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VI SURANA & SURANA AND UPES SCHOOL OF LAW,

NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION 2023

BEFORE THE HON'BLE SUPREME COURT OF MALTA

IN THE APPEAL UNDER SECTION 62 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

CIVIL APPEAL NO. ___ OF 2023

AGAINST THE ORDER OF THE HON'BLE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

IN THE MATTER OF-

MR. PIPARA……*APPELLANT*

VERSUS

DEORA NRE COKE LTD. ……*RESPONDENT*

&

MR. SHROFF……*APPELLANT*

VERSUS

FU-SAM POWER SYSTEMS LTD. THROUGH UDIT KUMAR RALHAN, LIQUIDATOR……*RESPONDENT*

&

AXIS TELECOM PRIVATE LIMITED ……*APPELLANT*

VERSUS

DANOBE INFO TECHNOLOGY LIMITED ……*RESPONDENT*

&

TIPSRA MSCL (INDIA) LIMITED & ORS. ……*APPELLANT*

VERSUS

VNTEK AUTO LIMITED ……*RESPONDENT*

[THE ABOVE MATTERS HAVE BEEN CLUBBED UNDER ARTICLE 145 OF THE CONSTITUTION OF INDIA, 1949, READ WITH RULE 3 OF ORDER LV OF THE SUPREME COURT RULES, 2013]

-WRITTEN SUBMISSION FOR APPELLANTS-

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TABLE OF ABBREVIATIONS

ABBREVIATIONS	WORDS
&	And
¶	Paragraph
§	Section
r/w	Read with
u/s	Under Section
Act	The Companies Act, 2013
Art	Article
CD	Corporate Debtor
Code	Insolvency and Bankruptcy Code 2016
FC	Financial Creditor
HC	High Court
Hon'ble	Honourable
IBBI	Insolvency and Bankruptcy Board of India
IRP	Insolvency Resolution Process
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
OC	Operational Creditor
S.	Section
SC	Supreme Court
v.	Versus

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A. CASES

S.no.	Case Name	Citation
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3.	Alchemist Asset Reconstruction Company Pvt. Ltd. v. NIIL Infrastructure Pvt. Ltd.	2017SCC OnLine NCLT 18372
4.	Arun Kumar Jagatramka v Jindal Steel And Power Ltd	(2021) 7 SCC 474
5.	Binani Industries Ltd v. Bank of Baroda	(2018)SCC Online NCLAT 112
6.	Calicut Bank Ltd. v. Devani Ammal	AIR 1940 Mad. 621
7.	Chitra Sharma v. Union of India	W.P. (C) 744 of 2017
8.	Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta and Ors	(2020) 8 SCC 531
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20.	Jasbir Singh Chadha v. U.P. Financial Corporation	2008 SCC OnLine Del 848
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27.	Meghal Homes (P.) Ltd. v. Shreeniwas Girni K.K. Sanity	(2007) 78 SCL 482
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47.	Swiss Ribbons Pvt. Ltd. v. Union of India	(2019) 4 SCC 17
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49.	T.R. Rajakumari v. Motion Picture Producers Combine Ltd	AIR 1942 Mad. 349

50.	Vivek Bansal v. Burda Druck India Pvt. Ltd. & Anr.,	2020 SCC OnLine NCLAT 582
51.	Y. Shivram Prasad v. S. Dhanapal & Ors	[2019] 153 SCL 294 (NCLAT)

B. STATUTES

1. Insolvency and Bankruptcy Code, 2016
2. Companies Act, 2013
3. Indian Contract Act, 1872

C. BOOKS

1. AKASH KUMAR MITTAL, INSOLVENCY AND BANKRUPTCY CODE: LAW AND PRACTICE (EBC Publishers 2022)
2. 1 CHATURVEDI AND PITHISARIA'S, Income Tax Law, (Lexis Nexis 2021)
3. 3 A RAMAIYA , GUIDE TO THE COMPANIES ACT (LexisNexis 2020)
4. DR. AVADHESH OJHA, INSOLVENCY AND BANKRUPTCY CODE, LAW AND PRACTICE WITH INSOLVENCY COURTS- NCLT & NCLAT, IBC VIS-À-VIS COMPANIES ACT, SARFARESI, DRT AND OTHER LAWS (Taxpublishers 2020)
5. GOWER & DAVIES, PRINCIPLES OF MODERN COMPANY LAW 5-16 (Sweet and Maxwell 2012)

D. IMPORTANT DEFINITIONS

1. **DNCL:** Deora NRE Coke Ltd is a private company and is registered at the Registrar of Companies, Melvi. It is one of the largest metallurgical coke manufacturers in the country with an installed capacity of 1.18 MTPA. The company also generates electricity through wind power projects with an installed capacity of 87.5 MW. DNCL is a major company in Darbhanga district of Devkhand in the Metcoke sector which is operational and has the largest industrial setup both in terms of manpower and scale of operations.
2. **SGOC:** Singhania Group of Companies s was established in the year 1993 and forms a part of the Singhania Group LLP. The company is a leading player in the Steel, Power, Mining, Oil & Gas, and infrastructure industries. It produces economical and efficient

steel and power through backward integration from its own captive coal and iron–ore mines and passes on the benefits to its customers. It is an unsecured Operational Creditor of DNCL.

3. **Fu-Sam:** Fu-Sam Power Systems Limited provides a one stop solution for all types of power backup issues for both domestic and industrial markets. Their focus is on solar power which is an eco-friendly energy solution. Being one of the biggest names in the power back up industries of India, Fu-Sam is spread in more than 90 countries worldwide.
4. **ATPL: (**Axis Telecom Pvt. Ltd.) is a company established in the year 1993 and is Asia's leading integrated telecom services provider with operations in Malta and Tri Lanka. It has been at the forefront of the telecom revolution and has transformed the sector with its world–class services built on leading edge technologies. Part of ATPL's success is due to its excellent relations with the customers.

STATEMENT OF JURISDICTION

The Appellants humbly submit before the Hon'ble Supreme Court of Malta, the Memorandum for the Appellants as Civil Appeal no. __of 2023 u/s. 62 of the Insolvency and Bankruptcy Code, 2016.

Section 62 of the Insolvency and Bankruptcy Code, 2016 reads as

62. *Appeal to Supreme Court*— (1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

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

The present memorial sets forth the facts, contentions, and arguments in the present case in the jurisdiction of the Appellants.

STATEMENT OF FACTS

SCENARIO – I

Mr. Pipara, a promoter of DNCL, submitted a resolution plan for DNCL on 1st October 2020, which was presented by the Resolution Professional before the Committee of Creditors. The plan was to be put to a vote in a meeting of the CoC scheduled on 23-24 October 2020. Before the conclusion of the voting, he was informed that he is ineligible u/s 29A of the Code of 2016 to submit a resolution plan and is also barred from proposing a scheme of compromise and arrangement u/s 230 of the Companies Act, 2013. The decision of the NCLAT dated 24th September 2022 is challenged in the appeal before this Court.

SCENARIO – II

The Appellant- Mr. Shroff was the promoter and director of Fu-Sam Power Systems Limited. As a part of the CIRP that was ongoing since 5th March 2021, Mr. Shroff submitted a Resolution Plan. Mr. Shroff was informed by an email dated 27th November 2021 issued by the RP, that the CoC had found him to be ineligible u/s 29A(h) of the Insolvency and Bankruptcy Code, 2016 (*hereinafter referred to as "the code")* and consequently annulled his resolution plan. Thereafter, he submitted his plan u/s 230 of the Act. However, he was informed that he was ineligible for the same in view of his ineligibility under IBC. An appeal has been filed challenging an order dated 19th November 2022 of the NCLAT.

SCENARIO – III

ATPL filed a Company Petition u/s 7 of IBC, alleging a default by Danobe. Despite executing a consent term between the parties, the petition was admitted. However, on appeal, the tribunal allowed the withdrawal of the petition on 9th February, 2022. Subsequently, Danobe failed to make the payment as per the consent terms, leading ATPL to approach NCLT for the revival of the Company Petition, which the Tribunal rejected.

SCENARIO – IV

MSCL (India) Limited, VRS Malta Financial Services Ltd. and M&N Finance Ltd. extended a short-term facility of INR 700 Crores to Kapro Engineering Limited and M.L.D Investments Private Limited, group companies of Vntek Auto Ltd (Corporate Debtor). The loan was secured by pledging shares of KMP Auto Limited held by CD. The CIRP proceedings were initiated against the Corporate Debtor and the creditors approached the Adjudicating Authority claiming their right on the basis of pledged shares, which was rejected. A subsequent dismissal by the Appellate Authority has led the creditors to approach this Hon'ble Supreme Court.

ISSUES RAISED

A.

WHETHER IN LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME OF COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTION 230 TO 232 OF THE COMPANIES ACT?

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 CODE TO SUBMIT A 'RESOLUTION PLAN'?

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?

D.

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

SUMMARY OF ARGUMENTS

A. THE SCHEME FOR COMPROMISE AND ARRANGEMENT UNDER SECTIONS 230 TO 232 OF THE COMPANIES ACT, 2013 CAN BE MADE WHEN THE PROCEEDING FOR LIQUIDATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 ARE ONGOING.

It is humbly submitted that a scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 (hereinafter referred to as "Scheme") of the Companies Act while a company is undergoing liquidation under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "Code"). In the instant case, a Scheme for Compromise and Arrangement was made by the Appellants who were the promoters of the Companies DNCL and Fu-Sam respectively. The Appellants submit, that this scheme made has been in furtherance of due procedure in order to save the Corporate Debtor and provide it with the resolution. It is further submitted that the scheme under the Companies Act can be made when the proceeding for liquidation under the Code is ongoing as the Scheme for Compromise and Arrangement as it caters to the Code. This applicability finds the due maintainability under the statute and it is a well-settled position of law.

B. THE APPELLATE AUTHORITY ERRED IN BARRING THE PROMOTER FROM FILING AN APPLICATION FOR COMPROMISE AND ARRANGEMENT

It is humbly submitted before the Hon'ble Supreme Court of Malta that the Appellate Authority was not right in extending the ambit of Section 29-A of the Code to the scheme of Compromise and Arrangement under the Companies Act, subsequently barring the promoters Mr. Pipara and Mr. Shroff from proposing a Scheme. They have attempted, with the right intent, to revive the Companies DNCL and Fu-Sam, respectively. They have been wrongly debarred from making this Scheme. The appellants in this regard humbly submit that the promoters should be allowed to make this scheme for compromise and arrangement as it is the last resort of the company and it should be advocated to protect the corporate debtor from a corporate death. further, the ineligibility u/s 29A of the Code applies only to a resolution mechanism and not a settlement mechanism. Lastly, the Code does not have the power to regulate the procedure under the Companies Act.

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

It is humbly submitted before the Hon'ble Supreme Court of Matla that in the instant case, the security interest created on the assets of corporate debtor held by the Appellants cannot be extinguished. The Appellants have granted short-term loan facilities against the pledge created on shares held by the Corporate Debtor to its group companies. While the CIRP proceedings have been initiated against the corporate debtor, the appellants contend that the security interest held by them cannot be extinguished on the whims of the Resolution Professional.

The appellants contend that the claim was not even admitted in the first place and subsequently the Appellate Authority has erred in holding that they are barred to raise the appeal rejected by the Adjudicating Authority. This is owing to the fact the appellants qualify to be considered as financial creditors and even if considered to be a secured creditor the extinguishment of security interest will go against the intent of the code. The appellants only possess this recourse and as a result the security interest shall not be extinguished as the same is bound to go against the intent of the code.

D. THE APPELLANT AUTHORITY ERRED IN DECLINING THE RESTORATION OF COMPANY PETITION IN CASE OF DEFAULT OF THE CONSENT TERMS.

It is humbly submitted that the Appellate Authority has erred rejecting the application seeking revival of the Company Petition vide an order dated 21.12.2022. The appellants i.e., Axis Telecom Private Ltd. who qualify to be a financial creditor of Danobe Info Technology Ltd. initiated company petition against the Corporate Debtor. However, a settlement agreement was entered into between the Appellant and the Corporate Debtor u/s 12-A of the Code. However, a default was committed by the Corporate Debtor in the payment of fourth tranche due to which the Appellant are compelled to file an application for reviving the company petition. The same was rejected, the reason stated by the Adjudicating Authority stating that "there is no specific provision in the IBC, 2016 for reopening the Company Petition".

The appellants in the present case contend that the Adjudicating Authority has inherent powers under Rule 11 of NCLT Rules, 2016 to be read with Section 60(5)(b) of the Code for the revival of Company Petition. As the revival petition has been placed on record before the Adjudicating Authority and subsequently there was a default ,the revival petition qualifies to be granted liberty. The adjudicating authority does not have the discretionary power with regards granting of liberty and as a result the company petition needs to be revived.

ARGUMENTS ADVANCED

A. A SCHEME FOR COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTION 230 TO 232 OF THE COMPANIES ACT, 2013 IN A LIQUIDATION PROCEEDING UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

1. It is humbly submitted that a scheme for Compromise and Arrangement can be made in terms of section 230 to 232 (*hereinafter referred to as "**Scheme")*** of the Companies act while a company is undergoing liquidation under the Insolvency and Bankruptcy Code, 2016 (*hereinafter referred to as "***Code***"). In the instant case, the companies DNCL and Fu-Sam have been ordered into liquidation[1] after no resolution plan could be approved by the CoC. Thereafter, a scheme for compromise and arrangement was made by the Appellants who were the promoters[2] of the Companies DNCL and Fu-Sam respectively. The Appellants submit, that this scheme made has been in furtherance of due procedure in order to save the Corporate Debtor and provide it with the resolution.
2. The objective of the Code 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*"[3] and it provides for liquidation only as a last resort.
3. Considering the outcome of the process of liquidation which majorly results in the dissolution of a Company, and in order to protect the creditors in a situation giving rise to a Corporate Insolvency Resolution Process (*hereinafter referred to as "***CIRP***"***)***, a procedure such as one u/s 230 of The Companies Act, 2013 (*hereinafter referred to as* "**Companies Act**"**)** caters to the objective of the Code as well as the Companies Act.
4. The Appellants submits that the scheme under Companies Act can be made when the proceeding for liquidation under the Code is ongoing as the Scheme for Compromise and Arrangement *[i] Scheme under Section 230 to 232 in a liquidation proceeding caters to the interest of the Code [ii] Scheme for Compromise and Arrangement can be made during a liquidation proceeding as it is statutorily backed and, [iii] Scheme for Compromise and Arrangement made in terms of sections 230 to 232 of the companies act as it is a settled position of law*

[1] Moot Proposition, ¶ 11, 19.
[2] Moot Proposition, ¶ 6, 18.
[3] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

(i) Scheme under Section 230 to 232 in a liquidation proceeding caters to the interest of the Code

5. It is humbly submitted that the scheme for compromise and arrangement u/s 230-232 of Companies Act caters to the interest of the Code as it provides last resort to the company undergoing liquidation for revival and saves the corporate debtor as well as the creditors from an undesirable outcome of liquidation.

6. The primary objective of the Code is resolution of the corporate debtor, the second object is "*maximization of value of values of assets of the corporate debtor"* and the third is "*balancing the interests of the corporate debtor and the creditors.*[4] Furthermore, the Adjudicating Authority orders liquidation when either the resolution plan is not submitted or is rejected by the Adjudicating Authority thereby leaving no option to revive the Company through CIRP.[5] Therefore, it strikes the right balance between resolution and liquidation.

7. A scheme for Compromise and Arrangement u/s 230-232 furthers the said objectives of the Code. It provides a mechanism to enter into a compromise or to amicably settle with an arrangement by mutual concessions including reorganization of share capitals, etc. between members, creditors, and corporate debtors of the class who are being affected by such a Scheme.[6] It has to be reasonable such that it is beneficial to both the sides entering it.[7]

8. It is submitted that the Compromise or Arrangement '*relieves the company and its contributories from ability further than that which is contemplated or imposed by the scheme*.'[8] It is a fact that a compromise can be a win-win situation for both the company and its creditors as it offered reconciliation with much less court's intervention.

9. The observations of the Bankruptcy Law Reforms Committee (*hereinafter referred to as "***BLRC**") in its interim report stated that liquidation should be used as the last option[9]which was later confirmed by the judicial authorities[10] leading to an amendment u/s 230.

[4] Binani Industries Ltd v. Bank of Baroda, (2018) SCC Online NCLAT 112.
[5] Insolvency and Bankruptcy Code, 2016, § 33, No.31, Acts of Parliament (India).
[6] AVTAR SINGH, INDIAN COMPANY LAW (Eastern Book Company 1966).
[7] Alabama,'Neiu Orleans, Texas and Pacific Junction RailwayCo,re, (1891) 1 Ch 213: 7TLR171.
[8] Motilal Kanji and Co. v. Natvarlal M. Jhaveri AIR 1932 Bom 78.
[9] Ministry of Finance, The report of Bankruptcy Law Review Committee Volume I- Rationale and Design (2015).
[10] Y Shivam Prasad v. S Dhanapal 2019 SCC OnLine NCLAT 1527.

10. In the instant case, the Appellant company, DNCL, was undergoing CIRP proceedings. In furtherance of the same, the promoter, Mr. Pipara submitted a Resolution Plan which was not considered because he was termed ineligible.[11] Owing to this and other circumstances, the company was ordered to undergo liquidation.[12] Henceforth, in order to save the company from liquidation, the appellant Mr. Pipara moved an application u/s 230 to 232 of the Companies Act proposing a scheme of arrangement between the promoters and creditors.[13]

11. In the instant case, Mr. Pipara and Mr. Shroff, promoters of DNCL and Fu-Sam respectively have rightly resorted to the spirit of both IBC and Companies Act to provide DNCL and Fu-Sam with a resolution before they fall into liquidation. Therefore, the recourse taken u/s 230 to 232 is in consonance with the objective of the Code serves the purpose of both the Companies Act and the Code alike.

(ii) A scheme for Compromise and Arrangement can be made during a liquidation proceeding as it is statutorily backed.

12. It is respectfully submitted that a scheme for Compromise and Arrangement proposed while a company is undergoing liquidation finds the basis in statutory amendments brought in the Companies Act as a result of the enactment of the Code. Moreover, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (*hereinafter referred to as* "**IBBI Regulations**") explicitly recognize[14] the possibility of such Scheme under the Code.

13. Section 230 of the Companies Act, which provides for the scheme of Compromise and Arrangements was amended through Section 255 of the Code r/w schedule XI thereto. These amendments were recommended by the Joint Parliamentary Committee[15] (*hereinafter referred to as* "**JPC**") by giving a green signal for the extension of such Schemes under Companies Act while a company is undergoing liquidation. This expansion aligns seamlessly with the established objective of the Code, as already submitted.

[11] Moot proposition, ¶11.
[12] Moot proposition, ¶11.
[13] Moot proposition, ¶ 12.
[14] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 2(b) (2016).
[15] REPORT OF THE JOINT COMMITTEE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2015 (Lok Sabha).

14. Section 255 of the Code r/w XI[th] Schedule has brought liquidation within the scope of winding up[16] under Companies Act. Moreover, the insertion of the phrase "*liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016…*" in Section 230(1) and 230(2) of the Companies Act grants right to the liquidator to present an application of a Scheme before the Tribunal. If such Scheme fulfills the necessary requirements[17], it becomes binding on the concerned parties.

15. A perusal of the above Sections in both the Code and the Companies Act, along with the JPC report, reveals a clear intent of the legislature to allow the scheme of Compromise and Arrangement to be proposed while a company is undergoing liquidation.

16. The same view is further substantiated by referring to the IBBI Regulations. The 2019 amendment inserted Regulation 2B which provides for a scheme of Compromise and Arrangement u/s 230 of the Companies Act to be concluded within ninety days of the 'liquidation order'[18]. This indicates the intention of the regulator to enable the interested parties [19,20] to propose a scheme through the liquidator, in accordance with the provisions specified u/s 230(1) of the Companies Act.

17. Further, a scheme made during liquidation proceeding will not be overridden by the Code by virtue of Section 238. It aligns with the objectives of the Code and derives the procedure from the Companies Act. Therefore, there exists no inconsistencies in the two procedures and should be allowed in order to achieve the objective of reviving the Corporate Debtor[21].

18. Conclusively the Appellant submits that the scheme for Compromise and Arrangement u/s 230 of the Companies Act, 2013 can be made during liquidation proceeding under the Code of 2016 is just, serving a legitimate purpose and protecting the rights of all the stakes in consideration. Both Mr. Pipara and Mr. Shroff have acted justly and in consonance with the prevailing laws to cater to the above interpretation of the scheme and liquidation proceedings.

[16] The Companies Act, 2013, §2(94)(b), No. 18, Act of Parliament, 2013 (India).
[17] The Companies Act, 2013, §230(6), No. 18, Act of Parliament, 2013 (India).
[18] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Reg. 2(b) (Dec. 15, 2016).
[19] National Steel & General Mills v. Official Liquidator, 1989 SCC OnLine Del 118.
[20] Rajendra Prasad Agarwalla v. Official Liquidator, 1977 SCC OnLine Cal 189.
[21] The Companies Act, 2013, §230(1), No. 18, Act of Parliament, 2013 (India).

(iii) A scheme for compromise and arrangement can be made in terms of sections 230 to 232 of the companies act as it is a settled position of law

19. It is respectfully submitted that a scheme for Compromise and Arrangement can be made during a liquidation proceeding as it is a settled position of law. Through a number of judgments, the Appellate Authority as well as this Hon'ble Supreme Court has strengthened the position by *[i] directing the liquidator to accept the applications for compromise and arrangement, and [ii] interpreting Section 230 of the Act of 2013.*

a. Directing the liquidator to accept the scheme during liquidation

20. The Appellant places reliance on the authority of NCLAT in the case of *S.C. Sekaran v Amit Kumar*[22] to submit that the authority itself has paved the way for a Scheme to be made during the liquidation proceedings under the Code. The Court has in several instances directed the liquidator to invite applications for the scheme for compromise and arrangement under the Companies Act.

21. Furthermore, it is submitted that a liquidator has to proceed in accordance with the law, i.e., to verify the claims of all the creditors[23] and take into control all the assets and actionable claims of the 'corporate debtor'. The liquidator is bound to carry on the business of the 'corporate debtor' for its beneficial liquidation, as per Section 35 of the Code. In furtherance of this, the liquidator before proceeding to sell the assets of the corporate debtor, has to take steps in terms of Section 230 of the Companies Act, 2013. Upon approval of such Scheme by the concerned parties the Adjudicating Authority, if so required, would pass appropriate order and only on the failure of revival, the Adjudicating Authority and the Liquidator will first proceed with liquidation in accordance with law.[24]

22. In another case of *Y Shivam Prasad v. S Dhanapal*[25] (*herein after* "**Y. Shivram**"), the Appellate Authority dealt with a similar issue. The facts being germane to those of the case at hand, the company was ordered into liquidation. This Hon'ble Court held that. "*during the liquidation stage, 'Liquidator' is required to take steps to ensure that the company remains a going concern and instead of liquidation and for the revival of the 'Corporate Debtor' by taking certain measures".*

[22] 2019 SCC OnLine NCLAT 1527.
[23] S.C. Sekaran v. Amit Kumar, (2019) SCC OnLine NCLAT 1527.
[24] S. Irudaya Nathan v. G.V. Ravikumar, 2021 SCC OnLine NCLAT 636.
[25] (2019) SCC OnLine NCLAT 172.

the Court had then directed the Liquidator to invite a scheme for compromise and arrangement before the process of liquidation is triggered.

23. Thus, the steps which have to be taken by the liquidator before proceeding with liquidation itself are:

i) 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.

ii) On failure, the liquidator is required to take steps to sell the business of the 'Corporate Debtor' as a going concern in its totality along with the employees.[26]

24. In coherence with this approach, the Hon'ble Supreme Court in the case of *Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr*.[27] has placed reliance on the above two judgments and substantiated the same while recognising the judicial intervention by the Appellate Authority in *Y Shivram Case.*

25. It is henceforth submitted that the Companies DNCL and Fu-Sam both received the order for liquidation *vide* orders dated December 11, 2020, and March 3, 2022, respectively. In the case of Fu-Sam, the liquidator was explicitly directed[28] to accept the applications for a scheme of Compromise and Arrangement under sections 230 to 232 of the Companies Act, 2013. Both the schemes made by the members of the corporate debtor were duly in furtherance of the settled position of law by this Hon'ble Court.

b. Interpretation of Section 230 of the Companies Act, 2013

26. A referral to Section 230 of the Companies Act also substantiates that a 'liquidator' is an eligible person to make a scheme for Compromise and Arrangement during liquidation. The interpretation of the provision as done by this Hon'ble Court in *Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors*.[29] confirms that the scheme was enacted with the intent to provide an opportunity for the revival of the corporate debtor. The Court categorically stated that,

"*scope of provision 391* (now Section 230) *considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up, and the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right*

[26] (2019) SCC OnLine NCLAT 172.
[27] Y Shivam Prasad vs. S Dhanapal (2021) 7 SCC 474.
[28] Moot proposition, ¶19.
[29] In Meghal Homes Pvt. Ltd. vs. Shree Niwas Girni K.K. Samiti & Ors., (2007) 7 SCC 753.

to the liquidator in the case of a company that 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 liquidator had been appointed."

27. Hence it is submitted that Section 230 itself has an underlying interpretation to it which makes it a viable option for revival during liquidation. It provides the liquidator with a right to propose a scheme for compromise and arrangement. The intent of this interpretation is to let the corporate debtor to have the last resort available and not slip into a corporate death due to liquidation.

28. The promoters Mr. Pipara and Mr. Shroff have attempted, with the right intent, to revive the Companies DNCL and Fu-Sam, respectively. They have proposed a scheme for Compromise and Arrangement under the Companies Act after the being informed of their ineligibility to propose a Resolution Plan during the CIRP. They have been wrongly debarred from making this scheme.

B. THE APPELLATE AUTHORITY ERRED IN BARRING THE PROMOTER FROM FILING AN APPLICATION FOR COMPROMISE AND ARRANGEMENT

29. It is humbly submitted before the Hon'ble Supreme Court of Malta that the Appellate Authority was not right in extending the ambit of Section 29-A of the Code to the scheme of Compromise and Arrangement under Companies Act, subsequently barring the promoters from proposing the scheme.

30. Based on the jurisprudence, statutory interpretation, and precedents, the appellant submits that the Appellate Authority has erred in dismissing the appeal mainly on the following grounds -*[i] The last resort of the Company should be to prevent the corporate debtor from a Corporate Death, [ii] The ineligibility u/s 29-A of the Code shall not extend to the provision of Compromise and Arrangement u/s 230-232 of Companies Act as it applies only to the 'Resolution mechanism' and not the "Settlement Mechanism' and [iii] IBC cannot regulate the procedure under the Companies Act.*

(i) The last resort of the company should be to prevent the Corporate Debtor from a corporate death

31. It is humbly submitted that a scheme for Compromise and Arrangement which is made during the liquidation proceeding, is in the nature of a last resort. While the resolution process under the Code was introduced with the idea of providing a 'resolution' to the

distressed corporate debtor[30], in case of failure of CIRP, there is barely any resolution left for the saving the corporate debtor from a corporate death. Once a CIRP fails, the company receives an order of liquidation. Following this a liquidator is appointed to carry out the liquidation. This liquidator ought to take measures to maximise the value of assets of the Company.[31]

32. The Code, as has been affirmed by this Hon'ble Court[32] is a beneficial legislation that puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.[33] A scheme when made after the failure of CIRP acts in furtherance of this principle. It is submitted that the scheme continues to protect the position of the creditors by providing them powers to approve the said Scheme followed Adjudicating Authority's approval. However, it does not take into consideration the diluted position of the corporate debtor and in turn serves the objective of the code by following the creditor-in-possession model.

33. The appellants rely on the procedure of the Scheme laid under the Companies Act to submit that there exists a wider ambit to the said provision and is not limited to liquidation only. The Scheme, as per the Act, can be made by a class of creditors and a class of members.[34] Conclusively, there is no restriction of any sort on who can propose such a scheme.

34. By extending the ineligibility given under section 29A of the Code to the Scheme under the Companies Act, the Adjudicating Authority has created these restrictions for the persons interested in proposing a scheme for compromise and arrangement. In relation to the prospect of a promoter of the corporate debtor, the appellants make this submission that at the last juncture when the revival of the company is sought, the promoter should be allowed to make a proposal for the scheme under the Companies Act. The promoter is not just any other entity that has vested interest of any other nature but to provide a resolution to the corporate debtor.

35. The promoter has been explained as a person who bears a fiduciary relation to the Company[35]. The creation and moulding of the company lie in their hands and they are the ones to predict how the corporation would begin working. In furtherance of this, the

[30] Ministry of Finance, The report of Bankruptcy Law Review Committee Volume I- Rationale and Design (2015).
[31] Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Anr., (2019) 4 SCC 17.
[32] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) 7 SCC 474.
[33] Swiss Ribbons Pvt. Ltd. & Anr. V. Union of India & Anr., (2019) 4 SCC 17.
[34] The Companies Act, 2013, §230(1), No. 18, Acts of Parliament, 2013 (India).
[35] GOWER & DAVIES, PRINCIPLES OF MODERN COMPANY LAW 516 (Sweet and Maxwell 2012).

erstwhile promoter can be assumed to be one who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold, thereby impairing the object of maximization of the value of assets.

36. Furthermore, in contrast to a successful resolution applicant under Chapter II or the person who benefits from the sale of assets in liquidation under Chapter III of the IBC, the person who proposes a Scheme under Section 230 of the Companies Act does not have the benefit of acquiring the company free of encumbrances.

37. Thusly, the promoters, if allowed to propose a scheme for Compromise and Arrangement stand at a pedestal that allows them to have a better knowledge about the corporate personality as well as its business.

38. In addition to this, the procedure of a scheme for compromise and arrangement calls for the proposal to be voted upon by the concerned Class of Creditors. The said scheme would be approved after 75% of the class of creditors votes in favour of it. Moreover, the mala fide intent or the undesirability of the promoter which he is deemed to possess merely because he is ineligible under section 29A, can be put to test by the commercial wisdom of the Class of Creditors and thereafter by the Adjudicating Authority.

39. In the case of *Miheer H Mafatlal v. Mafatlal Industries Ltd*.[36] , while expounding upon the extent of intervention by the Adjudicating Authority had laid that the scheme receives the sanction of the Tribunal if it is for the 'revival' of the Corporate Debtor. The court had also remarked that the Tribunals should not interfere with the commercial wisdom of the class of creditors except for when the scheme is not fair, reasonable, and just.

40. In the instant case, the Appellant Mr. Shroff had proposed the best scheme for Compromise and Arrangement. However, he could not proceed with the procedure and propose it before the class of creditors owing to the order of the Adjudicating Authority and thereafter the Appellate Authority as a result of the ineligibility imposed.

41. It is therefore humbly submitted that the promoter should be allowed to make a proposal for a scheme of Compromise and Arrangement during the liquidation proceeding even if he is ineligible to propose a resolution plan. As has been submitted, he can be the proposer with possibly the best scheme at times and the Class of Creditors possess the commercial wisdom to decide upon the aftermath of approval of such a scheme. Further, as has already been submitted, the Tribunal shall carry the authority to pass

[36] (1997) 1 SCC 579.

such orders with regards to the Scheme so submitted as it deems fit and shall also ensure that the Scheme only intends to grant the revival to the corporate debtor which he could not attain otherwise.

(ii) The ineligibility u/s 29-A of the Code shall not extend to the provision of Compromise and Arrangement u/s 230-232 of Companies Act as it applies only to the 'Resolution mechanism' and not the 'Settlement Mechanism'

42. It is humbly submitted that there exists a clear distinction between the 'Resolution mechanism' under the Code and the 'Settlement mechanism' under Companies Act. The ineligibility u/s 29A extends to the Resolution Mechanism only and not the Settlement Mechanism.

43. The provisions under Chapter II deal with the resolution of the company through a CIRP process. Section 30 and 31 under the Chapter, provides for the submission and approval of a resolution plan. If the CIRP proceedings are successful and the resolution plan gets approved the company is revived thereby, wholly passing the control to the successful resolution applicant.

44. Chapter III of the Code deals with the liquidation proceedings and does not have any statutory provision relating to settlement during the liquidation of Company. However, as has already being established, the Scheme for Compromise and Arrangement u/s 230 of the Companies Act can be initiated when the company is undergoing liquidation. This is referred to as Settlement Mechanism. Once the scheme has been accepted the successful applicant takes over the charge without extinguishment of all the claims and liabilities.

45. The legislative intent behind barring a promoter u/s 29-A of the Code is to not allow them to take the advantage of their own wrong and get a 'back door entry'.[37] This means that they shall not be given a chance to restore status quo without any encumbrances as a result of the application of clean slate theory[38] as is the outcome of a successful Resolution Mechanism. This is evident u/s Section 35(1)(f) under Chapter III wherein the ineligibility has been extended in order to bar the ineligible persons from getting the assets of the company of any encumbrances.

46. In a Resolution mechanism the successful resolution applicant starts *tubula rasa* i.e., starting afresh and thereafter no new claims can be accepted, and the unclaimed ones

[37] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd, (2021) 7 SCC 474.
[38] Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.

stand extinguished.[39] Moreover, the corporate debtor cannot be made liable for any offence committed prior to the commencement of CIRP[40],[41]. However, there is no provision or regulation under the Code applying the same for the applicant proposing a scheme for compromise and arrangement and in such cases the corporate debtor goes back to the promoter with all the encumbrances attached.

47. Therefore, the Appellant humbly pleads that, the ineligibility u/s 29-A shall not be extended to Section 230 and that both Mr. Pipara and Mr. Shroff, the promoters of DNCL and Fu-Sam respectively shall not be barred from proposing a scheme of Compromise and Arrangement as it falls under the ambit of Settlement Mechanism under the Companies Act.

(iii) IBC cannot regulate the procedure under the Companies Act

48. It is humbly submitted that the extension of ineligibility criteria by the Appellate Authority to a scheme for Compromise and Arrangement under the Companies Act is in ignorance of the scope of the Code as well as the Act. The Appellate Authority by doing the said act has judicially attempted to regulate a procedure which has its parent act as the Companies Act, 2013.

49. Black's Law Dictionary defines a 'regulation' as "the act or process of controlling by rule or restriction."[42] Therefore if the rule of ineligibility is extended to the scheme under the Companies Act, it is an attempt by the Appellate Authority to regulate the scheme through the Code.

50. It is further submitted that the scheme has been 'allowed' to be made during the liquidation proceedings by the statute as well as the judicial authorities. This allowance by the due authorities was never intended to impair the procedure of the scheme. The scheme for Compromise and Arrangement by virtue of section 230 (1) allows a class of members or a class of creditors to propose the same without any upright restrictions.

51. In the case of *Rajendra Prasad Aggarwal v. Official Liquidato*r[43] the court answered in negative to the question of only a liquidator proposing a scheme for compromise and arrangement during liquidation. It has been laid down that a member, creditor and liquidator can make a scheme all alike during liquidation.

[39] Insolvency and Bankruptcy Code, 2016, § 31(1), No.31, Acts of Parliament (India).
[40] Insolvency and Bankruptcy Code, 2016, § 32A, No. 31. Acts of Parliament (India).
[41] Manish Kumar v Union of India, 2021 SCC OnLine SC 30.
[42] Black's Law Dictionary 1311 (9th ed. 2009).
[43] 1977 SCC OnLine Cal 189.

52. Hence the judicial extension of the ineligibility criteria is invalid as the same is regulating the scheme for Compromise and Arrangement while there exists no such restriction in the parent act.

53. Further, the regulatory body for the Code, the IBBI has amended rules for liquidation[44] and furthered the stance upheld by the Appellate Authority. The amended Regulation 2B which primarily provides for a period of ninety days for the completion of a Scheme made during liquidation proceedings, now states that a person ineligible to propose a resolution plan under the Code shall not be a party to the scheme for compromise and arrangement in any manner.

54. The appellants humbly submit before this Hon'ble Court that this regulation by IBBI is flawed because *firstly*, the Code is not the parent act for a scheme of compromise and arrangement and *secondly*, it is outside the purview of the powers given to the board by the Code.[45]

55. The IBBI in this regard is empowered to make rules for the implementation of the provisions of the Code. While it has been stated that there exists no provision for this extension in the Code itself, the regulation then lacks the due qualification to be construed as a valid regulation. Further, a regulation of this sort can only be made by the Companies Act as it is the legislation governing the said Scheme.

56. Therefore, it is respectfully submitted that the extension of the ineligibility criteria Appellate Authority is improper as the Code cannot regulate a procedure under the Companies Act, 2013. The promoters Mr. Pipara and Mr. Shroff should hereby be allowed to make a scheme for Compromise and Arrangement for the companies DNCL and Fu-Sam, respectively.

C. THE SECURITY INTEREST CREATED ON THE ASSETS OF CORPORATE DEBTOR CANNOT BE EXTINGUISHED WHEN THE INTEREST HAS BEEN CREATED FOR THE LOAN AVAILED BY THE THIRD PARTY, NOT THE CORPORATE DEBTOR

57. It is humbly submitted before the Hon'ble Supreme Court of Matla that in the instant case, the security interest created on the assets of corporate debtor held by the Appellants cannot be extinguished. The Appellants have granted short-term loan

[44] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Reg. 2(b) (Dec. 15, 2016).
[45] Insolvency & Bankruptcy Code, 2016, § 196, No. 31, Act of Parliament, 2016 (India).

facilities against the pledge created on shares of KMP Auto Ltd.[46] to the group companies of corporate debtor. The same cannot be extinguished on the *ipse dixit* of the Resolution Professional when the claim was not even admitted in the first place.[47] The Appellate Authority has erred in holding that the Appellants are barred to raise the appeal rejected by the Adjudicating Authority.

58. Therefore, considering the present scenario, the arguments from the Appellants are three folded- *[i] The Appellate Authority has erred in debarring the appellants from raising the claim. [ii] The appellants qualify to be considered as financial creditors [iii] The retention* of security interest is the last resort for Appellants and extinguishment of the same will go against the intent of the code.

(i) The Appellate Authority has erred in debarring the appellants from raising the claim.

59. It is humbly submitted before this Hon'ble Supreme Court that the Appellate Authority has erred in debarring the appellants from raising the claim and the same can be attributed to a two-fold rationale**,** *firstly,* that the appellants have filed their claims in reasonable time and *secondly*, that the resolution plan proposed by PVI is being reconsidered.

a. The appellants have filed their claims in reasonable time.

60. The IBBI (Corporate insolvency resolution providing) Regulations (*hereinafter referred to as "**IBBI CIRP Regulations**")* provide for a total of ninety days to file for a claim, even if there has been a failure to do so within the time provided in the public announcement.[48] However, it has been a settled position that the said Regulations are directory, and not mandatory[49] in nature.

61. In the instant case, the CIRP Proceedings were initiated against the corporate debtor on June 24th, 2020[50] and the Appellants filed their claim as secured financial creditor on October 2nd, 2020[51]. The Appellants have filed their claim within 11 days of the deadline and this delay of few days qualifies to be considered by the Resolution

[46] Moot proposition, ¶32.
[47] Jaypee Kensington Boulevard Apartments v. NBCC India Ltd & Ors., (2022) 1 SCC 401, ¶259.
[48] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 12 (2016).
[49] State Tax Officer v. Rainbow Papers Ltd., 2022 SCC OnLine SC 1162.
[50] Moot proposition, ¶33.
[51] Moot proposition, ¶34.

Professional. Subsequently, the rejection of the Appellants claim is unjustified owing to the directory[52] nature of the time limit prescribed.

b. Resolution plan proposed by PVI is being reconsidered.

62. It is respectfully submitted before this Hon'ble Supreme Court that Merriam Webster's Law dictionary defines reconsideration as an act *"to consider again especially with a view to changing or reversing"*[53]. This implies that reconsideration of a resolution plan[54] is done with a view to alter the same. The failure of SHG's resolution plan in fulfilling the obligations sets the clock back[55] to the Resolution Professional to adjudicate on the claims and subsequently send it to CoC for approval.

63. In the instant case, the resolution plan submitted by PVI has been directed to be reconsidered by the CoC[56] and as a result, claim of the Appellants qualifies to be accepted. The Adjudicating Authority has at various instances[57] observed that when the CIRP has not reached the stage of approval of the resolution plan by the CoC, a claim submitted by a creditor cannot be rejected by Resolution Professional merely on the ground of delay in filing it. An extinguishment of any claim whatsoever happens only post approval of the resolution plan by the Adjudicating Authority.[58] Conclusively, the Appellant's claim should be accepted before approval of PVI's resolution plan is considered. [59]

(ii) The appellants qualify to be considered as financial creditors

64. It is humbly submitted before this hon'ble Supreme Court that the appellants qualify to be considered as financial creditors owing to two factors, *firstly,* that there exists direct debtor-creditor relationship between the Appellant and the corporate debtor and *secondly,* that pledge was made to secure the payment till the extent of shares pledged.

[52] M/s Edelweiss Asset Reconstruction company Private ltd v. Adel Landmarks Ltd, Company Appeal (AT) (Insolvency) No. 304 of 2017.
[53] MERRIAM WEBSTER, MW DICT OF LAW 672 (Merriam Webster 2016).
[54] Moot proposition, ¶34.
[55] Mr. Anup Kumar Singh v. Bank of India,2020 SCC OnLine NCLT 372.
[56] Moot Proposition, ¶35.
[57] In Re: Twenty First Century Wire Rods Ltd. 2019 SCC OnLine NCLT 737, EARC Pvt. Ltd. v. Adel Landmarks Ltd. NCLAT Company Appeal (AT) (Insolvency) No. 377 of 2019.
[58] K. V. Developers v. Puneet Kaur, 2022 SCC OnLine NCLAT 245.
[59] Alchemist Asset Reconstruction Company Pvt. Ltd. v. NIIL Infrastructure Pvt. Ltd., 2017 SCC OnLine NCLT 18372.

a. There exists a direct debtor-creditor relationship between the appellant and the CD.

65. It is humbly submitted that Securities Exchange Board of India defines 'group' in Share Based Employee Benefits and Sweat Equity Regulations, 2021[60] as

"two or more companies which, directly or indirectly, are in a position to—

(i) exercise 26 % or more of the voting rights in the other company; or

(ii) appoint more than fifty per cent of the members of the Board of Directors in the other company; or

(iii) control the management or affairs of the other company."

66. Consequently, group companies conduct business collectively by interlinked companies under common ownership and control.[61] It is a common practice to undertake operations through different arms [62], enjoying separate personality. However, the principle of separate legal entity is limited in scope and can be pierced for depriving the company or its controller of the advantage that it can obtain through separate legal personality. [63]

67. In the instant case, corporate debtor has taken up the loans through its two group companies Kapro and MLD. While using the companies' separate legal entity as a façade, the corporate debtor was able to get funds for its own ultimate use.[64] As a result, the 'corporate veil' needs to be pierced as the corporate debtor has taken advantage of the same and consequently needs to be held that there exists a direct debtor-creditor relationship between the appellants and corporate debtor.

b. Pledge was made to secure the payment till the extent of shares pledged.

68. It is humbly submitted that a security interest is created for securing performance or payments of an obligation and is inextricably linked to the underlying debt.[65] As a

[60]Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021, Gazette of India, 44 (India).

[61] Christian Witting, *The corporate group: system, design and responsibility*, 80(3) CAMBRIDGE LAW JOURNAL, 581 589 (2021), https://www.cambridge.org/core/journals/cambridge-law-journal/article/corporate-group-system-design-and-responsibility/.

[62] Shruti Sethi, The Third-Party Security Conundrum Under IBC: Whether 'Financial' or Just 'Secured (12 July 2023, 8:31PM), https://www.nlsblr.com/post/the-third-party-security-conundrum-under-ibc-whether-financial-or-just-secured.

[63] ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1.

[64] Moot proposition, ¶14.

[65] BRIAN A. BLUM, SAMIR D. PARIKH, EXAMPLES & EXPLANATIONS FOR BANKRUPTCY AND DEBTOR/CREDITOR, 215(Wolters Kluwer 2018), State Bank of India v. Samneel Engineering Company & Ors.,1995 SCC OnLine Del 824.

result, the debt subsists within the security interest[66] and a third-party security provider and a borrower are similarly liable to the creditor vis-à-vis the underlying debt under the Code.[67]

69. In the instant case, creation of security interest in favour of Appellants implies that the corporate debtor undertook to repay the debt owed by its group companies to the extent of the security interest in case of default.[68] Consequently, the Appellants who qualify to be secured creditors should be considered as financial creditor to the extent of the shares pledged.

(iii) The retention of security interest is the last resort for Appellants and extinguishment of the same will go against the intent of the code.

70. It is humbly submitted that a security interest is defined as the "*the 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 any obligation of any person.*"[69]

Consequently, any transaction leading to transfer[70] of asset in favour of a creditor would make him a secured creditor.[71]

71. The Hon'ble Supreme Court in the landmark case of *M/S Vistra ITCL (India) Limited v. Dinkar Venkatasubramanian*[72] has held that secured creditors can retain the security interest in the pledged shares along with security proceeds on the sale of the said pledged shares. Secured creditors are always in a position to contend that the mortgaged property is to the extent of the mortgage their own property. Consequently, it is immaterial whether the mortgage is in winding or not. They are allowed to remain outside the winding up [73] and enforce their rights as a secured creditor.

72. On similar lines, Hon'ble Supreme Court ruled in the case of *Jaypee Kensington Boulevard Apartments v. NBCC India Ltd & Ors*[74] held that the extinguishment of security interest will be against the due process of law while upholding that the security interest of secured creditors (who are not financial creditors) cannot be extinguished

[66] Jasbir Singh Chadha v. U.P. Financial Corporation, 2008 SCC OnLine Del 848.
[67] Ministry of Corporate Affairs, INSOLVENCY LAW COMMITTEE REPORT (2018).
[68] *Ibid.*
[69] Insolvency and Bankruptcy Code, 2016, § 3(31), No. 31, Acts of Parliament, 2016 (India).
[70] Insolvency and Bankruptcy Code, 2016, § 3(34), No. 31, Acts of Parliament, 2016 (India).
[71] Insolvency and Bankruptcy Code, 2016, § 3(30), No. 31, Acts of Parliament, 2016 (India).
[72] 2023 SCC OnLine SC 570.
[73] Food controller and others v. Cork, (1923) UKHL J0725-2.
[74] (2022) 1 SCC 401.

and such secured creditors would have to be paid in accordance with the value and priority of security held by them or will be discharged in accordance with law relating to discharge of security interest.[75]

73. In the present case, the corporate debtor has pledged its assets for securing the short term-loan facility to its group companies[76]. The Appellant would qualify to be considered as a secured creditor[77] holding a secured interest in its favour. In furtherance of the same, CIRP is immaterial to the security interest and the Appellants should be allowed to retain the pledged shares.

74. It is humbly submitted before this Hon'ble Supreme Court that the rights available to secured creditors are available only at the stage of liquidation and not at the stage of insolvency resolution process. The legislative rationale behind this is apparent from the inclusion of secured creditors only in Chapter- III titled 'Liquidation Process' as opposed to financial and operational creditors in Chapter- II titled 'Corporate Insolvency Resolution Process'.

75. In the instant case, the Appellants holding security interest would be devoid of any recourse if the security interest is extinguished. While the resolution plan being reconsidered will provide certainty to the claims of dissenting financial creditor and operational creditors[78] due to the statutory mandate, there would be no certainty with regards to the claim of appellants owing to the directory nature of 30(4)[79] as the CoC 'may' take into consideration the priority and value of security interest.

76. The only recourse available to the Appellants is in the case of liquidation u/s 30, 52 or 53 of the Code. However, insolvency resolution Process and liquidation are two completely different concepts with two different consequences.[80] Consequently, the rights under these provisions cannot be made applicable in the insolvency resolution process and are applicable only during liquidation.[81]

77. It is contended that the main purpose of security is the protection of creditors on insolvency. A security interest is of little value to a creditor unless the creditor is able

[75] M. K. Ranganathan And Another v. Government Of Madras And Others, 1955 AIR 604.
[76] Moot Proposition, ¶31.
[77] Insolvency and Bankruptcy Code, 2016, § 3(30), No. 31, Acts of Parliament, 2016 (India).
[78] Insolvency and Bankruptcy Code, 2016, § 30(2)(b), No. 31, Acts of Parliament, 2016 (India).
[79] India Resurgence ARC Private Limited v. Amit Metalika Limited and Anr., 2021 SCC OnLine SC 409.
[80] Edelweiss Asset Reconstruction v. Mr. Anuj Jain & Ors Company Appeal (AT) (Insolvency) No.517 & 518 of 2023.
[81] Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531

to enforce it in a predictable, efficient and timely manner vis-à-vis the debtor and third parties.[82]The efficiency of any legal framework for secured credit is a critical factor in the strengthening any financial systems.[83]

78. In the present case, the security interest in the form of pledged shares cannot be unilaterally extinguished. It would lead to a situation wherein the secured financial creditors will be incentivized to vote for liquidation rather than resolution. They would have better rights if the corporate debtor was to be liquidated rather than a resolution plan being approved. This would go against the very definition and identity of the Financial Creditors whose stakes are considered to be 'intrinsically interwoven'[84] with the well-being of the corporate debtor and is expected to engage in restructuring of loan and reorganization of corporate debtor's business when there is financial stress.[85] At the same time, it would contradict the entire objective of the Code i.e. to ensure that resolution of distressed assets takes place and only if that is not possible should , liquidation should follow.[86]

79. Furthermore, Section 31(1) of the Code provides that post approval of a resolution plan by the Adjudicating Authority, the plan shall be binding on the corporate debtor and its creditors, guarantors amongst other stakeholders in the resolution plan. A stakeholder is defined as one who is entitled to distribution of proceeds u/s 53 of the Code which includes debts owed to secured creditors[87]. Since the Appellants are entitled to proceeds u/s53 of the Code, they would qualify as stakeholder.

80. It is contended that in such a situation post approval of PVI's resolution plan, the Appellants would be unable to participate in the resolution process of the corporate debtor due to disqualification as Financial Creditor and on the other hand they will retain the right to enforce their security in case of liquidation, leading to a precarious situation.

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[82] Pascale De Boeck and Thomas Laryea, , *Development of Standards for Security Interest*, IMF (April 2003, 10:20PM), https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/pdb.pdf.
[83] PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY 359 (Sweet & Maxwell 2007).
[84] Mr. Rohit Prasad v. S and N Lifestyle Infraventures Pvt. Ltd., 2020 SCC OnLine NCLT 501.
[85] Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Ltd. & Ors [(2020) 8 SCC 401].
[86] Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta and Ors., (2020) 8 SCC 531.
[87] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 2(k) (2016).

81. Therefore, it is humbly pleaded before this Hon'ble Supreme Court that the security interest created on the shares pledged by corporate debtor should not be extinguished.

D. THE APPELLATE AUTHORITY ERRED IN DECLINING THE RESTORATION OF COMPANY PETITION IN CASE OF DEFAULT OF THE CONSENT TERMS

82. The It is humbly submitted before the Hon'ble Supreme Court of Malta that the Appellate Authority was not right in rejecting the application seeking revival of the Company Petition vide an order dated 21st December, 2020.[88] ATPL i.e., Financial Creditor filed an application u/s 12-A of the Code for the withdrawal of the Company Petition[89] in the lieu of the Settlement between the Appellant and the Respondent i.e., the Corporate Debtor. However, a default was committed by the Corporate Debtor due to which the Appellant filed an application for reviving the company petition. But the same was rejected, the reason stated by the Adjudicating Authority being "*when the Company Petition was withdrawn after the settlement, there is no specific provision in the IBC, 2016 for reopening the Company Petition".*[90]

83. Therefore, in the present case the arguments raised by the counsel of Appellant are three folded: - *[i]The Adjudicating Authority has inherent powers under Rule 11 of NCLT Rules, 2016[91] read with Section 60(5)(b) of the Code for the revival of Company Petition and [ii] The revival petition qualifies to be granted liberty and [iii] The adjudicating authority does not have the discretionary power with regards granting of liberty.*

(i) The Adjudicating Authority has inherent powers under Rule 11 of NCLT Rules, 2016 r/w Section 60(5)(b) of the Code for revival of company petition.

84. Rule 11 of NCLT Rules, 2016 (*hereinafter '**Rule 11'***) makes it clear that the Tribunal has inherent power to pass orders which may be necessary to 'meet the ends of justice' or 'prevent abuse of process' of the Tribunal. As affirmed by Hon'ble Supreme Court, it is a settled principle of law that Rule 11 applies to the Code[92]. Additionally, the non-

[88] Moot Proposition, ¶ 29.
[89] Insolvency and Bankruptcy Code, 2016, § 60 (5)(b), No.31, Acts of Parliament (India).
[90] Moot Proposition, ¶ 30.
[91] The NCLAT Rules, 2016, Rule 11.
[92] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17.

revival of the Company Petition results in unjust treatment of the creditor[93], leading to the abuse of process as confirmed by the Appellate Authority[94],[95] .

85. Furthermore, Section 60(5)(b) of the Code confers residuary jurisdiction[96] on the NCLT to 'entertain' or 'dispose' of any claim made by or against the Corporate Debtor.

86. A perusal of the Rule 11 r/w aforementioned Section provides an implication that the NCLT has an inherent jurisdiction to entertain application filed for seeking revival of the withdrawn Company Petition filed u/s 7 of the Code[97].

87. The Supreme Court in its seminal judgement has confirmed the jurisdiction and ordered the revival of application filed u/s 7 of the Code[98]. Even the Appellate Authority in *Sree Bhadra Parks & Resorts Ltd.* [99] observed that such 'inherent power' is to be exercised by the Tribunal to meet the ends of justice which is 'Co-extensive with the need' and upheld the order of the Adjudicating Authority allowing restoration of Company Petition under the Rule 11. It *inter alia* noted that the application filed for revival is not to be confused with 'Review Application' which is not an inherent power but needs to be specifically conferred[100] thereby being beyond the jurisdiction of the Adjudicating Authority. Therefore, rejecting the application of restoration on the reasoning that there is an absence of enabling provision under the Code is erroneous.[101]

88. In the current trend, a plethora of applications are being allowed by the Tribunals both for financial[102] as well as operational creditors[103] in case of non-adherence to the consent terms between the parties restoring the CIRP proceedings.

89. Therefore, the Adjudicating Authority rejecting the revival of the Company Petition vide its order dated 21st December, 2022 on the reasoning that there is 'no specific provision' in the Code has committed a grave error and on the basis of the aforementioned argument advanced and the authorities cited, it is humbly submitted

[93] ICICI Bank Ltd. v. OPTO Circuits (India) Ltd & Ors., 2022 SCC OnLine NCLAT 186.
[94] ICICI Prudential Venture Capital Fund Real Estate Scheme I v. Anand Divine Developers (P.) Ltd., (2022) 173 SCL 653 (India).
[95] Krishan Kumar Mittal v. GRJ Distributors & Developers Pvt. Ltd, 2020 SCC ONLINE NCLAT 531.
[96] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2020) 8 SCC 531.
[97] Insolvency and Bankruptcy Code, 2016, § 7, No.31, Acts of Parliament (India).
[98] ESS Investments P. Ltd v. Lokhandwala Infrastructure P. Ltd. & Ors., (2020) 17 SCC 398.
[99] Sree Bhadra Parks and Resorts Ltd. v. Sri Ramani Resorts and Hotels Pvt. Ltd., 2021 SCC OnLine NCLAT 129.
[100] MRA Associates (India) Pvt. Ltd. v. Red Fort Capital Advisors Pvt. Ltd, 2021 SCC OnLine NCLT 6084.
[101] M/s. Netfinity Solutions v. M/s Karvy DigiKonnect Limited, (2022) 09 NCLAT CK 0090.
[102] ICICI Bank Ltd. v. OPTO Circuits (India) Ltd & Ors., 2022 SCC OnLine NCLAT 186.
[103] Vivek Bansal v. Burda Druck India Pvt. Ltd. & Anr., 2020 SCC OnLine NCLAT 582.

before the Hon'ble Supreme Court to reaffirm the jurisdiction of the Adjudicating Authority to revive the Company Petition dated 8th September, 2021[104].

(ii) The revival petition qualifies to be granted liberty.

90. A perusal of various judgements [105] involving similar facts to the instant case, shows a consistent pattern wherein the application seeking restoration of Company Petition after default in the Settlement terms have been allowed. Through the pattern, three propositions are deciphered *firstly*, that the Settlement agreement/Consent term has to be brought on record, *secondly*, that there shall be a valid ground for restoration of the CIRP proceedings, non-adherence to consent term being one of them and *lastly*, that granting of liberty at the time of withdrawal of company petition is inconsequential.

The Appellant humbly submits that,

a. The Settlement Agreement/ Consent Term has been brought on record of the Adjudicating Authority.

91. The Appellate Tribunal has made a distinction between a 'Withdrawal Simplicitor' meaning a mere statement that the parties have settled and 'bringing the statement on record' thereby making it a part of withdrawal order.[106] It is only in the latter case that the restoration of insolvency proceedings be granted in case of default.[107]Additionally, after the terms are incorporated it becomes a decree/order of the Court and therefore a revival has to be granted in case of its default.[108]

92. In the instant case, it is an undisputed fact that the consent term was placed on record before the Adjudicating Authority at the time of presenting the Company Petition u/s 7 of IBC, specifically on 5th August, 2021.[109] As a result, it is safely concluded that the Tribunal was duly informed about the Settlement between the Corporate Debtor and the Financial Creditor which was thereby materialized *ipso facto*.

[104] Moot proposition, ¶ 28.
[105] ICICI Prudential Venture Capital Fund Real Estate Scheme I v. Anand Divine Developers (P.) Ltd., (2022) 173 SCL 653, ICICI Bank Ltd. v. OPTO Circuits (India) Ltd & Ors., 2022 SCC OnLine NCLAT 186.
[106] SRLK Enterprises LLP v. JALAN Transolutions (India) Ltd., 2021 SCC OnLine NCLAT 4577.
[107] Krishna Garg v. Pioneer Fabrications (P.) Ltd., (2021) 172 SCL 635 (India).
[108] ICICI Prudential Venture Capital Fund Real Estate Scheme I v. Anand Divine Developers (P.) Ltd., (2022) 173 SCL 653 (India).
[109] Moot Proposition, ¶ 28.

b. The Respondent defaulted in making the payments, thus failing to adhere to the consent terms.

93. The Hon'ble Supreme Court while admitting the withdrawal application as a result of settlement agreement expressly stated that, *In the event that there is any default in making the payment, the respondent shall lose the benefit of this order and the proceedings u/s 7 of IBC shall stand admitted with the CIRP to follow"*[110]

It is therefore a settled proposition that a default in the consent term shall be considered a valid ground for the restoration. Additionally, a recorded agreement being an order of the Tribunal, contempt proceedings can be initiated against the defaulting party[111].

In the present case, the Respondent breached the consent term by failing to make a payment towards the fourth tranche, thus committing a default.[112]

c. The adjudicating authority does not have the discretionary power with regards granting of liberty.

94. In various instances[113], the Adjudicating Authority has rejected the application for revival, stating that there was no liberty granted at the time of withdrawal of company petition u/s 12-A. However, if the settlement agreement is brought on record and its terms are not adhered to, the Appellate Authority, in such cases has ordered the Adjudicating Authority to revive the CIRP proceedings[114]. This makes the granting of liberty inconsequential[115].

95. The Adjudicating Authority cannot refuse to grant liberty of revival if there is an explicit prayer requesting such relief. It is clear that granting of liberty to revive is not a discretion of the Adjudicating authority[116]. If it can be proven that there was a default due to non-adherence to the settlement agreement and such terms are documented, the applicant can seek restoration of CIRP proceedings,[117]. Moreover, as is stated above

[110] Reliance Commercial Finance Limited (formerly Known as Reliance Capital Limited) v. Darode Jog Builder Private Limited, C.A. No. 7398 of 2022.
[111] Ruchita Modi v. Mrs.Kanchan Ostwal, (2020)157 SCL 705 (NCLAT).
[112] Moot Proposition, ¶ 30.
[113] Himadri Foods Lmt. v. Credit Suisse Funds Ag, 2021 SCC ONLINE NCLAT 48.
[114] Vivek Bansal v. Burda Druck India Pvt. Ltd. & Anr., 2020 SCC OnLine NCLAT 582.
[115] IDBI Trausteeship Services Limited v. Nirmal Lifestyle Limited, 2023 SCC OnLine NCLAT 225.
[116] ICICI Prudential Venture Capital Fund Real Estate Scheme I v. Anand Divine Developers (P.) Ltd., (2022) 173 SCL 653.
[117] Vivek Bansal v. Burda Druck India Pvt. Ltd. & Anr., 2020 SCC OnLine NCLAT 582.

the revival can be sought by invoking the inherent jurisdiction of the NCLT. Therefore, it should be sought as a matter of right and not due to the liberty granted.

96. Therefore, it is humbly submitted before the Hon'ble Court that the evidence clearly demonstrates that the consent terms were duly recorded and subsequently breached by the Respondent. In light of this fact, the denial of the Appellant's application for restoration should not be based on the non-granting of liberty.

(iii) The denial of application for revival petition is against the intent of the legislation.

97. The counsel for the Appellant humbly submits that, if the application for revival is rejected, the probable recourse for the Appellant would be filing a fresh Company Petition u/s 7 of the Code. However, starting anew would make the CIRP process a tedious task, contradicting the very principles of this enactment.

98. Moreover, it also goes against the principle of *Aequitas Sequitur Legem,* as the Creditor has to suffer due to the wrongdoing of its counterpart i.e., the corporate debtor prejudicing their interests. Moreover, this could be exploited as a shield by the Corporate Debtor to avoid honouring the settlement agreements, thereby deceiving the innocent and gullible financial creditors and operational creditors[118] neither can they run away from complying with the conditions stated merely on the pretext of technicalities[119].

99. The above proposition has been deliberated upon by the Tribunal in wherein it stated that,

> *"an observation to file a fresh Company Petition by the Appellant is erroneous and without application of mind and without following the Principles of Natural Justice..."*[120] .

100. In such situation, an order for filing a fresh applicable shall only add to the trouble waters causing grave injustice by denying them the right remedy.[121] Further, it will create a bad precedent for the upcoming judgements by going against the principles of natural justice and intent of the code.

[118] Krishan Kumar Mittal v. GRJ Distributors & Developers Pvt. Ltd, 2020 SCC ONLINE NCLAT 531.
[119] Sree Bhadra Parks and Resorts Ltd. v. Sri Ramani Resorts and Hotels Pvt. Ltd., 2021 SCC OnLine NCLAT 129.
[120] ICICI Bank Ltd. v. OPTO Circuits (India) Ltd & Ors., 2022 SCC OnLine NCLAT 186 ¶ 23.
[121] IDBI Trausteeship Services Limited v. Nirmal Lifestyle Limited, 2023 SCC OnLine NCLAT 225.

101. Hence, on the basis of above arguments advance, the Adjudicating Authority shall be directed to accept the application seeking revival of company petition and thereby restore the insolvency proceedings.

PRAYER

Wherefore in the light of facts presented, issues raised, arguments advanced and authorities cited, the Counsel on behalf of the Appellants humbly prays before this Hon'ble Supreme Court that it may be pleased to adjudge and declare that:

1. A Scheme of Compromise and Arrangement can be made in terms of Section 230 to 232 of the Companies Act in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016.
2. The Promoters are eligible to file application for Compromise and Arrangement, while he is ineligible Under Section 29A of the IBC to submit a 'Resolution Plan'.
3. The security interest created on the assets of Corporate Debtor cannot be extinguished when the interest has been created for the loan availed by the third party, not by the Corporate Debtor.
4. The Hon'ble NCLT has erred in rejecting the revival of Company Petition and that an insolvency proceeding can be restored in case of default when Consent term is entered between parties.

and/or

Pass any other order, direction or relief that it may deem fit in the interest of justice, equity, fairness and good conscience.

For this act of kindness of your lordship, the Appellants shall duty bound forever pray.

Place: *S/d-*

Date: **COUNSELS** *for* the **APPELLANT**