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

IN THE HON'BLE SUPREME COURT OF MALTA

(APPELLATE JURISDICTION)

IN THE APPEAL UNDER SECTION 62 OF THE INSOLVENCY AND BANKRUPTCY CODE AND ARTICLE 136 OF THE CONSTITUTION OF INDIA

MR PIPARA……APPELLANT

V.

SINGHANIA GROUP OF COMPANIES…….....……RESPONDENT

clubbed with

MR SHROFF……APPELLANT

V.

FU-SAM POWER SYSTEM LIMITED…….....……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 PRIVATE LIMITED……APPELLANT

V.

DANOBE INFO TECHNOLOGY PRIVATE LIMITED…....…….....……RESPONDENT

MEMORANDUM ON BEHALF OF RESPONDENT

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TABLE OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
¶	Paragraph
§	Section
Anr.	Another
Ors.	Others
Hon'ble	Honorable
SC	Supreme Court
SCC	Supreme Court Cases
v.	Versus
NCLT	National Company Law Tribunal
NCLAT	National Company Appellate Tribunal
MSMEs	Micro, Small and Medium Enterprises
IBC	Insolvency and Bankruptcy Code
SARFAESI	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest
IBBI	Insolvency and Bankruptcy Board of India
BLRC Report	Bankruptcy Law Review Committee Report
NPA	Non-Performing Asset
CIRP	Corporate Insolvency Resolution Process

INDEX OF AUTHORITIES

BOOKS REFERRED

S.NO	BOOK TITLE
1.	A Ramaiya, Guide to The Companies Act, 18th Edition, LexisNexis, Butterworths Wadhwa, Nagpur.
2.	Akaant Kumar Mittal, Insolvency and Bankruptcy Code Law and Practice,2nd Edition EBC
3.	R.P. Vats, Law & Practice of Insolvency & Bankruptcy, Taxmann's

STATUTES REFERRD

S.NO	STATUTES
1.	Insolvency and Bankruptcy Code, 2016.
2.	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
3.	Companies Act, 2013.
4.	Indian Companies Act, 1913.
5.	Indian Contract Act, 1872

CASES CITED

	Venkatachalam	NCLAT	
8.	Forech (India) Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.	(2019) 18 SCC 549	15
9.	Hitachi Plant Engineering & Construction Co Ltd & Anr. v. Eltraco International Pte Ltd and Anr.	[2003] SGCA 38	14
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21.	S.S. Natural Resources Pvt. Ltd. v. Ramsarup Industries Ltd. & Ors.	(2021) ibclaw.in 129 SC	21
22.	Santosh Wasantrao Walokar v. Vijay Kumar Iyer	2020 SCC OnLine NCLAT 128	21
23.	Swiss Ribbons Private Limited v. Union of India	(2019) 4 SCC 17	24, 26
24.	The Chairman, State Bank of India v. M.J. James	(2022) 2 SCC 301	22
25.	Y. Shivram Prasad v. S. Dhanapal & Ors.	2019 SCC Online NCLAT 172	15, 12

STATEMENT OF JURISDICTION

The Appellants have approached this Hon'ble Court under Section. 62 of the Insolvency and Bankruptcy Code. The relevant parts of the provisions have been extracted here.

62. Appeal to Supreme Court.—

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

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

STATEMENT OF FACTS

SCENARIO I

Mr. Pipara, a promoter of the largest metallurgical coke manufacturing company in Malta, Deora NRE Coke Ltd. (DNCL) submitted a resolution plan before the Committee of Creditors on 1st October, 2020. The CoC did not approve any resolution plan due to paucity of time. Thus, the NCLT passed an order of liquidation on 11th December, 2020. This was challenged by Mr. Pipara which was dismissed in the NCLAT. He further appealed to the Supreme Court which issued a notice to DNCL on 19th June 2022.

Mr. Pipara had approached the NCLT during the same time with a scheme for compromise and arrangement. The NCLT had allowed this application under Sections 230 to 232 of Companies Act 2013 and issued directions for convening a meeting of shareholders. In an appeal filed by Singhania Group of Companies, the NCLAT *vide* order dated 24th September, 2022 established ineligibility under Section 29A of the IBC as it would extends to Section 230 of the 2013 Act.

Mr. Pipara challenged the order before this Hon'ble Court stating that Section 230 does not place an embargo on any person for the purpose of submitting a scheme.

SCENARIO II

Mr. Shroff is a promoter of Fu-Sam Power Systems Ltd. (Fu-Sam) which provides one stop solution for all types of power back up issues.

An application filed by one of the creditors of Fu-Sam was admitted by the NCLT *vide* its order dated 5th March, 2021. The Corporate Insolvency Resolution Process was initiated against Fu- Sam. Mr. Shroff submitted a Resolution Plan along with Allianz FRC Pvt Ltd. on 15th October, 2021, but was informed *via* email that the CoC found him to be ineligible under Section 29A(h) of the IBC and consequently annulled his resolution plan.

Mr. Shroff challenged this decision before the NCLT which was dismissed by an order dated 30th September, 2022. Mr. Shroff then moved to the NCLAT, wherein the court relied on the judgement dated 24th September, 2022 to hold that those ineligible for proposing a resolution plan under Section 29A of the IBC are also ineligible under Section 230 of the Companies Act, 2013. Due to the absence of any other resolution plan, the NCLT ordered the liquidation of Fu-Sam on 3rd March, 2022.

SCENARIO III

Axis Telecom Pvt. Ltd. (ATPL), a telecom service provider, has filed a Company Petition under Section 7 of the IBC alleging a default of Rs. 7,71,32,111/- by the Corporate Debtor, Danobe Info Technology Ltd (the Respondent herein). In the Company Petition, a consent term was executed between ATPL and the Respondent and it was placed before the Adjudicating Authority on 5th August, 2021. The NCLAT permitted the withdrawal of the appeal with liberty to move the NCLT for withdrawal of the Company Petition under Section 12 A of the IBC. The NCLT *vide* order dated 09.02.2022 allowed the withdrawal of the Company Petition following which, the Respondent defaulted in making payment towards the fourth tranche as per the consent term dated 5th of August, 2021. The petitioner filed an IA seeking revival of the Company Petition which was rejected by the NCLT on 21st December, 2022. The appeal against this order of the NCLT is now placed before this Hon'ble Court.

SCENARIO IV

Vntek Auto Ltd. (Corporate Debtor) approached VRS Malta Financial Services and M&N Finance Ltd. to extend a short-term loan facility to its group companies namely, Kapro Engineering Ltd., and MLD Investments Pvt. Ltd. for the end use of the Corporate Debtor.

A security trustee agreement was executed between Tipsara MSCL (India) Ltd. and MLD for an amount of Rs. 140 crores. Further 2 security trustee agreements were executed between Tipsara and Kapro for Rs. 140 crores and Rs. 200 crores and an amended and re-instated pledge agreement was executed on July 2016 between the Corporate Debtor, MLD, Kapro and Tipsara. On 24th June, 2020, CIRP was initiated by the Corporate Debtor for which Respondent No.1 was appointed as Resolution Professional. On, October 2, 2020, Tipsara filed a claimed for the principal amount of Rs. 700 crores which was rejected by Respondent No.1 and the rejection was not challenged by the Appellants.

Thereafter, the Appellants filed an application before the Adjudicating Authority claiming their right on the basis of pledged shares, which was dismissed. The Appellate Authority also dismissed the appeal by observing that the claim rejected by the RP was not challenged before the NCLT at the earlier stage. Thus, the Appellants have approached this Hon'ble Court in this appeal.

The Chief Justice of Malta constituted a 5-judge bench to decide on all the issues being dealt with in the matters of DNCL, SC, Fu-Sam, ATPL and Vntek.

STATEMENT OF ISSUES

1. 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?

2. 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'?

3. 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?

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

SUMMARY OF ARGUMENTS

1. 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 Respondents contend that in a liquidation proceeding under the IBC, schemes of compromise and arrangement under the Companies Act 2013 must not be allowed as there exists a fundamental incompatibility between the statutes and the permitting of such schemes would result in the undermining of the objectives of the IBC which is in contravention to the settled position of law that the IBC shall override all other laws in force in case any conflict and proceedings that are carried out under the IBC, such as the liquidation proceedings, must be in consonance with the fundamental principles of the IBC.

2. 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'?

Without prejudice to the above submission, it is contended that the ineligibilities provided for under Section 29A of the IBC must also extend to persons submitting schemes of compromise and arrangement as such a restriction would prevent a surrogate entry for ineligible persons into the revival proceedings of the company as the persons whose default led to the precarious situation of the company would not be permitted to regain control of the company. This would be in accordance with the objective and purpose of the amendment as well as the judicial interpretation of the provision. Additionally, the manner in which the embargo has been extended has been done in a lawful manner by means of Regulation 2A of the Liquidation Process Regulations 2016.

3. 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?

It is the contention of the Respondents that in the present case, when a security interest is created upon the assets of a Corporate Debtor for a loan availed by a third-party, the lenders do not reserve the right to file an application claiming for their right over the assets during the liquidation proceedings of the Corporate Debtor for the following reasons. The application is barred by acquiescence, a rule that has been recognised by the Hon'ble Judiciary and Learned Ministry of Corporate Affairs who have noted in multiple occasions that the claims not acknowledged in the resolution plan stand extinguished and the Appellants are not in the nature of financial creditors owing to the fact they do not fit into the definition of Financial Creditors as elaborated in the IBC.

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

It is deferentially maintained that there is no revival clause in the Settlement Agreement that has placed before the Adjudicating Authority, and by extension, there is no right vested upon the petitioner to revive the proceeding. In the instant case, the respondent has only defaulted in the fourth tranche that is to be paid according to the consent term therefore, it is contended that the application for revival of CIRP for such reasons would render Section 12A, the provision providing for withdrawal of applications, otiose. Moreover, IBC is not a recovery forum for the petitioners to revive the CIRP from their end after withdrawal under Sec. 12A of the code.

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ARGUMENTS ADVANCED

ISSUE 1: WHETHER IN A LIQUIDATION PROCEEDING UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016, THE SCHEME FOR COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT?

1. When addressing the matter of whether schemes of compromise and arrangement can be proposed during liquidation, it is observed that the issue is essentially a clash between two statutes – the Companies Act 2013 (hereinafter "2013 Act") and the Insolvency and Bankruptcy Code 2016 (hereinafter "IBC"). In this regard, the Respondents submit that the contradictory position can be clarified by placing reliance on the following grounds: [A] incompatibility of the statutes and the [B] undermining of the objectives of the IBC.

[A] Incompatibility of Statutes

2. It is submitted that there exists a fundamental incompatibility between the 2013 Act and the IBC for the following reasons,

[i] Approval of Schemes During Liquidation

3. *Firstly,* Section 230 calls for the conducting of meetings with creditors and members and an elaborate voting mechanism to approve the proposed scheme. The involvement of such classes of creditors and members is at loggerheads with the liquidation process envisaged by the IBC as it does not provide for approval by creditors and member-shareholders of the Corporate Debtor. The judicial system has intervened in such situations to negate the necessity for class approvals for such schemes during liquidation but it has alps been held that the liquidator has the duty to constitute a creditors' committee in order to assess the viability, feasibility, and test the financial matrix of the proposed scheme.[1] However, it is submitted that this process has no

[1] Jindal Steel & Power Ltd. v. Arun Kumar Jagatramka and Gujarat NRE Coke Ltd., (2021) ibclaw.in 46 SC; J.M. Financial Asset Reconstruction Company Limited v. G. Madhusudhan Rao, R.P. of Bheema Cements Ltd, (2019) ibclaw.in 616 NCLT; Y. Shivram Prasad v. S. Dhanapal & Ors., 2019 SCC Online NCLAT 172.

place within the framework of the IBC as it has not contemplated the creation of creditors' committees during liquidation.

[ii] Role of Tribunals

4. *Secondly,* when schemes for compromise and arrangement are proposed under the 2013 Act during the liquidation process, the National Company Law Tribunal (hereinafter "NCLT") plays a key role in its approval and implementation. This dual role leads to the necessity for it to play the part of an Adjudicating Authority during the liquidation process under the IBC as well as the part of a Tribunal for the purpose of sanctioning of the scheme under the 2013 Act. At this juncture, it is pertinent to note that such schemes are headed by the Tribunal which exercises significant authority with regard to passing supervision and implementation of schemes.[2] To the contrary, liquidation is a process that is headed by the liquidator under the supervision of the Adjudicating Authority. Therefore, it is apparent that revival of companies through schemes of compromise and arrangement during liquidation would place the NCLT in a position that has not been envisaged under the IBC at the time of liquidation.

[iii] Timeline for Schemes and their Failure/Premature Termination

5. *Thirdly,* it is submitted that the IBC focuses on time-bound processes for revival and rehabilitation of businesses in order to maximise recovery value for the benefit of the creditors and in this vein, the liquidation process has been bestowed with the time limit of one year.[3] The Respondents accede to the fact that the Insolvency and Bankruptcy Board of India (hereinafter "IBBI")'s Liquidation Process Regulations 2016 (hereinafter "Liquidation Regulations") do indeed set forth a timeline for the completion of a scheme.[4] However, the 2013 Act does not contain a framework as to how this process will be carried out within the time period stipulated in the Liquidation Regulations, thereby creating practical difficulties.
6. In addition to the lack of guidelines in the 2013 Act with regard to the implementation of the scheme within the requisite time period, the 2013 Act also fails to contemplate how the failure or the premature termination of the scheme is to be dealt with in the

[2] 2 A RAMAIYYA, GUIDE TO THE COMPANIES ACT 3723 (LexisNexis 2015).

[3] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 44.

[4] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 2B.

liquidation process. The 2013 Act states that upon the failure of a scheme, the NCLT may issue an order of winding up of the company[5] which shall be deemed to be an order made under the IBC.[6] However, there is no provision dealing with this matter in the context of schemes initiated during the liquidation process. Moreover, although the Liquidation Regulations prescribe a time period for the completion of the scheme[7], it does not provide for situations where the scheme may fail during the implementation phase and how the time period for completion of scheme is to be accounted for in such instances.

[iv] Conflict with Section 53 of IBC

7. It is settled law that Resolution Plans shall follow the order of priorities, *i.e.* the *pari-passu* rule as set forth in Section 53 of the IBC.[8] However, in the case of schemes, the process is more inclusive and the decision-making is not vested solely with the financial creditors, as in the case of CIRP, and the requirement for distribution of assets of the business is based on "class consent". A realistic view of the situation shows that no creditor would vote in favour of a proposal which would place them in a more disadvantageous position than their position in liquidation. At this juncture, it is relevant to note a Singapore ruling, Hitachi Plant Engineering & Construction Co Ltd and Another v Eltraco International Pte Ltd and Another[9] where the nature of a scheme of arrangement as a corporate rescue mechanism through means of a contractual arrangement between a company and its creditors was recognised. It was also noted that in order for such mechanisms to yield efficacy, it may be necessary to discriminate among small creditors. Reference was also made to English rulings such as Re Bank of Credit and Commerce International[10] and Re Anglo American Insurance Ltd[11] wherein courts had approved schemes of arrangement during liquidation which contravened the *pari passu* rule.

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[5] Companies Act, 2013, §231, No. 18, Acts of Parliament, 2013 (India).

[6] Insolvency and Bankruptcy Code, 2016, §273, No. 31, Acts of Parliament, 2016 (India).

[7] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 2B.

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

[9] Hitachi Plant Engineering & Construction Co Ltd & Anr. v. Eltraco International Pte Ltd and Anr., [2003] SGCA 38.

[10] Re Bank of Credit and Commerce International, SA (No 3) [1993] BCLC 1490.

[11] Re Anglo American Insurance Ltd., [2001] BCLC 755.

8. In light of these contentions, reliance is placed upon Section 238 of the IBC which lays down that if the necessity arises, the IBC will override all other laws in force. It was also adjudged in ***Y. Shivram Prasad v. S. Dhanapal & Ors***.[12] that the schemes should be in consonance with the statement and object of the IBC. Furthermore, the Apex court in **PSL Ltd., In re**[13] has noted that even if proceedings are to be carried out in accordance with the 2013 Act, if such proceedings have been instituted under the IBC, then the provision of the IBC shall indeed apply to the proceedings.[14]
9. Therefore, as there exists various conflicts between the 2013 Act and the IBC upon allowing schemes of compromise and arrangement during liquidation, it is contended that the IBC will prevail over the Section 230 schemes. Resultantly, such schemes must not be permitted to be submitted during the course of liquidation of a company.

[B] Undermining the Objectives of IBC

10. It is submitted that permitting schemes of compromise and arrangement after the CIRP would, at the outset, disincentivise Resolution Applicants from attempting to revive the company during CIRP. Moreover, there already exist various means of reviving and rehabilitating a company prior to the commencement of IBC proceedings, *viz.* resolution under statutes of the Reserve bank of India and the general scheme of arrangement or compromise under Section 230. Despite such mechanisms, if a Corporate Debtor is order to be liquidated, preference must be given to going-concern sales in order to make certain that the value of the assets is maximised.[15] Repeated attempts at revival, either through schemes of compromise and arrangement or through other means, could result in value-destructive delays. This was recognised as one of the key factors for the failure of the erstwhile regime under the Sick Industrial Companies Act 1985 (hereinafter "SICA").[16]
11. Furthermore, the implementation of schemes under the 2013 Act subsequent to the liquidation order being passed by the Tribunal is fundamentally in contravention to

[12] Y. Shivram Prasad v. S. Dhanapal & Ors., 2019 SCC Online NCLAT 172.

[13] PSL Ltd., In re, 2018 SCC OnLine Bom 36.

[14] Forech (India) Ltd. v. Edelweiss Assets Reconstruction Co. Ltd., (2019) 18 SCC 549.

[15] Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 32(f).

[16] Ministry of Finance, Interim Report of The Bankruptcy Law Reforms Committee (2015) p. 42-43 <https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf> accessed 26 November 2019.

the essence of liquidation as envisaged by the IBC owing to the fact that upon the passing of a liquidation order, the dissolution of the Corporate Debtor must follow.

ISSUE 2: 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'?

12. Without prejudice to the above submissions, the Respondent contends that even if schemes of compromise and arrangement under Sections 230 to 232 of the 2013 Act can be proposed during ongoing liquidation proceedings, the disqualification under Section 29A must extend to these schemes as well. Section 29A and the proviso to Section 35(1)(f) were introduced into Chapters II and III of the IBC through a 2018 Amendment. While the former provision disqualifies certain persons from acting as resolution applicants during CIRP, the latter proviso explicitly extends the same disqualifications to Section 35(1)(f) dealing with the power of the liquidator to sell the property of the corporate debtor. In a similar vein, it is submitted that the embargo must also be exercised in relation to the submission of schemes for compromise and arrangement under the Companies Act for the following reasons: fulfilling the [A] object and purpose of Amendment, acting in accordance with the [B] judicial interpretation of Section 29A, and observing the [C] constitutional validity of Regulation 2B.

[A] Objective and Purpose of Amendment

13. The Statement of Objects and reasons of the Amendment Bill expounded upon the purpose of the provision. It was highlighted that the Amendment was brought forth owing to the lack of provisions restricting persons, who may have by their own defaults, resulted in the current precarious situation of the Corporate Debtor, from regaining control of the Corporate Debtor. This would translate to the undermining of the processes of the IBC as unscrupulous persons would be rewarded at the expense of the creditors.
14. A similar view was expressed during the course of the Lok Sabha debate in December 2017 wherein the Finance Minister rightfully noted that in the case of dissolution, every creditor faces some loss and the remaining resources are distributed equitably. However in the absence of a disqualifying provision, the person responsible for the insolvency is liable only for a fraction of the debt owed and regains control over the

management of the business. A similar position was observed by the Insolvency Law Committee.[17]

15. It is also pertinent to note that the ineligibilities introduced by the Amendment were incorporated in the Chapters dealing with CIRP as well as the liquidation process. In this regard, it is submitted that the scheme of compromise would essentially aid in revival of the company and as it would be proposed during the course of liquidation, the process aligns itself with the principles enshrined in the aforementioned Chapters of the IBC. Consequently, the disqualifications applicable on such Chapters must also be extended to the schemes of compromise and arrangement.

[B] Judicial Interpretation of Section 29A

16. In ***Chitra Sharma v. Union of India***[18], the Supreme Court recognised that the purpose of introducing Section 29A was to prevent misuse of the absence of a bar on the participation of a person whose conduct contributed to the downfall of a company. Therefore, the need for a purposive interpretation to Section 29A depending both on the text and context in which the provision was enacted was deemed necessary.[19]
17. In the landmark case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.***[20], against the backdrop of a similar factual matrix, the Supreme Court held that the disqualification under Section 29A would indeed extend to proposals of schemes of compromise and arrangement. Drawing a parallel with the case at hand, this embargo must be brought into effect in order to disable the Appellants from proposing schemes under the 2013 Act.
18. Section 29A was noted to have been enacted in the interest of the larger public, to facilitate effective corporate governance, and most importantly, to rectify a loophole in the IBC which in its erstwhile state, allowed ineligible persons a backdoor to participate in the resolution process.[21] The provision has been referred to as an instance of a 'see-through provision' in order to ensure that one is able to arrive at persons who are actually in 'control'.[22]

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[17] Ministry of Corporate Affairs, Report of the Insolvency Law Committee, MCA, 1, 5, (2018).

[18] Chitra Sharma v. Union of India, (2018) 18 SCC 575.

[19] Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors., (2019) 2 SCC 1.

[20] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) ibclaw.in 46 SC.

[21] Chitra Sharma v. Union of India, (2018) 18 SCC 575.

[22] Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors., (2019) 2 SCC 1.

19. 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.[23] Recent precedents of this Hon'ble Court have adopted a purposive interpretation of the provisions of the IBC.[24] It is thus submitted that the values which animate Section 29A continue to provide sustenance to the rationale underlying the exclusion of the same category of persons from the process of submitting schemes for compromise and arrangement.

[C] Constitutional Validity of Regulation 2B

20. The Insolvency and Bankruptcy Board of India (hereinafter "IBBI") has come out with the Liquidation Process Regulations 2016 (hereinafter "Liquidation Regulations") and in this regard, reliance is placed upon Sections 196(1)(t) and 240(1) of the IBC in order to examine the legal validity of the proviso to Regulation 2B, which stipulates that a person who is not eligible under the IBC to submit a resolution plan for insolvency resolution of the corporate debtor shall not be a party in any manner to such compromise or arrangement.
21. The IBC empowers the IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under the IBC[25] and to ensure that such regulations must be consistent with the provisions of the IBC for the purpose of carrying out the purpose of the IBC[26]. Therefore, it is necessary to harmonise the provisions in the Code and the Act to provide a level playing field.[27]
22. Furthermore, the Supreme Court in ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr,***[28] in addition to upholding the constitutional validity of Regulation 2B of the Liquidation Regulations has also set forth that Regulation 2B is merely clarificatory in nature. In the case of a company 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. Owing to the object

[23] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) ibclaw.in 46 SC.

[24] Phoenix ARC Private Limited v. Spade Financial Service,2021 SCC OnLine SC 51; Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt Ltd., IBA/215/2020; Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v.Axis Bank Limited, (2020) 8 SCC 401.

[25] Insolvency and Bankruptcy Code, 2016, §196(1)(t), No. 31, Acts of Parliament, 2016 (India).

[26] Insolvency and Bankruptcy Code, 2016, §240(1), No. 31, Acts of Parliament, 2016 (India).

[27] IBBI, *Discussion Paper on Corporate Liquidation Process along with Draft Regulations*, (Nov. 3, 2019).

[28] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) ibclaw.in 46 SC.

of the scheme of compromise or arrangement being the revival the company, there can be no manner of doubt that the provision only serves as a clarificatory exercise, and even in the absence of the provision, a person who is ineligible under Section 29A would not be permitted to propose a scheme of compromise or arrangement under the 2013 Act.

23. Therefore, the Respondents contend that in the case at hand, the proviso to Regulation 2B must be adhered to and the purpose of the ineligibility under Section 29A must be identified, *viz.* achieving sustainable revival by ensuring that the person who prompted liquidation proceedings by his default is not offered the opportunity to participate in the solution. Thus, the disqualification of promoters, by virtue of Section 29A of the IBC, from proposing schemes of compromise and arrangement under Sections 230 to 232 of the 2013 Act is indeed rightful and sound in law.

ISSUE 3: 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?

24. It is the contention of the Respondents that in the present case, when a security interest is created upon the assets of a Corporate Debtor for a loan availed by a third-party, the lenders do not reserve the right to file an application claiming for their right over the assets during the liquidation proceedings of the Corporate Debtor for the following reasons: [A] the application is barred by acquiescence and lenders [B] not in the nature of financial creditors.

[A] The Application is Barred by Acquiescence

25. Section 60(5) of the IBC allows for an application to be filed before the adjudicating authority to challenge the rejection of the claim, which if successful, would lead to the inclusion of the claim in the information memorandum[29].
26. In ***Santosh Wasantrao Walokar v. Vijay Kumar Iyer***[30], the Mumbai bench of the NCLT approved a resolution plan even when multiple petitions challenging the rejection of claims had been pending before the same bench and held that claims that are not submitted or are not accepted or dealt with by the Resolution Professional and such Resolution Plan submitted by the Resolution Professional is approved then those claims would stand extinguished. It reasoned that a successful Resolution Applicant cannot suddenly be faced with "undecided" claims after the Resolution Plan submitted by him has been accepted as this would amount to an extra amount coming up for payment after the debts have been dealt with and would throw into uncertainty amounts payable by a prospective Resolution Applicant who successfully takes over the business of the Corporate Debtor.
27. A similar situation was seen in multiple cases[31] wherein the Adjudicating Authority had approved Resolution Plans even when petitions challenging the rejection of

[29] Insolvency and Bankruptcy Code, 2016, §60, No. 31, Acts of Parliament, 2016 (India).

[30] Santosh Wasantrao Walokar v. Vijay Kumar Iyer, 2020 SCC OnLine NCLAT 128.

[31] S.S. Natural Resources Pvt. Ltd. v. Ramsarup Industries Ltd. & Ors., (2021) ibclaw.in 129 SC, Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531; Encote Energy (India) Pvt. Ltd. v. V. Venkatachalam, (2019) ibclaw.in 407 NCLAT.

claims were pending. It is thus submitted that the Tribunal, in the present instance, had acted within the scope of its authority by approving the Resolution Plan of Som Home Group Private Limited[32] (hereinafter "SHG") and also reserves the power to approve any other valid Resolution Plan that may be placed before it.

28. Moreover, the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta[33]*** held that no claims can exist apart from those acknowledged in the resolution plan. This essentially means that all claims which are not acknowledged in the resolution plan stand extinguished. Additionally, the Ministry of Corporate Affairs has also acknowledged this principle and has set forth that upon the approval of a Resolution Plan by an Adjudicating Authority, any proceedings relating to claims not included in the Resolution Plan should be terminated.[34]
29. A perusal of the facts of the case at hand reveals that both Resolution Plans have been approved *after* the rejection of the claim of the Appellants. [35] Drawing from the abovementioned legal principles, as the Appellants' claim has not been acknowledged in the Resolution Plans, it is contended that the claim is extinguished and it is not open for the Appellants to institute a suit to secure the claim at this juncture.
30. Furthermore, the Apex Court[36] has observed that it is now a well-recognized principle of jurisprudence that a right not exercised for a long time is non-existent and if a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong.
31. The Hon'ble Supreme Court of has also held[37] that acquiescence implies active assent and is based upon the Rule of *estoppel in pais*. As a form of estoppel, it bars a party

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[32] ¶35, Moot Proposition.

[33] Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta & Ors., (2020) 8 SCC 531.

[34] Ministry of Corporate Affairs, Notice File No. 30/38/2021 (Issued on January 18, 2023).

[35] ¶34, Moot Proposition.

[36] Prabhakar v. Joint Director Sericulture Department, (2015) 15 SCC 1.

[37] The Chairman, State Bank of India v. M.J. James , (2022) 2 SCC 301.

from complaining of the violation of the right afterwards. Even indirect acquiescence implies almost active consent, which is not to be inferred by mere silence or inaction which is involved in laches. Acquiescence virtually destroys the right of the person. Nevertheless, this acquiescence being in the nature of estoppel bars the Respondent from claiming violation of the right of fair representation.

32. In the case at hand, the Respondents had acted inconsistently with the alleged right of the Appellants by virtue of and setting before the Tribunal certain Resolution Plans, seeking the approval of the Tribunal for the same, and finally securing the requested relief as well. All such facts indicate that while other parties acted in a manner inconsistent with the alleged right of the Appellants, the Appellants did not raise any objection, thereby divesting themselves of the right to raise an objection now as the right has been extinguished under the doctrine of acquiescence.
33. Moreover, it is to be noted that the legislative object and intent behind the enactment of the Code was to restructure and revive the Corporate Debtor in a time-bound manner. [38] It is thus of paramount importance to limit time-barred claims from disrupting the process established under the IBC. Therefore, the Respondents submit that the petition of the Appellants is liable to be dismissed by this Hon'ble Court, in consonance with the object and intent of the IBC.

[B] Not in the Nature of a Financial Creditor

34. The Appellants may raise a claim over the pledged shares during CIRP if they act in the capacity of financial creditors. In this regard, it is pertinent to observe that Section 5(7) of the IBC defines "financial creditor" as any person to whom a financial debt is owed, and includes within its scope, a person to whom such debt has been legally assigned or transferred to. As a natural corollary, it is essential for the existence of a financial debt in order to recognise the Appellants as a financial creditors. However, the facts of the present case do not fall within the ambit of Section 5(8) of the IBC which defines financial debt, as nowhere in the defining provision is there a mention of financial debt comprising of security trustee agreements and pledges.
35. This position of law has also been observed by the Supreme Court in ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, the Resolution Professional of Doshion Water Solutions Private Limited***[39] and ***Anuj Jain Interim Resolution***

[38] Innoventive Industries v. ICICI Bank, [2017] ibclaw.in 02 SC.

[39] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

Professional for Jaypee Infratech Limited v. Axis Bank Limited[40] and the Court also brought to light that in order for a debt to be classified as "financial debt", there must be a "disbursement" of debt amount and security interest over pledged shares would not satisfy the requirement for a "disbursement".

36. Appellant No. 1, in the case at hand, is a Security Trustee[41] and is merely a holder of properties[42]. Assuming, but not conceding, that the debt is of financial nature, it is submitted that the Appellant has certainly not lent any money to the Corporate Debtor and therefore, is not entitled to claim for the same from the Corporate Debtor. In a similar vein, in ***Swiss Ribbons Private Limited v. Union of India***[43]**,** the Court stated that a beneficiary of a third party security cannot be considered as a 'financial creditor' as they would be involved in assessing the viability of the Corporate Debtor and in restructuring of the loans when financial stress occurs. Therefore, the financial creditor was identified to possess a unique parental and nursing roles. In this regard, it is set forth that the Appellants have clearly not acted in such a role, thus denuding themselves of the title of "financial creditors".
37. Furthermore, in the case at hand, although the Corporate Debtor was a third-party beneficiary of the loans extended by the Appellants to Kapro and MLD[44], the Appellants would still not be classified a financial creditor on account of the position of law laid down in ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel***[45], where in a similar factual background, the Court held that a beneficiary of a pledge cannot be categorised as a 'financial creditor' during the insolvency process. Additionally, it was also held that the Corporate Debtor had not entered into any contract to 'perform the promise' or 'discharge the liability' of the borrower in the event of default of the borrower. The Pledge Agreement executed by the Corporate

[40] Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited, Civil Appeal Nos. 8512-8527 of 2019.

[41] ¶32, Moot Proposition.

[42] Pratyush Khurana, *Compliance under Takeover Code—Security Trustee,* SCC ONLINE (Aug. 9, 2023, 9:52 PM), https://www.scconline.com/Members/NoteView.aspx.

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

[44] ¶31, Moot Proposition.

[45] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, the Resolution Professional of Doshion Water Solutions Private Limited, (2021) 2 SCC 799.

Debtor was limited to extending certain shares as security and thereby, would not amount to a 'guarantee'[46] to remedy the borrower's default.

38. In light of these contentions, it is submitted that in the present case, neither is the debt in question financial in nature nor are the Appellants financial creditors in the present case. Moreover, the Appellants' right to raise claims in this regard has been extinguished as a result of their acquiescing conduct. Consequently, the security interests created on the assets of the Corporate Debtor have been extinguished and the Appellants do not have the right to claim a right over the security interest.

[46] Indian Companies Act, 1956, §126, No. 1, Acts of Parliament, 1956 (India).

ISSUE 4: WHETHER INSOLVENCY PROCEEDING CAN BE RESTORED IN CASE OF DEFAULT WHEN CONSENT TERM IS ENTERED BETWEEN PARTIES?

39. With reference to issue of revival of insolvency proceedings upon default of consent terms, it is submitted that the Petitioner cannot seek to reinstate the CIRP and this contention is substantiated on the following grounds: [A] withdrawal of application under Section 12A, [B] absence of a revival clause, [C] failure to bring the revival clause on record, and [D] the IBC is not a recovery forum.

[A] Withdrawal of Application under Section 12A

40. The incorporation of Section 12-A into the IBC expedited the resolution proceedings of corporate debtors. Prior to the integration of this provision, there existed no framework for withdrawal. The Supreme Court, by virtue of its authority under Article 142 of the Constitution of India, issued rulings that allowed the withdrawal of applications lodged against corporate debtors undergoing CIRP and through judicial intervention, parties were able to withdraw their applications.[47] In the case of ***Swiss Ribbons Pvt. Ltd. v. Union of India***[48], it was clarified that at any stage prior to the constitution of the CoC, a party can approach NCLT directly and the Tribunal may, in exercise of its inherent powers under Rule 11 of NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement.

41. It is thus transparent that Section 12-A facilitates efficacious and expeditious remedy and this is fundamental to the object of the provision. Therefore, Section 12-A is rendered otiose if CIRP is revived without a substantial reason. In this regard, it is maintained that the insolvency proceeding initiated under Section 7 of the IBC cannot be restored in the instant case owing to the fact that, Following the institution of the proceedings by the Petitioners, the parties agreed upon a consent term and the Insolvency Resolution Professional filed an application under Section 12A of the IBC

[47] Amir Bavani et al., *Withdrawal under Section 12-A IBC: Remedial Mechanism in the Interest of Stakeholders*, SCC ONLINE BLOG (Aug. 11, 2023, 7:38PM), https://www.scconline.com/blog/post/2022/09/15/withdrawal-under-section-12-a-ibc-remedial-mechanism-in-the-interest-of-stakeholders/.

[48] Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors., (2019) 4 SCC 17.

for withdrawal of the proceeding, and after receiving due approval from the Tribunal, the petition was officially withdrawn.

[B] Absence of Revival Clause

42. It is humbly stated that the consent term does not have a revival clause and the petitioner's attempt to revive the company application is bad in law and hence has to be rightfully rejected.
43. In the case of ***IDBI Trusteeship Services Limited v. Nirmal Lifestyle Limited,*** the revival was allowed predominantly due to the fact that the consent term had a revival clause that was placed on record before the adjudicating authority and the debtors had given approval for the revival.
44. The Hon'ble tribunal went on to hold in this case:

> In the present case, consent terms were brought on record since they were part of the Application under Section 12A of the Code which was noticed in the Order of the Adjudicating Authority itself. When the consent term itself contains a clause for revival, non-giving liberty specifically for revival by the Adjudicating Authority is inconsequential.

45. It is submitted that the existence of a a revival clause would have facilitated the reinstating of the CIRP. However, in the absence of such a clause, it is of understanding that the case of the petitioners is fundamentally boneless and is liable to be rejected.

[C] Failure to Bring Revival Clause on Record

46. In the case of ***SRLK Enterprises LP v. Jalan Transolutions (India) Ltd.,*** the Hon'ble NCLT was of the opinion that the revival application cannot stand as the consent term was not placed on record before the adjudicating authority. This view was affirmed further by the NCLAT stating:

> It is different when bringing the settlement on record, and making it a part of the Order of withdrawal liberty is taken and brought on record to restore the proceedings in case of default. 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.

47. In the instant case, there is no revival clause and by extension, it was not placed on record before the adjudicating authority. Thus, the withdrawal under Section 12-A in such conditions would result in the termination of the insolvency proceedings. Resultantly, even as it stands that Respondent herein failed to pay the fourth tranche

as per the consent term, it does not warrant the petitioner to seek for revival of the CIRP.

[D] IBC Is Not a Recovery Forum

48. It is submitted that when a revival clause is not on record, the CIRP proceedings cannot be taken to be the means for recovery proceedings by the creditor, and the same has been established in a plethora of judgements by various tribunals and this Hon'ble Court.
49. The case of ***AMI Corporation***[49] had quoted the findings of the NCLT that such a petition can be construed as an exercise in recovery. Once the matters have been brought under the IBC, they need to be considered solely under the provisions of the IBC. It is a settled position of law that the provisions of the IBC cannot be invoked for recovery of outstanding amounts but can only be invoked to initiate CIRP for justified reasons. The Hon'ble Apex Court in the case of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited***[50], has held that IBC is not intended to be a substitute for a recovery forum.
50. Thus, the petitioner's application to revive the CIRP is bad in law and has to be rejected by this Hon'ble Court as it lacks substantiation and is aimed solely at recovery of debt which is not the object of the IBC.

[49] AMI Corporation v. Shivam Parivar Developers Private Limited., MANU/NC/3899/2023.

[50] Mobilox Innovations Private Limited v. Kirusa Software Private Limited, (2017) ibclaw.in 01 SC.

THE PRAYER ADVANCED

WHEREFORE, in the lights of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully prayed before this Hon'ble Court that it may be pleased to adjudge and declare that:

The present petition(s) are devoid of all merits and to dismiss the same.

AND/OR pass any other order/orders as this Hon'ble Court deems fit and proper in the circumstances of the given case and in the light of Justice, Equity and Good Conscience and thus, renders justice.

And for this act of kindness and justice the Respondents shall be duty bound and forever pray.

All of which is submitted with utmost reverence

Place: _____ , Malta

Date: June 2023

S/d _____

COUNSEL FOR THE RESPONDENTS