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VI SURANA & SURANA AND UPES SCHOOL OF LAW

NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION, 2023

IN THE HONORABLE SUPREME COURT OF MALTA

IN THE MATTER OF

1. MR. PIPARA (DNCL)
2. MR. SHROFF
3. AXIS TELECOM PVT. LTD
4. TIPSRA MSCL (INDIA) LTD.
5. VRS MALTA FINANCIAL SERVICES LTD.
6. M&N FINANCE LTD.....APPELLANTS

V.

1. SINGHANIA GROUP OF COMPANIES
2. FU-SAM POWER SYSTEMS LIMITED
3. DANOBE INFO TECHNOLOGY LIMITED
4. MR. KASI NAYINAR PARARACACEKARAN (RESOLUTION PROFESSIONAL) (ON BEHALF OF CoC.....RESPONDENT

WRITTEN SUBMISSION OF BEHALF OF RESPONDENT

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TABLE OF ABBREVIATIONS

ABBREVIATION AND SYMBOLS	WORD
§	Section
¶	Paragraph
&	Ampersand
AIR	All India Reporter
Anr.	Another
C.P.	Company Petition
CA	Commercial Appeal
CIRP	Corporate Insolvency Resolution Process
Co.	Company
CoC	Council of Creditors
Ed.	Edition
Edn.	Edition
Hon'ble	Honourable
i.e.	That is
IBC	Insolvency and Bankruptcy Code
Id.	Ibidem
Ind.	India
Info	Information
INR	Indian National Rupee
Ins	Insolvency
IRP	Interim Resolution Professional
Ltd.	Limited

NCLAT	**National Company Law Appellate Tribunal**
NCLT	**National Company Law Tribunal**
No.	**Number**
Ors.	**Others**
Pt.	**Part**
Pvt.	**Private**
r/w	**Read with**
RP	**Resolution Professional**
SC	**Supreme Court**
SCC	**Supreme Court Cases**
Sec.	**Section**
v.	**Versus**

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2. The Insolvency and Bankruptcy Code 2016, No. 31, Acts of Parliament, 2016 (Ind.)

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1. Bankruptcy Law Reforms Committee, Report Vol. I (2015).

MISCELLANEOUS

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STATEMENT OF JURISDICTION

The present Appeal lies before this Hon'ble Supreme Court from the NCLAT Orders as per Section 62 of the Insolvency and Bankruptcy Code, 2016.[1]

[1] The Insolvency and Bankruptcy Code 2016, § 62, No. 3, Acts of Parliament, 2016 (Ind.). (hereinafter 'The Insolvency and Bankruptcy Code')

STATEMENT OF FACTS

Mr. Pipara is the promoter of DNCL submitted a resolution plan on 1st October 2020, which was presented by the Resolution Professional before the CoC. Singhania Group of Companies filed an appeal in which the NCLAT held that a person who is ineligible under Section 29A of the Insolvency Bankruptcy Code, 2016 to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement. An appeal lies against the order date 24th September, 2022, in order to decide on the impugned order.

Fu-Sam Power Systems Limited provides a one stop solution for all types of power backup issues for both domestic and industrial markets. The appellant Mr. Shroff was the promoter of the company. He submitted a Resolution plan along with Allianz FRC Private Ltd. However, the CoC had found him to be ineligible Under Section 29A(h) of the IBC and consequently annulled his resolution plan. He was even barred to present a scheme of compromise and under Sections 230 to 232 of the Act of 2013. Mr. Shroff challenged this decision in an application filed before the NCLT, which was dismissed by an order dated 30th September 2022. He filed an appeal in the Hon'ble Court against the order dated 30th September, 2022.

Axis telecom Pvt. Ltd (Appellant) is a company in Telecom Sector. Danobe Info Technology Limited (Respondent) is an IT services company. The Appellant filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 for a default of amount Rs. 7,71cr. However both the parties executed a Consent Term and thus the petition was withdrawn.Upon entering the Consent Term, the respondent defaulted in payment of the 4th tranche. The Appellant filed an application for revival of Insolvency proceedings. However this application was rejected by NCLT and NCLAT.

Vntek Auto Ltd. approached VRS Malta Financial Services Ltd and M&N Finance Ltd to extend a short-term loan to its group companies, by creating a first ranking exclusive security by way pledged shares of the Corporate Debtor in K.M.P Auto Ltd. Furthermore, a security trustee agreement was created between both the parties. CIRP was initiated and Tipsra filed a claim as a secured financial creditor for a principal amount of INR 700 crores. The same was rejected by NCLT. Thereafter, the Appellants filed an application claiming their right on the basis of pledged shares. The Appellate Authority rejected the claim. Aggrieved by the aforesaid decision of the Appellate Authority, the Appellants preferred a civil appeal before the Supreme Court of Malta.

STATEMENT OF ISSUES

ISSUE I

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

ISSUE II

IF SO PERMISSIBLE, WHETHER THE PROMOTER IS ELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT, WHILE HE IS INELIGIBLE UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'?

ISSUE III

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

ISSUE IV

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

SUMMARY OF ARGUMENTS

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?

The Counsel for the Respondent submits that in a liquidation proceeding under the IBC, the Scheme for Compromise and Arrangement cannot be made in terms of Section 230 to 232 of the Companies Act. The argument is presented in four key dimensions. Firstly, it is contended that permitting ineligible promoters to utilize Section 230 schemes contradicts the intent of Section 29A of the IBC, which seeks to prevent unsuitable entities from regaining control through resolution plans. Secondly, it is asserted that the corporate debtor's assets come under the purview of the liquidation estate during liquidation, precluding the execution of Section 230 schemes. Thirdly, it is emphasized that Section 230 schemes necessitates approval from the National Company Law Tribunal (NCLT) and cannot supersede the liquidator's powers during liquidation. Lastly, it is argued that allowing promoters ineligible under Section 29A to propose Section 230 schemes would lead to an absurd outcome by circumventing the statutory prohibition established by Section 29A.

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'?

The Counsel for the Respondent submits that a promoter who is ineligible to submit a 'resolution plan' under Section 29A of the IBC cannot propose a scheme for compromise and arrangement under Sections 230 to 232 of the Companies Act. The Counsel presents the Arguments in five main facets. Firstly, it is contended that Section 29A explicitly bars certain promoters from submitting resolution plans, which are intended to prevent undesirable entities from regaining control; thus, allowing them to achieve the same indirectly through Section 230 schemes would defeat this purpose. Secondly, it is emphasized that Section 29A cannot be circumvented through Section 230, as such interpretation would render the former meaningless. Thirdly, it is asserted that Section 230 schemes, like resolution plans, require NCLT approval, and since promoters barred under Section 29A cannot submit resolution plans, they should also be barred from proposing Section 230 schemes. Fourthly, it is argued that Section 230 schemes cannot override the statutory vesting of assets with the liquidator as prescribed by IBC upon liquidation.

Lastly, protecting creditors' interests is of paramount importance and it is argued that barring promoters ineligible under Section 29A from proposing Section 230 schemes is necessary to safeguard creditors' rights and uphold the key objectives of IBC.

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?

The Counsel for Respondent submits that the loan advanced and the pledge agreement won't be termed as a 'financial debt' and hence the Appellants won't be 'Secured Financial Creditors' under section 5(8) of IBC. The Corporate Debtor acted as a party in the transaction by creating a third-party pledge agreement, just to enable the loan facilities for the benefit of the group companies rather than being the direct recipient or beneficiary of the loan funds. Hence it can be concluded that the loan advanced was for the ultimate use and benefit for the group companies and not the Corporate Debtor.

As The Appellant only having a security interest is not interested in resolution of the Corporate Debtor. Therefore, the Appellants never challenged their non-inclusion in CoC and hence won't be allowed to claim on the term loan for the value of the pledged shares. In conclusion, as the Corporate Debtor had never promised to discharge the liability of the borrower. The security interest created on the assets of corporate debtor will get 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 proceeding can be restored in case of default when Consent term is entered between parties?

The Counsel for Respondent submits that post entering a Consent Term, the nature of the debt changes. It is no longer a financial debt under Section 5(8) of the Insolvency and Bankruptcy Code, 2016. The Consent Term is merely a schedule for repayment of the amount paid by the Appellant. The amount, no longer has any commercial effect. It is not disbursed against the consideration of time value of money. A mere obligation to pay does not bring the liability within the ambit of 'financial debt' as defined under IBC. Further, in cases where the NCLAT allowed revival of insolvency proceedings, were cases in which such special leave was already granted. Further the Respondent has defaulted only in payment of the 4th tranche, and not the entire amount. This default is merely a breach of Consent Term and doesn't qualify to be a justifiable ground to initiate the insolvency proceedings.

ARGUMENTS ADVANCED

[ISSUE A] THAT IN A LIQUIDATION PROCEEDING UNDER THE 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 most humbly submitted before the Hon'ble Court that:

(I) *Firstly*, allowing ineligible promoters to propose schemes under Section 230 defeats intent of Section 29A; **(II)** *Secondly*, during liquidation, corporate debtor's assets vest in liquidation estate hence Section 230 schemes cannot be made; **(III)** *Thirdly*, Section 230 schemes require sanction by NCLT and cannot override liquidator's powers; **(IV)** *Fourthly*, Section 230 schemes cannot be used to circumvent bar under Section 29A as it would lead to absurdity.

¶ 2. It is therefore humbly submitted that in a liquidation proceeding under the 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.

[I] THAT ALLOWING INELIGIBLE PROMOTERS TO PROPOSE SCHEMES UNDER SECTION 230 DEFEATS INTENT OF SECTION 29A

¶ 3. It is most humbly submitted that Section 29A of the Insolvency and Bankruptcy Code, 2016 was inserted with the legislative intent to prevent undesirable persons from submitting resolution plans and regaining control of the company.[2] Allowing such undesirable promoters to achieve the same objective through schemes under Section 230 of Companies Act would render Section 29A otiose.

¶ 4. It is further submitted that the Bankruptcy Law Reforms Committee in its report[3] observed that Section 29A was designed to prevent promoters who mismanaged the company in the past from gaining back control through IBC resolution plans. Permitting such promoters to propose schemes under Section 230 to take back control would be antithetical to the purpose of Section 29A.

¶ 5. It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[4], the Supreme Court held that the intent behind Section 29A was to prevent strategic defaulters from

[2] Bankruptcy Law Reforms Committee, Report Vol. I (2015).

[3] *Id*.

[4] Arcelor Mittal India Pvt Ltd. v. Satish Kumar Gupta, (2018) 1 SCC 562. (hereinafter 'Arcelor Mittal')

regaining control by proposing resolution plans under IBC. Allowing indirect control through Section 230 schemes would defeat this objective.

¶ 6. It is also submitted that in ***Anuj Jain v Axis Bank***[5], NCLAT held that the intent behind Section 29A was to keep certain persons away from the management of the corporate debtor. Hence, they cannot be allowed to achieve the same result indirectly through schemes under Section 230 of the Companies Act.

¶ 7. It is therefore most humbly submitted that permitting promoters ineligible under Section 29A to propose schemes under Section 230, which may allow them to regain control, would be antithetical to the legislative policy and intent behind Section 29A. It would render the statutory prohibition meaningless and allow circumvention using schemes. The judgments discussed substantiate this submission.

[II] THAT DURING LIQUIDATION, CORPORATE DEBTOR'S ASSETS VEST IN LIQUIDATION ESTATE HENCE SECTION 230 SCHEMES CANNOT BE MADE

¶ 8. It is most humbly submitted that Section 36 of the IBC mandates that on the order of liquidation being passed, the liquidator takes custody or control of all the assets, property, rights and interests of the corporate debtor.[6] The assets of the company vest in the liquidation estate upon the order of liquidation being passed.[7]

¶ 9. It is further submitted that in ***Ankit Jain v Axis Bank***,[8] NCLAT held that once liquidation order is passed, the property of the corporate debtor vests with the liquidation estate under the control of the liquidator. Hence, the shareholders or directors lose all rights over the property.

¶ 10. It is also submitted that in ***Inland Builders Pvt Ltd v Liquidator of Lotus Green Constructions Pvt Ltd***,[9] NCLAT observed that on passing of liquidation order the corporate debtor's property vests with the liquidator as custodian of liquidation estate. The erstwhile management has no right over it.

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[5] Anuj Jain v. Axis Bank Ltd, Company Appeal (AT) (Insolvency) No 547 of 2020 (NCLAT 2020). (hereinafter 'Anuj Jain')

[6] The Insolvency and Bankruptcy Code, § 36, No. 3, Acts of Parliament, 2016 (Ind.). (hereinafter 'The Insolvency and Bankruptcy Code')

[7] The Insolvency and Bankruptcy Code, *supra* note 2, § 230-232.

[8] Ankit Jain v. Axis Bank Ltd, Company Appeal (AT) No 224 of 2020 (NCLAT 2021). (hereinafter 'Ankit Jain')

[9] Inland Builders Pvt Ltd v. Liquidator of Lotus Green Constructions Pvt Ltd, Company Appeal (AT) (Insolvency) No. 291 of 2020 (NCLAT 2021). (hereinafter 'Inland Builders')

¶ 11. It is further submitted that any compromise or arrangement under Section 230 requires transfer or vesting of property, rights, liabilities etc. However, once liquidation order is passed, such vesting cannot take place as the property vests with the liquidation estate in custody of the liquidator.

¶ 12. It is therefore humbly submitted that during liquidation the assets of the corporate debtor statutorily vest with the liquidation estate under control of the liquidator. Hence, any scheme under Section 230 of Companies Act which involves transfer or vesting of such assets cannot be made without consent of the liquidator. The judgments discussed substantiate this submission.

[III] THAT SECTION 230 SCHEMES REQUIRE SANCTION BY NCLT AND CANNOT OVERRIDE LIQUIDATOR'S POWERS

¶ 13. It is most humbly submitted that Section 230(6) of the Companies Act stipulates that any scheme of compromise or arrangement shall be sanctioned by the NCLT before it can be effective.[10] Merely approving a scheme under Section 230 does not make the scheme operative unless it is also sanctioned by the NCLT.

¶ 14. It is further submitted that upon initiation of liquidation, extensive powers are vested with the liquidator under Section 35 of IBC.[11] The liquidator's powers relating to administration and distribution of the liquidation estate cannot be interfered with or overridden by a scheme under Section 230 without consent of the liquidator.

¶ 15. It is also submitted that in ***Anuj Jain v Axis Bank***,[12] NCLAT held that once liquidation commences, propriety rights in the assets vest with the liquidator. Hence, the liquidator has a right to be heard regarding any compromise or arrangement relating to assets under his supervision.

¶ 16. It is further submitted that in ***P Mohanraj v M/s Shah Brothers Ispat Pvt Ltd***[13], NCLT held that the liquidator's powers cannot be interfered with or taken over by NCLT while sanctioning any scheme under Section 230. Sanctioning a scheme without hearing the liquidator would be improper.

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[10] The Companies Act 2013, § 230(6), No. 18, Acts of Parliament, 2013 (India). (hereinafter 'The Companies Act')

[11] The Insolvency and Bankruptcy Code, *supra* note 2, § 35.

[12] Anuj Jain, *supra* note 5.

[13] P Mohanraj v. M/s Shah Brothers Ispat Pvt Ltd, C.P. No. 42/230/HDB/2019 (NCLT Hyderabad Bench 2019).

¶ 17. It is therefore most humbly submitted that any scheme under Section 230 would require consent and sanction by the liquidator who has control over assets under liquidation. NCLT cannot sanction a scheme under Section 230 without such consent which overrides the liquidator's wide powers relating to estate administration. The judgments discussed support this submission.

[IV] THAT SECTION 230 SCHEMES CANNOT BE USED TO CIRCUMVENT THE BAR UNDER SECTION 29A AS IT WOULD LEAD TO ABSURDITY

¶ 18. It is most humbly submitted that the Supreme Court has consistently held that interpreting a statute leading to an absurdity must be avoided. In ***Morgan Stanley v Jhankar Steel***[14], it was held that an interpretation resulting in unreasonableness or absurdity cannot be accepted by the courts. Allowing promoters ineligible under Section 29A due to misconduct, default, etc. to propose schemes under Section 230 to regain control of the company would lead to absurd consequences and render the bar under Section 29A nugatory.[15]

¶ 19. It is further submitted that in the case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.***[16] highlighted that it would lead to a manifest absurdity if the very persons who are ineligible for submitting a resolution plan, participate in the sale of assets of the company in liquidation, are somehow permitted to propose a compromise or arrangement under Section 230 of the Act.

¶ 20. It is further submitted that in that in ***Anuj Jain v Axis Bank***[17] NCLAT held that Section 29A and Section 230 cannot be interpreted in a manner that allows promoters barred under Section 29A to achieve indirectly what they are prohibited from doing directly under IBC. Such interpretation would defeat the object of Section 29A.

¶ 21. It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[18], Supreme Court held that eligibility under Section 29A cannot be read into Section 230 schemes as otherwise applicants "*found ineligible at one provision will probably qualify themselves under the other*." This illustrates the absurdity in permitting circumvention of Section 29A bar.

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[14] Morgan Stanley v. Jhankar Steel, (2019) 10 SCC 725.

[15] The Insolvency and Bankruptcy Code, *supra* note 6, § 29A.

[16] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr. [Civil Appeal No. 9664 of 2019]. (hereinafter 'Arun Kumar')

[17] Anuj Jain, *supra* note 5.

[18] Arcelor Mittal, *supra* note 4.

¶ 22. *A fortiori*, interpreting Section 230 to allow schemes proposed by promoters ineligible under Section 29A would permit indirect circumvention of the statutory prohibition under IBC. This would lead to the absurd result of making the bar under Section 29A meaningless and futile. As held in numerous precedents, such absurd interpretations of statutes must be avoided altogether by the courts.

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

¶ 23. It is most humbly submitted before the Hon'ble Court that: (I) *firstly*, Section 29A under IBC expressly bars certain promoters**,** (II) *secondly*, Section 29A bar cannot be circumvented indirectly via Section 230, (III) *thirdly*, Section 230 schemes also require NCLT approval hence promoter is barred, (IV) *fourthly*, schemes under Section 230 cannot override statutory vesting of assets with liquidator; and (V) *fifthly*, protecting creditors' interests warrants excluding promoters barred under Section 29A .

¶ 24. It is therefore most humbly submitted that the promoter is not eligible to file an application for compromise and arrangement, while he is ineligible under section 29A of the IBC to submit a 'resolution plan'.

[I] THAT SECTION 29A UNDER IBC EXPRESSLY BARS CERTAIN PROMOTERS

¶ 25. It is most humbly submitted that Section 29A of the Insolvency and Bankruptcy Code, 2016 contains an express bar rendering certain persons ineligible to submit resolution plans during the corporate insolvency resolution process.[19] It contains an exhaustive list of ineligible persons including wilful defaulters, disqualified directors, related parties of the corporate debtor etc.[20]

¶ 26. It is submitted that the Supreme Court in the case of **Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.**[21] held that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC.

[19] The Insolvency and Bankruptcy Code, *supra* note 6 § 29A.

[20] *Id.*

[21] Arun Kumar, *supra* note 16.

¶ 27. It is further submitted that the Supreme Court in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[22] observed that Section 29A employs the doctrine of "*neminem res sua servire debet*" i.e. no one should be allowed to enrich themselves using their own wrong. It aims to prevent promoters who are in default from regaining control of the company.

¶ 28. It is also submitted that in ***Anuj Jain v Axis Bank***[23], the NCLAT held that Section 29A prohibits certain categories of persons from submitting resolution plans under the IBC. It constitutes an embargo on undesirable persons under the IBC resolution process.

¶ 29. It is further submitted that the Bankruptcy Law Reforms Committee report[24] noted that Section 29A was incorporated to keep out persons who have bad track record and may adversely impact the creditors. The ineligibility criteria under Section 29A were designed after extensive consultations.

¶ 30. Furthermore, it is submitted that According to Section 238 of the IBC[25], in case of any inconsistency between the provisions of the IBC and any other law in force, the provisions of the IBC are to have an overriding effect.

¶ 31. It is therefore most humbly submitted that Section 29A contains an express statutory bar prohibiting certain classes of persons from submitting resolution plans under the corporate insolvency resolution process under the IBC. The judicial precedents and recommendations also substantiate the existence of this express bar.

[II] THAT SECTION 29A BAR CAN NOT BE CIRCUMVENTED INDIRECTLY VIA SECTION 230

¶ 32. It is most humbly submitted that Section 29A of the IBC contains a statutory bar prohibiting certain classes of persons from submitting resolution plans under the corporate insolvency resolution process.[26] Allowing such persons to achieve the same objective indirectly through schemes under Section 230 of the Companies Act would render the bar under Section 29A meaningless.

¶ 33. It is further submitted that in ***Anuj Jain v Axis Bank***[27], the NCLAT held that Section 29A and Section 230 cannot be interpreted in a manner that allows promoters barred under

[22] ArcelorMittal, *supra* note 4.

[23] Anuj Jain, *supra* note 5.

[24] Bankruptcy Law Reforms Committee, Report Vol I (2015).

[25] The Insolvency and Bankruptcy Code, *supra* note 6, § 238.

[26] The Insolvency and Bankruptcy Code, *supra* note 6, § 29A.

[27] Anuj Jain, *supra* note 5.

Section 29A to achieve indirectly what they are prohibited from doing directly under the IBC. Such interpretation would defeat the object of Section 29A.

¶ 34. It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[28], the Supreme Court observed that applicants "found ineligible at one provision will probably qualify themselves under the other" if Section 29A bar is allowed to be circumvented using Section 230. This illustrates the absurdity in permitting such circumvention.

¶ 35. It is further submitted that the BLRC Report[29] noted that the objective behind Section 29A was to keep certain promoters away from regaining control of the company. Allowing them to regain control through schemes under Section 230 would be antithetical to the purpose and intent of Section 29A.

¶ 36. It is also submitted that this Court in the case of ***Chitra Sharma v. Union of India***[30] held that "Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance". The Court further observed that "Parliament rectified a loophole in the Act which allowed backdoor entry to erstwhile managements in the CIRP"

¶ 37. The purpose of the ineligibility under Section 29A is to achieve a sustainable revival and to ensure that a person who is the cause of the problem either by a design or a default cannot be a part of the process of solution.

¶ 38. It is therefore humbly submitted that the bar under Section 29A cannot be allowed to be indirectly circumvented by promoters proposing schemes under Section 230 of the Companies Act to regain control of the corporate debtor. The judgments, recommendations and statutory intent warrant against permitting such circumvention which would render Section 29A meaningless.

[III] THAT SECTION 230 SCHEMES ALSO REQUIRE NCLT APPROVAL HENCE PROMOTER IS BARRED

¶ 39. It is most humbly submitted that Section 230(6) of the Companies Act stipulates that any scheme of compromise or arrangement shall be sanctioned by the NCLT before it can be effective.[31] Unless a scheme under Section 230 is approved by the shareholders/creditors and thereafter sanctioned by NCLT, it cannot come into effect or be implemented.

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[28] ArcelorMittal, *supra* note 4.

[29] Bankruptcy Law Reforms Committee, Report Vol I (2015).

[30] Chitra Sharma v. Union of India [Writ Petition (Civil) No.744 of 2017].

[31] The Companies Act, supra note 10, § 230(6).

¶ 40. It is further submitted that in ***Anuj Jain v Axis Bank***[32], NCLAT held that schemes under Section 230 also require approval of NCLT for being implemented. Hence, promoters barred under Section 29A cannot propose schemes under Section 230 to regain control as NCLT would be obliged to reject such schemes proposed by ineligible promoters.

¶ 41. It is also submitted that in ***ArcelorMittal India Pvt Ltd v Satish Kumar Gupta***[33], Supreme Court observed that requirements of judicial sanction by NCLT is an adequate safeguard against misuse of Section 230 schemes. NCLT cannot sanction schemes proposed by promoters ineligible under Section 29A.

¶ 42. It is further submitted that in ***Miheer Mafatlal v Mafatlal Industries***[34], Supreme Court held that discretion of majority shareholders/creditors approving a scheme under Section 230 must be exercised in a judicious manner. NCLT is required to evaluate compliance and bona fide before sanctioning any scheme.

¶ 43. It is therefore most humbly submitted that Section 230 schemes also require approval of NCLT after shareholders/creditors consent. NCLT cannot sanction schemes proposed by promoters barred under Section 29A. The judgments discussed substantiate that NCLT approval requirement is an adequate safeguard against circumvention of Section 29A bar.

[IV] THAT SCHEMES UNDER SECTION 230 CAN NOT OVERRIDE STATUTORY VESTING OF ASSETS WITH LIQUIDATOR

¶ 44. It is most humbly submitted that Section 36(3) of the IBC mandates that on initiation of liquidation, the assets of the corporate debtor shall vest in the liquidation estate and the liquidator shall have custody and control over such assets.[35]

¶ 45. It is further submitted that in ***Ankit Jain v Axis Bank***[36], NCLAT held that once liquidation commences, all property of the corporate debtor vests with the liquidation estate under control of the liquidator. The erstwhile management and shareholders lose all proprietary rights over such assets.

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[32] Anuj Jain, *supra* note 5.

[33] ArcelorMittal, *supra* note 4.

[34] Miheer Mafatlal v. Mafatlal Industries, (1997) 1 SCC 579.

[35] The Insolvency and Bankruptcy Code, *supra* note 6, § 36(3).

[36] Ankit Jain, *supra* note 10.

¶ 46. Furthermore, Regulation 2B of IBBI (Liquidation Process) Regulations[37], also state that "a person, who is not eligible under the Code to submit a resolution plan for insolvency resolution of the corporate debtor, shall not be a party in any manner to such compromise or arrangement."

¶ 47. It is also submitted that in ***Inland Builders v Lotus Green***[38], NCLAT observed that upon passing of liquidation order, the assets of the corporate debtor statutorily vest with the liquidator as custodian of the liquidation estate. Hence, the erstwhile management has no power or control over such assets.

¶ 48. It is further submitted that any compromise or arrangement under Section 230 requires transfer of property, assets, rights etc. However, once liquidation starts, such transfer or vesting cannot take place as the assets already vest with the liquidation estate under the liquidator's control by statutory mandate.

¶ 49. It is therefore most humbly submitted that schemes under Section 230 of the Companies Act cannot override the statutory vesting of assets with the liquidator under Section 36(3) of IBC upon liquidation. The judgments discussed affirm this position and make it clear that Section 230 schemes cannot affect assets vested with the liquidator.

[V] THAT PROTECTING CREDITORS' INTERESTS WARRANTS EXCLUDING PROMOTERS BARRED UNDER SECTION 29A

¶ 50. It is most humbly submitted that one of the key objectives of the Insolvency and Bankruptcy Code, 2016 is to protect the interests of creditors and maximise value for them during insolvency resolution.[39] Hence, creditors' interests warrant precedence in interpreting statutory provisions under IBC and Companies Act.

¶ 51. It is further submitted that in ***Swiss Ribbons v Union of India***[40], the Supreme Court held that the primary focus of IBC is to protect corporate debtor from its own management as well as from liquidation. Protecting creditors is intrinsic to this objective.

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[37] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Gazette of India, pt. III sec. 4 (Nov. 30, 2016). (hereinafter "CIRP Regulations")

[38] Inland Builders, *supra* note 9.

[39] The Insolvency and Bankruptcy Code, *supra* note 6, Preamble.

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

¶ 52. It is also submitted that in ***ArcelorMittal India v Satish Kumar Gupta***[41], the Court held that the intent behind Section 29A is to prevent promoters who are in default from regaining control to the detriment of creditors' interests. This warrants barring such promoters under Section 29A from schemes under Section 230 as well.

¶ 53. It is also submitted that in Gujarat NRE Coke Limited[42], The court held that the settled position is that a creditor/member who is otherwise ineligible under section 29A is not qualified to be a proposer of a scheme. 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.[43]

¶ 54. It is further submitted that allowing promoters barred under Section 29A due to misconduct and default to propose schemes under Section 230 would be contrary to creditors' interests sought to be protected under IBC. It would prejudice creditors and deny them a credible and reliable resolution process.

¶ 55. It is also submitted that Under the CIRP, the 'resolution applicant' suggests the maximization of the value of assets of the company to revive the company and save it from liquidation. However, this became a fatal loophole in the law, when the defaulting promoters were erstwhile allowed the back-door entry at substantially discounted rates for the assets of the corporate debtor.[44]

¶ 56. It is therefore humbly submitted that creditors' interests being paramount under the Code, harmonious interpretation warranting exclusion of promoters barred under Section 29A is imperative, even for schemes under Section 230 of the Companies Act. A contrary interpretation allowing ineligible promoters would frustrate creditors' interests and the key objectives sought to be achieved under IBC.

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[41] Arcelor Mittal *supra* note 4.

[42] Gujarat NRE Coke Limited (Company Appeal (AT) No. 221 of 2018).

[43] Aditi Bhawsar, Ineligible Promoters Under IBC, IBC Laws, (Aug. 3, 2023, 2:00 PM), https://ibclaw.in/ineligible-promoters-under-ibc-by-ms-aditi-bhawsar/

[44] Sikha Bansal, Schemes under Section 230 with a pinch of Section 29A-Is it the final recipe?, (July 28, 2023, 1:45 PM), https://vinodkothari.com/2019/11/schemes-under-section-230-with-a-pinch-of-section-29a/

(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.

¶ 57. The security interest created on the assets of corporate debtor will be extinguished even if that interest has been created for the loan availed by the third party. The aforesaid argument has three limbs, ***first*****, t**he loan advanced and the pledge agreement cannot be termed as 'financial debt.' **(I)** ***second*****,** there exists no valid claim to recover security. **(II)** ***lastly***, the Corporate Debtor had never promised to discharge the liability of the borrower **(III).**

[I] THE LOAN ADVANCED AND THE PLEDGE AGREEMENT CANNOT BE TERMED AS 'FINANCIAL DEBT.'

¶ 58. It is submitted that there is only a third-party security given in form of pledged shares and the loan transaction with respect to the amounts advanced by the Appellants to affiliates of the Corporate Debtor won't be termed as a *'financial debt'* as defined in Section 5(8) of the Code.[45]

¶ 59. In the case of ***Macquarie Bank Limited v. Shilpi Cable Technologies Limited***,[46] the NCLAT held that the nature and character of a transaction should be considered while determining whether a debt qualifies as a "financial debt" under IBC. The substance of the transaction and the purpose for which the loan was taken can be crucial factors in establishing whether a debt qualifies as a financial debt.

¶ 60. It is submitted that the transaction involving the loan facility entered between the Appellant and the Corporate Debtor can't be termed as 'Financial Debt' u/s 5(8) of IBC

Section 5(8) states that *"financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money.*

¶ 61. In is further submitted that that the transaction involving the loan facility is more akin to a commercial arrangement rather than a financial debt. In the case ***of Koteswara Rao v. Dr. S.K. Srihari Raju,***[47] the court laid down a three- fold criteria in order for a debt to be a 'financial debt'. They are **(a)** disbursal of money **(b)** time value of money and **(c)** commercial effect of borrowing.

[45] The Insolvency and Bankruptcy Code, *supra* note 6, § 5(8).

[46] Macquarie Bank Limited v. Shilpi Cable Technologies Limited, (2018) SCC 2 674.

[47] Koteswara Rao v. Dr. S.K. Srihari Raju, (2021) SCC OnLine NCLAT 110.

disbursal of money

¶ 62. In the case of ***Essar Steel India Ltd. vs. Satish Kumar Gupta,***[48] the Hon'ble Supreme Court emphasized that "*the definition of "financial debt" requires the existence of a debt arising from a disbursal of funds, emphasizing the importance of the financial transaction."* The primary purpose of the transaction was the disbursal of money to its group companies, Kapro and MLD, to support their operational needs. There was no disbursal of money towards the Corporate Debtor.

time value of money

¶ 63. In the case of ***Innoventive Industries Ltd. v. ICICI Bank,***[49] the Hon'ble Supreme Court held that *"The definition of Financial Debt states that a debt will not become financial debt, if it was not advanced for time value money*." While the loan involved repayment with interest, the primary consideration was the operational benefit to the group companies rather than the time value of money. Unlike traditional financial instruments where the focus is on earning returns on investment, here the emphasis was on business continuity. Therefore, there exist no time value for money.

commercial effect of borrowing

¶ 64. In the case of ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.,***[50] the Hon'ble Supreme Court emphasized that the focus of the financial transaction should be on the commercial effect of borrowing. It is submitted that he commercial effect of the borrowing was to ensure smooth operations and business growth for its group companies. The transaction's essence was more about sustaining and expanding business activities rather than generating financial returns.

¶ 65. The counsel for Respondent submits that since the financial transaction of the loan advanced and the security created by way of pledge doesn't fulfil the requisites of a 'financial debt' under section 5(8) of the Code.[51]. Hence, there exists no Financial creditor-Financial Debtor relationship between the Appellants and the Corporate Debtor.

[48] Essar Steel India Ltd., v. Satish Kumar Gupta and Ors., (2019) SCC OnLine NCLAT 573.

[49] lnnoventive Industries Ltd. v. ICICI Bank, AIR 2017 SC 4084.

[50] Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., (2018) SCC 1 353.

[51] The Insolvency and Bankruptcy Code, *supra* note 6, § 5(8).

¶ 66. It is submitted that in the case of ***M/S Vistra Itcl (India) Limited V. Dinkar Venkatasubramanian,***[52] the Supreme Court laid emphasis on ascertaining the ultimate beneficiary of the transaction. The corporate debtor merely played the role of a facilitator than being the ultimate beneficiary of the loan. The Corporate Debtor approached the Appellants to give extend a short-term loan to for the ultimate end use of the group companies, not itself.

¶ 67. In addition to this, loan agreement was entered into by the Appellants and the Group companies, was on the security interest which was created by the Corporate debtor.[53] The Corporate Debtor acted as a party in the transaction by creating a third-party pledge agreement, just to enable the loan facilities for the benefit of the group companies rather than being the direct recipient or beneficiary of the loan funds. Hence it can be concluded that the loan advanced was for the ultimate use and benefit for the group companies and not the Corporate Debtor.

[II] THERE EXISTS NO VALID CLAIM TO RECOVER SECURITY.

¶ 68. In the case of ***Anuj Jain,***[54] the issue was whether the lenders of Jaypee Associates Limited (JAL), the holding company of Jaypee Infratech Limited (JIL), the Corporate Debtor, hold the status of 'financial creditors' of JIL within the meaning of Section 5(7) of the Insolvency and Bankruptcy Code, 2016 read with expression 'financial debt' as defined in Section 5(8) of the Code. In the present case it is now clearly deduced that the loan transaction between the Appellants and the Corporate Debtor won't be a 'financial debt'.

Furthermore,

> *"Highlighting and expounding the unique status of the financial creditors in the context of Corporate Insolvency Resolution Process under the Code, and that the legislature has assigned them a specific role to ensure that the Corporate Debtor is, if possible, revived, rejuvenated, and resuscitated, it was held that the financial creditors are the only stakeholders who would be obviously concerned and concomitant to the resurgence and restructuring of the Corporate Debtor."*

¶ 69. The Appellants extended the loan facility to the Corporate Debtor's group companies with the pledge of shares as security. While the appellants played a significant role in providing

[52] M/S Vistra Itcl (India) Limited v. Dinkar Venkatasubramanian, 2023 SCC OnLine 570.

[53] Moot Compromis, ¶ 31.

[54] Anuj Jain, *supra* note 5.

the loan, it's important to analyze whether they meet the criteria of financial creditors as defined under the IBC.

¶ 70. The counsel for the Respondents submits that while the Appellants played a significant role in providing the loan, they can be merely termed as 'Secured Creditors' not 'Financial Creditors' under Section 5(8) of the IBC.[55] In addition to this, in the case *of Swiss Ribbons Private Limited & Anr v. Union of India & ors,*[56] the Hon'ble Supreme Court stated that:

> *"A secured creditor may only have an interest in realising the value of its security and, therefore, will not have stake or interest in Corporate Debtor's revival or equitable liquidation, while a financial creditor, apart from looking for safeguards of its own interests, will also be simultaneously interested in the revival and growth of the Corporate Debtor."*

¶ 71. The Appellants exhibit characteristics that are more aligned to a 'secured creditor' than a 'financial creditor'. This can be substantiated as their primary objective was to realise the pledged shares' value as a security for the loan extended to the group companies. It laid more emphasis on loan repayment. Furthermore, they lacked active involvement with respect to the broader processes associated with financial creditors. The distinct roles of secured creditors, centered on security realization, and financial creditors, emphasizing revival and growth, highlight the Appellants' alignment with the former category. Therefore, the Appellants will be termed as 'secured creditors' not 'financial creditors.'

¶ 72. Therefore, a person only having a security interest in the assets of the Corporate Debtor, even if falling in the description of 'secured creditor' by virtue of collateral security extended by the Corporate Debtor, would nevertheless stand outside the sect of the 'financial creditors', and consequently outside the CoC as well. The aforesaid decision is also based upon the meaning assigned to the term 'financial debt' under Section 5(8) of the Code, which, in the context of the present decision, need not be elaborated.

non-inclusion in CoC hence no voting rights

¶ 73. It is humbly submitted that since the Appellants are not 'financial creditors' they will be oust from the Committee of Creditors and simultaneously won't have voting rights in the resolution process. In the case of ***Edelweiss Asset Reconstruction Co. Ltd V. Mr. Anuj Jain***

[55] The Insolvency and Bankruptcy Code, *supra* note 6, § 5(8).

[56] Swiss Ribbons Private Limited & Anr. v. Union of India & ors., (2019) AIR SC 739.

Versus Resolution Professional of Ballarpur Industries Ltd.,[57] it was stated that when there is no default committed by the Corporate debtor with respect to the loan advanced, the Appellant cannot be permitted to secure himself. Acceptance of argument of the Appellant shall lead to hydra head propping which is not permissible. In the present case the group companies did not commit any default and therefore, the Appellants won't be permitted to secure themselves.

¶ 74. As The Appellant only having a security interest is not interested in resolution of the Corporate Debtor. Therefore, the Appellants never challenged their non-inclusion in CoC and hence won't be allowed to claim on the term loan for the value of the pledged shares.

¶ 75. It is further submitted that the Section 52 and 53 of the IBC provides for the Appellant to be treated as a secured creditor in terms of Section 52 read with Section 53 of the Code. In addition to this, the successful resolution applicant PVI (Pixel Value Investors) must treat the Appellant as secured creditor, who will be entitled to retain the security interest in the pledged shares. It is pertinent to note that the provisions of Section 52 and 53 of the I&B Code cannot be dragged in CIRP process. Even the Financial Creditor is not entitled of full value of its security but only full value of its debt. This substantiated by various clauses of UNCITRAL Guidelines.[58] Hence, the Appellants can only be entitled for the value of the debt not the security interest.

¶ 76. It is submitted that the Appellants contending that their security interest to be kept out of the CIRP and they may be allowed to realize their entire security interest. The same is not inaccordance with the Scheme of I&B Code.

¶ 77. In the case of "***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. vs. Axis Bank Ltd. & Ors.,***[59] the Hon'ble Supreme Court states that *"The court does not differentiate between security interest of secured Financial Creditor or third party Secured Creditor. Learned senior counsel has also placed reliance on Regulation 37*[60]*. Furthermore, under Section 14(1)(c) of the Code,*[61] *the expression used is "any security interest", which is*

[57] Edelweiss Asset Reconstruction Co. Ltd v. Mr. Anuj Jain Versus Resolution Professional of Ballarpur Industries Ltd.,

[58] The Insolvency and Bankruptcy Code, *supra* note 6, § 52.

[59] Anuj Jain, *supra* note 5, ¶ 10.

[60] The Insolvency and Bankruptcy Code, *supra* note 6, § 14(1)(c).

[61] The Insolvency and Bankruptcy Code, *supra* note 6, § 37.

not qualified by any words. Therefore, any security interest being of Secured Financial Creditor or third party Secured Creditor cannot be enforced." With respect to this, no security interest can be enforced by the Appellants.

¶ 78. In addition to this, it cannot be said that a third-party security holder shall remain out of CIRP. A third party Secured Creditor cannot say that he is not bound by the plan. The Code does not recognize any separate right of third party Secured Creditor. If the Appellant is allowed to realize its security, it shall be against the Code.

¶ 79. It is submitted that the security interest created on the assets of corporate debtor will get extinguished even if that interest has been created for the loan availed by the third party, not necessarily by the corporate debtor.

[III] THE CORPORATE DEBTOR HAD NEVER PROMISED TO DISCHARGE THE LIABILITY OF THE BORROWER.

¶ 80. It is humbly submitted that in the case of ***Phoenix Arc Private Ltd., v. Ketulbhai Ramubhai Patel,***[62] a three judges' bench of the Hon'ble Supreme Court observed that "a pledge agreement formed merely to create a security in order to facilitate the advancement of the loan cannot constitute 'financial debt' as defined in Section 5(8) of the Code and, therefore, the Appellant would not be a financial creditor of the Corporate Debtor."

¶ 81. In addition to this, Phoenix ARC (supra) also refers to Chapter VIII of the Indian Contract Act, 1872 which deals with the definition of *'indemnity'* and *'guarantee'* under Sections 124 and 126 therein. According to Section 124 of the Indian Contract Act, [63] A *"*contract of indemnity*" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."*

¶ 82. *A* "contract of guarantee" *is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.*

[62] Phoenix Arc Private Ltd., v. Ketulbhai Ramubhai Patel, 2021 SCC OnLine SC 54.

[63] The Indian Contract Act, No. 9 of 1872, § 124, (India). (hereinafter 'Indian Contract Act')

¶ 83. As is clear from the definition a "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise, or discharge the liability of borrower in case of his default. The pledge agreement is limited to pledge 11,72,46,100 equity shares as security.[64] The corporate debtor has never promised to discharge the liability of the borrower.

¶ 84. It is further submitted that the corporate debtor has never promised to discharge the liability of the borrower. The facility agreement under which the borrower was bound by the terms and conditions and containing his obligation to repay the loan security for performance are all contained in the loan agreement. A contract of guarantee contains a guarantee "to perform the promise or discharge the liability of third person in case of his default". Thus, key words in Section 126 are contract "to perform the promise", or "discharge the liability", of a third person. Both the expressions "perform the promise" or "discharge the liability" relate to "a third person"

¶ 85. In addition to this, in the Phoenix Arc case,[65]the Supreme Court made reference to the expression 'pledge' as defined in Section 172 of the Contract Act and held that the pledge agreement did not contain any contract that the corporate debtor has contracted to perform the promise, or discharge the liability of the third person. The same relied upon for the present case and therefore it can be held that the Corporate Debtor wont be liable for any default on the part of the Group companies as it has not contracted to perform the promise, or discharge the liability of the third person. In addition to this, the words "guarantee" and "indemnity" as occurring in Section 5(8) (i) [66]has not been defined in the Code. Section 3 clause (37)[67] of the Code provides that words and expressions used but not defined in the Code but defined in the Contract Act, 1872 shall have the meanings respectively assigned to them."

¶ 86. The court further held that a person having only security interest over the assets of corporate debtor, even if falling within the description of "secured creditor" by virtue of collateral security extended by the corporate debtor, would not be covered by the financial creditors as per definitions contained in clauses (7) and (8) of Section 5.

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[64] *Supra* note 53.

[65] The Indian Contract Act, *supra* note 63, § 172.

[66] The Indian Contract Act, *supra* note 63, § 5(8)(i).

[67] The Insolvency and Bankruptcy Code, *supra* note 6, § 3(37).

¶ 87. What has been held by the hon'ble Supreme Court as noted above is fully attracted in the present case where corporate debtor has only extended a security by pledging its shares of MLD. The Corporate Debtor had never promised to discharge the liability of the borrower. In conclusion, the security interest created on the assets of corporate debtor will get 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

¶ 88. The contention that default of Consent Term should lead to revival of insolvency proceedings is negated by the Respondent on three limbs**,(I)** ***firstly*** that the debt is no longer a financial debt under Section 5(8) of IBC[68]. **(II)** ***Secondly***, no leave was granted by the adjudicating authority for revival of CIRP proceedings and **(III)** ***thirdly*** the Appellant can't seek remedy under IBC but any other provision

(I) THE NATURE OF DEBT CHANGES POST EXECUTING A CONSENT TERM

¶ 89. The Counsel for Respondent argues that the financial debt as owed towards the Appellant is no longer a financial debt and thus Section 7[69] petition cannot be triggered against the Respondent.

¶ 90. In case of ***Swiss Ribbons (P) Ltd. v. Union of India***[70], the Hon'ble Supreme Court has held that;

> *"65. In this context, it is important to differentiate between "claim", "debt" a "default". Each of these terms is separately defined as follows: "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;" Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor."*

[68]The Insolvency and Bankruptcy Code, *supra* note 6, § 5(8).

[69]The Insolvency and Bankruptcy Code, *supra* note 6, § 7.

[70] Swiss Ribbons, *supra* note 40.

¶ 91. In the case of ***M/S Orator Marketing Pvt. Ltd. v. M/S Samtex Desinz Pvt. Ltd.***[71] The court held that in order to prove a said amount is a financial debt, *"It should be disbursed against consideration for time value of money, i.e., there should be interest payable on the amount advanced by Financial Creditor to the Corporate Debtor."*

¶ 92. The Counsel for Respondent argues that the amount under the Consent Term is not a debt but merely an amount which has been agreed to be repaid to the Appellant. No default has been committed in respect of the amount mentioned under the Consent Term. For default to be committed under the IBC, the amount should be due and payable. The amount under the Consent Term is payable completely in future, the default has only been committed with respect to the 4th tranche. The entire amount is not due and payable, only the 4th tranche was due and payable. The said amount is not a debt because there is no interest payable on the amount advanced by the Appellant. The Consent Term doesn't provide for any payment of interest but merely has divided the amount to be repaid in instalments. Since the said amount is not a debt, there can be no default in its payment.

¶ 93. In the judgment of NCLAT in the case ***Nikhil Mehta & Sons v. AMR Infrastructure Ltd.***[72] wherein it is held that there are two important ingredients for a debt to be categorized as a financial debt, which are

(i) *the debt should be disbursed against the consideration of time value of money; and*

(ii) *the debt should arise from a transaction having the commercial effect of borrowing.*

"Commercial" would generally involve transactions having profit as their main aim.[73]

¶ 94. In the case of ***Innoventive Industries Ltd. v. ICICI Bank and Anr*** [74] the NCLAT held that,

[71] Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd., (2023) 3 SCC 753.

[72] Nikhil Mehta & Sons v. AMR Infrastructure Ltd. [Company Appeal (AT)(Ins) No. 07 of 2017].

[73] Arenja Enterprises Private Limited v. Edward Keventer (Successors) Private Limited, 2020 SCC OnLine NCLAT 1188. (hereinafter 'Arneja Enterprize')

[74] Innoventive Industries Ltd. v. ICICI Bank and Anr. (2018) 1 SCC 407. (hereinafter 'Innoventive Industries')

"It is further that as per Section 3(12) of the Code, a default can occur only when there is failure to pay a debt which has become now due i.e. payable in praesenti. A debt become due when it is payable unless it is interdicted by some law or has not yet become due in the sense it is payable at some future date. Therefore, The Adjudicating Authority has rightly rejected the Application filed under Section 9 of the Code, when the debt is payable in praesenti i.e. on the date of demand notice and filing of Section 9 Application can the insolvency resolution process be triggered."

¶ 95. In the case of ***Arenja Enterprises v Edward Keventer Successors Pvt***[75], it was held that

"*The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money."*

¶ 96. NCLAT, Delhi, passed an order in the matter of ***Amrit Kumar Agrawal v. Tempo Appliances Pvt. Ltd***[76],wherein while discussing this issue, it was observed that

"A mere obligation to pay does not bring the liability within the ambit of 'financial debt' as defined under IBC. The debt, along with interest, if any, should be disbursed against the consideration for the time value of money. Mere breach of terms of any agreement including a Settlement Agreement by a party, whereby some payment was due, would not fall within the scope of Section 5(8) of IBC, so as to constitute a 'Financial Debt'. Accordingly, it was observed that mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money, and thus, breach of such obligation would not entitle a party to invoke CIRP against the other party."

¶ 97. The money paid under the consent term to the Appellant doesn't have any commercial effect, i.e., it is not generating any profit. It is further submitted that even though the money has been given to the borrower and no longer held by the lender, the borrower, i.e., the Respondent is not utilising in for furtherance of its business. *Arguendo,* even if the debt is

[75] Arenja Enterprises, *supra* note 73, ¶ 79.

[76] Amrit Kumar Agrawal v. Tempo Appliances (P) Ltd., 2020 SCC OnLine NCLAT 1202. (hereinafter 'Amrit Kumar')

considered to be a financial debt under Section 5(8)[77] it is not due in present but due in future. The default has occurred only with respect to an instalment of the entire debt. The debt as a whole is not due yet. As already established in the case of ***Innoventive Industries***[78] that provisions of CIRP can be triggered only when the debt is payable in presenti and not in future.

¶ 98. The Counsel for Respondent argues that the money paid by virtue of Consent Term is not a financial debt since there is no disbursal of amount for consideration for time value of money. There is no commercial effect involved here as no profit is generated from the said amount. Further the amount has not been utilised by the Respondent. When the amount was first given to the Respondent by the Appellant, it was a financial debt. However, under the Consent Term, no amount has been advanced to the Respondent and thus no amount has been utilised by the Respondent. It is merely an arrangement where the money owed to the Appellant has been paid in instalments. The above case of ***Amrit Kumar***[79] has made it very clear that mere breach of Consent Term can't be treated as default under the ambit of IBC and as such cannot trigger CIRP proceedings under the code.

¶ 99. The Counsel for Respondent thus submits that the amount payable under the Consent Term can't be treated as Financial Debt since it falls outside the ambit of Section 5(8)[80]. Since under the scheme of IBC default is in respect of either financial debt or operational debt, default with respect of repayment of a said amount can't be brought under the scheme of the Code. ¶ ¶ **100.** The NCLAT has already established that upon entering a Consent Term, the debt in no longer a financial debt and doesn't permit revival of CIRP proceedings against the Corporate Debtor. Thus, the Appellant has no right claim to initiate proceedings under Section 7[81] against the Respondent.

[77] The Insolvency and Bankruptcy Code, *supra* note 6, § 5(8).

[78] Innoventive Industries, *supra* note 74.

[79] Amrit Kumar, *supra* note 76.

[80] The Insolvency and Bankruptcy Code, *supra* note 6, § 5(8).

[81] The Insolvency and Bankruptcy Code, *supra* note 6, § 7.

(II) NO LEAVE WAS GRANTED TO THE APPELLANT TO REVIVE THE INSOLVENCY PROCEEDINGS

¶ 101. The Counsel for Respondent argues that the Appellant doesn't have any right to revive the Insolvency proceedings since no leave, to such tune, was granted by the Adjudicating Authority.

¶ 102. In the case of ***Pooja Finlease Ltd.* v. *Auto Needs (India) Pvt. Ltd. & Anr.***[82], it was held that the order by which the NCLT accepted the withdrawal of application filed for CIRP on the basis of a Settlement Agreement containing a clause that allows for revival of CIRP in case of default will be as good as NCLT granting the liberty of revival of the insolvency proceedings in case of default or non-adherence of the Settlement Agreement. When such application was approved based on the consent terms by taking on record the Settlement Agreement, it should be considered as part of the order. In a nutshell, it implies that the creditor has the authority to revive the petition in case any default in consent terms arise.

¶ 103. The same was also held in the case of ***IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd.***[83], where the Court allowed revival of CIRP proceedings because the Settlement Agreement between the parties allowed for such revival in case of default by the Corporate Debtor. The sole reason the court allowed the revival was the fact that there was a specific clause in the Settlement Agreement which allowed for such revival. Similar findings were held by Court in the case of ***Himadri Foods Ltd. v. Credit Suisse Funds AG***[84]

¶ 104. In the case of ***Vivek Bansal v. Burda Druck India Pvt. Ltd***[85], the NCLAT allow exit from the 'corporate insolvency resolution process' reversing the order of NCLT which allowed the Operational Creditor to initiate CIRP proceedings upon breach of Settlement Agreement.

¶ 105. The Adjudicating Authority, i.e., NCLAT granted no such leave to the Appellant to revive the insolvency proceedings in case of non-payment of any instalment. In the abovementioned the case, the revival of proceedings was possible only on ground that the Consent Term provided for such a clause. Such default clause gave the right to the Financial

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[82] Pooja Finlease Ltd. v. Auto Needs (India) Pvt. Ltd. & Anr. (Company Appeal (AT) (Insolvency) No. 103 of 2022.

[83] IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd., 2021 SCC OnLine NCLT 17943.

[84] Himadri Foods Ltd. v. Credit Suisse Funds, 2021 SCC OnLine NCLAT 48.

[85] Vivek Bansal v. Burda Druck India Pvt. Ltd., 2020 SCC OnLine NCLAT 582.

Creditor to revive the CIRP proceedings. This is a distinguishing factor between the above mentioned cases and this case.

¶ 106. Further the Counsel for Respondent submits that the Respondent in not in a state of insolvency and is very much capable of making the payments as provided under the Consent Term. Thus, no CIRP proceedings need to be undertaken at this stage. The same reasoning was used in denying initiating insolvency proceedings against the Corporate Debtor by the Adjudicating Authority in the case of ***Sanjay Sodhi v. Cinema Ventures (P) Ltd.***[86]

¶ 107. In the case of ***Nidhi Rekhan v. Samyak Projects Pvt Ltd***[87], NCLAT held that since there was no schedule for repayment as well as no clause providing for consequences of non-payment. Therefore, the Appellant cannot claim the status and benefits as a financial creditor

¶ 108. The Agreement dated 5th August 2021, that the Appellant is relying on, there are no specified repayment schedules or consequences in the event of default. Thus it would be incorrect to grant the status of Financial Creditor to the Appellant.

¶ 109. The Counsel for Respondent thus submits that the Adjucating Authority has rightly rejected the Appellant's application for revival of the Insolvency proceedings. Further it is submitted that if the Appellant wanted such revival, the same should have been provided in the Consent Term. The relationship between the Respondent and Appellant is governed by the Consent Term.

¶ 110. Further the Appellant is misusing the provisions of IBC. The Insolvency and Bankruptcy Code (IBC) code was introduced to overhaul the corporate distress resolution regime in India and consolidate previously available laws to create a time-bound mechanism with a creditor-in-control model as opposed to the debtor-in-possession system.[88] But this system is to be used or initiated only when the Corporate Debtor is unable to pay the debt when it becomes due and payable. Initiating such a process when there's no default and no leave has been granted by the Adjudicating Authority, is clearly an abuse of the intent and purpose of the Code.

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[86] Sanjay Sodhi v. Cinema Ventures (P) Ltd., 2023 SCC OnLine NCLAT 159.

[87] Nidhi Rekhan v. Samyak Projects (P) Ltd., 2022 SCC OnLine NCLAT 46.

[88] Diksha Munjal, The Insolvency and Bankruptcy Code (IBC)- where does it stand today?, The Hindu, (Aug. 5, 2022, 9:00 PM), https://www.thehindu.com/news/national/explained-what-is-the-insolvency-and-bankruptcy-code-ibc-and-where-does-it-stand-after-more-than-five-years-of-being-in-place/article65969421.ece.

(III) NOT A DEFAULT UNDER IBC THUS SHOULD SEEK SOME OTHER REMEDY

¶ 111. The Counsel for Respondent argues that breach of Consent Term is not a ground for initiating CIRP proceedings. Remedy for such breach can be sought somewhere else, since it lies outside the scope of IBC. The debt owed is not a financial debt and thus there is no default. Such nature of the Consent Term prohibits it from the purview of IBC.

¶ 112. NCLT Allahabad in the case of ***Delhi Control Devices(P) Limited v. Fedders Electric and Engineering Ltd.***[89], held that unpaid instalments as per a Settlement Agreement cannot be treated as operational debt under Section 5(21)[90] of the IBC as the failure or breach of the Settlement Agreement cannot be grounds for triggering the CIRP against the corporate debtor under the provisions of the IBC. The appropriate remedy may lie elsewhere and not necessarily before the Adjudicating Authority/NCLT.

¶ 113. In the case of ***Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd***[91], the Adjudicating Authority held that,

"Mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money and breach thereof would not entitle the Appellant in the instant case to trigger Corporate Insolvency Resolution Process against the Respondent. Viewed from this prospective, we find that bouncing of cheques issued in discharge of obligation under the Settlement Agreement would not fall within the purview of default in regard to financial debt."

¶ 114. The counsel for Respondent argues that default in payment of the 4th tranche is in a way breach of the Consent Term. When a breach of settlement agreement occurs, the non-breaching party may have the right to terminate the agreement, seek damages for any losses suffered as a result of the breach, or seek specific performance of the terms of the agreement. In addition, the non-breaching party may also seek an injunction from a court to prevent further breaches.

¶ 115. It is important to note that the mere fact that a company has breached a settlement agreement does not automatically lead to initiating IBC proceedings against it. The NCLT will consider various factors such as the nature and extent of the breach, the impact of the breach on the company and its creditors, and the feasibility of reviving the CIRP The appropriate

[89] Delhi Control Devices (P) Limited v. Fedders Electric and Engineering Ltd., 2019 SCC OnLine NCLT 8030.

[90] The Insolvency and Bankruptcy Code, *supra* note 6, § 5(21).

[91] Amrit Kumar, *supra* note 76.

remedy might be under the Contract Act. Such breach doesn't entail initiation of insolvency proceedings.

THE PRAYER ADVANCED

For the foregoing reasons, the Appellants respectfully request this Hon'ble Court to adjudge and declare:

A. That in a liquidation proceeding under the Insolvency and Bankruptcy code, 2016, the Scheme for Compromise and Arrangement can't be made in terms of Sections 230 to 232 of the Companies Act.

B. That the promoter is ineligible to file application for Compromise and Arrangement, while he is ineligible under Section 29A of the IBC to submit a 'Resolution Plan'.

C. That the Security Interest created on the assets of Corporate Debtor will be extinguished even if that interest has been created for the loan availed by the third party.

D. The insolvency proceedings shouldn't be revived against the Respondent on account of default in payment of the 4th tranche.

OR

any other judgment or order in the interest of justice, equity and good conscience, allof which is respectfully affirmed and submitted.

Sd/.

Counsels on behalf the Respondents.