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

BEFORE THE SUPREME COURT OF MALTA

In the matter of

MR. PIPARA *Versus* **DEORA NRE COKE LTD.**

WITH

MR. SHROFF *Versus* **FU SAM POWER SYSTEM LTD.**

WITH

AXIS TELECOM PVT. LTD. *Versus* **DANOBE INFOTECH LTD.**

WITH

TIPSRA MSCL (INDIA) LTD.
VRS MALTA FINANCIAL SERVICES LTD. *Versus* **VNTEK AUTO LTD.**
M&N FINANCE LTD.

Civil Suit No: -__/__/2023

(Under Section 62 of Insolvency and Bankruptcy Code, 2016 and Article 136 of the Constitution of Malta, 1949)

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENTS

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LIST OF ABBREVIATIONS

S. NO.	ABBREVIATIONS	EXPANSIONS
1	§	Section
2	¶	Paragraph
3	Adjudicating Authority	AA
4	Anr.	Another
5	Art.	Article
6	AT	Appellate Tribunal
7	CC	Corporate Creditor
8	CD	Corporate Debtor
9	CIRP	Corporate and solvent resolution process
10	COC	Committee of Creditor
11	Comm'n	Commission
12	Com	Company
13	DNCL	Deora NRE Coke Ltd
14	FC	Financial Creditor
15	Fu-Sam	Fu-Sam Power Systems Limited
16	Hon'ble	Honourable
17	i.e	That is
18	I&B Code	Insolvency and Bankruptcy Code
19	IBBM	Insolvency and Bankruptcy Board of Malta
20	IBC	Insolvency and Bankruptcy Code, 2016
21	ILC	Insolvency Law Committee

22	Kapro'	Kapro Engineering Limited,
23	LP	Liquidation Proceedings
24	Ltd.	Limited
25	M.L.D. Investments Private Limited	M.L.D
26	NCLAT	National Company Appellant Tribunal
27	NCLT	National Company Law Tribunal
28	No.	Number
29	Ors.	Others
30	Para	Paragraph
31	Pvt.	Private
32	RP	Resolution Professional
33	SARFAESI Act	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act
34	SC	Supreme Court
35	SCC	Supreme Court Cases
36	SCR	Supreme court report
37	U.K	United Kingdom
38	Vntek	Vntek Auto Limited
39	v.	Versus
40	WP	Writ petition

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6	Indian Contract Act, 1872
7	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
8	National Company Law Tribunal Rules, 2016.
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STATEMENT OF JURISDICTION

The jurisdiction of this Hon'ble Court has been invoked under **Section 62 of the Insolvency and Bankruptcy Code, 2016 and Article 136 of the Malta Constitution.**

Section 62: Appeal to Supreme Court. –

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

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

Article 136: Special leave to appeal by the Supreme Court. –

*"**136(1)** Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. (2) Nothing in clause (1) shall apply to any judgment, determination, sentence, or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."*

STATEMENT OF FACTS

NO.	FACTS OF THE SCENARIOS
Scenario I	Mr. Pipara, a promoter of DNCL, submitted a resolution plan for DNCL on , which was presented by the Resolution Professional before the Committee of Creditors. Due to the insertion of Section 29A, Mr. Pipara became ineligible to submit a resolution plan. In the absence of a resolution plan, the NCLT passed an order of Liquidation after the expiry of 270 days. Mr. Pipara moved an application under Sections 230 to 232 of the Companies Act of 2013 before the NCLT proposing a scheme for compromise and arrangement The Application was allowed by the NCLT. Singhania Group filed an appeal against the order of the NCLT before the NCLAT. On 24th September 2022. the NCLAT allowed the appeal of by Singhania Group and gave the judgment on 24th September 2022 in case of *(Mr. Pipara v. Singhania Group of Companies) 2013*.
Scenario II	Mr Shroff Promotor of Fu-Sam. An application under Section 7 of the IBC was filed which was admitted by the NCLT. After which, the (CIRF) was initiated. Mr. Shroff submitted a Resolution plan. Mr. Shroff became ineligible Under Section 29A(h) of the IBC. NCLT passed an order, directing the liquidation. The Liquidator was also directed to accept applications under Sections 230 to 232 of the Act of 2013. Mr. Shroff was informed that he was ineligible to propose a scheme under Section 230 of the Companies Act, 2013 in view of his ineligibility under IBC.
Scenario III	Axis Company Pvt. Ltd. (Financial Creditor) and Danobe Info Technology Limited (Corporate Debtor) executed a Consent Term and the Company Petition against the CD was withdrawn. However, the CD failed to hold his end of the Consent Term and the FC is now looking for the revival of their Company Petition.
Scenario IV	Vntek Auto Limited (Corporate Debtor) is a Corporate Guarantor to VRS Malta Financial Services Limited, M&N Finance Limited and Tipsra MSCL (India) Limited (Appellants) for a loan granted and secured by the appellants in the name of Kapro Engineering Limited and M.L.D Investments Private Limited (Group Companies of CD). The CRIP proceedings have been started against the CD. The Appellants are now seeking the assets of CD holding their Security Interest.

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 THE 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

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.?

It is humbly submitted to this Hon'ble Court that liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement cannot be made in terms of Sections 230 to 232 of the Companies Act. The decision of the NCLAT dated 24th September 2022 is challenged in the appeal before this Court. Under the Contention that there is no interplay between Insolvency and Bankruptcy Cord (I&B), 2016 and Companies Act 2013.

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'.?

It is humbly submitted by the Respondent to this hon'ble court that the promotor is ineligible to file application for Compromise and Arrangement, as he is ineligible Under Section 29A of the I&B, Code 2016 to submit a 'Resolution Plan'. Under the Contention that there is a Purposive Interpretation between Section 35 (f) and Section 29 A of I&B, Code 2016. 2.2 Linkage between Section 230, Companies Act 2013 and Section 35 (1) (f) IBC. A harmonious construction between Section 29 A of I&B, Code, 2016 and Section 230 of Companies, Act 2013. There is a distinction between a Section 230 of Companies Act, 2013 and Section 12 A of I&B, Code, 2013. Validity of Amendment of Insolvency and Bankruptcy Board of India (IBBI),- Regulation 2B.

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. ?

The Respondent in the present issue (the Corporate Debtor, Vntek Auto Limited), humbly submits before this Hon'ble Supreme Court that the Security Interest created on the assets of the Corporate Debtor cannot be realised even if that interest has been created for the loan availed by the third party (in the present case, group companies of the Corporate Debtor, M.L.D. Investments Private Limited and Kapro Engineering Limited), in favour of the Appellant (the Financial Creditors of the Corporate debtor, Tipsra MSCL (India) Limited, VRS Malta Financial Services Limited, M&N Finance Limited). The Respondents in the present issue shall present their contentions in a three-fold fashion in the following manner: 1) There exists no creditor-debtor relationship between the Respondent and the Secured Creditor. 2) The Appellants are not secured financial creditor of the Corporate Debtor. 3) The terms under IBC derive their definition from the Contract Act, of 1872. 4) The appellants are not entitled to realise their security interest.

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

The Respondent in the present issue (the Corporate Debtor, Vntek Auto Limited), humbly submits before this Hon'ble Supreme Court that the Security Interest created on the assets of the Corporate Debtor cannot be realised even if that interest has been created for the loan availed by the third party (in the present case, group companies of the Corporate Debtor, M.L.D. Investments Private Limited and Kapro Engineering Limited), in favour of the Appellant (the Financial Creditors of the Corporate debtor, Tipsra MSCL (India) Limited, VRS Malta Financial Services Limited, M&N Finance Limited). The Respondents in the present issue shall present their contentions in a three-fold fashion in the following manner: 1) There exists no creditor-debtor relationship between the Respondent and the Secured Creditor. 2) The Appellants are not secured financial creditor of the Corporate Debtor. 3) The terms under IBC derive their definition from the Contract Act, of 1872. 4) The appellants are not entitled to realise their security interest.

ARGUMENTS ADVANCED

ISSUE I: Whether in a liquidation proceeding under the 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. It is humbly submitted to this Hon'ble Court that liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement cannot be made in terms of Sections 230 to 232 of the Companies Act. The decision of the NCLAT dated 24th September 2022 is challenged in the appeal before this Court. The Counsel of the Respondent is going to present this issue on following grounds: - 1) There is no interplay between Insolvency and Bankruptcy Cord (IBC), 2016 and Companies Act 2013.

I.I In Liquidation Proceeding there is no interplay between Insolvency and Bankruptcy Code (IBC), 2016 and Companies Act 2013.

2. The Counsel humbly submits that there is no interplay between IBC Code, 2016 and Companies Act 2013. It is imperative to underscore that the IBC formulated to address insolvency and bankruptcy matters comprehensively. Operates as a self-contained and exclusive legislative framework. Judicial pronouncements have consistently upheld the principle that the Provisions enshrined in the IBC shall hold supremacy over any inconsistent cohesions from other statutes, including the company's act.[1]

[1] L. Viswanathan & Indranil Deshmukh, *Innoventive Industries Limited v. ICICI Bank Limited: Paradigm Shift in Insolvency Law in India,* CYRILAMARCHANDBLOGS (Aug. 11, 2013, 8.30 PM) https://corporate.cyrilamarchandblogs.com/2017/09/innoventive-industries-limited-v-icici-bank-limited-paradigm-shift-insolvency-law-india/

3. It is the humbly submission of the Counsel of the respondent that the Liquidation Proceeding which is governed by Chapter III of the Code [2] has the overriding effect on the provision of the Compromise and Arrangement given under Section 230 to 232 of the Companies Act, 2013. That the Section 238 of the IBC[3], 2016 give the overriding power to IBC which can supersede all other laws and regulations. Section 238 states that: -

Section 238: Provisions of this Code to override other laws.

*"*238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

4. This decision reinforced the idea that IBC's provision would prevail over other laws when it comes to insolvency bankruptcy matters. In the present case, during the DNCL liquidation proceeding under the IBC, 2016, the Scheme for Compromise and Arrangement cannot be made in terms of Sections 230 to 232 of the Companies Act because by allowing the application of Compromise and Arrangement under Section 230 it will infringer the liquidation proceeding governing by IBC. Hence the relevance of Section 238 of IBC, 2016 come into effect which will override Compromise and Arrangement governed by Section 230 to 232. In the case of ***Innoventive Industries Limited v. ICICI Bank,***[4] the Hon'ble Supreme Court held that the IBC is a complete code in itself and its provisions would override anything inconsistent with other laws including the company's act.
5. It is humbly submitted to this hon'ble court that the Applicant being the promotor in the present case submitted a resolution plan for DNCL on **1st October 2020**, which was presented by the Resolution Professional before the Committee of Creditors[5]. Due to the insertion of Section 29A, The Applicant became ineligible to submit a resolution plan. Subsequently, no resolution plan was approved by the (Committee of creditors) CoC due to the paucity of time. In the absence of a resolution plan, the NCLT passed an order of liquidation on 11th December 2020, after the expiry of 270 days. The order of the NCLT

[2] Insolvency and Bankruptcy Code, 2016, § Ch. III, No. 31, Acts of Parliament, 2016 (India).
[3] Insolvency and Bankruptcy Code, 2016, § 238, No. 31, Acts of Parliament, 2016 (India)
[4] *Innoventive Industries Limited* v. *ICICI Bank Limited,* (2017) 1 SCC 1.
[5] Moot Problem, *Para 1*

ordering liquidation was challenged in appeal by Applicant before the NCLAT. The appeal was dismissed by the NCLAT by its order dated 10th June 2021.[6] It is imperative to understand that liquidation proceeding define under Section 33(1)(b) and Section 33(5) support the dismissal of Appel by the NCLT and NCLAT of the applicant which states that; -

Section 33(1)(b) states:

"Where the resolution professional does not receive a resolution plan under sub-Section (6) of Section 30 or Section 31, as the case may be, before the expiry of the maximum period permitted under sub-Section (2) of Section 12(withdrawal of applications admitted under Sections 7, 9 and 10 of IBC) or the corporate insolvency resolution process (CIRP) period, as the case may be, it shall apply to the Adjudicating Authority (NCLT) for liquidation of the corporate debtor."

Section 33 (5) states:

"(5) Subject to Section 52, ***(Secured creditor in liquidation proceedings).*** *when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor: Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority".*

6. It is important to note that the Section 33(1)(b) of the IBC, which govern the rule during no resolution plane does not include any application of Compromise and Arrangement scheme which can be filled by the promotor during the liquidation proceedings. Moreover, it is also imperative to understand the Section 33(5) bard any suit or other legal proceeding after the Order of liquidation by the AA. Hence it is the humble submission of the Counsel that the present appeal needs to be disposed of by this hon'ble Court according to Section 33(5) with the since that applicant in the present case cannot file the application of Compromise and Arrangement under Section 230 of the Company Act 2013, when liquidation order is generated by the NCLT on 11 December 2022.

[6] Moot Problem, *Para 11*

7. The Counsel humbly submits that in the present case if the application of Compromise and Arrangement, under Section 230 of the Companies Act, 2013 is allowed it will create the backdoor entry for the promotor to take part in the management of the company. the Contention of the petitioner was referred in case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd***[7] in this case the court held that observed that a promoter, who is barred under Section 29A of IBC from bidding for his company undergoing insolvency proceeding, cannot also take control of the company back by using the provision of the scheme of arrangement under Section 230 of the Companies Act, 2013. The salient facts of the case leading to the controversy, the issues involved, and the judgment pronounced by the Supreme Court have been discussed below.[8]
8. The Counsel humbly submits that the **Insolvency Law Committee Report (ICR) 2020**[9] also hold the same views which support the contention of the respondents that during liquidation proceeding under IBC, the Scheme for Compromise and Arrangement under Section 230 to 232 of company act, 2013 cannot be made. The ICR in its report debated incompatibility of Section 230 schemes with the liquidation proceedings under IBC.[10] The report observed that: -
    - *" This, the Committee noted, had led to a multiplicity of issues including, but not limited to, the duality of the role of the NCLT (as a supervisory Adjudicatory Authority under the IBC versus the driving Tribunal under the Act of 2013) and indeed the very question before us in this case, whether the disqualification under Section 29A and proviso to Section 35(1)(f) of the IBC also attaches to Section 230 of the Act of 2013."*[11]

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[7] *Arun Kumar Jagatramka v. Jindal Steel and Power Ltd.*, (2021) 7 SCC 474. see also, Ritu Singh, *Fictional Scheme to benefit few selected related parties; NCLAT upholds Liquidation of Corporate Debtor*, SCCONLINE (Aug.11, 2023, 9.15 PM), https://www.scconline.com/blog/post/2022/12/21/fictional-scheme-to-benefit-few-selected-related-parties-nclat-upholds-liquidation-of-corporate-debtor/

[8] *Arun Kumar Jagatramka v Jindal Steel and Power Limited and Anr.*, Supreme Court denies back-door entry of defaulting promoters in CIRP under Section 29A of IBC, REEDLAW (Aug.11, 2023, 4.50 PM), https://www.reedlaw.in/post/supreme-court-denies-back-door-entry-of-defaulting-promoters-in-cirp-under-Section-29a-of-ibc

[9] Insolvency and Bankruptcy Board of India, *Discussion Paper on Corporate Liquidation Process*, 2019, https://www.ibbi.gov.in/uploads/whatsnew/2309f5c72bbf7e41148d97670767d8f7.pdf

[10] Shikha Bansal, *A Case for Exclusion of Schemes of Arrangement from Liquidation*, INDIACORPLAW (Aug.11, 2023, 7:00 AM, https://indiacorplaw.in/2021/03/a-case-for-exclusion-of-schemes-of-arrangement-from-liquidation.html (Accessed: 2023).

[11] *Supra note9*

- *"The Committee thereafter notes that the introduction of such schemes into the framework of the IBC may be worrisome since it will alter the incentives during the CIRP and lead to destructive delays, which often plagued the process under the Sick Industrial Companies (Special Provisions) Act, 1985."* [12]
- *"4.6...However, the Committee was of the view that such a process for compromise or settlement need not be effected only through the schemes mechanism under the Companies Act, 2013, and felt that the liquidator could be given the power to effect a compromise or settlement with specific creditors with respect to their claims against the corporate debtor under the Code".*[13]
- *"4.7 Given the incompatibility of schemes of arrangement and the liquidation process, the Committee recommended that recourse to Section 230 of the Companies Act, 2013 for effecting schemes of arrangement or compromise should not be available during liquidation of the corporate debtor under the Code."*[14]

9. The Counsel humbly submits that the IBC, 2016 and Company Act 2013 does interplay with each other during Liquidation Proceeding. In case of ***Swiss Ribbons Pvt. Ltd. v. Union of India.***[15] The Supreme Court supported the constitutionality of the IBC and stressed the distinction between the IBC's settlement procedure and liquidation. The Court confirmed the IBC's precedence over other laws and acknowledged the IBC's contribution to resolving the nation's bankruptcy issue.
10. The Counsel humbly submits to this honourable court that with reference to the above contentions of the respondent, the Scheme for Compromise and Arrangement cannot be made in terms of Sections 230 to 232 of the Companies Act during Liquidation proceeding under IBC.

[12] *Supra note 9*
[13] *The Scheme of Arrangement as a Debt Restructuring Tool in India: Problems and Prospects*, NUS, (Aug. 9, 2023, 4:34 PM), http://law.nus.edu.sg/wp
[14] *Supra* note 13.
[15] *Swiss Ribbons Pvt. Ltd. v. Union of India*, Writ Petition (Civil) No. 99 of 2018.

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'.

11. It is humbly submitted by the Respondent to this hon'ble court that the promotor is ineligible to file application for Compromise and Arrangement, as he is ineligible Under Section 29A of the I&B, Code 2016 to submit a 'Resolution Plan'. The National Company Law Appellate Tribunal, Melvi, dated 19th November 2022 in order held that the Appellant in this present case in view of Section 29A of the IBC, cannot file any application for compromise and arrangement in terms of Section 230 and 232 of the Companies Act, 2013 to take over the Company.[16]

12. The Council of the Respondent is going to present this issue on the following grounds: - 1) Purposive Interpretation between Section 35 (f) and Section 29 A of IBC. 2) Linkage between Section 230, Companies Act 2013 and Section 35 (1) (f) IBC. 3) A harmonious construction between Section 29 A of IBC and Section 230 of Companies, Act 2013. 4) There is a distinction between a Section 230 of Companies Act, 2013 and Section 12 A of I&B, Code, 2013. 5) Validity of Amendment of Insolvency and Bankruptcy Board of India (IBBI)- Regulation 2B.

II.I Purposive Interpretation between Section 35 (f) and Section 29 A of I&B, Code 2016.

13. It is humbly submitted to this hon'ble court that there is a Purposive Interpretation between Section 35 (f) and Section 29 A of I&B, Code 2016. The Contention of the Council was taken into consideration by this Hon'ble court in case of ***Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors***[17] in which the Court uphold the validity of Section 29 A and Section 35 (1) (f) of the IBC and held that:- The Promoters, who are ineligible under

[16]Moot Proposition, ANNEXURE-2
[17] *Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.*, Writ Petition (Civil) No.99 of 2019.

Section 29A, are not entitled to file application for Compromise and Arrangement in their favour under Section 230 to 232 of the Companies Act. Proviso to Section 35(f) prohibits the Liquidator to sell the immovable and movable property or actionable claims of the 'Corporate Debtor' in Liquidation to any person who is not eligible to be a Resolution Applicant, quoted below: -

> *"**Section 35. Powers and duties of Liquidator**. -(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:--*
>
> *(f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.*
>
> *Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant."*[18]

14. The Council humble submits that from the aforesaid provision of Section 35 (f) of IBC,2016 it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the 'Corporate Debtor'."[19]
15. The Council humbly submits that Hon'ble Supreme Court made the observation in the case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr.***[20] **that the** ineligibility which was engrafted by the amending legislation was incorporated in both the provisions of Chapter II dealing with the CIRP as well as in Chapter III dealing with the liquidation process. Section 29A stipulates the category of persons who "*shall not be ideligible to submit a resolution plan".* The proviso to Section 35(1)(f) incorporates the same norm in the liquidation process, when it stipulates that the liquidator shall not sell the immovable

[18] Insolvency and Bankruptcy Code, 2016, § 35(1)(f), No. 31, Acts of Parliament, 2016 (India).
[19] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., Civil Appeal No. 9664 of 2019, Arun Kumar Jagatramka v. Union of India, Writ Petition (Civil) 269 of 2020 *and* Kunwer Sachdev v. Su Kam Power Systems Limited, Civil Appeal No. 2719 of 2020
[20] *Ibid. 19.*

and movable or actionable claims of the corporate debtor in liquidation *"to any person who is not eligible to be a resolution applicant".*

16. The Supreme Court in the series of the judgement **(*Phoenix ARC Private Limited* v. *Spade Financial Service*[21] , *Ramesh Kymal* v. *M/s Siemens Gamesa Renewable Power Pvt Ltd.*[22]** and ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited* v. *Axis Bank Limited***.[23]) observed that the Section 29A has been construed to be a crucial link in ensuring that the objects of the IBC are not defeated by allowing "ineligible persons", including but not confined to those in the management who have run the company aground, to return in the new *avatar* of resolution applicants. Section 35(1)(f) is placed in the same continuum when the Court observes that the erstwhile promoters of a corporate debtor have no vested right to bid for the property of the corporate debtor in liquidation. 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 liquidation involving the sale of assets, by virtue of the provisions of Section 35(1)(f).
17. In the case of ***Chitra Sharma* v. *Union of India*[24] and *Arcelormittal India Private Limited* v. *Satish Kumar Gupta & Ors.*[25]** The Court 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 words in Section 35(1)(f) are clearly referable to the ineligibility which is set up in Section 29A.

II.II Linkage between Section 230, Companies Act 2013 and Section 35 (1) (f) IBC.

18. It is humbly submitted to this hon'ble court that there is a linkage between Section 230, Companies Act 2013 and Section 35 (1) (f) IBC**.** The Supreme Court in ***Y Shivram Prasad v. S Dhanapal*[26]** while analysing the interplay between liquidation under the IBC and

[21] *Phoenix ARC Private Limited v. Spade Financial Service,,* , 2021 SCC OnLine SC 51
[22] *Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt Ltd.* C.A. No. 4050 of 2020
[23] *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited,* (2020) 8 SCC 401
[24] *Chitra Sharma v. Union of India,* (2018) 18 SCC 575.
[25] *Arcelormittal India Private Limited v. Satish Kumar Gupta & Ors.*, (2019) 2 SCC 1.
[26] *Y Shivram Prasad v. S Dhanapal***,** 2019 SCC OnLine NCLAT 172.

Section 230 of the Act, concluded that schemes under Section 230 of the Act being a mode of revival of the corporate debtor, the restrictions imposed under Section 35(1)(f) of the IBC shall be applicable. However, the Supreme Court observed that since the scope of Section 230 of the Act is very wide, the restrictions imposed by Section 35(1)(f) shall only be applicable when the scheme is being submitted for a company which is in liquidation under the IBC and not otherwise.

II.III A Harmonious Construction between Section 29 A of IBC and Section 230 of Companies, Act 2013.

19. The Council humbly submits that there is a Harmonious Construction between Section 29 A of IBC and Section 230 of Companies, Act 2013. In ***Arun Kumar Judgment***[27], takes about of maintaining a harmonious construction between the two statutes would ensure that, on the one hand, a scheme of compromise or arrangement under Section 230 is pursued in a way that is consistent with the underlying principles of the IBC, because the scheme is proposed in relation to an entity that is undergoing liquidation under Chapter III of the IBC. As a result, the corporation must be safeguarded from managerial failure and corporate death. It would be a blatant absurdity if the very people who are ineligible to submit a resolution plan, participate in the sale of the company's assets in liquidation, or participate in the sale of the corporate debtor as a 'going concern' were somehow allowed to propose a compromise or arrangement under Section 230 of the Act of 2013.[28]

[27] *Supra* note 19.

[28] G.P. Singh, *Principles of Statutory Interpretation,* which notes that "Further, these principles [referring to the principle of harmonious construction] have also been applied in resolving a conflict between two different Acts" and providing the following examples – "***Jogendra Lal Saha*** *v.* ***State of Bihar***, 1991 Supp (2) SCC 654 (Sections 82 and 83 of the Forest Act, 1927 are special provisions which prevail over the provisions in the Sale of Goods Act); ***Jasbir Singh*** *v.* ***Vipin Kumar Jaggi***, (2001) 8 SCC 289 (Section 64 of NDPS Act will prevail over section 307 CrPC 1974 as it is a special provision in a Special Act which is also later); ***P.V. Hemlatha*** *v.* ***Kattam Kandi Puthiya Maliackal Saheeda***, (2002) 5 SCC 548 (conflict between section 23 of the Travancore Cochin High Court Act and section 98(3) Civil Procedure Code resolved by holding the latter to be special law); ***Talchar Municipality*** *v.* ***Talcher Regulated Market Committee***, (2004) 6 SCC 178 (Section 4(4) of the Orissa Agricultural Produce Markets Act, 1956 was held to prevail over section 295 of the Orissa Municipalities Act, 1950 as the former was a special provision and also started with a non-obstante clause); and ***Iridium India Telecom Ltd.*** *v.* ***Motorola Inc***, (2005) 2 SCC 145 "

20. It is humbly submitted by the applicant that the prohibition in section 29A applies to Compromise and Arrangement under section 230 of the Company Act 2013, as Compromise and Arrangement can result in the promoter regaining control of the company. Due to which the purpose of section 29A would be defeated if promoters who are ineligible to submit a resolution plan were allowed to propose a Compromise and Arrangement. In case of ***Jindal Steel and Power Limited v. Gujarat NRE Coke Limited (2019)***, [29] the National Company Law Appellate Tribunal (NCLAT) held that section 29A of the Insolvency and Bankruptcy Code (IBC) is a part of the resolution mechanism and that its object and purpose is to prevent a back-door entry to the promoter who should not be allowed to have advantage of their own wrong.
21. The Counsel humble submitted that the ineligibility engrafted in Section 29A extends to Chapter III by virtue of the provision of Section 35(1)(f). This must be read together with Regulation 32 of the Liquidation Process Regulations. Regulation 32 provides six modes of realization of assets, out of which four involve the sale of assets and two involve the transfer of the corporate debtor or its business as a 'going concern[30].
22. The Insolvency and Bankruptcy Code (IBC) has established a regulation concerning disqualification as outlined in Section 29A, which operates throughout the Corporate Insolvency Resolution Process (CIRP). A parallel provision can be found in Section 35(1)(f), incorporated within Chapter III of the IBC, specifically pertaining to the liquidation procedures. Given the statutory connection established by Section 230 of the 2013 Act with Chapter III of the IBC, when a proposal for a scheme is presented for a company undergoing liquidation under the IBC, it would be unreasonable to argue that the disqualifications encompassed by Section 35(1)(f) in conjunction with Section 29A would

[29] *Jindal Steel and Power Limited v. Gujarat NRE Coke Limited,* Company Appeal (AT) (Insolvency) No. 322 of 2019.

[30] Prohibition Placed By The Parliament In Section 29a Of The IB Code Also Attaches Itself To A Scheme Of Compromise Or Arrangement Under Section 230 Of Companies Act: A Case Study - Corporate and Company Law – India, MONDAQ, (Aug. 9, 2023, 5:21AM) https://www.mondaq.com/india/corporate-and-company-law/1075826/prohibition-placed-by-the-parliament-in-section-29a-of-the-ib-code-also-attaches-itself-to-a-scheme-of-compromise-or-arrangement-under-section-230-of-companies-act-a-case-study.

not be applicable in cases involving the invocation of Section 230. These principles underline the legal standpoint[31]

II.IV There is a distinction between a Section 230 of Companies Act, 2013 and Section 12 A of IBC 2016.

23. The Council humbly submits that there is a distinction between a Section 230 of Companies Act, 2013 and Section 12 A of IBC 2016.
24. The counsel humble submitted that the rational of the legislature for imposing an ineligibility under Section 29A in the resolution process is that the successful resolution applicant under Section 31 of the IBC[32] obtains the company on a clean slate, as indicated in the decision of this Court in ***Committee of Creditors of Essar Steel India Limited*** *v.* ***Satish Kumar Gupta***[33]**.** The Section 29A has several ineligibilities apart from those that attach to promoters. To allow a person who is ineligible under Section 29A from submitting a compromise or arrangement under Section 230 at the liquidation stage is contrary to the letter and spirit of the IBC.
25. A withdrawal under Section 12-A is in the nature of settlement, which has to be distinguished both from a resolution plan which is approved under Section 31 and a scheme which is sanctioned under Section 230 of the Act of 2013. **The scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot certainly be equated with a withdrawal *simpliciter* of an application, as is contemplated under Section 12-A of the IBC.**
26. A scheme of compromise or arrangement, upon receiving sanction under Sub-section (6) of Section 230, binds the company, its creditors and members or a class of persons or creditors as the case may be as well as the liquidator (appointed under the Act of 2013 or the IBC). Both, the resolution plan upon being approved under Section 31 of the IBC and

[31] *Supra* note 19.
[32] Insolvency and Bankruptcy Code, 2016, § 31, No. 31, Acts of Parliament, 2016 (India).
[33] *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta*, (2020) 8 SCC 531.

a scheme of compromise or arrangement upon being sanctioned under Sub-section (6) of Section 230, represent the culmination of the process. This must be distinguished from a mere withdrawal of an application under Section 12-A. There is a clear distinction between these processes, in terms of statutory context and its consequences and the latter cannot be equated with the former.[34]

II.V Validity of Amendment of Insolvency and Bankruptcy Board of India (IBBI),- Regulation 2B.

27. The Counsel humbly submits that Insolvency Law Committee published the repost dated 3 March 2018[35]states that the intent behind introducing Section 29A was to prevent unscrupulous persons from gaining control over the affairs of the company. These persons included those who by their misconduct have contributed to the defaults of the company or are otherwise undesirable. The Committee observed:

"14.1. Section 29A was added to the Code by the Amendment Act. Owing to this provision, persons, who by their misconduct contributed to the defaults of the corporate debtor or are otherwise undesirable, are prevented from gaining or regaining control of the corporate debtor. This provision protects creditors of the company by preventing unscrupulous persons from rewarding themselves at the expense of creditors and undermining the processes laid down in the Code."[36]

28. It is humbly submitted to this Hon'ble Court that The Liquidation Process Regulations (LPR) have been issued by the Insolvency and Bankruptcy Board of India (IBBI), constituted under Part IV of the IBC. The (LPR) was amended by the notification. In which Regulation 2B was amended by a dated 6 January 2020, by which a proviso was added to Sub-section (1) of Regulation 2B, which provides that a party ineligible to propose a

[34] *Supra* note 19.
[35] Ministry of Corporate Affairs, Government of India, *Report of the Insolvency Law Committee*, (2018). https://ibbi.gov.in/ILRReport2603_03042018.pdf

[36] *Ibid 35*

resolution plan under the IBC cannot be a party to a compromise or arrangement. Regulation 2B, in its present form, reads as follows:

"Regulation 2-B. Compromise or arrangement. — (1) *Where a compromise or arrangement is proposed under Section 230 of the Companies Act, 2013 (18 of 2013), it shall be completed within ninety days of the order of liquidation under sub-sections (1) and (4) of Section 33:*

Provided 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.[37]

II.V.I Constitutional Validity of - Regulation 2B

- **Section 196**

29. The powers and functions entrusted to IBBI are specified in Section 196 of the IBC. Section 196(1)(t) provides IBBI with the power to frame regulations, as follows:

"(t) make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor; and"

30. Clause (t) empowers IBBI to make regulations and guidelines on matters relating to insolvency and bankruptcy, as may be required under the IBC.

- **Section 240**

31. Section 240(1) empowers IBBI with the power to make regulations in the following terms:

"(1) The Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code."

32. Under Sub-Section (1) of Section 240, the power to frame regulations is conditioned by two requirements: first, the regulations have to be consistent with the provisions of the IBC and the rules framed by the Central Government; and second, the regulations must be to

[37] Insolvency And Bankruptcy Board of India, *Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2020*, (2020) https://ibbi.gov.in/uploads/legalframwork/672273de085acc7678468590d0f981e6.pdf

carry out the provisions of the IBC. Regulation 2B meets both the requirements, of being consistent with the provisions of IBC and of being made in order to carry out the provisions of the IBC, for the reasons discussed earlier in this judgment.

33. The introduction of the proviso to Regulation 2B was a step in this direction which sought to clarify the position with respect to the applicability of the disqualifications set out in Section 29A of the IBC to Section 230 of the Act of 2013 in tandem with the legislative intendment.
34. The Case of Arun Kumar also upheld the Constitutional Validity of Regulation 2B on relying on the principle was enunciated in the decision in **Meghal Homes** while construing the provisions of erstwhile in Section 391. The object of the scheme of compromise or arrangement under Section 230 of the Companies Act, 2019 is to revive the company from the Corporate Death.
35. The Council humbly submits, with reference to the above contention 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'.

ISSUE III: Whether security interest created on the assets of the 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.

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36. The Respondent in the present issue (the Corporate Debtor, Vntek Auto Limited, hereafter referred to as 'The Respondent') humbly submits before this Hon'ble Supreme Court that the Security Interest created on the assets of the Corporate Debtor cannot be realised even if that interest has been created for the loan availed by the third party (in the present case, group companies of the Corporate Debtor, M.L.D. Investments Private Limited and Kapro Engineering Limited, hereafter referred to as 'M.L.D.' and 'Kapro' respectively) in favour of the Appellant (the Financial Creditors of the Corporate debtor, Tipsra MSCL (India)

Limited, VRS Malta Financial Services Limited, M&N Finance Limited, hereafter referred to as 'The Appellants").

37. The Respondents in the present issue shall present their contentions in a three-fold fashion in the following manner: 1) There exists no creditor-debtor relationship between the Respondent and the Secured Creditor. 2) The Appellants are not secured financial creditor of the Corporate Debtor. 3) The terms under IBC derive their definition from the Contract Act, of 1872. 4) The appellants are not entitled to realise their security interest.

III.I There exists no creditor-debtor relationship between the Respondent and the Secured Creditor.

38. The Respondent in the present issue humbly submits before this Hon'ble Supreme Court that there is no creditor-debtor relationship between the Respondent and the Appellant.
39. It is submitted that as per Section 3(11)[38] of the IBC 'Debt' means *a liability or obligation in respect of a claim which is due from any person* and that it includes a 'financial debt' and an 'operational debt'.
40. That Section 5(8)[39] of the IBC defines 'financial debt' as *debt along with interest, if any, which is disbursed against the consideration for the time value of money*.
41. That in the case of ***Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited***[40] the following observation was made:

'*The definition of "financial debt" under IBC uses the terms 'means and includes.' Therefore, for a debt to become 'financial debt', it needs to be (i) disbursed against the consideration for the time value of money; and (ii) may include any of the methods for raising money or incurring liability by the modes prescribed in sub-clauses (a) to (i) of the definition of 'financial debt'. Since no debt was advanced by the lenders to JIL, the essential element of 'disbursal against the consideration for the time value of money could not be fulfilled and therefore, the debt could not be treated as 'financial debt.*'

[38] Insolvency and Bankruptcy Code, 2016, § 3(11), No. 31, Acts of Parliament, 2016 (India).
[39] Insolvency and Bankruptcy Code, 2016, § 5(8), No. 31, Acts of Parliament, 2016 (India).
[40] *Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited,* (2020) 8 SCC 401.

42. That in a similar case of ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, the Resolution Professional of Doshion Water Solutions Private Limited***[41]**,**

'*Doshion Water Solutions Private Limited ("**Doshion**") had pledged certain shares of Gondwana Engineers Limited held by them in favour of Phoenix ARC Private Limited (as the assignee of the loan) ("**Phoenix**") for the loan advanced to Doshion Limited. In this case, the National Company Law Appellate Tribunal ("**NCLAT**") held that the pledge of shares would not be tantamount to "disbursement of any amount against the consideration for the time value of money" (as required under the definition of financial debt under IBC).*'

43. That while keeping the above observation in mind, it can be concluded that a loan advanced against a security does not form a debt for the Security Provider.

III.II The Appellants are not Secured Financial Creditors of the Corporate Debtor.

44. The Respondent humbly submits that the root requirement for a creditor to be seen as a financial creditor under Section 5[42] of the IBC, is that there must be a financial debt which is owed to that person regardless of him being the principal creditor to whom the financial debt is owed or an assignee in terms of extended meaning.
45. That in the case of ***M/s Vistra ITCL (India) Limited and Others v. Mr Dinkar Venkatasubramanian and Another***[43] the Supreme Court observed that-

*'In the Anuj Jain Case the court held that even though the lenders of Jaypee Associates Limited are secured creditors of Jaypee Infratech Limited ("**JIL**") within the realms of IBC, they cannot be considered as financial creditors of JIL and would not form part of the CoC of JIL merely by virtue of third-party security creation.'*

[41] *Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, the Resolution Professional of Doshion Water Solutions Private Limited*, (2021) 2 SCC 799.
[42] Insolvency and Bankruptcy Code, 2016, § 5, No. 31, Acts of Parliament, 2016 (India).
[43] *M/s Vistra ITCL (India) Limited and Others v. Mr Dinkar Venkatasubramanian and Another*, CIVIL APPEAL NO.3606 of 2020.

46. That further in the case of ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, the Resolution Professional of Doshion Water Solutions Private Limited***[44] the Hon'ble SC relied on the judgement of Anuj Case[45] and held that-

    'Phoenix ARC Private Limited cannot be considered a financial creditor of Doshion Limited and Doshion Veolia Water Solutions Private Limited by virtue of third-party security creation.'

    The Hon'ble SC observed that even in the case ***Vistra ITCL (India) Limited and Others v. Mr Dinkar Venkatasubramanian and Another***[46], the primary liability to repay the financial advancement was on the group companies of the CD who had availed the facility and not on the CD.

47. That in view of the above-mentioned issue, the SC considered two possible ways of action. The first was to add the secured creditor to the CoC and grant it voting rights equal to the estimated value of the pledged shares by treating it as a financial creditor of the Corporate Debtor to the extent of the estimated value of the pledged share on the date the CIRP began. However, this would need a referral to a larger bench of the Supreme Court and call for a review of the earlier rulings in the Anuj Jain Case and Phoenix Case. The Supreme Court stated that the first approach is not workable in light of the aforementioned rationale.[47]
48. That in the ***Phoenix Arc case***[48] it was held that: *'if a corporate debtor has only offered security by pledging shares, without undertaking an obligation to discharge the borrower's liability, then the creditor in such a case will not become 'financial creditor' vis-à-vis the corporate debtor as defined under the IBC.'*
49. That in the above-mentioned case due to the lack of existence of a financial debt Phoenix could not be categorized as a 'financial creditor' of Doshion. This judgement relied on the fact that the pledge was created on a specific number of shares and did not have a contract that the security provider would perform the particular promise or discharge the liability of the borrower.

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[44] *Supra* note 41.
[45] *Supra* note 40.
[46] *Supra* note 43.
[47] *Ibid.*
[48] *Supra* note 41.

50. That even in the ***Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited***[49] case it was held that '*beneficiaries of the security interest cannot be categorized as a 'financial creditor' in the insolvency process of the Security Provider. However, such a creditor can be categorized as a 'secured creditor' by virtue of collateral security extended by the corporate debtor.'* Reliance was made on the cases of ***Swiss Ribbons Private Limited v. Union of India***[50] and ***Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India and Ors***.[51]

51. That in line with the abovementioned judgements, the Insolvency and Bankruptcy Board of India ("**IBBI"**) amended the **Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016**[52] *vide* an amendment dated March 15, 2021 ("**CIRP Amendment Regulations**"), and provided that:

-claims as 'financial creditor' can only be submitted by (a) direct lenders to the Corporate Debtor; or (b) beneficiaries of a guarantee from the Corporate Debtor, or (c) beneficiaries of obligations under para-B(2)(h) and (i) above.

52. *Prima facie*, this implies that creditors who form security interest would not be permitted to submit their claims as 'financial creditors' regardless of the terms of the contractual agreement between the creditor and the Security Provider. Instead, they would need to submit their claims in the format designated for other creditors (i.e. creditors other than financial creditors and operational creditors), who are generally written off in resolution plans.

53. That "secured creditor" as per Section 3(30)[53] of the IBC means *a creditor in whose favour a security interest is created*; and "security interest", as per Section 3(31)[54] of the IBC, means *a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation.*

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[49] *Supra* note 40.
[50] *Ribbons Private Limited v. Union of India,* AIR (2019) 4 SCC 17.
[51] *Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India and Ors.*, WRIT PETITION (CIVIL) NO. 43 OF 2019.
[52] IBBI, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, IBCLAW, https://ibclaw.in/ibbi-cirp-regulations/?print-posts=pdf.
[53] Insolvency and Bankruptcy Code, 2016, § 3(30), No. 31, Acts of Parliament, 2016 (India).
[54] Insolvency and Bankruptcy Code, 2016, § 3(31), No. 31, Acts of Parliament, 2016 (India).

54. That in the ***Pheonix case***[55]**,** the SC observed that the combined reading of the statutory provisions with the ratio of the ***Swiss Ribbons case***[56], can clarify the scheme of IBC, and the intention of the legislature, of the expression 'financial creditor' to mean a person who has direct engagement in the functioning of a corporate debtor; who is involved right from the beginning while assessing the viability of a corporate debtor; engaging in restructuring of the loan as well as in re-organization of a corporate debtor's business.
55. That the SC, therefore, in the above-mentioned case concluded that *'a person such as the Lender, having only security interest over the assets of the Corporate Debtor, even if falling within the description of 'secured creditor' by virtue of collateral security extended by the Corporate Debtor, would nevertheless stand outside the sect of 'financial creditors' as per the provisions of the IBC. Hence, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the IBC.'*
56. The Respondent finally submits that therefore a secured creditor *ipso facto* does not become a financial creditor.[57]

III.III The terms under the IBC derive their definition from the Contract Act of 1872.

57. The Respondent humbly submits that the words "guarantee" and "indemnity" as occurring in Section 5(8) (i) have not been defined in the Code. Section 3 clause (37) 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.[58]
58. That Chapter VIII of the Indian Contract Act of 1872[59] which deals with the definition of 'indemnity' and 'guarantee' under Sections 124[60] and 126[61] therein. It was observed:

*'**25**. 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*

[55] *Supra* note 41.
[56] *Supra* note 50.
[57] *Supra* note 40.
[58] *Supra* note 55.
[59] Indian Contract Act, 1872, Ch. VIII, No. 09, Acts of Parliament, 1872 (India).
[60] Indian Contract Act, 1872, § 124, No. 09, Acts of Parliament, 1872 (India).
[61] Indian Contract Act, 1872, § 126, No. 09, Acts of Parliament, 1872 (India).

not a case where the corporate debtor has entered into a contract to perform the promise or discharge the liability of the borrower in case of his default. The pledge agreement is limited to the pledge of 40,160 shares as security. 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 facility agreement. A contract of guarantee contains a guarantee "to perform the promise or discharge the liability of the 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'.[62]

59. That 'pledge' is defined in Section 172[63] of the Contract Act and it has been held:

*'**26**. .....The pledge agreement dated 10-1-2012 does not contain any contract that the corporate debtor has contracted to perform the promise, or discharge the liability of the third person.....*'[64]

60. That a Pledge agreement and a guarantee cannot be compared since, according to the requirements of the 1872 Act, the ramifications and implications of each are completely different. Any obligation resulting from a guarantee for any of the things listed in subclauses (a) through (h) of Section 5(8) of the IBC is covered by Section 5(8)(I) of the IBC, but not any other document that has the characteristics of a guarantee. In order to fulfil the commitment or release a third party from obligation in the event of the appellant's default, the Corporate Debtor has not signed any deed of guarantee with the appellant. The Appellants have a limited right to recover the funds in the event that the Borrower defaults.

[62] *Supra* note 55.
[63] Indian Contract Act, 1872, § 172, No. 09, Acts of Parliament, 1872 (India).
[64] *Supra* note 55.

III.IV The Appellants are not entitled to realise their security interest.

61. The Respondent humbly submits that in the case of ***Vistra ITCL (India) Limited and Others v. Mr. Dinkar Venkatasubramanian and Another***[65] the Supreme Court observed that '*Appellant No. 1, not being a secured financial creditor is neither in a position to opt to realize its security interest in terms of Section 52(1)(b) (Secured creditor in liquidation proceeding) of the IBC nor it is in a position to receive sale proceeds at a relatively higher priority in the event of relinquishment of security interest to the liquidation estate.'*
62. That the court in the above-mentioned case observed that the creditors who are secured creditors but neither financial creditors nor operational creditors, will face a highly peculiar situation where such creditors would be left remediless in terms of the amounts entitled to them upon implementation of an approved resolution plan since such creditors would neither avail the benefit available to the financial creditors nor the operational creditors.
63. That the Supreme Court in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta***[66] where the court held that *no claims can exist apart from those acknowledged in the resolution plan, which has been interpreted to mean that all claims that are not acknowledged in the resolution plan are extinguished.*
64. That a similar situation was seen in other cases as ***Encote Energy (India) Pvt. Ltd. v. V. Venkatachalam***[67] and ***Kotak Mahindra Prime Ltd v. Mr. Bijay Murmuria***[68].
65. That in some instances the Adjudicating Authority has admitted claims even at a stage where the CIRP would be disrupted such as the admission of claims after the Committee of Creditors had approved the resolution plan such as ***Credit Suisse Funds AG v. Kumar***

[65] *Supra* note 43.
[66] *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta,* CIVIL APPEAL NO. 8766-67 OF 2019.
[67] *Encote Energy (India) Pvt. Ltd. v. V. Venkatachalam,* Company Appeal (AT) (Insolvency) No. 1226 of 2019.
[68] *Kotak Mahindra Prime Ltd v. Mr. Bijay Murmuria,* Company Appeal (AT) (Insolvency) No. 47 of 2019.

Kapadia[69] and ***PRC International Hotels Pvt. Ltd. v. S. Mukanchand Bothra***[70] [71], which causes grave inconvenience to the entire CRIP proceedings.

66. That even in a liquidation order the assets over which the security interest is created become a part of the liquidation state, by virtue of Section 36 of the IBC.

'36. (1) For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor. (2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors. (3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;'[72]

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

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67. The Respondent Petitioner (Danobe Info Technology Limited), (hereafter referred to as 'the Respondent') in the present issue is the corporate debtor for the Petitioner (Axis Telecom Pvt. Ltd.) (hereafter referred to as 'the Petitioner'), against who a Company Petition was filed under Section 7 of the IBC for the default of Rs. 7,71,32,111/-.[73]
68. The Respondent humbly submits that an Insolvency proceeding under the Insolvency and Bankruptcy Code, 2016 (referred to as 'IBC'), cannot be restored in case of default even when a Consent term is entered between parties. The Respondent here will present a three-

[69] *Credit Suisse Funds AG v. Kumar Kapadia*, IA427/2018 in CP(IB) 209/NCLT/AHM/2017.
[70] *PRC International Hotels Pvt. Ltd. v. S. Mukanchand Bothra*, MA/518/2018 in CP/540/IB/2018.
[71] Anchit Jasuja *and* Preksha Mehndiratta, *Creditors with Rejected Claims: Methods to Address Inadequacies under the IBC,* (Aug. 11, 2023, 8:37 PM) https://indiacorplaw.in/2020/11/creditors-with-rejected-claims-methods-to-address-inadequacies-under-the-ibc.html .

[72] Insolvency and Bankruptcy Code, 2016, § 36, No. 31, Acts of Parliament, 2016 (India).
[73] Moot Proposition, Para 27.

fold submission before this Hon'ble Supreme Court of Malta: 1) The Adjudicating Authority is not bound to admit a revival application. 2) The liberty of the Adjudicating Authority is necessary for the revival of CIRP proceedings. 3) The nature of the debt changes post the settlement of the debt.

IV. I The Adjudicating Authority has the discretionary power to accept or reject an application.

69. The Respondent in the present issue humbly submits that the Adjudicating Authority (NCLT)has the discretionary power to accept or reject an application, i.e., the AA is not bound to admit an application especially when it is decided priorly.

70. The Respondent submits that Rule 11 of the NCLT Rules[74] has the power to revive the original application but it does not mandate the admission of such revival on the AA.

71. That Section 7[75] of the IBC deals with the admission of complaints, however, the use of 'may' in the section shall be interpreted as indicating that the AA has the Discretion to admit or Reject despite the existence of a default.[76] If this Section was to be considered mandatory then the terminology used in Section 7(5)(a)[77] of IBC would have been 'shall' and not 'may'.

72. That the first and foremost principle of interpretation of a statute is the rule of literal interpretation as held in numerous case laws.[78]

73. That such decisions may be influenced by various factors and not merely the admittance of default like the solvency and financial health of the corporate debtor.

74. That in the ***Vidarbha Case***[79] the Hon'ble SC observed that *'the Adjudicating Authority (NCLT) as also the Appellate Tribunal (NCLAT) fell in error in holding that once it was*

[74] National Company Law Tribunal Rules, 2016, § 11, No. 507, Acts of Parliament, 2016 (India).
[75] Insolvency and Bankruptcy Code, 2016, § 7, No. 31, Acts of Parliament, 2016 (India).
[76] *Vidarbha Industries Power Limited v. Axis Bank Limited,* Civil Appeal No. 4633 of 2021.
[77] Insolvency and Bankruptcy Code, 2016, § 7(a), No. 31, Acts of Parliament, 2016 (India).
[78] *Lalita Kumari v. Government of Uttar Pradesh and Ors.* (2014) 2 SCC 1, *Hiralal Rattanlal v. State of Uttar Pradesh* (1973) 1 SCC 216.
[79] *Supra* note 76.

found that a debt existed and a Corporate Debtor was in default in payment of the debt there would be no option to the Adjudicating Authority (NCLT) but to admit the petition under Section 7 of the IBC.'

75. That Section 7(5)(a)[80] of the IBC with Rule 11 of the Rules makes it abundantly clear that NCLT, on ascertaining the existence of debt and its default, by a CD, has the discretion to admit or not admit an application for initiation of CIRP. It cannot be said that NCLT has no power, except to examine whether a debt exists or not and accordingly accept or reject the application under Section 7 of the IBC.

IV. II The liberty of the Adjudicating Authority is necessary for the revival of CIRP Proceedings.

76. The Respondent humbly submits that the liberty of the AA to seek the revival of CRIP Proceedings is necessary, as held in ***AVANT Garde Clean Room & Engg. Solutions Private Limited v. HLL Biotech Limited***[81]**-**

'When there is no specific order granting liberty to approach this Authority (NCLT), for restoration of a dismissed petition, this application cannot be entertained. It is an established position of law that if any relief claimed in the petition/memo, which is not expressly granted by the order, shall be deemed to have been refused.'

77. That this position was further explained in the case of ***Krishna Garg & Anr.*** **v.** ***Pioneers Fabricators Pvt. Ltd.***[82], while placing reliance on ***Swiss Ribbons Pvt. Ltd. & Anr. v. UOI & Ors.***[83] wherein the Hon'ble NCLAT declined to revive the CIRP proceedings because the settlement terms were not filed, nor recorded and incorporated in the order of the NCLT with liberty to revive/ restore the CIRP in the event of the corporate debtor not adhering to the terms of the settlement.

[80] *Supra* note 75.
[81] *AVANT Garde Clean Room & Engg. Solutions Private Limited v. HLL Biotech Limited,* CP(IB) No.02/KOB/2021.
[82] *Krishna Garg & Anr.* v. *Pioneers Fabricators Pvt. Ltd,* Company Appeal (Ins.) Nos. 92 of 2021.
[83] *Swiss Ribbons Pvt. Ltd. & Anr. v. UOI & Ors* ,2019 SCC OnLine SC 73.

78. That the application to revive the petition was allowed in the case of ***Pooja Finlease Ltd.* v. *Auto Needs (India) Pvt. Ltd. & Anr.*[84]** as the facts of the case were different and a specific clause of revival was incorporated as a part of the Consent Terms, which is not the case in the current instance.
79. That as per the law laid down in ***SRLK Enterprises LLP*[85],** it was observed that: *'There is a difference between withdrawal simplicitor making statements that parties have settled. 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.'* The settlement agreement/Consent Terms should not only be put on record but also be made a part of the order to be made mandatory without an inherent revival clause.

IV. III Whether the nature of Debt changes post the settlement of the debt.

80. The Respondent humbly submits that the nature of debt once settled changes and it no longer is regulated by the IBC, such as observed in ***Finsbury Global FZE v. M/s Uttam Sucrotech International Pvt. Ltd.***,[86].
81. In the above-mentioned case it was also observed that *'in order to settle the outstanding operational debt, a Settlement Agreement was entered into by the parties. The NCLT held that the moment the parties entered into the settlement agreement, the nature of the debt changed from being operational debt under Section 5(21) of the Code. The debt outstanding by virtue of the Settlement Agreement loses the substratum of operational debt under the Code and merely stands to be a debt.'*
82. That a similar view was observed in the case of ***Delhi Control Devices(P) Limited v. Fedders Electric and Engineering Ltd.*[87]**, wherein it was held that- *'unpaid instalments as per a Settlement Agreement cannot be treated as operational debt under Section 5(21) of*

[84] *Pooja Finlease Ltd.* v. *Auto Needs (India) Pvt. Ltd. & Anr*, Company Appeal (AT) (Insolvency) No. 103 of 2022.
[85] *Srlk Enterprises Llp vs Jalan Transolutions India Ltd,* Company Appeal (AT) (Ins) No. 294 of 2021.
[86] *Finsbury Global FZE v. M/s Uttam Sucrotech International Pvt. Ltd.,* I.A. 4081 of 2022 in C.P (I.B) No. 1013 of 2020.
[87] *Delhi Control Devices(P) Limited v. Fedders Electric and Engineering Ltd.,* 2019 SCC OnLine NCLT 8030.

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'.[88]

83. That if the above view is followed then as a natural corollary, it follows that mechanisms under IBC cannot be resorted for dues vide the Settlement Agreement, as a consequence of which neither the withdrawn CIRP proceedings can be revived nor a fresh application for CIRP can be filed for non-payment of debt agreed by the settlement agreement.[89]

[88] Insolvency and Bankruptcy Code, 2016, § 5(21), No. 31, Acts of Parliament, 2016 (India). See also, Aman G. and Mayank K., *Revival of insolvency proceedings: Analysis and way forward*, LEXOLOGY, (Aug. 10, 2023, 4:14 PM) https://www.lexology.com/library/detail.aspx?g=05ac92fe-3350-4640-b5c0-2d96e9ce1862.

[89] Aman Gupta and Mayank Kumar, *Revival of insolvency proceedings: Analysis and way forward*, LEXOLOGY, (Aug. 10, 2023, 4:14 PM), https://www.lexology.com/library/detail.aspx?g=05ac92fe-3350-4640-b5c0-2d96e9ce1862.

PRAYER

Wherefore, in light of facts stated, issues raised, arguments advanced and authorities cited, it is humbly requested that the Hon'ble Court may be pleased to hold, adjudge and declare,

1. That in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement cannot be made in terms of Sections 230 to 232 of the Companies Act.
2. 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.
3. That the security interest created on the assets of corporate debtor can be extinguished;
4. That the Insolvency proceeding cannot be restored in case of default when Consent term is entered between the parties;

AND/OR

Pass any other order it may deem fit in the interest of Justice, Equity, and Good Conscience.

All of which is most respectfully prayed and humbly submitted.

(Signed)

Place:

Date:

Counsel for the Respondent