the prevailing case is being heard by a bench comprising five learned judges.

ISSUE D: It is submitted that the Appellant No. 3 (Financial Creditor) can seek restoration/revival of Company Petition due to default in Settlement Agreement as a matter of right because:

i. *Firstly*, numerous cases demonstrate that Adjudicating authorities have revived Company Petitions when settlement agreements have failed to be executed by the parties, implying their authority to revive the petition in case of default in the terms of a settlement agreement.

ii. *Secondly*, Rule 11 of the NCLT Rules, 2016 grants the Adjudicating Authority inherent power to allow for restoration or revival of the Application, even without specific liberty given in a withdrawal order.

iii. *Thirdly*, the nature of debt does not change after entering into a settlement agreement. It is submitted that the debt contemplated in the consent term remains intact as "financial debt" under section 5(8) of the IBC, which must be given a wider interpretation by virtue of use of the words, “includes”, indicating that the provision is extensive and inclusive, not exhaustive. Therefore, it is submitted that the debt under the settlement agreement should also be classified as "financial debt."

iv. *Fourthly,* Regulation 30A, which permits withdrawal of applications without the approval of the Committee of Creditors (CoC), is ultra vires IBC and should be considered invalid in law.

[2] M/S Vistra ITCL (India) Ltd & Ors. v. Mr. Dinkar Venkatasubramanian & Anr, 2023 SCC OnLine SC 570.
[3] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 Supreme Court Cases 799.
[4] Anuj Jain Interim Resolution Professional for Jay pee Infratech Limited v. Axis Bank Limited, 2020 SCC.

ARGUMENTS ADVANCED

A. IN A LIQUIDATION PROCEEDING UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (HEREINAFTER REFERRED TO AS THE 'I&B CODE'), IT IS 'PERMISSIBLE' TO MAKE A SCHEME FOR COMPROMISE AND ARRANGEMENT THROUGH THE PROVISIONS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT.

1. It is imperative to submit that the issue at hand must be answered in an affirmative manner.

2. In relation to the concept of compromise, it is essential to recognize that a "compromise" comes into play when there exists a disagreement or dispute; as the saying goes, "*there can be no compromise unless there is some dispute.*" [5] Resolving the said dispute often involves formulating a scheme of compromise. However, it's imperative to highlight that a reasonable compromise cannot be achieved if the scheme compels individuals to entirely relinquish their rights without any form of compensation or reciprocal adjustments. The same viewpoint on this matter was taken by Bowen LJ, who has stated, that "*..the object is to enable compromises to be made which are for the common benefit of the creditors, or a class of creditors as such.*"[6]

3. It is important to elucidate the provision concerning the Adjudicating authority's power under Section 230 of the Companies Act. The said provision empowers the company, its liquidator[7] (during winding up or in a liquidation proceeding)[8], as well as any member or creditor belonging to the affected class, to initiate an application before the Tribunal. This application can only be filed by a member or creditor of the class directly impacted by the proposed compromise or arrangement presented by the company. In the precedent of ***Wearwell Cycle Co (India) Ltd v. AK Misra***[9], the court allowed an application from two individuals, including a managing director. This case elucidates the court's willingness to

[5] GOGNA P.P.S., A TEXTBOOK OF COMPANY LAW 438 (S. Chand Publishing 2016).
[6] See, Sneath v Valley Gold Ltd, (1893) 1 Ch 477: 68 LT602 (CA), where the word "compromise" appearing in a trust deed was given this meaning; See also NFU Development TrustLtd,re,(1972) 1 WLR1548(Ch D); Alabama,'Neiu Orleans, Texas and Pacific Junction RailwayCo,re, (1891) 1 Ch 213: 64 LT127:7TLR171.
[7] The powers vested in a liquidator are explicitly outlined under Section 33 of the Insolvency and Bankruptcy Code (IBC). The duties assigned to liquidators during the winding-up proceedings are defined in Section 34 of the IBC.
[8] Inserted by the Eleventh Schedule (Sec. 255) to the Insolvency and Bankruptcy Code, 2016, w.e.f. 15.11.2016[S.O. 3453(E) dated 15.11.2016].
[9] Wearwell Cycle Co (India) Ltd v AKMisra, ILR(1994) 1 Del109: (1998) 94Comp Cas 723.

consider those individuals as members and creditors based on their commitment to provide funds. The court's approach highlights the flexibility in interpreting membership for individuals contributing to the company's cause.

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully posited: -

I. FACILITATING A SCHEME FOR COMPROMISE AND ARRANGEMENT ALIGNS WITH THE CORE OBJECTIVE OF IBC, 2016.

4. The core objective of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") is to reorganize and resolve insolvency cases in a time-bound manner, while safeguarding the interests of all stakeholders and ensuring the revival of the corporate debtor.[10] In other words, the IBC's core purpose is to revive the corporate debtor and safeguard it from liquidation. This objective assumes paramount importance, particularly in cases of liquidation where the assets of the company are held in custodia legis. The liquidator, in this context, serves as the custodian responsible for the equitable distribution of the liquidation estate.

5. In the judgements of ***S.C. Sekaran v. Amit Gupta and Others***[11] (2019) and ***Y. Shivram Prasad v. S. Dhanapal and Others***[12] (2018), the NCLAT emphasised the object of the IBC, i.e., the revival and continuation of the corporate debtor. This Hon'ble Court in ***Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.***[13] highlighted that the primary object of IBC on the revival of the corporate debtor. This court also emphasised that IBC aims to prevent corporate death of a Company by liquidation.

6. In light of the foregoing arguments, it is respectfully submitted that the objective of the IBC is to revive and sustain the corporate debtor. Allowing schemes for compromise and arrangement during liquidation aligns with this objective by preserving the corporate debtor as a going concern, which serves the interests of all stakeholders and is in harmony with the principles of IBC.

[10] See Mundhra, R.P. and Agarwal, S., 2021. Gujarat NRE Coke Ltd.: Revival of Companies in Distress. *Emerging Economies Cases Journal*, *3*(1), pp.35-45.
[11] S.C. Sekaran v. Amit Gupta and Others, Company Appeal (AT) (Insolvency) No. 495 and 496 of 2018.
[12] Y. Shivram Prasad Vs. S. Dhanapal & Ors., Company Appeal (AT) (Insolvency) No. 224 of 2018.
[13] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

II. THE AMENDMENT TO SECTION 230 FORGES A NEXUS WITH THE INSOLVENCY AND BANKRUPTCY CODE (IBC), THEREBY RENDERING IT PERMISSIBLE TO INVOKE THE PROVISION OF SECTION 230 IN THE CONTEXT OF A LIQUIDATION PROCEEDING.

7. It is submitted that a scheme for compromise and arrangement is permissible in law in a liquidation proceeding in IBC, which has been amplified further by the amendment to section 230[14] of Companies Act, which provides as under:

> "6A. In section 230,—
> (a) in sub-section (1), after the word "liquidator", the words "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," shall be inserted;
> (b) in sub-section (6), after the word "on the liquidator", the words "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," shall be inserted;"

8. This amendment clarifies that the liquidator has also been vested with the right to proceed under Section 230 in an insolvency proceeding. Thus, a scheme can be made during CIRP.

III. EVERY ATTEMPT MUST BE MADE TO REVIVE A COMPANY FROM ITS CORPORATE DEATH AND SECTION 230 SERVES TO ADVANCE PRECISELY THIS OBJECTIVE.

9. In ***A. Navinchandra Steels (P) Ltd. v. SREI Equipment Finance Ltd.***[15], the court ruled that a Compromise or Arrangement is legally permissible within an IBC proceeding if liquidation is ordered. The court was relying on section 230(1) of the Companies Act, 2013.[16] In this case, the court, while addressing the issue whether an insolvency proceedings could be initiated after the winding up application had been admitted under the Companies Act. The Court ruled,

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[14] Inserted by the Eleventh Schedule (Sec. 255) to the Insolvency and Bankruptcy Code, 2016, w.e.f. 15.11.2016[S.O. 3453(E) dated 15.11.2016].
[15] A. Navinchandra Steels (P) Ltd. v. SREI Equipment Finance Ltd., 202 SCC OnLine SC 149, at para 23.
[16] Editor_4, *Application under S. 7 or S. 9 IBC is an independent proceeding unaffected by winding up proceedings that may be filed qua the same company; Supreme Court | SCC Blog*, SCC BLOG (2021), https://www.scconline.com/blog/post/2021/04/01/application-under-s-7-or-s-9-ibc-is-an-independent-proceeding-unaffected-by-winding-up-proceedings-that-may-be-filed-qua-the-same-company-supreme-court/ (last visited Aug 10, 2023).

"...every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country."

10. Thus, extending the analogy of a winding up proceeding, it is submitted that upon admission of a liquidation proceeding, any subsequent endeavor to revive the company through a Section 230 application should not be overshadowed.

11. The court in this case also relied on ***Swiss Ribbons (P) Ltd. v. Union of India***[17], wherein it was stated that*"the IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail."*[18]

12. Extending this analogy, it is argued that Section 230 is also embarks on the same objective, i.e., presenting a last opportunity to revive a Company from its Corporate death, and can be allowed for the same in a liquidation proceeding. Therefore, the Promoters, i.e., Appellant No. 1 and Appellant No. 2 should not be restricted from submitting a plan for Compromise and arrangement as it is for the larger objective or rather, the last attempt to save the Companies from Corporate Death.

B. THE PROMOTERS ARE ELIGIBLE TO FILE AN APPLICATION FOR COMPROMISE AND ARRANGEMENT UNDER SECTION 230 OF THE COMPANIES ACT, WHETHER OR NOT THEY ARE INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'.

13. Promoters[19] play a significant and integral role in the operation of a company. They are individuals who conceive the idea for establishing a company and actively bring that concept to execution, utilizing their own resources as well as assistance from others. Promoters are involved in managing the company's affairs, whether it be through direct involvement as shareholders, directors, or in other capacities. As a result of their fiduciary connection with the company, Promoters bear a responsibility of safeguarding the company's interests and ensuring sustainability. This includes acting in the best interest of

[17] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.
[18] A. Navinchandra Steels (P) Ltd. v. SREI Equipment Finance Ltd., 202 SCC OnLine SC 149, at para 14.
[19] The term "Promoter" is defined under Section 2(69) of the Companies Act, 2013.

the company and avoiding conflicts of interest. In view of this very role of the Promoter, it is humbly posited before this Court that the Promoters in the present case, i.e, Mr. Pipara ("Appellant No. 1") and Mr. Shroff ("Appellant No. 2") should be allowed to submit an application for Compromise and Arrangement, whether or not they are ineligible under section 29A of IBC to submit a resolution a plan, as the provision of section 230 is for the purpose of enabling a Company to **restructure its debt or equity capital, or both, in a manner that is acceptable to its shareholders and creditors, thereby, leading to the financial stability and sustainability of the Company and balancing interest of all stakeholders at the same time.**

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully posited:

I. THE OBJECTIVE OF IBC (I.E., MAXIMIZATION OF ASSETS AND REVIVAL OF A COMPANY FROM CORPORATE DEATH) WOULD BE DEFEATED IF A PROMOTER IS NOT ALLOWED TO SUBMIT A SCHEME FOR COMPROMISE AND ARRANGEMENT.

14. This Court in ***Swiss Ribbons (P) Ltd v. Union of India***[20] has stated that the core objectives of the IBC are asset maximization and corporate debtor resolution. However, a concerning implication emerges when the participation of promoters, capable of proposing the highest bid, is hindered, leading to the acceptance of proposals from competitors with lower bids. This scenario potentially undermines the critical goal of asset maximization, thereby compromising the interests of both creditors and members, which fundamentally contradicts the purpose of the IBC. It is submitted that such an outcome may detrimentally impact the overarching objective of facilitating effective entity revival. Promoters, being intimately acquainted with the company's operations and intricacies, possess a unique perspective crucial for devising meaningful strategies for revival and debt-restructuring. Barring their involvement in the revival process curtails the potential for informed decision-making and strategic planning, ultimately impeding the realization of the IBC's core objectives.[21]

[20] Swiss Ribbons (P) Ltd v. Union of India, (2019) 4 SCC 17, paras 27-28.
[21] Insolvency and Bankruptcy Board of India (Board Note No. 11/2019), Discussion Paper on Corporate Liquidation Process.

15. In essence, by precluding willing promoters from proposing lucrative bids and sidelining their role in the revival process, the IBC risks thwarting the twin objectives of asset maximization and effective entity revival. Therefore, it is submitted that the Promoter should be allowed to submit a scheme for compromise and arrangement as it steers the objectives of IBC.

II. SECTION 230 MUST BE GIVEN A SOURCE-BASED LITERAL INTERPRETATION IN DUE CREDENCE TO THE PRINCIPLE OF "COMMERCIAL WISDOM". DISQUALIFICATION UNDER SECTION 29A CANNOT BE TRANSPOSED INTO SECTION 230 IN THE ABSENCE OF A STATUTORY MANDATE.

16. Legal positivists advocate the principle that the validity and authoritativeness of law derive from its source. According to this "source thesis", "*any legal principle that lacks a source is not law*". A literal/strict interpretation of Section 230 suggests the absence of specified disqualifications for proposing a scheme of compromise and arrangement under this provision, unlike the express ineligibilities outlined in Section 29A of the IBC. Notably, Section 230 does not inherently disqualify promoters from introducing such schemes.

17. A crucial contention emerges when these disqualifications, as prescribed by Section 29A, are transposed into Section 230 without a statutory mandate.[22] It is argued that the Supreme Court's decision in ***Arun Kumar Jagatramka v. Jindal Steel And Power Ltd*** [23] potentially contravenes the essence of the source thesis. The basis for compromise and arrangement lies in Section 230 of the Companies Act. According to this provision, upon submitting an application, NCLT has the authority to convene a meeting among various classes of creditors or members to vote on the proposal's sufficiency. If the proposal garners the necessary votes, NCLT validates the approved scheme, rendering it legally binding. However, NCLT's approval may be withheld in cases of violation of Sections 230(1), 232, or 68 of the Companies Act. No other provision permits NCLT to reject a proposal sanctioned in a meeting.

[22] Ram Mohan, M.P. and Raj, V., 2022. Section 29A of India's Insolvency and Bankruptcy Code: an instance of hard cases making bad law?. *Journal of Corporate Law Studies*, *22*(1), pp.365-390.
[23] Arun Kumar Jagatramka vs Jindal Steel And Power Ltd, (2021) 7 SCC 474.

18. However, the decision in ***Jagatramka***[24] (supra) mandates that proposals from entities falling within the ambit of Section 29A, a distinct provision, should face rejection under Section 230. This stance raises the question of whether the Supreme Court's decision, in extending the Section 29A disqualifications, overlooks the foundational premise of the source thesis and misaligns the jurisdictional locus. In the ***Jagatramka***[25] case, given that a promoter inherently assumes membership within the company, it is incontrovertible that a Promoter qualifies to introduce proposals for schemes and arrangements under Section 230.

19. Therefore, it is submitted that the extension of Section 29A disqualifications to Section 230, without a direct legislative mandate, raises concerns regarding the adherence to the exclusive legal positivist concept of the source thesis. This interpretation also potentially infringes upon the principles of strict rule of interpretation of statutes.

20. The basis for the Court's stance emanates from its purposive interpretation of Section 29A, a pattern consistent with the Court's approach in various cases[26]. This line of cases underscores the judiciary's recurrent inclination toward the purposive approach to Section 29A of the IBC, thereby expanding its purview.[27] While it is acknowledged that Section 29A exhibits a broad scope, courts and tribunals have consistently employed purposive interpretation to augment its application, with the ***Jagatramka***[28] ruling being a recent addition to this trajectory. However, a critical inquiry emerges: *is this burgeoning extension of judicial intervention during insolvency and liquidation stages viable?* This submission posits that it is not. It is submitted that the ***Jagatramka***[29] Case, ostensibly disregards a literal interpretation in favour of notion of commercial morality. This deviates from the principles expounded by exclusive legal positivists regarding judges' power and role in adjudication. According to exclusive legal positivists, the primary purpose of law is to resolve disputes. Therefore, judges bear the responsibility of adhering to the law as delineated in statutes. Deviating from the letter of the law to accommodate moral

[24] *Ibid.*
[25] *Ibid.*
[26] See Arcelormittal India Private Limited v. Satish Kumar Gupta and Others, Civil Appeal Nos.9402-9405 Of 2018 & Civil Appeal No.9582 Of 2018, Chitra Sharma v. Union of India W.P. (C) 744 of 2017, and Swiss Ribbons Private Limited v. Union of India, AIR (2019) 4 SCC 17, as cited within the Jagatramka judgment.
[27] Disqualification Under Section 29A - A restrictive provision made quandary? - azb, AZB (2021), https://www.azbpartners.com/bank/disqualification-under-section-29a-a-restrictive-provision-made-quandary/ (last visited Aug 8, 2023).
[28] Arun Kumar Jagatramka vs Jindal Steel And Power Ltd, (2021) 7 SCC 474.
[29] *Ibid.*

considerations results in diverging from statutory intent and raises concerns about overextension of judicial interference.

21. In the context of Section 29A, if the proposed compromise/settlement plan satisfies creditors' preferences and meets all requisites, rejecting it based on the applicant's initial ineligibility raises legitimate questions. Similarly, such reasoning applies to Section 230 when read with Section 29A and Section 35(1)(f) of the IBC. In light of the above, it is submitted that when creditors endorse a promoter's proposal, the need for judicial scrutiny of commercial wisdom appears superfluous. In other words, it is imperative to respect creditors' 'commercial wisdom'[30].

22. Judicial pronouncements have consistently upheld the principle of the CoC's commercial wisdom. In the case of ***Vallal RCK v. M/s Siva Industries & Anr.*** (2022)[31], the Supreme Court ruled that the Adjudicating Authority cannot scrutinize the substance of a settlement plan endorsed by the CoC under Section 12A of the IBC. The landmark judgment of ***K. Sashidhar v. Indian Overseas Bank*** (2019)[32] also established the non-justiciability of the CoC's commercial wisdom. The case of ***Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Ors*** (2019)[33] highlighted that NCLT and NCLAT must respect the framework of the IBC and limit their review to specified parameters. The CoC's commercial decisions were considered beyond their purview.[34] Recently, the case of ***Kalparaj Dharamshi v. Kotak Investment Advisors Ltd***[35] has also recognized the position that commercial wisdom of Committee of Creditors cannot be interfered with.[36]

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[30] M Ramesh, *SC interprets true meaning of "commercial wisdom,"* THEHINDUBUSINESSLINE.COM (2023), https://www.thehindubusinessline.com/business-laws/sc-interprets-true-meaning-of-commercial-wisdom/article66876839.ece (last visited Aug 8, 2023).

[31] Vallal RCK v M/s Siva Industries & Anr., (2022) ibclaws.in 63 SC.

[32] K. Sashidhar v. Indian Overseas Bank, (2019) ibclaw.in 08 SC; See also Ashish Saraf v. Bhuvan Madan, (2022) 10 SCC 493.

[33] Committee of Creditors of Essar Steel India Ltd v. Satish Kumar Gupta & Ors, (2019) ibclaw.in 07 SC.

[34] IBC Laws, *Read more: IBC Laws - Decoding the Commercial Wisdom of Committee of Creditors (CoC) : An analysis of Indian & Global Scenarios - By Adv. Vishawjeet Singh*, IBC LAWS (2023), https://ibclaw.in/decoding-the-commercial-wisdom-of-committee-of-creditors-an-analysis-of-indian-global-scenarios-by-vishawjeet-singh/ (last visited Aug 8, 2023).

[35] Kalparaj Dharamshi v. Kotak Investment Advisors Ltd, 2021 SCC OnLine SC 204; See also Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd., (2022) 1 SCC 401.

[36] Prachi Bhardwaj, *"Commercial wisdom of Committee of Creditors is not to be interfered with"; Supreme Court sheds light on the limited scope of interference by NLAT/NCLAT | SCC Blog*, SCC BLOG (2021), https://www.scconline.com/blog/post/2021/03/12/commercial-wisdom-of-committee-of-creditors-is-not-to-be-interfered-with-supreme-court-sheds-light-on-the-limited-scope-of-interference-by-nlat-nclat-have-a-limited-authority-to-do/ (last visited Aug 8, 2023).

23. Notably, reorganization under Section 230 often represents the final recourse for reviving a distressed company. Consequently, minimal constraints should be imposed during this phase, with paramount deference given to the 'commercial wisdom' of creditors or members. This approach harmonizes with the overarching objective of the IBC, specifically safeguarding the surplus value of corporate entities and deterring fragmented liquidation. Instances may arise where promoters put forth competitive bids, and creditors exhibit confidence in these proposals. Imposing restrictions in such scenarios could deprive creditors of superior offers and subsequently infringe upon their 'commercial wisdom'. By adopting a purposive interpretation and infusing ineligibilities into Section 230, the ***Jagatramka***[37] case seemingly prioritizes 'commercial morality' over 'commercial wisdom', thereby deviating from a purely legal interpretation. It is submitted that it is paramount to accord due respect to the commercial sagacity of creditors and members. This deference should remain unswerving and should not be eclipsed by moral considerations.

24. It is submitted that a strict interpretation is also mandated because it is evident from the intent of the legislature that a strict interpretation was warranted, which is evident from the fact that despite the introduction of eight revisions to the IBC from November 2017 to September 2020, the disqualification criteria outlined in Section 29A and Section 35(1)(f) has not been explicitly included within Section 230 of the 2013 Act, even following the amendments made to the IBC.

25. It is also humbly submitted that in examining the intricacies of debt-restructuring under Section 230, one cannot overlook its inherent complexity. NCLT is responsible for categorizing creditors and members into distinct classes, and each class is tasked with voting on the proposed scheme. The scheme necessitates approval by a majority, constituting 75% in value of each class of creditors or shareholders present and participating in separate class meetings. This complex process, marked by its intricacies, has regrettably suffered from underutilization and inefficacy. In light of these existing intricacies, introducing further intricate and unjustifiable disqualifications into the section would invariably exacerbate the constraints on its usage.

[37] *Supra* note 28.

III. SECTION 35(1)(F) OF THE CODE CANNOT FORM A PREMISE FOR READING DISQUALIFICATION UNDER 29A OF IBC INTO SECTION 230 OF THE ACT.

26. It is submitted that Mr. Shroff ("Appellant No. 2"), the promoter of Fu-Sam Power Systems Ltd. is eligible under section 230 of the Companies Act to submit schemes for compromise and arrangement as the embargo found in Section 35(1)(f) of IBC, which prohibits the liquidator from selling immovable and movable property or actionable claims of the corporate debtor in liquidation to a person who is ineligible to be a resolution applicant, as stipulated under Section 29A, cannot be extended to read disqualification under 29A of IBC into Section 230 of the Act.

27. It is brought to fore that the prohibition under s. 35(1)(f) applies only to a 'sale' which is governed by Regulation 32 of the Liquidation Process Regulations. This particular regulation outlines the modes for sale of the corporate debtor as a 'going concern'.[38]

28. In connection with section 35(1)(f), it is submitted that when a sale of a corporate debtor's assets or business occurs during the liquidation process, Section 35(1)(f) of the IBC explicitly states that these assets cannot be sold to an individual ineligible under Section 29A. This provision is in place to prevent the exploitation of liquidation as a means for the promoter to acquire assets without any liabilities. In contrast to a successful resolution applicant under Chapter II or an individual who gains from the asset sale during liquidation under Chapter III of the IBC, an individual putting forth a compromise or arrangement under Section 230 of the 2013 Act does not have the advantage of acquiring the company's assets without any encumbrances. Thus, there is no legitimate cause or rationale to prevent the promoter from invoking the clauses of Section 230.

[38] See Dr. Devaiah Pagidipati vs Southern Online Bio Technologies Ltd. IA 1038 of 2019 in CP (IB) 343 of 2018 as cited in the Insolvency and Bankruptcy Board of India (Liquidation Process), WIRC-ICAI.ORG (2016), https://wirc-icai.org/wirc-reference-manual/part6/insolvency-bankruptcy-board-liquidation.html#:~:text=Regulation%2032%3A%20Sale%20of%20Assets%2C%20etc.&text=Provided%20that%20where%20an%20asset,relinquished%20to%20the%20liquidation%20estate. (last visited Aug 10, 2023).

IV. THERE IS NO EXPRESS PROVISION WHICH MAKES A 'PROMOTER' DISQUALIFIED UNDER SECTION 29A INELIGIBLE TO SUBMIT A SCHEME FOR COMPROMISE AND ARRANGEMENT.

29. Section 230 of the Companies Act, 2013, does not impose any restrictions on any individual from presenting a scheme. Since there are no explicit disqualifications mentioned in the statute, it is inappropriate for the National Company Law Appellate Tribunal (NCLAT) to infer the ineligibility under Section 29A of the Insolvency and Bankruptcy Code (IBC) into Section 230. Such an interpretation would essentially amount to judicially altering the legislation, which is impermissible.

30. Before proceeding, it is pertinent to note that the "Promoter", being a member of a Company, is not barred to make an application under Section 230, allows the company, its members, its creditors or liquidators (in case of winding up or in a liquidation proceeding) to submit a scheme for compromise and arrangement to the Tribunal. Given that the promoters[39] fall in the category of 'members or any class of them' (which is a broad and inclusive term) of the companies or the representatives of 'company', they can submit a scheme for compromise and arrangement. Moreover, it is mentioned that Mr. Shroff ("Appellant No. 2") is both a promoter a director of Fu-Sam Power Systems Ltd.[40] Section 230 does not prohibit a promoter or an individual affiliated with the former management from presenting a scheme of compromise or arrangement. This establishes a potential avenue for the previous management to step forward and rescue the company.

31. The precedent set by ***Rasiklal S. Mardia v. Amar Dye Chemical Ltd.***[41] and ***Meghal Homes Private Limited v. Shree Niwas Girni K.K. Samiti and Others***[42] supports the eligibility of promoters to propose a compromise even during liquidation. Reference is drawn to the case of ***Rasiklal S. Mardia v. Amar Dye Chemical Ltd.***[43], where the National Company Law Appellate Tribunal (NCLAT) pronounced that a liquidator is an additional party and not the exclusive person authorized to move an application. This conclusion

[39] The legal definition of "promoter" is explicitly provided in Section 2 (69) of the Companies Act, 2013. The section defines a promoter as an individual named in the prospectus or identified in the annual returns, or someone exercising direct or indirect control over the company's affairs. The case of Bosher v. Richmond Land Co [89 Va 455: 16 SE 360] delineates a promoter as an entity instrumental in incorporating and organizing a corporation.
[40] See Para 18, Moot Proposition.
[41] Rasiklal S. Mardia v. Amar Dye Chemical Ltd, COMPANY APPEAL(AT) NO.337 OF 2018.
[42] Meghal Homes Private Limited v. Shree Niwas Girni K.K. Samiti and Others, (2007) 7 SCC 753.
[43] *Supra* note 41.

underscores the fact that the initiation of an application for a scheme of arrangement under Section 230(3) is not the sole prerogative of the liquidator.

32. Reference can also be made to the proposition in paras 8 and 9 of Singhania Group of Companies' appeal, wherein the NCLT allowed an application by a promoter under Sections 230 to 232 of the Companies Act, 2013, thereby indicating that fact the Promoter can make an application under section 230 of the Companies Act. Therefore, in light of the above, it is submitted that Section 230 of the Companies Act, 2013 does not specifically bar promoters from making applications for compromise and arrangement.

33. It is submitted that the Scheme cannot be rejected only on the premise of Promoter's disqualification in the absence of sanction under the provision and without considering its contents. In ***Meghal Homes***[44], the Supreme Court stated that when a company is ordered to be wound up, and then a scheme is proposed under Section 391 (now, section 230), the court must assess whether the scheme aims to rejuvenate the company's operations, includes provisions for the settlement of creditor dues as mutually agreed, addresses the settlement of worker liabilities, and is presented in good faith. The court's responsibility is to assess the legitimacy of the scheme, ensuring that it is not a mere strategy to dispose of the company's assets during its liquidation process. While the court is not tasked with reviewing the business judgment of a company's shareholders (or Commercial wisdom of CoC), it is entrusted with evaluating whether a sincere effort is being made to revive a company that has entered the liquidation phase. This evaluation should consider whether such revival aligns with public interest and adheres to commercial morality.

34. Moreover, in ***S.C. Sekaran v. Amit Gupta & Ors***[45], it has been observed that "*Only on failure of revival, the Adjudicating Authority and the Liquidator will first proceed with the sale of company's assets wholly and thereafter, if not possible, to sell the company in part and in accordance with law.*" This aforementioned decision offers justifications for permitting arrangements and compromises even subsequent to the issuance of a liquidation order by the Adjudicating Authority, namely the National Company Law Tribunal (NCLT). Additionally, this verdict extends a new opportunity to numerous companies that have been compelled into the process of liquidation due to the absence of a viable Resolution Plan.

[44] *Supra* note 42.
[45] S.C. Sekaran v. Amit Gupta & Ors., Company Appeal (AT) (Insolvency) No. 495 & 496 of 2018, at para 8.

With this decision, these companies will now have a renewed chance to revive themselves prior to facing corporate dissolution through liquidation.[46]

35. The discussion papers circulated by the IBBI in April[47] and November 2019[48] also indicate that the IBBI was fully aware that the ineligibility attached to the resolution process under Section 29A of the Insolvency and Bankruptcy Code, 2016 (IBC) would not apply to Section 230 of the Companies Act, 2013 (the Act of 2013).[49]

36. Therefore, it is submitted that the ineligibility under section 29A would attach itself only to IBC and cannot be extended to Companies Act, which is a separate legislation. The scheme for compromise and arrangement cannot be called a continuation of the liquidation process. Rather, it provides for an alternative arrangement that is of a general nature and can be invoked in non-liquidation proceedings also. Sections 230 to 232 of the Companies Act form a part of 'settlement mechanism' and cannot be said to be a part of the 'resolution mechanism', to which alone the ineligibility under section 29A applies. Thus, this ineligibility cannot be implanted into section 230.

C. APPELLANTS OUGHT TO BE HELD ENTITLED FOR SECURITY INTEREST CREATED ON THE ASSETS OF CORPORATE DEBTORS EVEN IF THAT INTEREST HAS BEEN CREATED FOR THE LOAN AVAILED BY THE THIRD PARTY, NOT NECESSARILY BY CORPORATE DEBTORS.

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully submitted: -

[46] CA Binay Kumar SInghania Insolvency Professional, Partner AAA Insolvency Professionals LLP, https://insolvencyandbankruptcy.in/wp-content/uploads/2019/04/Liquidation-last-resort-under-IBC.pdf (last visited Aug 9, 2023).

[47] Insolvency and Bankruptcy Board of India Discussion Paper on Corporate Insolvency Resolution Process, (2019), https://ibbi.gov.in/uploads/whatsnew/b6be2f41ed8a1b8f4ac1ed2838ac9fcc.pdf (last visited Aug 11, 2023).

[48] Invitation of Public Comments: Bankruptcy Process for Personal Guarantors to Corporate Debtors along with Draft Regulations, (2019), https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/Apr/Discussion%20paper_2019-04-26%2016:38:00.pdf (last visited Aug 11, 2023).

[49] Insolvency and Bankruptcy Board of India (Board Note No. 11/2019), Discussion Paper on Corporate Liquidation Process.

I. CONTINUING CAUSE OF ACTION

37. It is humbly submitted before this Hon'ble Apex court that Tipsra MSCL (India) Ltd (herein, "Appellant No. 1" for the present Issue pertaining to Scenario IV) entered into a security trustee agreement with Kapro Engineering Ltd. ("Kapro") and MLD Investments Pvt. Ltd. ("MLD").[50] The purpose of this agreement was to secure the loan facilities availed by Kapro and MLD from VRS Malta Financial Services Ltd (herein, "Appellant No. 2" for the present Issue pertaining to Scenario IV) and M&N Finance Ltd (herein, "Appellant No. 3" for the present Issue pertaining to Scenario IV).[51] After the Corporate Insolvency Resolution started against corporate debtors, Appellant No. 1 filed its claim of INR 7,00,00,00,000/ on October 2, 2020.[52] Thereafter, that claim was rejected by resolution professional.

38. It is submitted that there is no provision in the Insolvency and Bankruptcy Code, 2016 that prescribes limitation for objecting to the wrongful categorization of creditors. The schedule of Limitation Act, 1963 states that "money claims cannot be raised beyond a period of 3 years from the date on which cause of action arises."[53] In addition, in the case ***of Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd***,[54] the NCLT held that:

> "*There is nothing on the record that limitation Act, 1963 is applicable to I&B Code. If there is a debt which includes interest and there is default of debt and having a continuous course of action, the argument that the claim of money by Respondent is barred by limitation cannot be accepted*."[55]

39. In addition, in the case of ***Patel Brothers v. State of Assam and Ors***,[56] the Hon'ble Apex court held that "*If the legislative intent behind an enactment is to provide a complete code which shall govern the matters provided in it in all aspects, then it cannot be considered that such matters also come under the ambit of the Limitation Act*."[57]. Further, in ***M/s.***

[50] Moot Proposition, Para 32.
[51] Moot Proposition, Para 31.
[52] Moot Proposition, Para 34.
[53] The Limitation Act, 1963.
[54] Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd, 2017 SCC OnLine NCLAT 860.
[55] *Id.*, Para 24.
[56] Patel Brothers v. State of Assam and Ors, AIR 2017 SC 383.
[57] *Id.,* Para 35.

Innoventive Industries Ltd. v. ICICI Bank & Anr.,[58] the Hon'ble Apex court held that "*There can be no doubt, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in The 7th Schedule which reads: "9. Bankruptcy and insolvency*"."

40. As per the Moot Proposition, "The Appellate Authority observed that the claim form submitted by Appellant No. 1 as a secured financial creditor was rejected by Mr. Kasi Nayinar Pararacacekaran ("Respondent No. 4") in 2020 and the same was not challenged before the Adjudicating Authority. As a consequence, the Appellants are barred to raise the same."[59] The Adjudicating Authority did not appreciate the fact that it is a case of continuing cause of action. Moreover, Insolvency and Bankruptcy Code, 2016 is an exhaustive code on the subject matter. hence, the claim of Appellants cannot be barred by limitation.

41. The claim of Appellants is of continuing cause of action and there is no provision in the Insolvency and Bankruptcy Code to prescribe the limitation period to claim debts. In addition, the limitation prescribed under The Limitation Act, 1963 does not apply to Insolvency and Bankruptcy Code, 2016. Therefore, the observation of the adjudicating authority ought to be held erroneous and this appeal filed by the Appellants ought to be allowed.

II. THERE IS EXISTENCE OF FINANCIAL CREDITOR-DEBTOR RELATIONSHIP.

42. It is humbly submitted before this Hon'ble Apex court that Appellants No. 2 & 3 have given short-term loan facility to the group companies of Vntek Auto Ltd. ("Vntek"). The loan is secured on pledged shares of KMP Auto Ltd. ("KMP") held by Vntek.[60] In Addition, Appellant No. 1 and corporate debtors have entered into security trustee agreement to secure the term loan facilities availed by corporate debtors from Appellants No. 2 & 3.

43. Section 5(7) of The Insolvency and Bankruptcy Code, 2016 defines financial creditor as "any person to whom financial debt is owed and includes a person to whom such debt has

[58] M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr., AIR 2017 SC 4084.
[59] Moot Proposition Para 36.
[60] Moot Proposition, Para 31.

been legally assigned or transferred to"[61]. In addition, section 5(8) of the code defines financial debt as "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. Further, sub-clauses (c) of clause 8 of section 5 includes "any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument".[62] Further, sub-clause (h) of the aforesaid section includes under the definition "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".[63] In addition, in the case of ***Dr. B.V.S. Lakshmi v. Geometrix Laser Solutions Private Limited***,[64] The NCLT held that "*fc/- coming within the definition of 'Financial Debt' as defined under sub-section (8) of Section 5 the Claimant is required to show that (i) there is a debt along with interest, if any, which has been disbursed and (ii) such disbursement has been made against the 'consideration for the time value of money*".

44. In addition, in the case of ***Innoventive Industries Ltd. v. ICICI Bank Ltd***.,[65] it was stated:

45. *"The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an*

[61] The Insolvency and Bankruptcy Code, 2016, S 5(7).
[62] The Insolvency and Bankruptcy Code, 2016, S 5(8).
[63] *Ibid.*
[64] Dr. B.V.S. Lakshmi v. Geometrix Laser Solutions Private Limited, 2017 SCC OnLine NCLT 458.
[65] Innoventive Industries Ltd. v. ICICI Bank Ltd, (2018) 1 SCC 407.

operational debt under Section 5(21) means a claim in respect of provision of goods or services".

46. In the present case, Kapro and MLD have been given a corporate debt of INR seven hundred crores for the ultimate benefit of Vntek.[66] And that debt is legally assigned to Vntek because of the pledged shares of KMP held by Vntek. In addition, Appellants No. 2 & 3 have lent the money of INR seven hundred crores to the corporate debtors, hence, they come under the purview of section 5(7) of Insolvency and Bankruptcy Code, 2016. Further, Appellant No. 1 has been legally assigned that debt by security trustee agreement in which he entered with the corporate debtors.

47. The Corporate debtors have taken a short-term loan from the financial creditors. Moreover, this debt has been assigned to Appellant No. 1 also by way of security trustee agreement. Hence, non-inclusion of the financial creditors in the corporate insolvency resolution plan is erroneous.[67]

III. PROOF OF INTEREST-FREE DEBT IS NOT ESSENTIAL.

48. It is humbly submitted before this Hon'ble Apex court that the loan facility availed by the corporate debtors from Appellant No. 2 & 3 of INR Seven Hundred Crores are secured by way of pledged shares of KMP held by Vntek.[68] Moreover, Appellant No. 1 is trustee of the security of other 2 Appellants to make a claim on their behalf.[69] In addition, adjudicating authority while dismissing the appeal filed by the Appellants, made observations with respect to Appellant No. 1 only.[70] The adjudicating authority did not make any observation for dismissing the claims of Appellant No. 2 & 3.

49. In the case of ***Orator Marketing Pvt Ltd v. Samtex Desinz Pvt Ltd***,[71] this Hon'ble court had held,

> "*The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC does not expressly exclude*

[66] Moot Proposition, Para 31.
[67] Shreyans Realtors Private Limited & Anr. vs. Saroj Realtors & Developers Private Limited, July 4 2018.
[68] *Supra* note 66.
[69] Moot Proposition, Para 32.
[70] Moot Proposition, Para 36.
[71] Orator Marketing Pvt Ltd v. Samtex Desinz Pvt Ltd, (2023) 3 Supreme Court Cases 753.

an interest free loan. 'Financial Debt' would have to be construed to include interest free loans advanced to finance the business operations of a corporate body".[72]

50. In addition, in the case of ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India***,[73] the Hon'ble Apex court held that "*even individuals who were debenture holders and fixed deposit holders could also be financial creditors who could initiate the Corporate Resolution Process*".

51. In the moot proposition, this is not expressly mentioned whether the loan was interest free or otherwise. Moreover,[74] the observation made in the above stated case puts the present case within the ambit of sections 5(7)&5(8) of The Insolvency and Bankruptcy Code, 2016. This established three points:
    1) Appellant No. 2 & 3 are financial creditors of corporate debtors by way of granting them short-term loan facility of INR seven hundred crores;
    2) Appellant No. 1 is also financial creditor of the corporate debtors by way of security trustee agreement executed between Appellant No. 1 and corporate debtors.
    3) Whether the loan was interest free or otherwise, is immaterial.[75]

52. The Appellants have granted short-term loan facility to corporate debtors on account of pledged shares. Then non-inclusion of Appellants as financial creditors is erroneous. Further, the dismissal of the appeal by the Appellant authority on the ground of time-barred debt ought to be held erroneous.

IV. IT IS IMPERATIVE THAT THE JUDGMENTS RENDERED FOR RECONSIDERATION IN THE VISTRA CASE UNDERGO A PROCESS OF RECONSIDERATION AND SUBSEQUENT OVERRULING.

53. It is humbly submitted before this Hon'ble Apex court that the corporate debtor has created first ranking exclusive security for the loan facility availed from Appellant No. 2 & 3 by way of pledged shares of KMP held by Vntek.[76] moreover, the Appellant No. 1 became trustee of that debt by way of security trustee agreement executed between Appellant No.

[72] *Id*, Para 31.
[73] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, ((2019) 8 SCC 416.
[74] Shivam Agrioils Pvt. Ltd. v. Shree Krishna Vanaspati Industries Pvt. Ltd, 2023 SCC OnLine NCLAT 233.
[75] New Okhla Industrial Development v. Anand Sonbhadra, (2023) 1 Supreme Court Cases 724.
[76] Moot Proposition, Para 31.

1 and corporate debtors.[77] In addition, the re-instated pledge agreement was also executed between Appellant No. 1 and corporate debtors.

54. In the case of ***M/S Vistra ITCL (India) Ltd & Ors. v. Mr. Dinkar Venkatasubramanian & Anr.***,[78] the Hon'ble Apex court, while deciding a case of identical facts, observed that:

"Thus, we are presented with a difficult situation, wherein, Appellant No. 1 - Vistra, a secured creditor, is being denied the rights under Section 52 as well as Section 53 of the Code in respect of the pledged shares, whereas, the intent of the amended Section 30(2) read with Section 31 of the Code is too contrary, as it recognises and protects the interests of other creditors who are outside the purview of the CoC. To our mind, the answer to this tricky problem is two-fold. First is to treat the secured creditor as a financial creditor of the Corporate Debtor to the extent of the estimated value of the pledged share on the date of commencement of the CIRP. This would make it a member of the CoC and give it voting rights, equivalent to the estimated value of the pledged shares. However, this may require reconsideration of the dictum and ratio of ***Anuj Jain***[79] *(supra) and* ***Phoenix ARC***[80] *(supra), which would entail reference to a larger bench. In the context of the present case, the said solution may not be viable as the resolution plan has already been approved by the CoC without Appellant No. 1 - Vistra being a member of the CoC. Therefore, we would opt for the second option"*[81].

55. In the aforementioned case, there was 2 judges bench. And the reason behind upholding the judgements of ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel***,[82] and ***Anuj Jain Interim Resolution Professional for Jay pee Infratech Limited v. Axis Bank Limited***,[83] was that to overrule those judgements the larger bench was required. In addition, in the present case, Hon'ble Chief Justice of "Malta" has constituted 5 judges bench to decide the case,[84] which has power to overrule the aforementioned judgements.

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[77] Moot Proposition, Para 32.
[78] M/S Vistra ITCL (India) Ltd & Ors. v. Mr. Dinkar Venkatasubramanian & Anr, 2023 SCC OnLine SC 570.
[79] Anuj Jain Interim Resolution Professional for Jay pee Infratech Limited v. Axis Bank Limited, 2020 SCC. OnLine Sc 237.
[80] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 Supreme Court Cases 799.
[81] M/S Vistra ITCL (India) Ltd & Ors. v. Mr. Dinkar Venkatasubramanian & Anr, Para 33, 2023 SCC OnLine SC 570.
[82] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 Supreme Court Cases 799.
[83] Anuj Jain Interim Resolution Professional for Jay pee Infratech Limited v. Axis Bank Limited, 2020 SCC OnLine Sc 237.
[84] Moot Proposition, Para 38.

56. In the present case, all the Appellants fulfil the requirements of financial creditors. Further, in deciding a case of identical facts, the reason behind non-consideration of Appellants as financial creditor was the precedents. Moreover, the Hon'ble Apex court stated the reason for not overruling those judgements that "it requires larger bench". And in the present case, we have a larger bench to decide the matter. In the present case, the Appellants fulfil the requirements to be considered as financial creditors of the corporate debtors. In addition, this matter is before the 5 judges bench on which the precedents are not binding. It is therefore humbly submitted before this Hon'ble court that the appeal filed by the Appellants ought to be allowed.

D. INSOLVENCY PROCEEDING CAN BE REVIVED BY REOPENING THE COMPANY PETITION WHEN A THE CORPORATE DEBTOR COMMITS A 'DEFAULT' IN TERMS OF THE CONSENT TERM ENTERED BETWEEN PARTIES.

57. In 2018, an amendment was made to the Insolvency and Bankruptcy Code, 2016 and section 12A was inserted. This amendment aimed to officially recognize settlements between parties that occurred after the corporate insolvency resolution process (CIRP) application had been accepted, allowing for the withdrawal of such insolvency applications. As of March 31, 2023[85], a total of 848 CIRPs have been withdrawn under this provision. Out of these, 650 CIRPs were withdrawn due to settlements reached between the corporate debtor and the creditors. Instances have been observed where corporate debtors attempt to avoid the stringent process of CIRP by reaching a settlement with the creditor. In such cases, the creditor withdraws the insolvency application in hopes of a faster recovery, based on the agreed terms in the settlement agreement. This leads to the termination of the CIRP proceedings before the National Company Law Tribunal (NCLT). However, problems arise when the corporate debtor fails to uphold the terms of the settlement, prompting the creditor to seek the revival of the insolvency application.

58. In the facts of the present case, it is submitted that the Respondent No. 3, that is, Danobe Info Technology Limited 'defaulted' in payment making payment towards the 4th tranche as agreed under the Consent Term dated 05.08.2021. The Respondent must not be allowed

[85] The quarterly newsletter of the Insolvency and Bankruptcy Board of India, January -March, 2023.

to take advantage of its own wrong by breaching the settlement agreement, thereby, depriving the Appellants from their lawful claim. It is prayed to this court to allow the prayer of the Appellants in reopening the company petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016.

59. It is submitted that there is no provision in the IBC that obstructs the Appellants from reviving the Insolvency Proceeding in case of a 'default' of terms in Settlement Agreement. The Appellants can seek restoration/revival of Company Petition due to default in Settlement Agreement as a matter of right because:

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully posited: -

I. IN A PLETHORA OF CASES, THE ADJUDICATING AUTHORITIES HAVE REVIVED COMPANY PETITION WHERE SETTLEMENT AGREEMENT HAS FAILED TO BE EXECUTED BY THE PARTIES.

60. It is submitted that in countless case laws, the Adjudicating authorities have revived Company Petition under section 7 of IBC where a Corporate Debtor has defaulted in the terms of Settlement Agreement. In this regard, it is pertinent to cite the case of ***Sree Bhadra Parks Resorts Ltd. v. Sri Ramani Resorts and Hotels Pvt. Ltd.***[86], wherein the Hon'ble NCLAT has revived the Petition and has taken the view that technicalities cannot come in the way of justice. It is notable to refer para 55 of the said judgment:

*"... the Hon'ble Supreme Court at Paragraph 52 of the Judgement in **Swiss Ribbons**[87] had made it clear that at any stage where the 'Committee of Creditors' is not yet constituted, a party can approach National Company Law Tribunal directly, which 'Tribunal' may in exercise of its 'inherent powers' under Rule 11[88] of the National Company Law Tribunal Rules, 2016 allow or disallow an application for withdrawal or settlement and as such, it cannot be said by any stretch of imagination that the 'Adjudicating Authority' cannot pass an order to restore and revive the application in IBA/13/KOB/2020 by way*

[86] Sree Bhadra Parks Resorts Ltd. v. Sri Ramani Resorts and Hotels Pvt. Ltd., Comp App (AT)(CH) (Ins) No. 95/2021.
[87] Swiss Ribbon Pvt. Ltd. Vs. Union of India , Manu/SC/0079/2019.
[88] Rule 11. Inherent powers.- "Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal."

of an Interlocutory Application filed by the 'Respondent'/'Financial Creditor'/ 'Applicant'. Consequently, the contra plea taken on behalf of the 'Appellant' is not acceded to by this 'Tribunal'."

61. This has been affirmed in the Order of Hon'ble NCLT, Ahmedabad dated 09.02.2022 in ***JFE Shoji Steel India Pvt. Ltd. v. Danke Technoelectro Pvt. Ltd.***[89], wherein the revival of the petition had been allowed. The facts of this case were that four cheques issued by the Corporate Debtor for making payment of outstanding amount were dishonoured, which constituted a 'default' in the payment of outstanding amount through cheques as per the settlement agreement.

62. Moreover, in the matter of ***Ruchita Modi v. Kanchan Ostwal***[90], the NCLT exercised its inherent powers under Rule 11 of NCLAT Rules to set aside the admission order, thereby providing an opportunity for the Operational Creditor to approach NCLAT for the recall of the order and revival of the Corporate Insolvency Resolution Process against the Corporate Debtor in case of default.[91] The case of ***M/s. Ess Investments Pvt. Ltd. v. Lokhandwala Infrastructure Pvt. Ltd.***[92] also highlights that NCLT has the authority to reinstate a petition that was previously dismissed as infructuous.

63. Further, it is submitted that the Adjudicating Authority, while holding to the contrary, has failed to consider two important judgments of NCLAT as precedents, wherein on similar facts, the Court has clearly reiterated the position with respect to revival in case of default in terms of settlement agreement. In ***M/s. ICICI Bank Limited v. M/s. OPTO Circuits (India) Ltd.***[93], Hon'ble NCLAT has held, *"It is made clear that in the event of default not adhering to the terms of 'settlement agreement' as regards the payment of the outstanding instalments, the 'Financial Creditor' shall be at liberty to seek revival/restoration of the 'Corporate Insolvency Resolution Process' proceedings before the Adjudicating Authority…"*. Likewise, the same has also been held in ***Vivek Bansal v. Bruda Druck India Pvt. Ltd.***[94]

[89] JFE Shoji Steel India Pvt. Ltd. v. Danke Technoelectro Pvt. Ltd., CP (IB) No. 439 / 9/ NCLT/ AHM/ 2018.
[90] Ruchita Modi v. Kanchan Ostwal , Company Appeal (AT) (Ins) No.1000 of 2019.
[91] See also INUI Pulp & Paper Industries P Ltd. V M/s Roxcel Trading GMBH(NCLAT): NCLAT dealt with inherent powers of NCLAT U/R 11 & SC upheld it.
[92] M/s. Ess Investments Pvt. Ltd. v. Lokhandwala Infrastructure Pvt. Ltd., CIVIL APPEAL NO(S). 324/2020.
[93] M/s. ICICI Bank Limited Vs. M/s. OPTO Circuits (India) Ltd., Company Appeal (AT) (CH) (Insolvency) No. 146 of 2021 decided on decided on 28.04.2022.
[94] Vivek Bansal vs Bruda Druck India Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 552 of 2020.

II. RULE 11 OF THE NCLT RULES, 2016 ENABLES THE ADJUDICATING AUTHORITY TO ALLOW FOR RESTORATION OR REVIVAL OF THE APPLICATION, EVEN IN THE ABSENCE OF LIBERTY GIVEN IN WITHDRAWAL ORDER.

64. It is submitted that in the present case, grave injustice will be caused to the Creditor if the 'default' is not addressed by this Court. Although there is no specific provision in the IBC, 2016 for reopening of the Company Petition, the Adjudicating authority under Rule 11 of the NCLT Rules, 2016 has inherent power to render justice to the litigant by reviving a company Petition. This power has been deliberated upon by the NCLT, Ahmedabad, in the case of ***Sree Bhadra Parks Resorts Ltd. v. Sri Ramani Resorts and Hotels Pvt. Ltd.***[95](supra):

> *"It is to be mentioned that an 'inherent power' of the 'Tribunal' has its gross root in necessity and the said power can be exercised by a 'Tribunal' based on the rudimentary principle that an 'act of Court shall prejudice no person'. Further, to meet the ends of justice an 'inherent power' of a 'Tribunal' being 'Co-extensive with need' can be exercised to render justice to the litigants. Also that, I A No. 02/KOB/2021 filed by the Respondent/Financial Creditor/Applicant to restore and Revive the Application IBA/13/KOB/2020 (filed under Section 7 of the Code) is not to be termed as one of 'Review Application' or to be confused with, in the considered opinion of this 'Tribunal'."*

65. In the case of ***Union Bank of India v. Financial Creditors of M/s Amtek Auto Limited & Ors***[96] (2023), the NCLAT five-member bench ruled that the NCLAT possesses the authority to recall its judgment through the exercise of inherent power. As such, it is not adequate to state that the IBC and its Rules do not contemplate a specific provision on revival of Company Petition. Moreover, as per this rule, no question arises that the Adjudicating authority does not have the jurisdiction to restore or revive the main petition in the absence of liberty given in the withdrawal order. The same has been stated in ***JFE Shoji Steel India Pvt. Ltd. v. Danke Technoelectro Pvt. Ltd.***[97] at para 18 of the Order. In the present case, it is prayed that the withdrawal should be cancelled/recalled and the

[95] Sree Bhadra Parks Resorts Ltd. v. Sri Ramani Resorts and Hotels Pvt. Ltd., Comp App (AT)(CH) (Ins) No. 95/2021, Para 56.
[96] Union Bank of India v Financial Creditors of M/s Amtek Auto Limited & Ors, 2023 LiveLaw (SC) 589.
[97] JFE Shoji Steel India Pvt. Ltd. v. Danke Technoelectro Pvt. Ltd., CP (IB) No. 439 / 9/ NCLT/ AHM/ 2018.

Company Petition filed by the Appellant No. 3 should be revived.

66. The above position has also been reiterated and settled in the case of ***M/s. ICICI Bank Limited v. M/s. OPTO Circuits (India) Limited***[98], whereby the NCLAT, Chennai Bench, has held that the CIRP reinstated if there is a failure to adhere to the conditions stipulated in the settlement agreement executed between the parties. In this case, the NCLT Bangalore had initially rejected the creditor's application, but the NCLAT, on appeal, found that the NCLT's decision to grant the liberty to file a fresh CIRP application was incorrect. The NCLAT determined that the NCLT's order lacked proper application of mind and did not adhere to the principles of natural justice. Consequently, the NCLAT granted the financial creditors the opportunity to revive the CIRP proceedings. Therefore, it is amply clear that lack of specific liberty granted in the Adjudicating Authority's Order is inconsequential.

III. THE NATURE OF DEBT DOES NOT CHANGE POST ENTERING SETTLEMENT AGREEMENT.

67. The Hon'ble NCLAT's Judgment in the case of ***Priyal Kantilal Patel v. IREP Credit Capital (P) Ltd.***[99], establishes that the nature of debt does not change after a Settlement Agreement. In this case, the financial creditor filed a fresh Section 7 application after the breach of the Settlement Agreement, which was challenged by the corporate debtor, arguing that the breach did not constitute a Financial Debt. However, the NCLAT ruled that the breach of consent terms in a previous company petition does not negate the financial debt claimed by the creditor, and it does not alter the nature and character of the financial debt. This interpretation safeguards against granting undue advantage to the corporate debtor who breaches consent terms and ensures that the remedies available under the Code are not extinguished for creditors who agreed to settle the debt and withdrew the CIRP proceedings. In light of this judgment, it is humbly submitted that the nature of debt contemplated in the consent term remains intact as if it were a Financial Debt, which is defined under section 5(8) of IBC.

68. The legislative intent was not to exclude a liability concerning a "claim" arising from a recovery certificate issued by the DRT from being classified as a "financial debt." Such a

[98] M/s. ICICI Bank Limited vs. M/s. OPTO Circuits (India) Limited , 2021 SCC OnLine NCLAT 1932.
[99] Priyal Kantilal Patel v. IREP Credit Capital (P) Ltd., 2023 SCC OnLine NCLAT 51, decided on 1 February 2023.

liability, which would otherwise be considered a "financial debt" based on the general definition, remains within the scope of the term under Section 5(8). The same has been established in the case of ***Kotak Mahindra Bank Ltd. v. A. Balakrishnan***[100]. Therefore, it is submitted that the debt contemplated in the consent term/settlement agreement is none other than "financial debt".

IV. REGULATION 30A, WHICH PERMITS WITHDRAWAL OF APPLICATIONS WITHOUT THE APPROVAL OF THE COMMITTEE OF CREDITORS (COC), IS ULTRA VIRES THE INSOLVENCY AND BANKRUPTCY CODE (IBC) AND SHOULD BE CONSIDERED INVALID IN LAW.

69. Section 12A of the Insolvency and Bankruptcy Code (IBC) provides the process for the withdrawal of applications admitted under section 7, section 9, or section 10. An applicant seeking withdrawal is required to obtain the approval of ninety percent of the committee of creditors (CoC), as specified in the statute. The Insolvency and Bankruptcy Board of India has the authority to formulate regulations governing the manner in which such applications for withdrawal may be made.

70. Regulation 30A is one such regulation framed by the Insolvency and Bankruptcy Board of India. According to this regulation, an application for withdrawal under section 12A may be made to the Adjudicating Authority before the constitution of the CoC, by the applicant through the IRP; or after the constitution of the CoC, by the applicant through the IRP/RP, as the case may be. Therefore, regulation 30A makes a distinction based on whether the request for withdrawal is submitted before or after the establishment of the CoC. When the submission is after the formation of the CoC, the interim resolution professional (IRP) transmits the application to the CoC for their endorsement, requiring a consensus of 90%. Upon approval from the CoC, the submission is then brought before the NCLT. However, if the application is made prior to the constitution of the CoC, the IRP directly forwards the appeal to the NCLT for authorization, bypassing the need for CoC's endorsement.

71. In the specific facts of the present case, the CoC had not yet been constituted. In view of Regulation 30A, the approval of 90% of CoC, as provided in the parent legislation, i.e., IBC, was not applied. The issue here is that the Regulations made under the parent act is

[100] Kotak Mahindra Bank Ltd. v. A. Balakrishnan, (2022) 9 SCC 186.

going against the Parent act, which makes it ultra vires. The assertion of the invalidity of regulation 30A is based on the principle of administrative law that subordinate legislation cannot be ultra vires the parent Act, in this case, the Insolvency and Bankruptcy Code (IBC). This principle is well-established and consistent in legal jurisprudence[101]. As delegated legislation, regulation 30A must be within the scope and bounds of the IBC, and it cannot be inconsistent with the legislative policy laid down in the statute.[102]

72. It is further submitted that the interpretation of Section 12A Section 12A of the IBC clearly states that withdrawal may be allowed by the NCLT on an application made by the applicant with the approval of the CoC, "in such manner as may be specified." The phrase "in such manner" pertains to the procedure for making the application, while the substantive requirement of the CoC approval is explicitly provided in the statute itself. The discretion for delegated legislation lies only in prescribing the procedural aspects of the application. Therefore, regulation 30A, which permits withdrawal without the mandatory approval of the CoC, is in contradiction with section 12A, and to that extent, it is ultra vires.

73. It is submitted that Section 12A and the original regulation 30A were introduced in 2018 based on the recommendations of the Insolvency Law Committee[103], which recommended allowing withdrawal of CIRP proceedings with certain conditions. It emphasized that withdrawal should not be permitted solely on the basis of a settlement between the applicant creditor and the corporate debtor. The IBC process was designed as a proceeding in “rem”, considering the interests of all stakeholders. Therefore, the requirement of CoC approval (90% vote) represents an institutional check on private settlements that could negatively impact other stakeholders. Any regulation conflicting with this requirement would be inconsistent with the underlying essence of the IBC.

[101] See State Of Tamil Nadu & Anr vs P. Krishnamurthy & Ors, Appeal (civil) 5572-5644 of 2005.
[102] Rectifying the Law: CoC Approval for Withdrawal of CIRP Proceedings - IndiaCorpLaw, IndiaCorpLaw (2022), https://indiacorplaw.in/2022/01/rectifying-the-law-coc-approval-for-withdrawal-of-cirp-proceedings.html (last visited Aug 6, 2023).
[103] IBBI, *Discussion Paper on Corporate Insolvency Resolution Process along with Draft Regulations*, (2019), https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/May/CIRP%20Discussion%20Paper%20revised%201_2019-05-08%2019:10:29.pdf (last visited Aug 11, 2023).

THE PRAYER

Wherefore, in light of issues raised, arguments advanced, and authorities cited, this Hon'ble Court may be pleased to:

1. **OVERTURN** the Judgment dated 24.09.2022 of NCLAT in *Mr. Pipara* v. *Singhania Group of Companies*.
2. **ALLOW** the present Appeals preferred by Appellant No. 1 and Appellant No. 2.
3. **DECLARE** Appellant No. 1 and Appellant No. 2 'eligible' under section 230 to 232 of the Companies Act to propose a scheme of compromise and settlement.
4. **DECLARE** that the Appellant No. 4 (Tipsara MSCL (India) Ltd.) comes within the purview of 'financial creditor'.
5. **HOLD** that Security interest created on the assets of corporate debtor remains valid even if that interest is created for the loan availed by the third party, not necessarily by the corporate debtor.
6. **ALLOW** the Appeal of Appellant No. 3 seeking revival of the Company Petition admitted on 08.09.2021.
7. **SET ASIDE** the Order of the Adjudicating authority dated 21.12.2022.

AND / OR

Pass any order, direction, or relief that this Hon'ble Court may deem fit in theinterest of Justice, Equity and Good Conscience.

For this act of kindness, the counsels on behalf of the Appellants shall duty bound forever pray.

Sd/-

(COUNSELS FOR THE APPELLANTS)