TC-22

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

IN THE SUPREME COURT OF MALTA

CIVIL APPELLATE JURISDICTION U/S 62(1) OF IBC 2016

PIPARA……..……...…APPELLANT

V.

SINGHANIA……..…….RESPONDENT

CLUBBED WITH

MR SHROFF……...……..APPELLANT

V.

FU-SAM POWER SYSTEMS LTD…….……..RESPONDENT

CLUBBED WITH

TIPSRA MSCL (INDIA) LIMITED……...……..…… APPELLANT NO. 1

VRS MALTA FINANCIAL SERVICES LIMITED…….…… APPELLANT NO. 2

M&N FINANCE LIMITED…….....……...…… APPELLANT NO. 3

V.

MR KASI NAYINAR PARARACACEKARAN……..……..RESPONDENT NO. 1

CLUBBED WITH

AXIS TELECOM PVT. LTD……..…APPELLANT

V.

DANOBE INFO TECHNOLOGY LIMITED……..……RESPONDENT

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ABBREVIATION	CORRESPONDING EXPANSION
¶	Paragraph
AIR	All India Reporter
Anr.	Another
SCC	Supreme Court Cases
Art.	Article
v.	Versus
Hon'ble	Honourable
i.e.,	That is
Ors.	Others
Sec.	section
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
SC	Supreme Court
RP	Resolution Professional

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

APPELLANTS in the instant case have the honour to submit this dispute before this Hon'ble Court which has jurisdiction under sec. 62(1) of the Insolvency and Bankruptcy Code, 2016.

The section reads as follows: 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.

STATEMENT OF FACTS

SCENARIO 1: As the appellant, Mr. Pipara (promoter) became ineligible under sec. 29A of IBC, to submit a resolution plan, no plan was approved by the CoC. After NCLT ordered liquidation and while an appeal to NCLAT was still pending, the appellant proposed a scheme for compromise and arrangement under sections 230-232 of the Companies Act, 2013, which was approved by the NCLT but rejected by NCLAT which held that a person ineligible under sec. 29A of IBC cannot propose a scheme for compromise and arrangement. The appellant has appealed before the SC against this judgment.

SCENARIO 2: Fu-Sam Power Systems Limited faced insolvency proceedings. Mr. Shroff, promoter of the company, submitted a resolution plan with Allianz FRC Private Limited, but was declared ineligible due to Section 29A(h) of the IBC. The NCLT ordered Fu-Sam's liquidation as no suitable resolution plan emerged. A Liquidator was appointed, and Mr. Shroff expressed interest in presenting a compromise plan, but was informed by the Liquidator of his ineligibility under Section 230 of the Companies Act due to IBC ineligibility. His appeals to the NCLT and NCLAT were dismissed. This led to the current appeal challenging the NCLAT's decision.

SCENARIO 3: After the withdrawal of the Company Petition, Danobe Info Technology Limited failed to fulfil the payment obligations as per the consent term. In response, the Petitioner Axis Telecom Pvt. Ltd. (ATPL) submitted an Interim Application to revive the Company Petition, which was dismissed by the Adjudicating Authority. They observed that there is no specific provision within the IBC 2016 for restoring the Company Petition.

SCENARIO 4: The corporate Debtor i.,e Vntek Auto Limited sought loans from VRS Malta (Appellant No. 2) and M&N Finance (Appellant No. 3) for its group of companies viz, pledging 66.77 % OF KMP Auto's shares. In June 2020, CIRP was initiated against the corporate debtor. In October 2020, Appellant No.1 filed a claim as a secured financial creditor which was rejected by the RP but went unchallenged. The appellant filed an application before the AA claiming his right based on pledged shares but this contention was rejected by both the NCLAT and NCLAT with the reasoning that the appellant is not a secured financial creditor. Thus, the appeal before the SC.

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 INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CANNOT BE MADE IN TERMS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT.

The Respondent humbly submits that a scheme for compromise and arrangement in terms of Section 230 and 232 of the Companies Act cannot be proposed during liquidation proceedings under the Insolvency and Bankruptcy Code, 2016.

This assertion is being made in light of the fact that the precedents by various adjudicating authorities have stood by the fact that IBC, in itself is a complete code which holistically and exhaustively covers the matter of insolvency and liquidation. Hence, the need of stepping out of the purview of the code does not arise. Further, the commercial viability with respect to the revival of the Corporate Debtor can be better ensured by the mechanisms suggested by the Code, such as the Going Concern Sale mechanism.

ISSUE B: THE PROMOTER IS NOT ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, WHILE HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'.

The Respondent humbly submits that a promoter, who is ineligible under Section 29A of the IBC to propose a resolution plan Cannot propose a scheme of compromise or arrangement under section 230 or 232 of Companies Act.

This assertion is being made in light of the intent of section 29A. It needs to be noted that the liquidation proceedings are taking place under the Insolvency and Bankruptcy Code and hence, the provisions of companies act as applicable to the said proceedings need to be harmonious with the IBC provisions. The intent of the ineligiblity is that if a person is made ineligible from proposing a resolution plan, he should not be allowed a back door entry under the provisions of the Companies Act in order to save the corporate Debtor from its management that was responsible for its liquidation.

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

The security interest created on the assets of the corporate debtor can be extinguished as the appellant does not fall under the category of 'financial creditor'. As the expression 'means and includes' is not an inclusive one, therefore, the shares pledged by the corporate debtor on behalf of the third party to the appellant is not a financial debt. The appellant here is an indirect secured creditor due to which the unique position of financial creditors doesn't apply to them. Further, according to the 'Clean Slate' theory, claims which are not a part of the resolution plan will be extinguished and the creditors will not be entitled to any further claims. And since, the appellant here is not a financial creditor, the latter will not be entitled to protection under sections 52 and 53 of the Code.

ISSUE D: INSOLVENCY PROCEEDING CANNOT BE RESTORED IN CASE OF DEFAULT WHEN CONSENT TERM IS ENTERED BETWEEN PARTIES.

The respondent humbly submits before this Hon'ble Court that the insolvency proceeding cannot be restored or revived after withdrawal under section 12A of the IBC 2016 in the present case. There are no laws which permit the court to restore the insolvency proceeding from where it was withdrawn. Reviving the insolvency proceeding will amount to an undesirable exercise of power and will be in contravention of the doctrine of separation of power. Further, it is humbly argued that the instant case is not fit for exercising the inherent power of the court since there is no provision to deal with the revival of the insolvency proceeding. Moreover, it is essential to recognize that the Consent Term was the result of extensive negotiations between the parties and made in good faith efforts to put an end to the contentious issues between them.

ARGUMENTS ADVANCED

ISSUE A: IN A LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CANNOT BE MADE IN TERMS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT.

¶ 1. It is humbly submitted that in a liquidation proceeding under insolvency and bankruptcy code, 2016, the scheme for compromise and arrangement cannot be made in terms of sections 230 to 232 of the companies act as the IBC is a comprehensive and exhaustive code in itself **[A.1];** and the methods for ensuring revival by the IBC are not only sufficient but commercially viable **[A.2].**

[A.1] THE IBC IS A COMPREHENSIVE AND EXHAUSTIVE CODE IN ITSELF.

¶ 2. It is humbly submitted before the hon'ble court that the Insolvency and Bankruptcy Code was brought with an intent to govern the ecosystem pertaining to Insolvency and Bankruptcy holistically. The IBC is a comprehensive and systemic economic reform by India that consolidates all existing laws dealing with insolvency and bankruptcy. The Code secures economic freedoms and provides a predictable and orderly mechanism to resolve insolvency. It enables a failing yet viable firm to resurrect in a time-bound manner. It sets in motion a process that assesses the viability of the CD to revive and maximize the value of its assets. The authority of the Code in matters pertaining insolvency proceedings, liquidation and the likes of such procedures is to be allotted utmost priority.

¶ 3. At the outset, it is submitted that a scheme of compromise and arrangement as per Section 230 and Section 232 during the liquidation proceedings transcends the remedies provided by the Insolvency & Bankruptcy Code. In a matter where the Corporate Debtor has been ordered to undergo liquidation proceedings, the proceedings should be conducted in line with the remedies provided in the Insolvency & Bankruptcy Code. It needs to be noted that the Code already comes with sufficient measures and remedies.

¶ 4. Regulation 32A of the Liquidation Regulations under the Insolvency & Bankruptcy Code provides with 'going concern sale' as a measure to be adopted by the liquidator to prevent corporate death of the company. Reference may be made to the report of the Insolvency Law Committee dated 26.03.2018, where in the committee examined the term

"going concern" as follows: The phrase "as a going concern" implies that the corporate debtor would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the code. IBBI has defined 'Going Concern' to mean all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource.[1]

¶ 5. As far as Regulation 2-B of the Liquidation Regulations is concerned that provides the provisions of the Companies Act, 2013 as a recourse during liquidation, it should be noted that the amendment was brought by the IBBI. The IBC provides power to the IBBI, the regulator, to make regulations that are consistent with the Code and the rules, to carry out the provisions of the IBC. For instance, the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, flesh out the provisions for conducting an insolvency resolution process for corporates.(cite) However, it needs to be noted that Regulation 2B is inconsistent with the Code as liquidation is deemed the last resort under the Code and as for revival, the Code already provides for 'going concern sale' to rescue the corporate debtor from death.[2]

¶ 6. In light of the aforementioned, it is submitted that a conclusion with respect to the sufficiency of the Code to provide suitable measures that have been developed over the course of years by the IBBI can be drawn.

¶ 7. There have been multiple precedents where the adjudicating authorities have upheld the aforementioned contentions. In E S Krishnamurthy & Ors. v. M/s Bharath Hi Tech Builders Pvt. Ltd, J. Chandrachud held that IBC is a complete code in itself.

¶ 8. In Narendra Singh Panwar v. Pashchimanchal Vidyut Vitran Nigam Limited and Others [3] & Indian Overseas Bank v. RCM Infrastructure Limited[4] the Petitioner further contended that IBC is a complete code in itself and by virtue of Section 238 (*Provisions of this Code to override other laws*) of IBC. The High Court observed that IBC is a complete code in itself and in the event of any inconsistency, shall prevail over any other law for the time being in force, by virtue of its non-obstante clause, that is, Section 238 of IBC.

---

[1] Injeti Srinivas, Report of the Insolvency Committee, 1, 56 57 (2018), https://ibbi.gov.in/ILRReport2603_03042018.pdf>.

[2] INTERNATIONAL FINANCE CORPORATION, UNDERSTANDING THE IBC 100 102 (IBBI).

[3] Narendra Singh Panwar v. Pashchimanchal Vidyut Vitran Nigam Limited and Others (2023) SCC OnLine All 19.

[4] Indian Overseas Bank v. RCM Infrastructure Limited, AIR Online 2022 SC 736.

¶ 9. In M/S. Speculum Plast Pvt. Ltd. V. Ptc Techno Pvt. Ltd.[5] with Parag Gupta & Associates V.B.K. Educational Services Pvt. Ltd.[6] with Ashlay Infrastructure Pvt. Ltd. V. Lds Engineers Pvt. Ltd[7]., the matter in issue was whether Limitation Act, 1963 is applicable for triggering 'Corporate Insolvency Resolution Process' under Insolvency and Bankruptcy Code, 2016? Citing the the provisions under the IBC, the Tribunal reasoned that time limit has been prescribed for specific matters under various provisions, shows that the remedy provided in the code is complete in itself and the time limit under the Limitation Act shall not be applicable.

¶ 10. The Hon'ble Supreme Court in the recent case of M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr.19 , after analyzing various provisions of the IBC and the legislative intent behind the incorporation of the Code along with the factors that led to its formulation unanimously held that there can be no doubt, therefore, 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 as under. Therefore, by this decision of the apex court, it is settled that the IBC is a complete code in itself and the remedies provided by it holistically covers all the matters under it. Thus IBC cannot be guided by other legislative enactments.

[A.2] THE METHODS FOR ENSURING REVIVAL BY THE IBC ARE NOT ONLY SUFFICIENT BUT COMMERCIALLY VIABLE

¶ 11. It is submitted before the hon'ble court that in light of the previous submission that IBC is a complete code in itself, it needs to be noted that the remedies provided for in IBC are not only sufficient but also commercially viable in respect of value maximization and maintaining timelines. Both the aforementioned traits have been recognized by the adjudicating authorities as a part of the going concern mechanism. Hence, the objectives that a scheme of compromise or arrangement under the Act seek to achieve are available under the Code through resolution process. Having two provisions in two different legislations for a single cause is confusing for the stakeholders besides being superfluous. [8]

[5] M/S. Speculum Plast Pvt. Ltd. V. Ptc Techno Pvt. Ltd (2018) SCC OnLine NCLAT 852.

[6] Parag Gupta & Associates V.B.K. Educational Services Pvt. Ltd. (2017) SCC OnLine NCLT 462.

[7] Ashlay Infrastructure Pvt. Ltd. V. Lds Engineers Pvt. Ltd (2017) SCC OnLine NCLAT 319.

[8] Insolvency & Bankruptcy Board of India, Discussion Paper on Corporate Liquidation Process, 1, 7 (2019), https://www.ibbi.gov.in/uploads/whatsnew/2309f5c72bbf7e41148d97670767d8f7.pdf>.

¶ 12. The Bankruptcy Law Reforms Committee (BLRC), in its Report, had also recognised GCS as an effective method of realization of assets and stated that from the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. The approach of BLRC was well-found and well-reasoned.[9]

[A.2.1] Value maximization is an essential aspect of liquidation proceedings

¶ 13. It is a common economic understanding that sum of parts is better than sum of the parts; and it is by virtue of such principle that going-concern values are generally in excess of value of individual assets. The various assets, stitched together as one, constitute a much greater value than the same assets in isolation. As such, selling assets on a piece-meal basis might not be lucrative for the buyers due to the loss of synergic benefit arising from purchasing a going concern leading to an ultimate loss to the creditors of the corporate debtor.

¶ 14. This is in addition to the fact of loss of jobs of several employees of the corporate debtor which might have been saved in case of sale as a going concern. Recognising this, various Adjudicating Authorities have, in the past, allowed the sale of the corporate debtor as a going concern for value maximisation as held in the matter of M/s. Gujarat NRE Coke Limited.[10] Further, it is commonly observed that NCLTs across jurisdictions have followed the practice of directing liquidators to endeavor a GCS prior to other modes of sales envisaged under the Liquidation Process Regulations.

[A.2.2] Maintaining timelines is to be given due importance during insolvency and liquidation proceedings

¶ 15. A liquidator may find it difficult to complete the sale of all the assets of the corporate debtor (piece by piece) in the stipulated 1 year period, to finally make an application of dissolution as provided under Section 54. This may result in failure in fulfilment of one of the key objectives of enacting IBC, that is, timely completion of the proceedings. Allowing the liquidator to sell the corporate debtor as a going concern proves to be time and cost effective, as well as saves the effort of the liquidator to find multiple buyers for multiple assets of the corporate debtor; hence, resulting in faster realisation for the creditors which is the ultimate aim of this entire exercise.

---

[9] Bankruptcy Law Reforms Committee, The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, 1, 103 (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf>.

[10] Arun Kumar Jagatramka v. Jindal Steel & Power Ltd. & Anr., (2021) 7 SCC 474.

¶ 16. While relying on Regulation 32(e) of the Liquidation Process Regulations, the Hon'ble Supreme Court in the matter of Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta & Ors [11]observed that: "The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation.

¶ 17. We must not forget that the corporate debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the corporate insolvency resolution process. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.

[A.2.3] Survival of the entity, which is the main objective of the Code is ensured

¶ 18. Unlike winding-up, where the aim is to dissolve the entity, liquidation implies liquidating the entity and the main objective is to sell-off the asset(s) at a maximum value for realization and not necessarily kill the entity. In line with this objective, various Adjudicating Authorities have, in the past, allowed GCS in liquidation process. In Gaurav Jain v. Sanjay Gupta, Liquidator of Topworth Pipes and Tubes Pvt. Ltd.[12], the Adjudicating Authority noted that even though there is no specific provision in IBC for "sale of the Company as a going concern", the Liquidation Process Regulations provide guiding principles in dealing with the case. It held that "going concern" sale, in normal parlance, is transfer of assets along with the liabilities.

¶ 19. However, as far as the 'going concern' sale in liquidation is concerned, there is a clear difference that only assets are transferred and the liabilities of the corporate debtor has to be settled in accordance with Section 53 of IBC[13] and hence the purchaser of the assets takes over the assets without any encumbrance or charge and free from the action of the creditors. The legal entity of the corporate debtor survives and the assets with claims, limitations, licenses, permits or business authorisations remain with the corporate debtor. Only the ownership of the corporate debtor is acquired by the successful bidder and all creditors of the corporate debtor get discharged.

[11] Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta & Ors, (2019) 2 SCC 1.

[12] Gaurav Jain v. Sanjay Gupta, Liquidator of Topworth Pipes and Tubes Pvt. Ltd.2021 SCC OnLine NCLT 489.

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

[A.2.4] In light of the numerous mechanisms IBC provides for revival, further attempts for revival might not be a commercially viable option.

¶ 20. A general argument which can support the applicability of section 230 schemes in IBC liquidation is – if a scheme can be undertaken in liquidations happening outside the IBC, then why not under the IBC? That takes us to the very obvious question as to how a liquidation under the IBC is different from a general liquidation. The answer is obvious: liquidation under the IBC is (mandatorily) preceded by resolution proceedings, which is arguably another incarnation of schemes of arrangement.[14]

¶ 21. Schemes would generally entail a compromise by creditors, merger or demerger of the company, or other forms of corporate or capital restructuring, which are also the possible routes of resolution. It is just that, when it comes to the IBC, this 'settlement mechanism' has to be in alignment with the 'resolution mechanism'.

¶ 22. In rulings such as *Swiss Ribbons*[15], the courts have held that "*liquidation should be seen as a matter of last resort*". Allowing schemes of arrangement even after liquidation is actually counter-intuitive to this idea, as it allows for a never-ending cycle towards resolving an entity.

¶ 23. It shall be noted that there are already sufficient mechanisms. Before the IBC proceedings begin, the parties can go for resolution under the framework of the Reserve Bank of India or under a general scheme of arrangement or compromise under section 230. Once IBC proceedings begin, the corporate insolvency resolution process (CIRP) is for resolution and revival of the entity only – there are chances of withdrawal of proceedings too. Even if the corporate debtor slips into liquidation, preference has to be given to going-concern sales. Despite all these available mechanisms, we are still looking for schemes in liquidation where one might end up having more questions than solutions. The idea of a scheme of arrangement, in itself, is almost like trying for a fresh beginning, where the ruins are all the liquidator is left with.

¶ 24. Over-emphasizing revival and neglecting the fact that liquidation, in some cases, is the best way to maximise value, might actually lead to value destruction. In fact, some committee reports such as the Report of the Committee on Industrial Sickness and Corporate

[14] Sikha Bansal, A Case for Exclusion of Schemes of Arrangement from Liquidation, INDIA CORPLAW (Last visited on August 12, 2023).

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

¶ 25. Restructuring, popularly known as Goswami Committee report (1993), have advocated the sale of dismantled assets over going-concern sales in liquidation. An entity under the auspices of IBC gets multiple chances of proving its viability. A viable business, in all possibilities, should emerge successful from CIRP proceedings. Thus, the insistence on another opportunity in the form of a 'scheme' might actually be futile.

ISSUE B: THE PROMOTER IS NOT ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, WHILE HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'.

¶ 26. It is humbly submitted that the promoter is not eligible to file application for compromise and arrangement, while he is ineligible under section 29A of the IBC to submit a 'resolution plan' as the provisions of the Companies Act that are applicable in the liquidation proceedings need to be harmonious with the IBC provisions **[B.1];** and corporate debtor must be saved from its own management in light of the liquidation proceedings **[B.2].**

[B.1] THE PROVISIONS OF THE COMPANIES ACT THAT ARE APPLICABLE IN THE LIQUIDATION PROCEEDINGS NEED TO BE HARMONIOUS WITH THE IBC PROVISIONS

¶ 27. Section 29A of the Insolvency & Bankruptcy Code lays down a criteria for the persons who can put forth a resolution plan during Corporate Insolvency Resolution Proceedings. It delineates the persons who are not permitted to propose a resolution plan for the company's revival. Section 29A is a restrictive provision within the IBC Code that prohibits promoters and any party related to them from participating in a CIRP as an RA. It enlists promoters and the people/parties connected to the promoters with varying degrees of separation, who are ineligible to be resolution applicants.

¶ 28. A purposive interpretation has been encouraged by the courts to ensure that the proposal of a scheme of compromise under the Companies Act does not intervene with the object of the Insolvency and Bankruptcy Code. In light of the fact that the liquidation proceedings come under the purview of the Insolvency and Bankruptcy Code, it needs to be ensured that even if certain provisions of the Companies Act are applicable, they do not hamper the spirit of the Insolvency and Bankruptcy Code and uphold the provisions and objects of the Code.

¶ 29. When the process of invoking the provisions of Section 230 of the Act of 2013 traces its origin or, as it may be described, the trigger to the liquidation proceedings which have been initiated under the IBC, it becomes necessary to read both sets of provisions in harmony. "A harmonious construction between the two statutes would ensure that while on the one hand a scheme of compromise or arrangement under Section 230 is being pursued, this takes place in a manner which is consistent with the underlying principles of the IBC because the scheme is proposed in respect of an entity which is undergoing liquidation under Chapter III of the IBC."[16]

¶ 30. In the case of a company which is undergoing liquidation pursuant to the provisions of Chapter III of the IBC, a scheme of compromise or arrangement proposed under Section 230 is a facet of the liquidation process. The object of the scheme of compromise or arrangement is to revive the company, which is also the main object of the Code.

¶ 31. In a certain case of R. Vijay Kumar v. Kasi Viswanathanxiii[17], the 'Resolution Professional' has filed an application under Section 33 of the IBC before the Adjudicating Authority (National Company Law Tribunal) due to failure of the resolution process. The NCLT has passed the order of liquidation dated 26th February, 2019. The appellants who are the Directors of M/s. Gemini Communication Limited (Corporate Debtor) submitted that the liquidation value of the property of the 'corporate debtor' is Rs.3 Crores whereas the 'Promoters' are willing to pay a sum of Rs.30 Crores. However, such submission was not accepted in view of their non entitlement under Section 29A of the IBC.

¶ 32. It might be relevant to note that in Y. Shivram Prasad v. S. Dhanapal & Ors., Company Appeal (AT) (Insolvency) No. 224 of 2018, NCLAT explicitly observed that "As the liquidation so taken up under the 'I&B Code', the arrangement of scheme should be in consonance with the statement and object of the 'I&B Code'[18]

¶ 33. The Adjudicating Authority ordered that during the liquidation process, step required to be taken for its revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from a death by liquidation. Thus, the steps which are required to be taken are as follows: By compromise or arrangement with the creditors, or class of creditors or members or class of members in terms of Section 230 of the

[16] Mr. Harish Sharma vs C &C Construction Limited & Ors, COMPANY APPEAL (AT) (INS) NO. 368 OF 2023.

[17] R. Vijay Kumar & Anr vs Kasi Viswanathan & Anr , Company Appeal (AT) (Insolvency) No. 340 of 2019.

[18] Y. Shivram Prasad v S. Dhanapal & Ors, [Company Appeal (AT) (Insolvency) No.224 of 2018].

Companies Act, 2013. On failure, the liquidator is required to take step to sell the business of the 'Corporate Debtor' as going concern in its totality along with the employees. The last stage will be death of the 'Corporate Debtor' by liquidation, which should be avoided

¶ 34. The Supreme Court relying upon the judgments Chitra Sharma v. Union of India [19]**and** Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors[20]**.**, observed that Section 29A of the IBC has been enacted keeping in mind the larger public interest and to facilitate effective corporate governance. Section 29A rectifies a loophole in the IBC, which allowed backdoor entry to the erstwhile management of corporate debtors into corporate insolvency resolution process. Reference was also made to the judgment in the matter of Swiss Ribbons Private Limited v. Union of India[21] to observe that the object behind introducing Section 29A of the IBC continues to permeate Section 35(1)(f) of the IBC as well, during the liquidation of the corporate debtor.

[B.2] CORPORATE DEBTOR MUST BE SAVED FROM ITS OWN MANAGEMENT IN LIGHT OF THE LIQUIDATION PROCEEDINGS

¶ 35. The intention behind section 29A of the IBC is to oust the previous management from taking control over the corporate debtor again. Section 29A of the IBC[22]which was introduced through the Insolvency and Bankruptcy Code (Amendment) Act, 2017, restricts certain persons from submitting a resolution plan during CIRP. An undischarged insolvent, wilful defaulter, or promoter of a company among others are restricted from becoming a resolution applicant and submitting a resolution plan. The IBBI amended the Insolvency Bankruptcy Board of India (Liquidation Process) Regulations, 2016 and added a proviso to regulation 2B.

¶ 36. The above regulation provides for the rules binding the compromise or arrangement proposed under section 230 of the Act. The proviso excludes the person ineligible under section 29A of the IBC from being a party *in any manner* to such compromise or arrangement. It must be noted that this amendment has been introduced to plug the loophole that existed in the insolvency law, and it also must be looked at as an attempt to preserve the true purpose of the IBC.

[19] Chitra Sharma v. Union of India, (2018) 18 SCC 623.

[20] Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta & Ors, (2019) 2 SCC 1.

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

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

¶ 37. The intent of the IBC is to allow the corporate debtor to avoid liquidation and rebuild the business to make it profitable again. However, allowing the previous management to regain control over the corporate debtor would mean that the management that drove the corporate debtor to insolvency and possible liquidation would again be put in a position of power in the company. As such, schemes under section 230 cannot be said to be "surrogate" route for the defaulting promoters to acquire the corporate debtor after a failed resolution.[23]

¶ 38. It would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participating in the sale of assets of the company in liquidation or participating in the sale of the corporate debtor as a 'going concern', are somehow permitted to propose a compromise or arrangement under Section 230 of the Act of 2013."[24]

¶ 39. In the context of the statutory linkage provided by the provisions of Section 230 of the Act of 2013 with Chapter III of the IBC, where a scheme is proposed of a company which is in liquidation under the IBC, it would be far-fetched to hold that the ineligibilities which attach under Section 35(1)(f) read with Section 29A would not apply when Section 230 is sought to be invoked. Such an interpretation would result in defeating the provisions of the IBC and must be eschewed. "The stages of submitting a resolution plan, selling assets of a company in liquidation and selling the company as a going concern during liquidation, all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages.".[25]

¶ 40. In Narendra Singh Panwar v. Pashchimanchal Vidyut Vitran Nigam Limited and Others [26] & Indian Overseas Bank v. RCM Infrastructure Limited[27], the Petitioner further contended that IBC is a complete code in itself and by virtue of Section 238 (*Provisions of this Code to override other laws*) of IBC. The High Court observed that IBC is a complete

[23] Sikha Bansal, Schemes under Section 230 with a pinch of Section 29A – Is it the final recipe?, VINOD KOTHARI (August 12, 2023, 10:16 PM) https://vinodkothari.com/2019/11/schemes-under-section-230-with-a-pinch-of-section-29a/>.

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

[25] Shebani Bhargava, Schemes of Compromise or Arrangement During Liquidation, 76 SCC OnLine 1, 4-6(2020).

[26] Narendra Singh Panwar v. Pashchimanchal Vidyut Vitran Nigam Limited and Others (2023) SCC OnLine All 19.

[27] Indian Overseas Bank v. RCM Infrastructure Limited, AIR Online 2022 SC 736.

code in itself and in the event of any inconsistency, shall prevail over any other law for the time being in force, by virtue of its non-obstante clause, that is, Section 238 of IBC.

ISSUE C: 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.

¶ 41. Appellant No.1 who was a party to the security trustee agreement filed its claim during the insolvency proceeding against the corporate debtor. However, this claim was rejected by the RP after which Appellant No.1 filed an application before the AA (NCLT) claiming their right on the basis of pledged shares. Both the NCLT and NCLAT rejected the appellant's contention by holding that the appellant would not come under the purview of financial creditor.

¶ 42. It is submitted that the security interest created on the assets of corporate debtor cannot be extinguished as the present case is that of continuing cause and thus not challenging the rejection by RP would not bar the Appellant from filing an application before the AA **[C.1]**; Pledge of shares falls under the definition of financial debt and therefore the appellant is a secured financial creditor **[C.2];** and the appellant as a third party security holder should be considered a financial creditor **[C.3].**

[C.1] PLEDGE OF SHARES DOES NOT FALL UNDER THE DEFINITION OF FINANCIAL DEBT

¶ 43. According to sec. 172 of the Indian Contract Act[28], The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The term bailment simply denotes that the pledgee can retain the shares till the time of repayment of the loan.

[C.1.1] Financial debt under s 5(8) the code

¶ 44. The connotations of the expressions 'debt', 'financial debt', 'financial creditor' and 'creditor' in the present context would be limited to the definitions given in the Code[29] meaning any interpretations of these definitions would strictly be restricted to the code itself.

[28] Indian Contract Act, 1872, § 172, No. 9, Acts of Parliament, 1872 (India).

[29] Rajkumari Kaushalya Devi v. Bawa Pritam Singh & Anr., 1960 AIR 1030.

Under sec. 5(8) of IBC[30], "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. "Disbursement" is defined as a) 1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable and b) The money so paid; an amount of money given for a particular purpose."[31]

¶ 45. It is well settled that financial debt must involve the essential elements of the time-value of money. This means the financial creditor must receive something extra besides the principal amount from the corporate debtor over a specific period. However, in this tripartite agreement, the corporate debtor has merely pledged its shares against the loan obtained by a third party with no additional time-related benefit owing to the creditor; therefore, no time value of money qua corporate debtor is involved. Also, it has been held that pledge of shares would not tantamount to "disbursement of any amount against the consideration for the time value of money".[32]

¶ 46. It is submitted that since, in the present case, certain amount of shares have been pledged as security, these shares will not fall under the definition of financial debt.

[C.1.2] The words means and include are restrictive in nature

¶ 47. "Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.[33] Where a word is defined to 'mean' something, the definition is prime facie restrictive and exhaustive.

¶ 48. In various cases it has been held that wherever the expression "means" is followed by the expression "and includes" whether with or without additional words separating "means" from "includes", these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation.[34] The words 'means and includes', on the other hand, indicate 'an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions'.[35]

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

[31] Black's Law Dictionary (10th Edn.) to mean: 137.

[32] Phoenix ARC (P) Ltd. v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

[33] Insolvency and Bankruptcy Code, 2016, §5(7), No. 31, Acts of Parliament, 2016 (India).

[34] Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union, (2007) 4 SCC 685.

[35] Mahalakshmi Oil Mills v. State of A.P., (1989) 1 SCC 164.

¶ 49. The expression "means and includes" does not indicate that the definition is inclusive in nature and would also cover the categories which were not mentioned therein.[36] The natural meaning of the 'means' part of the definition is not narrowed down by the 'includes' part.[37] Hence, the definition is not inclusive and includes only those categories that have been mentioned in the code. As pledge of shares have not been expressly mentioned in the categories, they cannot be considered as a financial debt.

[C.1.3] Appellant (Pledgee) does not fall under the category of financial creditor

¶ 50. It is further contended that a secured creditor under the Code can be a financial creditor under two circumstances i.e., (i) when corporate debtor directly avails a debt from the creditor and such a debt is a secured debt; and (ii) if corporate debtor furnishes a guarantee to any person.[38]

¶ 51. Section 126 of the Indian contract act defines a contract of guarantee as a contract to perform the promise or discharge the liability of the defaulting party in case he fails to fulfill his promise.

¶ 52. In the case of Nikhil Mehta and Sons v. AMR Infrastructure Ltd.[39] Company it was held that guarantee and indemnity are distinct documents under the relevant laws and the mortgages executed by the corporate debtor are not like guarantee and indemnity. Similarly, pledging of shares cannot be held as a guarantee given by the corporate debtor as the latter has no intentions to undertake to discharge the liability of a third person in case of his default in repayment of debts. Where corporate debtor has mortgaged its property in favour of third party without any consideration for time value of money, the mortgagee cannot be held as a financial creditor.[40]

¶ 53. The concept of 'financial creditor' has been explicated to mean and include a person who has direct engagement in the functioning of corporate debtor right from the beginning, while assessing the viability of corporate debtor; and who would also engage in restructuring of debts and reorganising the corporate business in case of financial stress[41]. Mere holding of

[36] P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors., (1995) Suppl. 2 SCC 348.

[37] Black Diamond Beverages & Anr. v. Commercial Tax Office, Central Section, Assessment Wing, Calcutta & Ors., (1998) 1 SCC 458.

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

[39] Nikhil Mehta and Sons v. AMR Infrastructure Ltd., 2017 SCC OnLine NCLAT 859.

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

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

security interest, not meant for direct disbursement of any credit to corporate debtor cannot convert the lenders of the respondent into the financial creditors.

¶ 54. If a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty.[42] Beneficiaries of security interest thus cannot be categorized as a 'financial creditor' in the insolvency process of the Security Provider.[43]

¶ 55. The concept of equitable treatment of creditors, including the observations that equitable treatment of creditors meant equitable treatment only within the same class; and that protection of creditors in general was important but it was also imperative that the creditors be protected from each other,[44] thus drawing the distinction between a secured creditor and a financial creditor.

¶ 56. In light of the above contentions, it is thus submitted that the appellant is neither a financial creditor nor an operational creditor, due to which the appellant's rights over the security interest can be extinguished.

[C.1.4] Appellant is an indirect secured creditor

¶ 57. Third-party security holders have been categorised as indirect secured creditors and do not fall under the definition of financial creditors.[45] The financial creditors enjoy a unique status owing to their involvement from the very initial stages with the corporate debtor. Akin to a guardian, they are entrusted with the vital task of assessing the viability and restructuring of corporate debtors while exercising their commercial wisdom. Thus, the unique statues of financial creditors cannot be accorded to indirect creditor.[46] Third-party security holders are indirect secured creditors and are not financial creditors.

¶ 58. In a similar case, where the where corporate debtor has only extended a security by pledging 40,160 shares, it was held that the appellant(creditor) at best will be secured debtor qua above security but shall not be a financial creditor within the meaning of Section 5 sub-sections (7) and (8).[47]

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

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

[44] Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.

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

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

[47] Phoenix ARC (P) Ltd. v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

¶ 59. In the present case, the corporate debtor had not entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The Pledge Agreement was limited to a pledge of certain amount of shares as security. The corporate debtor had never promised to discharge the liability of borrower.

[C.2] APPLICATION OF THE CLEAN SLATE THEORY

¶ 60. The doctrine of 'clean slate' essentially implies that once the Resolution Plan is accepted by the Committee of Creditors and approved by the Adjudicating Authority, no claim (whether satisfied or dissatisfied) would survive. This doctrine is based upon Sec 31(1) of IBC, which makes the approved Resolution Plan (by the adjudicating authority) binding *on* on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arises.

¶ 61. Further, only the claims included in a Resolution Plan [which is approved by the Committee of Creditors ("**COC**") and the Adjudicating Authority] would be entertained and all the other claims would stand extinguished, thus provided a 'clean slate' to the Corporate Debtor[48]. The intent behind Section 31 of the Code was to provide a fresh start to a corporate debtor so that it can resume functions and operations afresh. If in case, unsatisfied creditors were allowed to re-agitate the claims which have already been dealt with in the Resolution Plan, the mischief that is sought to be cured by Section 31 of the Code would continue and render the provision otiose.[49]

¶ 62. On the date of approval of the Resolution Plan by the Adjudicating Authority, all claims stood frozen, and claims which are not part thereof are extinguished.[50] The IBC is to revive the financially distressed company and return the debt owed to the creditor in a timely manner. If time and again new claims pop up, then it would eventually become impossible to revive the Corporate Debtor in a timely manner.[51] Since, the claim of the appellant had already been rejected by the RP and the claim was not included in the resolution plan which was proposed later, the doctrine of 'clean slate' would apply and the claim put forth by the appellant would stand extinguished.

[48] Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.

[49] Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657.

[50] Ruchi Soya Industries Ltd. v. Union of India, (2022) 6 SCC 343.

[51] Bijoy Prabhakaran Pulipra vs. Tahsildar, Kanyannu & Ors., (2022) ibclaw.in 207 NCLT.

[C.3] SECURITY INTEREST CAN BE EXTINGUISHED

¶ 63. Secured Creditor cannot realize the assets during the Corporate Insolvency Resolution Process. A secured creditor is not allowed to enforce its security interest against the corporate debtor during the Corporate Insolvency Resolution Process52. Section 14(1)(c) specifically provides that the Adjudicating Authority on insolvency commencement date, shall by order declare moratorium for prohibiting any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of property including any action under the SARFAESI Act, 2002.

¶ 64. Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act is not permissible.[53] The secured creditors does not have the right to realize its security interest as the same would be detrimental to the liquidation process and the interest of the remaining secured creditors.[54] The rights of the secured creditors are restored only after the commencement of liquidation proceedings against the corporate debtor under section 33 of the Code.

¶ 65. Further it has been held that when any asset, including security interest in an asset is part of the CIRP, a resolution plan can provide for extinguishment of such asset/ security interest in the resolution plan.[55] The secured creditor would not be entitled to the value of its security but would receive in proportion to what the others in the same class receive,[56] thus extinguishing the security interest created on the assets of the corporate debtor.

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

¶ 66. After the withdrawal of the Company Petition, Danobe Info Technology Limited failed to fulfil the payment obligations as per the consent term. In response, the Petitioner submitted an Interim Application to revive the Company Petition, which was dismissed by

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

[53] Indian Overseas Bank v. RCM Infrastructure Ltd., (2022) 8 SCC 516.

[54] Srikanth Dwarakanath v. Bharat Heavy Electricals Limited, 2020 SCC OnLine NCLAT 997.

[55] Edelweiss Asset Reconstruction Company Ltd. v. Mr. Anuj Jain, Resolution Professional of Ballarpur Industries Limited & Ors., Comp.App.(AT)(Ins) 517/2023.

[56] India Resurgence ARC Private Limited v. Amit Metaliks Limited, 2021 SCC OnLine SC 409.

the Adjudicating Authority. They observed that there is no specific provision within the IBC 2016 for restoring the Company Petition.

¶ 67. It is humbly submitted before this Hon'ble Court that the insolvency proceeding cannot be restored or revived after withdrawal under section 12-A of the Insolvency and Bankruptcy Code 2016[57] in any case whatsoever.

¶ 68. ***Firstly***, the revival of insolvency proceedings is not in compliance with the IBC 2016 **[D.1]**. ***Secondly***, Inherent power cannot be exercised in the present case **[D.2]**. ***Thirdly***, revival will discourage the promotion of efficient debt resolution **[D.3]**.

[D.1] THAT RESTORING INSOLVENCY PROCEEDING IS NOT IN COMPLIANCE WITH THE IBC

¶ 69. The Insolvency and Bankruptcy Code recognizes the significance of settlements between parties to achieve the primary objective of expeditious resolution. Section 12A of the IBC 2016 provides for the withdrawal of insolvency proceedings if the parties reach a settlement before the admission of the application.

¶ 70. In the present case[58], the parties reached a settlement during the pendency of the insolvency proceedings and withdrew the company petition. The appellant seeking revival of the proceeding is not in adherence with the relevant laws. In a similar case[59], the Hon'ble National Company Law Tribunal declined to revive the CIRP proceeding considering it not in compliance with the intent and object of IBC.

¶ 71. It is humbly submitted before the Hon'ble Court that there are no laws which permit the court to restore the insolvency proceeding from where it was withdrawn. Reviving the insolvency proceeding will amount to an undesirable exercise of power and will be in contravention of the doctrine of separation of power.

[D.2] INHERENT POWER CANNOT BE EXERCISED IN THE PRESENT CASE

¶ 72. It is humbly put forth before this court that the instant case is not fit for exercising the inherent power of the court and to apply Rule 11 of the NCLAT Rules 2016[60] since there is no provision to deal with the revival of the insolvency proceeding.

[57] Insolvency and Bankruptcy Code, 2016, §12A, No. 31, Acts of Parliament, 2016 (India).

[58] Moot Proposition, ¶29.

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

[60] NCLAT Rules 2016, Rule 11.

¶ 73. The tribunal in a similar case has dismissed the contention to rely on Rule 11 of the NCLT Rules and observed that the Supreme Court has repeatedly held in several cases that the IBC, 2016 is comprehensive on its own and as there is no provision to deal with such a situation as we have one in hand, they do not find it to be a fit case to apply which operate in altogether different sphere[61] and beyond its power[62].

¶ 74. It is humbly submitted before the court that there is no merit in the argument that the insolvency proceeding can be revived by Rule 11 of NCLT Rules 2016. Hence, the question of exercising inherent power under the given rule does not arise[63] in the instant case.

[D.2.1] Alternate remedies available

¶ 75. It is humbly submitted before this Hon'ble Court that the inherent power under Rule 11 of NCLT Rules 2016 can be used by the tribunal only if there is no alternate remedy available to the applicant[64].

¶ 76. In the present case, the appellant can't seek for the exercise of inherent power by the tribunal for the revival of the insolvency proceeding as they have an alternate remedy to file a fresh application[65] for initiating the insolvency proceeding against the respondent. There is no justification for invoking the inherent power in the instant case and exercising inherent power would amount to an abuse of process.

[D.3] THAT REVIVAL WILL DISCOURAGE THE PROMOTION OF EFFICIENT DEBT RESOLUTION

¶ 77. The Consent Term is an agreement willingly entered into by both parties. It is essential to recognize that the Consent Term was the result of extensive negotiations between the parties and made in good faith efforts to put an end to the contentious issues between them.This agreement reflects a genuine attempt to resolve the financial dispute and promotes the objectives of the Insolvency and Bankruptcy Code, 2016 which encourages timely and effective resolution of insolvency cases.

[61] Shailaja Vaibhav Patil v. Harshad S. Deshpande, 2022 SCC OnLine NCLAT 1615.

[62] Mothers Pride Dairy India Pvt. Ltd. v. Portrait Advertising and Marketing Pvt. Ltd.

[63] Lokhandwala Kataria Construction Pvt. Ltd. v. Nisus Finance & Investment Manager LLP, 2017 SCC OnLine NCLAT 406.

[64] Harish Raghavji Patel v. Shapoorji Pallonji Finance (P.) Ltd., [2021] 133 taxmann.com 183 (NCLAT- New Delhi); SRLK Enterprises LLP v. JALAN Transolutions (India) Ltd., 2021 SCC OnLine NCLAT 581.

[65] Vaishno Industries Pvt. Ltd. v. Horizon Global Ltd., MANU/NC/3122/2020.

¶ 78. Allowing the revival of insolvency proceedings after a valid settlement would amount to an abuse of the insolvency process. The purpose of the IBC is to provide a time-bound and efficient mechanism for the resolution of insolvency issues. However, permitting such revival would discourage parties from entering into amicable resolutions, thereby defeating the very purpose of the IBC.

¶ 79. It is humbly submitted that merely because there is default by a borrower in repayment of borrowed amount to a creditor does not render the borrower or its guarantor, dishonest. Every act of default cannot be equated with malfeasance[66].

¶ 80. In the ***SRLK Enterprises LLP Case***[67], the NCLAT held that IBC is not a recovery proceeding where because the money or part of it has not come, the party may repeatedly come to the Court. Adjudicating Authority has rightly observed that no liberty to revive was there and so declined to interfere. The further observed that the appellant would be at liberty to pursue other remedies in law.

¶ 81. Hence, in view of these arguments, it is humbly submitted before this Hon'ble Court that the insolvency proceeding cannot be restored or revived in case of default when a consent term is entered between parties.

[66] RBL Bank Ltd. v. MBL Infrastructure Ltd., (2017) ibclaw.in 45 NCLT.

[67] SRLK Enterprises LLP v. Jalan Transolutions (India) Ltd., 2021 SCC OnLine NCLAT 4577.

THE PRAYER ADVANCED

In light of the above submissions, RESPONDENTS respectfully requests this Court to adjudge and declare that:

I. IN A LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CANNOT BE MADE IN TERMS OF SECTIONS 232 OF THE COMPANIES ACT.

II. PROMOTER IS NOT ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, EVEN THOUGH HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A RESOLUTION PLAN.

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

IV. INSOLVENCY PROCEEDING CANNOT BE RESTORED IN CASE OF DEFAULT WHEN THE CONSENT TERM IS ENTERED BETWEEN THE PARTIES.

AND/OR

Pass any order/declaration that the Hon'ble Court may deem fit in the interest of justice, equity and good conscience.

All of which is most humbly prayed.

Respectfully submitted

_____

On behalf of the Respondents,