IM-06

VI SURANA & SURANA AND UPES SCHOOL OF LAW,

NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION 2023

IN THE HON'BLE SUPREME COURT OF MALTA

CIVIL APPELLATE JURISDICTION

UNDER SECTION 62 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

CIVIL APPEAL NO. XX/2023

Mr. Pipara …Appellant No. 1

versus

Singhania Group of Companies and Anr. …Respondent No. 1

Heard along with

CIVIL APPEAL NO. XX/2023

Mr. Shroff …Appellant No. 2

versus

Fu-Sam Power Systems Ltd. …Respondent No. 2

Heard along with

CIVIL APPEAL NO. XX/2023

Axis Telecom Pvt. Ltd. …Appellant No. 3

versus

Danobe Info Technology Ltd. …Respondent No. 3

Heard along with

CIVIL APPEAL NO. XX/2023

Tipsara MSCL India Ltd. and Ors. …Appellant No. 4

versus

Mr. Kasi Nayinar Pararacacekaran **…**Respondent No. 4

MEMORIAL ON BEHALF OF THE RESPONDENTS

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ABBREVIATION	ACTUAL TERM
&	And
S.	Section
AA	Adjudicating Authority
AIR	All India Reporter
Anr.	Another
CoC	Committee of Creditors
CompCas	Company Cases
Corpn	Corporation
CIRP	Corporate Insolvency Resolution Process.
Ed.	Edition
GDP	Gross Domestic Product
Hon'ble	Honorable
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
ILC	Insolvency Law Committee
Ld.	Learned
LLP	Limited Liability Partnership
Ltd.	Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
No.	Number
NPA	Non-Performing Assets

Pvt.	Private
SC	Supreme Court
SCC	Supreme Court Cases
Regd.	Registered
RP	Resolution Professional
v./vs.	Versus
Vol.	Volume

INDEX OF AUTHORITIES

CASES

STATUTES & RULES

STATEMENT OF JURISDICTION

This Hon'ble Court is vested with the jurisdiction to hear the present matter under **Section 62** of Insolvency and Bankruptcy Code, 2016.

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.

STATEMENT OF FACTS

Malta, the world's largest democracy with the 2nd largest economy and GDP, faces obstacle in economic growth due to NPA, which has prompted the enactment of the IBC, 2016 to enhance insolvency resolution framework.

SUMMARY OF SCENARIO I

Deora NRE Coke Ltd. ("Respondent No.1"), in liquidation, is one of the largest coke manufacturers in Malta. On 1.10.2020, Mr. Pipara, the promoter of DNCL ("Appellant No. 1") proposed a resolution plan for the company. Before it could be put to vote, he became ineligible under s. 29A of IBC. He also became ineligible to move an application under s. 230 of Companies Act due to the judgment in *Mr. Pipara v. Singhania Group of Companies*.

SUMMARY OF SCENARIO II

Fu-Sam Power Systems Ltd. ("Respondent No. 2") is one of the biggest names in the power backup industries. CIRP started against Fu-Sam on an application of a financial creditor. On the invitation of resolution plans by the RP, Mr. Shroff (promoter; "Appellant No. 2") submitted his plan; however, he was informed that he is ineligible under s. 29A(h) of IBC to submit a plan. Thereafter, a liquidation process was directed by NCLT. Mr. Shroff expressed his interest to present a scheme on invitation by Liquidator. However, the liquidator informed him of his ineligibility under s. 230 of the Act. His appeal was rejected by NCLAT.

SUMMARY OF SCENARIO III

Axis Telecom Pvt. Ltd. ('Financial creditor'; "Appellant No. 3") had filed a Company Petition under s. 7 of IBC, alleging a default of Rs. 7,71,32,111/- by Danobe Info Technology Ltd. ("Respondent No. 3"), which is an IT services company. After a consent term was executed, the Petition was permitted to be withdrawn. However, Respondent No. 3 committed a 'default' toward making payment per the consent term. Appellant has approached this Hon'ble Court with the prayer to revive the Company Petition.

SUMMARY OF SCENARIO IV

An amount of INR 700 crores was lent to group companies of Vntek Auto Ltd. ('Corporate Debtor'; "Vntek") by VRS Malta Financial Services Ltd. and M&N Finance Ltd. on pledged shares of KMP Auto Ltd.("KMP") held by Vntek. The group companies of Vntek entered into a security trustee agreement with Tipsara MSCL Ltd. and shares of KMP held by them were pledged to secure the loan through a pledge agreement. CIRP was initiated and a RP was appointed. The AA rejected the Appellants' claim as 'financial creditors', which is challenging before this Hon'ble Court.

STATEMENT OF ISSUES

ISSUE A: Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act;

ISSUE B: If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible Under Section 29A of the IBC to submit a 'Resolution Plan'.

ISSUE C: Whether security interest created on the assets of corporate debtor be extinguished even if that interest has been created for the loan availed by the third party, not necessarily by the corporate debtor.

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

SUMMARY OF ARGUMENTS

ISSUE A: In a liquidation proceeding under the insolvency and bankruptcy code, 2016 (hereinafter referred to as the 'IBC'), the scheme for compromise and arrangement is 'permissible' (but contrary to the objective of IBC) to be made under the provisions of sections 230 to 232 of the Companies Act.

i. *Firstly*, Section 230 of Companies Act is incompatible with insolvency proceeding under IBC as it runs counter the objective of achieving a time-bound process of re-organization and insolvency resolution, as it culminates in a never-ending cycle that hinders the timely resolution of entities. However, it is submitted that it legally 'permissible' for a scheme for compromise to be made by a 'liquidator' in an insolvency proceeding.
ii. *Secondly*, the Amendment to Section 230 forges a nexus with the Insolvency and Bankruptcy Code (IBC), thereby rendering it permissible to invoke the provision of Section 230 in the context of a liquidation proceeding.
iii. *Thirdly*, Section 230 makes it 'permissible' for the liquidator to make every attempt to Revive a Company from its Corporate death.

ISSUE B: The promoters, i.e., Appellant No. 1 and 2 are ineligible to propose a compromise and arrangement under Sections 230 to 232 of the Companies Act because:

i. *Firstly*, Section 230 does not specifically mention whether the 'Promoters' can file an application for Compromise and Arrangement.
ii. *Secondly*, the ineligibility of promoters to submit a scheme for compromise and arrangement under sections 230 to 232 of the Companies Act in view of their ineligibility under section 29A of IBC is reinforced by the Amendments to Rule 2B of Liquidation Process Regulations, 2016.
iii. *Thirdly*, back-door entry sought to be prohibited under Section 29A cannot be permitted in a similar situation arising out of the provisions of Section 230. Allowing the Promoter-Appellant to propose a scheme for compromise and arrangement would defeat the purpose of Section 29A and undermine the objectives of the Insolvency and Bankruptcy Code (IBC).

ISSUE C: Security interest created on the assets of corporate debtor ought to be extinguished even if that interest has been created for the loan availed by the third party, not necessarily by the corporate debtor because:

i. *Firstly*, the terms of the Contract do not provide for right of creditor to claim any amount from debtor: Appellants No. 2 & 3 have lent INR seven hundred crores to group companies of Vntek Auto Ltd. ("Vntek") and that loan is secured by the shares of KMP Auto Ltd. ("KMP"), which are held by Vntek. In addition, Appellant No. 1 has not lent any money to the corporate debtors. Therefore, Appellants are not entitled to claim any amount from Kapro Engineering Ltd. ("Kapro") and MLD Investments Pvt Ltd.("MLD").

ii. *Secondly*, there is no promise by Appellant No. 1 to discharge the liability of a third person: It is humbly submitted before this Hon'ble court that Kapro and MLD have pledged shares of KMP held by them to Appellant No. 1 under re-instated pledge agreement. However, the loan of which the shares were pledged as security was already secured by Vntek, and Appellant No. 1 has not entered into an agreement with Appellants No. 2 & 3 to pay the loan in case of default.

iii. *Thirdly*, the Appellants are not financial creditors of Kapro and MLD: The loan given by Appellants No. 2 & 3 to is secured by the pledged shares held by Vntek., and Appellant No. 1 has not lent any amount to corporate debtors. Appellant No. 1 also claimed INR seven hundred crores from corporate debtors, and later, all Appellants have filed their claims. This claim does not come within the purview of section 5(7) read with section 5(8) of Insolvency and Bankruptcy Code, 2016.

iv. *Fourthly*, the corporate debtors are not declared insolvent: The proceeding of insolvency initiated against corporate debtors was stopped due to proposal of various resolution plans. And the same is still on hold. It is therefore humbly submitted before this Hon'ble court that for Appellants, even the cause of action has not arisen. Hence, this appeal ought to be dismissed.

ISSUE D: In the peculiar facts of the present case, the Company Petition was withdrawn after the settlement was arrived at through a consent term, and thus, cannot be reopened because:

i. *Firstly*, CIRP under IBC is not a recovery proceeding.

ii. *Secondly*, since the nature of debt has changed post-settlement, the Company Petition cannot be revived.

iii. *Thirdly*, breach of Consent terms by default in payment towards the fourth tranche does not amount to operational debt for the purpose of CIRP.

iv. *Fourthly*, no liberty has been given to the Appellant to revive the Company Petition.

v. *Fifthly*, there is no specific provision in IBC, 2016 for reopening the Company Petition.

ARGUMENTS ADVANCED

A. IN A LIQUIDATION PROCEEDING UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (HEREINAFTER REFERRED TO AS THE 'I&B CODE'), IT IS 'PERMISSIBLE' TO MAKE A SCHEME FOR COMPROMISE AND ARRANGEMENT THROUGH THE PROVISIONS OF SECTIONS 230 TO 232 OF THE COMPANIES ACT.

1. It is imperative to submit that the question at hand should be answered affirmatively.

2. In relation to the concept of compromise, it is essential to recognize that a "compromise" comes into play when there exists a disagreement or dispute; as the saying goes, "*there can be no compromise unless there is some dispute."* [1] Resolving the said dispute often involves formulating a scheme of compromise. However, it's imperative to highlight that a reasonable compromise cannot be achieved if the scheme compels individuals to entirely relinquish their rights without any form of compensation or reciprocal adjustments. The same viewpoint on this matter was taken by Bowen LJ, who has stated, that "*the object is to enable compromises to be made which are for the common benefit of the creditors, or a class of creditors as such*."[2]

3. It is important to elucidate the provision concerning the Adjudicating Authority's power under Section 230 of the Companies Act. The said provision empowers the company, its liquidator[3] (during winding up or in a liquidation proceeding)[4], as well as any member or creditor belonging to the affected class, to initiate an application before the Tribunal. This application can only be filed by a member or creditor of the class directly impacted by the proposed compromise or arrangement presented by the company. The case of ***Jaypee***

[1] GOGNA P.P.S., A TEXTBOOK OF COMPANY LAW 438 (S. Chand Publishing 2016).
[2] See, Sneath v Valley Gold Ltd, (1893) 1 Ch 477: 68 LT602 (CA), where the word "compromise" appearing in a trust deed was given this meaning; See also NFU Development TrustLtd,re,(1972) 1 WLR1548(Ch D); Alabama,'Neiu Orleans, Texas and Pacific Junction RailwayCo,re, (1891) 1 Ch 213: 64 LT127:7TLR171.
[3] The powers vested in a liquidator are explicitly outlined under Section 33 of the Insolvency and Bankruptcy Code (IBC). The duties assigned to liquidators during the winding-up proceedings are defined in Section 34 of the IBC.
[4] Inserted by the Eleventh Schedule (Sec. 255) to the Insolvency and Bankruptcy Code, 2016, w.e.f. 15.11.2016[S.O. 3453(E) dated 15.11.2016].

Cement Ltd[5] asserts the need for proper classification of members or creditors in a scheme. The court emphasized in this case that dissimilar interests should not be consolidated under one class.[6]

4. Moving on from the aforementioned conceptual background, it is submitted that in the present scenarios, in a liquidation proceeding, a scheme for compromise and arrangement is 'permissible' (though contrary to the objective of IBC) to be made by a 'liquidator'.

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully posited: -

I. SECTION 230 OF COMPANIES ACT IS INCOMPATIBLE WITH INSOLVENCY PROCEEDING UNDER IBC AS IT RUNS COUNTER THE OBJECTIVE OF ACHIEVING A TIME-BOUND PROCESS OF RE-ORGANIZATION AND INSOLVENCY RESOLUTION, AS IT CULMINATES IN A NEVER-ENDING CYCLE THAT HINDERS THE TIMELY RESOLUTION OF ENTITIES.

5. The Insolvency Law Committee ("ILC"), in its report (2020)[7] has recognized the incompatibility of section 230 schemes with the liquidation proceedings under IBC. The ILC 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*". Thus, the report of ILC makes it amply clear that the IBBI in view of the objective of IBC, i.e., a time bound process of re-organization and insolvency resolution, did not envisage the provision of section 230 to be invoked in a liquidation proceeding.

6. It is contended that due to the inherent incongruity between schemes of arrangement and the liquidation procedure, the Committee had put forth a recommendation, which pertains to the restriction of employing Section 230 of the Companies Act, 2013 to facilitate schemes of arrangement or compromise during the phase of corporate debtor liquidation

[5] Jaypee Cement Ltd, re,(2004) 122Comp Cas 854: (2004) 2 CompLJ105(All).
[6] L. Viswanathan, *The `Jaypee Judgement' – Assessing it's impact on the Indian financing landscape*, INDIA CORPORATE LAW (2020), https://corporate.cyrilamarchandblogs.com/2020/03/the-jaypee-judgement-assessing-its-impact-on-the-indian-financing-landscape/ (last visited Aug 11, 2023).
[7] REPORT OF THE INSOLVENCY LAW COMMITTEE MINISTRY OF CORPORATE AFFAIRS GOVERNMENT OF INDIA, (2020), https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf (last visited Aug 11, 2023).

under the Insolvency and Bankruptcy Code.[8]

7. In judicial pronouncements like the ***Swiss Ribbons*** case[9], it has been established that liquidation ought to be regarded as a measure of last resort. Therefore, Sanctioning schemes of arrangement subsequent to the commencement of liquidation runs counter-intuitive to this principle, as it introduces a paradoxical perpetuity, a never-ending cycle in the pursuit of entity resolution, defeating the larger objective of time-bound process of re-organization and insolvency resolution envisioned by IBC.

8. Therefore, it is submitted that originally, it was not contemplated by the legislators to establish a connection between section 230 of the Companies Act and IBC. However, it must be noted that legally speaking, a scheme for compromise and arrangement is permissible. The argument posited above seeks to address the disadvantage, not the legal permissibility of invoking section 230 in insolvency proceeding. Thus, although section 230 runs contrary to the objective of IBC, i.e., of time efficiency, which can be effectively bridged, its disadvantage cannot be countenanced at the cost of death of a Company. Here, the Counsel partially concurs in humble agreement with the learned Counsel for Appellants.

II. THE AMENDMENT TO SECTION 230 FORGES A NEXUS WITH THE INSOLVENCY AND BANKRUPTCY CODE (IBC), THEREBY RENDERING IT PERMISSIBLE TO INVOKE THE PROVISION OF SECTION 230 IN THE CONTEXT OF A LIQUIDATION PROCEEDING.

9. It is submitted that a scheme for compromise and arrangement is permissible in law in a liquidation proceeding in IBC, which has been amplified further by the amendment to section 230[10] of Companies Act, which provides as under:

> "6A. In section 230,—
>
> (a) in sub-section (1), after the word "liquidator", the words "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," shall be inserted;
>
> (b) in sub-section (6), after the word "on the liquidator", the words "appointed under

[8] *Ibid*.
[9] Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors., Writ Petition (Civil) No.99 of 2019.
[10] Inserted by the Eleventh Schedule (Sec. 255) to the Insolvency and Bankruptcy Code, 2016, w.e.f. 15.11.2016[S.O. 3453(E) dated 15.11.2016].

this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," shall be inserted;"

10. This amendment clarifies that the liquidator has also been vested with the right to proceed under Section 230 in an insolvency proceeding. Thus, a scheme can be made during CIRP.

III. SECTION 230 MAKES IT 'PERMISSIBLE' FOR THE LIQUIDATOR TO MAKE EVERY ATTEMPT TO REVIVE A COMPANY FROM ITS CORPORATE DEATH.

11. In ***A. Navinchandra Steels (P) Ltd. v. SREI Equipment Finance Ltd.***[11], the court held that Compromise/arrangement is permissible in law in an IBC proceeding if liquidation is ordered. The court was relying on section 230(1) of the Companies Act, 2013.[12] In this case, the court, while addressing the issue whether CIRP could be initiated after the winding up application had been admitted under the Companies Act. The Court ruled,

> *"...every effort should be made to resuscitate the corporate debtor in the larger public interest, which includes not only the workmen of the corporate debtor, but also its creditors and the goods it produces in the larger interest of the economy of the country."*

12. Thus, it is submitted that upon admission of a liquidation proceeding, any subsequent endeavor to revive the company through a Section 230 application is not impermissible per se.

13. The court in this case also relied on ***Swiss Ribbons (P) Ltd. v. Union of India***[13], wherein it was held that,

> "*The IBC is a special statute dealing with revival of companies that are in the red, winding up only being resorted to in case all attempts of revival fail. Vis-à-vis the Companies Act, which is a general statute dealing with companies, including*

[11] A. Navinchandra Steels (P) Ltd. v. SREI Equipment Finance Ltd., 202 SCC OnLine SC 149.
[12] *Application under S. 7 or S. 9 IBC is an independent proceeding unaffected by winding up proceedings that may be filed qua the same company; Supreme Court | SCC Blog*, SCC BLOG (2021), https://www.scconline.com/blog/post/2021/04/01/application-under-s-7-or-s-9-ibc-is-an-independent-proceeding-unaffected-by-winding-up-proceedings-that-may-be-filed-qua-the-same-company-supreme-court/ (last visited Aug 10, 2023).
[13] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

companies that are in the red, the IBC is not only a special statute which must prevail in the event of conflict, but has a non-obstante clause contained in Section 238, which makes it even clearer that in case of conflict, the provisions of the IBC will prevail.".

14. Extending this analogy, it is argued that Section 230 is also embarks on the same objective, i.e., presenting a last opportunity to revive a Company from its Corporate death, and can be allowed for the same in a liquidation proceeding.

15. However, it is pertinent to state that section 230 cannot be invoked by a Promoter, especially in the present case, by the Promoters who are ineligible under Section 29A of IBC, which has been argued elaborately in the consequent connected issue.

B. THE PROMOTER IS INELIGIBLE TO FILE APPLICATION FOR COMPROMISE AND ARRANGEMENT IN VIEW OF HIS INELIGIBLITY UNDER SECTION 29A OF THE IBC TO SUBMIT A 'RESOLUTION PLAN'.

16. The NCLAT in its Judgments dated 24.09.2022 in the case of ***Mr. Pipara v. DNCL*** and Orders dated 30.09.2022 and 19.11.2022 in ***Mr. Shroff v. Fu-Sam Power Systems Ltd.*** has rightly held that "*promoters who are ineligible to propose a resolution plan under S. 29A of the IBC are not entitled to file an application for compromise and arrangement under ss. 230 to 232 of the Companies Act, 2013*" by following the precedent in the case of ***Mr. Pipara v. Singhania Group of Companies*** dated 25.09.2022, which is equivalent to the judgment in ***Arun Kumar Jagatramka vs Gujarat NRE Coke Ltd***[14].

17. In the present cases, there is no dispute with regard to the ineligibility of the Promoters, Mr. Pipara and Mr. Shroff. Mr. Shroff has incurred disqualification under 29-A(h)[15]. In this regard, it is important to note that if a personal guarantee has been invoked by a creditor, it is adequate to disqualify the person who executed the guarantee. This disqualification persists even if a different creditor files the insolvency resolution

[14] Arun Kumar Jagatramka vs Gujarat NRE Coke Ltd, Company Appeal (AT) (Insolvency) Nos. 55-56 of 2018.
[15] Section 29A(h): "..has executed [a guarantee] in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code [and such guarantee has been invoked by the creditor and remains unpaid in full or part];…".

application. Once an application is accepted, all creditors of the same class gain equal rights. The term "such creditor" in Section 29-A(h) pertains to similarly positioned creditors post application admission. Hence, triggering disqualification under this rule requires just one creditor invoking a personal guarantee, irrespective of the applicant. This has been reiterated in the case of ***Bank of Baroda v. MBL Infrastructures Ltd.***[16]. From this, it can be safely inferred in the facts of the present case, that Mr. Shroff stand indisputably disqualified under section 29-A(h) to submit a resolution plan, and the fact that section 7 application was filed by one of the financial creditors of Fu-Sam does not hold much ground in view of this decision.

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully posited:

I. SECTION 230 DOES NOT SPECIFICALLY MENTION WHETHER THE 'PROMOTERS' CAN FILE AN APPLICATION FOR COMPROMISE AND ARRANGEMENT.

18. The legal definition of "promoter" is explicitly provided in Section 2 (69) of the Companies Act, 2013. This term finds application in various sections of the Act, including Sections 35, 39, 40, 300, and 317. The section defines a promoter as an individual named in the prospectus or identified in the annual returns, or someone exercising direct or indirect control over the company's affairs. The case of ***Bosher v. Richmond Land Co***[17] delineates a promoter as an entity instrumental in incorporating and organizing a corporation. The promoter initiates the assembly of interested parties, facilitates subscriptions, and initiates the process that leads to the corporation's establishment. Notably, if a promoter's contract is ratified by the company after its establishment, the contractual obligations bind the company and not the promoter. This principle is emphasized in Sections 15(h) and 19(e) of the Act.

19. Section 230 empowers the company, its liquidator during winding up, as well as any member or creditor belonging to the affected class, to initiate an application before the Tribunal.

[16] Bank of Baroda v. MBL Infrastructures Ltd., (2022) 5 SCC 661.
[17] Bosher v. Richmond Land Co, 89 Va 455: 16 SE 360.

20. It is pertinent to note the language of **Section 230 of IBC**, which states as follows:-

"Power to compromise or make arrangements with creditors and members

(1) Where a compromise or arrangement is proposed—

(a) Between a company and its creditors or any class of them; or

(b) Between a company and its members or any class of them,

The Tribunal may, on the application of the Company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator [appointed under this Act or under the Insolvency and Bankruptcy Code], 2016 as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs."

21. **It is submitted that as per the language of sec 230 the term promoter is not specifically mentioned in it.** It states only its members, so the question arises whether Promoter is an active member or competent individual to make the scheme of compromise and arrangement. In the present proposition, there is no mention of the promotor being a member of the Company. As a result, a promotor, whether eligible or ineligible under section 29A of IBC, is ineligible under Section 230 of the Companies Act.

22. Moreover, in the case of ***Tecpro Systems Ltd. (in Liquidation) and Kaira Power Ltd.***[18], the NCLT Delhi Bench Court-III has equivocally held at para 25 of its judgment that:

"*…25. Thus, in our view the Scheme under Section 230-232 of Companies Act 2013 for a Corporate Debtor under Liquidation under the provisions of IBC 2016, can only be preferred by the Liquidator."*

Therefore, since only a liquidator can prefer a scheme under section 230, there is no question of an ineligible Promoter to propose a scheme under the said section.

23. Reliance is also placed on the authoritative pronouncement by the Supreme Court in ***Meghal Homes Private Limited v. Shree Niwas Girni K.K. Samiti and Others***[19], wherein it was clarified that Section 230 confers the right upon the liquidator, in cases of winding

[18]Tecpro Systems Ltd. (in Liquidation) and Kaira Power Ltd, Company Application No. CA (CAA) 74(ND)/2021.
[19] Meghal Homes Private Limited v. Shree Niwas Girni K.K. Samiti and Others, (2007) 7 SCC 753.

up, to propose a compromise or arrangement with creditors and members.

II. THE INELIGIBILITY OF PROMOTERS TO SUBMIT A SCHEME FOR COMPROMISE AND ARRANGEMENT UNDER SECTIONS 230 TO 232 OF THE COMPANIES ACT IN VIEW OF THEIR INELIGIBILITY UNDER SECTION 29A OF IBC IS REINFORCED BY THE AMENDMENTS TO RULE 2B OF LIQUIDATION PROCESS REGULATIONS, 2016.

24. It is submitted that the ineligibility of promoters to submit a scheme for compromise and arrangement under section 230-232 of the Companies Act in view of ineligibility under section 29A in the present case is reinforced by the amendments to the Liquidation Process Regulations, 2016, introduced by the IBBI through a notification dated 25 July 2019.

25. The IBBI had issued the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("Liquidation Regulations")[20]. The Liquidation Regulations were amended on July 25, 2019[21], pursuant to which Regulation 2B was inserted in the Regulation. Regulation 2B (1) requires a compromise or arrangement proposed under Section 230 of the Act to be completed within 90 days of the order of liquidation issued under the IBC.

26. On 6th January 2020, the IBBI amended the Liquidation Regulations to make it clear that individuals ineligible under the Code to submit a resolution plan for the corporate debtor's insolvency resolution are also prohibited from submitting any compromise or arrangement scheme (under S. 230) during the liquidation stage.[22] In other words, according to this amendment, any party ineligible to propose a resolution plan under the IBC is barred from participating in a compromise or arrangement.

27. Regulation 2B stated as under:

> "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.

[20] The Liquidation Process Regulations have been issued by the Insolvency and Bankruptcy Board of India22, constituted under Part IV of the IBC, in exercise of the powers conferred by Sections 5, 33, 34, 35, 37, 38, 39, 40, 41, 43, 45, 49, 50, 51, 52, 54, 196 and 208 read with Section 240 of the IBC.
[21] Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.
[22] *Ins. by Notification No. IBBI/2019-20/GN/REG053, dated 6th January, 2020 (w.e.f. 06-01-2020).*

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."

It is notable that this court has affirmed the constitutional validity of Regulation 2B of the Liquidation Process Regulations, specifically the proviso to Regulation 2B(1) in ***Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd. & Anr***[23].

28. The question of whether a former promoter, who is disqualified from participating in the resolution process under the IBC, can propose a compromise and arrangement during the liquidation stage has been resolved by the IBBI. Thus, it is submitted that the 06.01.2020 amendment has effectively barred ineligible promoters from regaining control through indirect means, specifically during the liquidation phase.

29. Even without considering Regulation 2B, the same embargo found in Section 29A and Section 35(1)(f) of the IBC applies to a compromise or arrangement proposed under Section 230 of the Companies Act for a company undergoing liquidation under Chapter III of the IBC. Regulation 2B is merely a clarificatory provision, based on the same principles as Sections 29A and 35(1)(f), which prevent individuals who contributed to the company's financial difficulties from being part of the revival process.

III. BACK-DOOR ENTRY SOUGHT TO BE PROHIBITED UNDER SECTION 29A CANNOT BE PERMITTED IN A SIMILAR SITUATION ARISING OUT OF THE PROVISIONS OF SECTION 230. ALLOWING THE PROMOTER-APPELLANT TO PROPOSE A SCHEME FOR COMPROMISE AND ARRANGEMENT WOULD DEFEAT THE PURPOSE OF SECTION 29A AND UNDERMINE THE OBJECTIVES OF THE INSOLVENCY AND BANKRUPTCY CODE (IBC).

30. The IBC bifurcates the interests of the corporate debtor from that of its promoters or those who are in management. Further, the insertion of provisions like Section 29A ensures a company's viable revival, barring individuals responsible for the issue – whether due to intent or default – from participating in the resolution process.

31. It is submitted that the ineligibility of promoters under Section 29A of the Insolvency and

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

Bankruptcy Code (IBC) is rooted in the principle that those responsible for the company's problems should not be part of the solution. Allowing ineligible promoters to propose a scheme under Sections 230 of the Companies Act would undermine the very purpose of Section 29A and the objectives of the IBC.

32. The liquidation process under the IBC is (obligatorily) preceded by resolution proceedings, which is nothing but another incarnation of schemes of arrangement. As such, back-door entry sought must be restricted in the same vein as for resolution plan.

33. The Supreme Court in ***Swiss Ribbons Pvt. Ltd. vs. Union of India***[24] emphasized the primary object of the IBC legislation, i.e., 'to ensure the revival and continuation of the corporate debtor by safeguarding it from its own management and potential corporate death through liquidation'. It has also been held in ***Chitra Sharma vs. Union of India***[25] and ***ArcelorMittal India Private Limited vs. Satish Kumar Gupta***[26], that Section 29A was introduced with a specific objective: to safeguard creditors' interests and prevent the inclusion of management responsible for the default through indirect means. Therefore, it follows from the above cases, that a person who is the cause of problem cannot be part of the process of solution.

34. The aforesaid judgment makes it clear that even during the period of Liquidation, for the purpose of Section 230 to 232 of the Companies Act, the 'Corporate Debtor' must be shielded from its own management, specifically the ineligible Promoters under Section 29A, thus barring them from seeking approval for Compromise and Arrangement under Sections 230 to 232 of the Companies Act.

35. Moreover, the IBC is an economic legislation with objectives such as promoting good corporate governance, controlling deviant behavior, protecting the integrity of the resolution process, enhancing commercial morality, and fostering respect for the rule of law. Allowing ineligible promoters to participate in the resolution or liquidation process goes against these objectives, and the IBC aims to ensure resolution plans are submitted by credible persons.

36. Section 29A was introduced in the IBC to prevent unscrupulous persons, including

[24] Swiss Ribbons Pvt. Ltd. Vs. Union of India, REED 2019 SC 01504.
[25] Chitra Sharma vs. Union of India, (2018) 18 SCC 575.
[26] ArcelorMittal India Private Limited vs. Satish Kumar Gupta, (2019) 2 SCC 1.

defaulting promoters, from gaining or regaining control of the corporate debtor. This norm extends to both the Corporate Insolvency Resolution Process (CIRP) and the liquidation process under Section 35(1)(f). The underlying purpose of Section 29A continues to apply during liquidation, restricting ineligible persons from bidding for the corporate debtor's assets. The primary objective of Section 29A is to prevent individuals or entities with a history of non-compliance, default, or misconduct from participating in the resolution process. This helps maintain the integrity and credibility of the insolvency resolution process.

37. The proviso to Section 35(1)(f) of the IBC, which deals with 'Powers and duties of Liquidator', also explicitly prohibits the liquidator from selling immovable and movable property or actionable claims of the corporate debtor in liquidation to any individual who is ineligible to be a resolution applicant, as stipulated under Section 29A. This provision further emphasizes the principle that ineligible promoters should not be in control of the assets of the corporate debtor. In other words, ineligible promoters must be precluded from devising a scheme of compromise and arrangement under sections 230 to 232 of the Companies Act due to the prohibition stated in Section 35(f) of the Code, which disallows the sale of assets in Liquidation to such ineligible promoters of the corporate debtor company. The proviso to Section 35(1)(f) is reproduced as below:

> "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."

38. It is submitted that this court has extensively deliberation on the same issue at length. At para 91, the Court in ***Arun Kumar***[27] case, while dismissing the appeal challenging disqualification under section 230 to 232, has held:

> "*…we find that the prohibition placed by the Parliament in Section 29A and Section 35(1)(f) of the IBC must also attach itself to a scheme of compromise or arrangement under Section 230 of the Act of 2013, when the company is undergoing liquidation under the auspices of the IBC."*

39. It is also submitted that Liquidation is a factual situation where the provisions of Section 230 of the Companies Act can be invoked. Since the promoter is ineligible under Section

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

29A, they should logically be ineligible to file an application for compromise and arrangement, as both processes involve restructuring or settling debts, which could compromise the effectiveness of resolution plans.

40. Allowing ineligible promoters to propose a compromise under Section 230 of the Companies Act would create an absurd situation where persons barred from submitting a resolution plan, obtaining assets during liquidation, and taking control of the company as a going concern can still participate in the revival process through a compromise or arrangement. This would perpetrate the mischief which was sought to be obviated. Therefore, a purposive interpretation of the provisions of IBC must be adopted.[28]

41. It is further submitted that Sections 230 to 232 of the Companies Act should be interpreted harmoniously with the Insolvency and Bankruptcy Code (IBC) and not considered as independent provisions. This ensures that the scheme of compromise or arrangement under Section 230 aligns with the underlying principles of the IBC, particularly when the scheme is proposed for an entity undergoing liquidation under Chapter III of the IBC. This approach is supported by the rationale behind Section 29A of the IBC, which prohibits certain persons, including promoters of the Corporate Debtor, from submitting a resolution plan. The objective is to ensure a sustainable revival and prevent those responsible for the problem from being part of the solution, as also stated ***in Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Others***[29]. Therefore, it is submitted that allowing the Promoters to make the scheme for compromise and arrangement would be contrary to core objective of introducing Section 29A in IBC.

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

In order to effectively engage with the issue under consideration, the ensuing arguments are

[28] More recent precedents of this Court continue to adopt a purposive interpretation of the provisions of the IBC. See in this context the judgments in Phoenix ARC Private Limited v. Spade Financial Service, 2021 SCC OnLine SC 51 at paragraphs 103-104; Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt Ltd., C.A. No. 4050 of 2020, decided on 9 February 2021, at paragraphs 23 and 25; and Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited, (2020) 8 SCC 401, at paras 28.4 and 28.5.

[29] ArcelorMittal India Private Limited vs. Satish Kumar Gupta, (2019) 2 SCC 1.

respectfully posited:

I. THE TERMS OF THE CONTRACT DO NOT PROVIDE FOR RIGHT OF CREDITOR TO CLAIM ANY AMOUNT FROM DEBTOR.

42. It is humbly submitted before this Hon'ble Apex court that VRS Malta Financial Services Ltd (herein, "Appellant No. 2" for the present Issue pertaining to Scenario IV) & M&N Finance Ltd. (herein, "Appellant No. 3" for the present Issue pertaining to Scenario IV) have lent Rs. 7,00,00,00,000/ (seven hundred crores) to the group companies of Vntek Auto Ltd. ("Vntek"),[30] namely, Kapro Engineering Ltd. ("Kapro") and MLD Investments Pvt Ltd.("MLD")[31] In lieu of the loan, Vntek pledged 1,72,46,100 equity shares of KMP Auto Ltd. ("KMP") having a face value of INR 3/ each held by Vntek.[32] further, Kapro and MLD entered into an agreement with Tipsra MSCL India Ltd. (herein, "Appellant No. 1" for the present Issue pertaining to Scenario IV). This agreement was signed separately with each of the two, i.e., Kapro and MLD for INR 140,00,00,000/.[33] In addition, Appellant No. 1 entered into another agreement with Kapro for INR 2,00,00,00,000/. All of these agreements were called "Security Trustee Agreements".[34] Thereafter, Kapro and MLD pledged their 66.7% shareholding of KMP to Appellant No. 1 for the loan facility availed by them from Appellants No. 2 & 3.[35]

43. According to section 172 of the Indian Contract Act, 1872, "The bailment of goods as security for payment of a debt or the performance of the promise, is called a "pledge".[36] In the light of this section and the fact of the present case, it is established that the shares pledged by Vntek to Appellants No. 2 & 3 come under the purview of this section. In addition, in the case of ***PTC India Financial Services Limited v. Venkateswarlu Kari and Another***,[37] the Hon'ble Supreme Court held that "*As per Section 172, creating a valid pledge requires delivery of the possession of goods by the pawnor to the pawnee by way of*

[30] Moot Proposition, Para 31.
[31] *Ibid.*
[32] *Ibid.*
[33] Moot Proposition, Para 32.
[34] *Ibid.*
[35] *Ibid.*
[36] The Indian Contract Act, s 172.
[37] PTC India Financial Services Limited v. Venkateswarlu Kari and Another, (2022) 9 SEE 70; See also M.R. Dhawan v. Madan Mohan and Others, 1969 SCC OnLine Del 36; Rani Leasing & Finance Ltd v. Sanjay Khemani, (2015) 150 AIC 278; Haridas Mundra v. National and Grind-Lays Bank Ltd, 1962 SCC OnLine Cal 184; Kannambra Nayar Veetil Valia Ammukutti Neithiar's Son Kunhunni Elaya Nayar Avargal (Deceased) and Another v. P.N. Krishna Pattar and Two Other, 1942 SCC OnLine Mad 126.

security upon the promise of repayment of a debt or the performance of a promise, thereby, creating an estate that vests with the pawnee".[38] In addition, the section 174 of The Indian Contract Act, 1872 provides that "The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee."[39] This establishes three points:

1) The shares pledged to Appellant No. 1 are not for any debt given by him to Kapro and MLD;
2) The loan given by Appellants No. 2 & 3 to Kapro and MLD is secured by the pledged shares of Vntek;
3) There is no subsequent loan given by Appellant No. 1 to Kapro and MLD.

44. As per the facts and the relevant law, it is established that Appellants No. 2 & 3 have fulfilled their promise to extend the loan to the group companies of Vntek, and Vntek is under the responsibility that if its group companies do not pay their debts; it may face either of two consequences as laid down under section 176[40] of The Indian Contract Act, 1872:

i. The pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or
ii. He may sell the thing pledged, on giving the pawnor reasonable notice of the sale.[41]

In addition, the shares pledged by Kapro and MLD to Appellant No. 1 are neither for a debt given by Appellant No. 1 and nor for the debt given by Appellants No. 2 & 3.

45. Appellants No. 2 & 3 have not approached Vntek to pay the debt. Moreover, Appellants No. 2 & 3 have approached the Kapro and MLD to claim the status of financial creditors.[42] This claim does not come under the purview of section 176 of the Indian Contract Act, of 1872. In addition, Appellant No. 1 also filed a separate claim (earlier) to claim the status

[38] The Companies Act, 2013, S 44.
[39] The Indian Contract Act, 1872, S 174.
[40] The Indian Contract Act, 1872, S 176.
[41] *Ibid.*
[42] Moot Proposition, Para 36.

of financial creditor[43] even without lending any money to the corporate debtors.[44] It is therefore humbly submitted before this Hon'ble Apex court that the present Appeal ought to be dismissed.

II. THERE IS NO PROMISE BY APPELLANT NO. 1 TO DISCHARGE THE LIABILITY OF A THIRD PERSON.

46. It is humbly submitted before this Hon'ble Apex court that Appellants No. 2 & 3 have given loans to the group companies of Vntek. The loan is given on account of pledged shares of KMP held by Vntek and the terms of the contract do not provide that if the group companies of Vntek, namely, Kapro and MLD make default in paying the debt, the Appellant No. 1 namely, Tipsra MSCL (India) Ltd shall pay the loan on behalf of Kapro and MLD.

47. Section 126 of the Indian Contract Act, 1872 provides that "A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"."[45] In addition, in the case of ***Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel***,[46] while deciding the case of the same facts, this Hon'ble court observed,

> "*As is clear from the definition a "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The present is not a case where the corporate debtor has entered into a contract to perform the promise or discharge the liability of the borrower in case of his default. The pledge agreement is limited to pledge*."

48. The agreement between Kapro and MLD and Appellant No. 1 is of pledge. There is no agreement between Appellant No. 1 and Appellants No. 2 & 3 that if corporate debtors

[43] Moot Proposition, Para 34.
[44] *Supra* note 42.
[45] The Indian Contract Act, 1872, S 126.
[46] Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel, (2021) 2 SEE 799; See also Maitreya Doshi v. Anand Rathi Global Finance Ltd. and Another, 2022 SCC OnLine SC 1276; Jagjivandas Jethalal and another v. King Hamilton & Co., 1931 SCC OnLine Bom 8; Maharashtra State Warehousing Corporation, through its Storage Superintendent and Another v. Pusad Urban Co-operative Bank Ltd., through its Chief Executive Officer/Branch Manager and Others, (2023) 1 Mah LJ 117; Ajoy Khanderia v. Barclays Bank And Another, AIR 2021 Del 141.

make a default in paying the debt, Appellant No. 1 shall pay the debt to Appellants No. 2 & 3. However, such an agreement exists between Vntek and Appellants No. 2 & 3.

49. Appellant No. 1 has neither lent any money to the corporate debtor nor promised to Appellants No. 2 & 3 to pay their loan in case corporate debtors make default in paying such loan. It is therefore humbly submitted before this Hon'ble Apex court that the claim of Appellant No. 1 ought to be dismissed.

III. THE APPELLANTS ARE NOT FINANCIAL CREDITORS OF KAPRO AND MLD.

50. It is humbly submitted before this Hon'ble Apex court that Kapro and MLD owe INR seven hundred crores to Appellants No. 2 & 3.[47] And the same debt is secured by the pledged shares of KMP held by Vntek. Further, Appellant No. 1 has not lent any money to Kapro and to MLD.[48] In addition, Appellant No. 1 filed a claim of INR seven hundred crores which was rejected by the resolution professional,[49] then all the Appellants filed their claim against Kapro and MLD.

51. Section 5(7) of the Insolvency and Bankruptcy Code, 2016 defines the financial creditor as "financial creditor" which means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred." In addition, in the case of ***Anuj Jain Interim Resolution Professional for Jay pee Infratech Limited v. Axis Bank Limited***,[50] while deciding the same question in the same facts, this Hon'ble court held that:

> "*the financial creditors are the only stakeholders who would be concerned and concomitant to the resurgence and restructuring of the Corporate Debtor. A secured creditor may only have an interest in realizing the value of its security and, therefore,*

[47] Moot Proposition, Para 1.
[48] Moot Proposition, Para 36.
[49] Moot Proposition, Para 34.
[50] Anuj Jain Interim Resolution Professional for Jay pee Infratech Limited v. Axis Bank Limited, (2020) 8 SEE 401; See also Maitreya Doshi v. Anand Rathi Global Finance Ltd. and Another, 2022 SCC OnLine SC 1276; Orator Marketing Private Limited v. Samtex Desinz Private Limited, (2023) Supreme Court Cases 753; Bank of Baroda And Another v. MBL Infrastructure Limited And others, 2022 SCC OnLine SC 48; South City Projects (Kolkata) Ltd. v. Ideal Real Estates Pvt. Ltd., AIR 2021 Cal 217; Babulal Varoharji Gurjar v. Veer Gurjar Alumnum Industries Private Limited And Another, 2020 SCC OnLine SC 647; Jaypee Kensinghton Boulevard Appartments Welfare Association And Others v. MBCC (India) Limited And Others, (2022) 1 Supreme Court Cases 401.

will not have a stake or interest in Corporate Debtor's revival or equitable liquidation, while a financial creditor, apart from looking for safeguards of its interests, will also be simultaneously interested in the revival and growth of the Corporate Debtor.".

52. Appellants No. 2 & 3 have neither filed any suit against Vntek nor they are financial creditors of Kapro and MLD. Further, Appellant No. 1 has neither given any loan to Kapro and MLD nor he is liable to pay the debts of Appellants No. 2 & 3 in case corporate debtors commit default. And all the Appellants have filed their claims to corporate debtors.

53. It is therefore humbly submitted before this Hon'ble Apex court that in the situation where neither of the Appellants is entitled to claim any debt from the corporate debtors I.e. Kapro and MLD, their claim is erroneous. Hence, this appeal ought to be dismissed.

IV. THE CORPORATE DEBTORS ARE NOT DECLARED INSOLVENT.

54. It is humbly submitted before this Hon'ble court that on June 24, 2020, Corporate Insolvency Resolution Process was initiated against the Corporate Debtors i.e., Kapro and MLD under the provisions of the Insolvency and Bankruptcy Code, 2016 wherein Mr. Kasi Nayinar Pararacacekaran ("Respondent No. 4") was appointed as the interim resolution professional and he was subsequently confirmed as the resolution professional.[51] Then Appellant No. 1 filed a claim of INR seven hundred crores against corporate debtors which was rejected by resolution professional.[52] It is also significant to note that the insolvency proceedings were stopped for the reason of different resolution plan proposals and are still stopped.[53]

55. Section 30(2) of Insolvency and Bankruptcy Code, 2016 says that "(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor; (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than— (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under Section 53; or (ii)

[51] *Supra* note 49.
[52] Moot Proposition, Para 35.
[53] Moot Proposition, Para 36-37.

the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53, whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the corporate debtor."[54]

56. If the proceedings take place for insolvency, then the question of the entitlement of Appellants may arise. However, when the resolution professional is trying to revive the company, at that point the claims of the Appellant do not come under the purview of section 30(2) of the Insolvency and Bankruptcy Code, 2016. In addition, the supreme court in ***M/S Vistra ITCL (India) Ltd & Ors. v. Mr. Dinkar Venkatasubramanian & Anr.***,[55] held that:

> *"by virtue of a security created by a corporate debtor in favour of a lender to secure the loan facility advanced to a third-party, even though the lender would be considered as a secured creditor of the corporate debtor, however, the lender would not be considered as a financial creditor and would not form part of the Committee of Creditors of the Corporate Debtor."*

57. In the light of aforesaid arguments, it is established that the Appellants are not entitled to claim any amount against corporate debtors. In addition, Appellants No. 2 & 3 can claim their amount from Vntek on account of pledged shares, and Appellant No. 1 may not claim any amount from corporate debtors. It is therefore humbly submitted before this Hon'ble Apex court that this appeal filed by the Appellants ought to be dismissed.

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

58. The Adjudicating Authority has rightly rejected the Petitioner's Interim Application seeking revival of the Insolvency Proceeding on 21st December 2022. It is submitted that in the peculiar facts of the present case, the Company Petition was withdrawn after the

[54] Insolvency and Bankruptcy Code, 2016, S 30(2).
[55] M/S Vistra ITCL (India) Ltd & Ors. v. Mr. Dinkar Venkatasubramanian & Anr., Civil Appeal No. 3606 of 2020.

settlement was arrived at through a consent term, and cannot be reopened.

59. At the outset, it is pertinent to mention that the withdrawal of the Company Petition on the application of the suspended director by the Adjudicating Authority vide Order dated 09.02.2022 has been validly permitted. The Suspended Director, who was the applicant, was entitled to withdraw the Company Petition in accordance with the Order dated 09.02.2022. It cannot be stated that since the CoC was not constituted, the withdrawal would become invalid. In fact, the Appellate Tribunal itself issued a direction to refrain from constituting the CoC till the disposal of the Section 12A Application.[56] In the landmark judgment of ***Swiss Ribbons (P) Ltd. v. Union of India***[57], the Supreme Court discussed the stage at which a withdrawal application can be made. The Court clarified that if the CoC is not yet constituted, a party can directly approach the NCLT, which, in the exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, can allow or disallow the withdrawal or settlement application after considering all relevant factors and hearing all concerned parties.[58]

60. Moreover, in ***Abhishek Singh vs. Huhtamaki PPL Ltd. and Ors.***[59], it has been held that an application for the withdrawal of the CIRP under Section 12A of the Insolvency and Bankruptcy Code, 2016 (IBC) can be allowed by the Adjudicating Authority even before the formation of the committee of creditors (CoC)[60]. This decision is based on the provisions of Regulation 30A of the Insolvency Resolution Process for Corporate Persons, 2018 (IBBI Regulations).[61] Therefore, based on the Hon'ble Supreme Court's ruling and the subsequent amendment to the Regulations, it is established that applications for withdrawal can be made and processed even before the formation of the CoC.

In order to effectively engage with the issue under consideration, the ensuing arguments are respectfully posited:

---

[56] Moot Proposition, Para 29.
[57] Swiss Ribbon Pvt. Ltd. Vs. Union of India, (2019) 4SCC 17.
[58] Bhumika Indulia, Withdrawal under Section 12-A IBC: Remedial Mechanism in the Interest of Stakeholders | SCC Blog, SCC Blog (2022), https://www.scconline.com/blog/post/2022/09/15/withdrawal-under-section-12-a-ibc-remedial-mechanism-in-the-interest-of-stakeholders/ (last visited Aug 6, 2023).
[59] Abhishek Singh vs. Huhtamaki PPL Ltd. and Ors., MANU/SC/0312/2023.
[60] Section 12A of IBC does not debar entertaining of applications for withdrawal of CIRP even before constitution of CoC, Manupatra.com (2023), https://updates.manupatra.com/newsroom/contentsummary.aspx?iid=42457&text= (last visited Aug 6, 2023).
[61] JSA Prism (Insolvency) - February 2023 - JSA, JSA (2023), https://www.jsalaw.com/newsletters-and-updates/jsa-prism-insolvency-february-2023-4/ (last visited Aug 6, 2023).

I. IBC IS NOT A RECOVERY PROCEEDING

61. It is submitted that the Insolvency and Bankruptcy Code (IBC) does not function as a recovery mechanism where a party can repeatedly approach the Adjudicating Authority to recover the same amount of money that has not been received or part of it, as in the present matter. The remedy for recovery of the fourth tranche from the Corporate Debtor may lie in some other forum and is certainly not admissible through a revival of the Company Petition before this Hon'ble Court. It is pertinent to note that IBC proceedings are not the same as debt recovery proceedings.

62. The NCLT, in ***M/s. Ahluwalia Contracts (India) Ltd. v. M/s. Jasmine Buildmart Pvt. Ltd.***[62] in its judgment has notably stated, *"It is no more res integra that IBC is not a recovery proceeding where because the money or part of it has not come, the party may repeatedly come to the Adjudicating Authority for the recovery of the same amount."*

63. This Hon'ble Court in its Order dated 25.04.2022 in ***M/s. Invent Asset Securitisation and Reconstruction Private Limited v. M/s. Girnar Fibres Limited***[63] observed that time and again, it has been expressed and explained by this Court that the purpose of the provisions of IBC are essentially intended to rehabilitate the corporate debtor and are not merely that of recovery of money proceedings.

64. Moreover, in ***Permali Wallace Pvt. Ltd. Vs. Narbada Forest Industries Pvt. Ltd.***[64], an Application was filed under Section 9 in 2017 which was withdrawn after the parties entered into a settlement agreement for payment of a certain principal amount and interest. However, there was a default in payment of the interest amount, and thus the Section 9 Application was filed again, which was rejected by the Adjudicating Authority. The Appellant challenged the order, contending that the settlement agreement allowed for the revival of the Section 9 Application in case of any breach. The Hon'ble NCLAT New Delhi in this case held that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application. The court cited the decision in ***Swiss Ribbon Pvt. Ltd.***

[62] M/s. Ahluwalia Contracts (India) Ltd. v. M/s. Jasmine Buildmart Pvt. Ltd ., Company Petition No. IB-1941(ND)/2019, Para 12.
[63] M/s. Invent Asset Securitisation and Reconstruction Private Limited v. M/s. Girnar Fibres Limited , Civil Appeal No. 3033/2022.
[64] Permali Wallace Pvt. Ltd. Vs. Narbada Forest Industries Pvt. Ltd, Company Appeal (AT) (Insolvency) No. 36 of 2023.

v. Union of India[65], which held that the IBC is not a recovery proceeding, and that the Application in the present case was only for the recovery of the balance amount of interest and not for the resolution of any insolvency of the Corporate Debtor. Therefore, the court concluded that the Adjudicating Authority was correct in rejecting the Section 9 Application filed by the Appellant.[66] Similarly, in the case of ***Vaishno Industries Pvt Ltd v. Horizon Global Ltd***[67], the NCLT Delhi dismissed the request for revival of the application and, instead, provided the Operational Creditor with the liberty to submit a new application.

II. SINCE THE NATURE OF THE DEBT CHANGES POST THE SETTLEMENT OF THE DEBT, THE COMPANY PETITION CANNOT BE REVIVED.

65. Based on the available records, it is essential to highlight that both parties reached a settlement agreement to resolve the outstanding financial debt. The moment this settlement agreement was made, the nature of the debt shifted from being a financial debt, as defined in Section 5(8) of the Code, 2016, to a mere debt under the definition provided in Section 3(11) of the same Code. Therefore, the amount outstanding after the settlement can only be considered a 'debt' resulting from the agreement between the parties and does not retain its original classification as financial debt. More so, unpaid installments cannot be treated as 'financial debt'.

66. Recently, vide an order dated 4 May 2023 passed by the NCLT, Delhi, in the case of ***Finsbury Global FZE v. M/s Uttam Sucrotech International Pvt. Ltd.***[68]**,** it was held therein that the nature of the debt changes post settlement. In this case, 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 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. If the above view of the NCLT is followed, then as a natural corollary, it follows that mechanisms under IBC

[65] Swiss Ribbon Pvt. Ltd. Vs. Union of India, (2019) 4SCC 17.
[66] See para 5, Order dated 17.01.2023 in Permali Wallace Pvt. Ltd. v. Narbada Forest Industries Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 36 of 2023.
[67] Vaishno Industries Pvt Ltd v. Horizon Global Ltd , MANU/NC/3122/2020.
[68] 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.

cannot be resorted to 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.

67. A similar view has been taken by NCLT Allahabad in the case of ***Delhi Control Devices(P) Limited v. Fedders Electric and Engineering Ltd.,*** wherein it was held that "*unpaid instalments as per a Settlement Agreement cannot be treated as operational debt*" under Section 5(21) of the IBC as the failure/breach of the Settlement Agreement cannot be grounds for triggering the CIRP against the corporate debtor under the provisions of the IBC.

III. BREACH OF CONSENT TERMS BY DEFAULT IN PAYMENT TOWARDS THE FOURTH TRANCHE DOES NOT COME WITHIN THE AMBIT OF FINANCIAL DEBT FOR THE PURPOSE OF CIRP.

68. In a catena of judgments, this Tribunal has held that breach of the terms and conditions of payment according to a Settlement Agreement does not come within the purview of the Operational Debt as defined under the IBC, 2016 and it cannot be a ground to trigger CIRP against the Corporate Debtor.

69. Recently Hon'ble NCLT New Delhi Bench in the matter titled ***'Bajaj Rubber Company Private Limited Vs Sarawati Timber Private Limited[69]'*** has declined to revive a petition filed under Section 9 of IBC, which was earlier withdrawn due to the Settlement Agreement being entered upon between the parties and later settlement had failed. The Court reaffirmed that violating the terms of a Settlement Agreement doesn't fall within the scope of 'Operational Debt' under IBC, and hence, cannot be a basis to initiate CIRP. In the instant case, the corporate debtor failed to comply with the terms of the settlement agreement dated 17.01.2019, leading to dishonoring of several cheques. Consequently, the operational creditor sought to revive the application, citing a breach of the settlement agreement as the reason. The main issue before the court was whether the default in payment under the settlement agreement could be considered an operational debt under Section 5(21) of the IBC and whether it could be used as a basis to trigger CIRP against

[69] 'Bajaj Rubber Company Private Limited Vs Sarawati Timber Private Limited, (2022) ibclaw.in 761 NCLT.

the corporate debtor.

70. The court's decision in the above case was influenced by the judgment of NCLT Allahabad Bench in ***M/s Delhi Control Devices Ltd Vs M/s Fedders Electric and Engineering Ltd***,[70] where it was held that unpaid installments under a settlement agreement do not qualify as operational debt under Section 5(21) of the IBC. The court, in the present case, concluded that a breach of the settlement agreement by the corporate debtor could not be used as a ground to initiate the Corporate Insolvency Resolution Process under the provisions of the IBC. Therefore, the court declined the applicant's prayer and rejected the present application, indicating that the default in payment of the settlement agreement did not fall under the definition of operational debt as per the IBC. A similar view was taken in the matter of ***Nitin Gupta vs International Land Developers Private Limited***[71].

71. At this juncture, it is worthwhile referring to the Judgment of NCLT, Delhi, Court V passed in the matter of ***M/s. Alhuwalia Contracts (India) Ltd. Vs. M/s. Logix Infratech Private Limited***[72], which reads as below:

> *"Operational Debt means a claim in respect of provision of goods or services including employment. Now we consider the case of the Applicant and we observe, the claim of the applicant do not fall either under the category of the supply of the goods or service rendered by the Corporate Debtor. Rather the claim of the Applicant is based on the breach of terms and conditions of the settlement agreement, on the basis of which the Applicant has claimed that there is a default in payment of the amount as referred to part IV of the application. And the second part of the Operational debt says a debt in respect of payment dues arising under any law for the time being enforced. Admittedly the claim of the Applicant also does not come under this part of the definition of the Operational debt."*

72. The above controversy was also resolved by the judgment of NCLAT, Delhi, passed in the matter of ***Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd.***[73], wherein while discussing this issue, it was observed that a mere obligation to pay does not bring the

[70] M/s Delhi Control Devices Ltd Vs M/s Fedders Electric and Engineering Ltd, Company Petition (IB) No. 343/ALD/2018.
[71] Nitin Gupta vs International Land Developers Private Limited, IB No. 507/ND/2020.
[72] M/s. Alhuwalia Contracts (India) Ltd. Vs. M/s. Logix Infratech Private Limited in (IB)- 882/ND/2022, dated 03.06.2022, Para 15.
[73] Amrit Kumar Agrawal vs. Tempo Appliances Pvt. Ltd [Company Appeal (AT) (Insolvency) No. 1005 of 2020.

liability within the ambit of 'financial debt' as defined under IBC. The debt, along with interest, if any, should be disbursed against the consideration for the time value of money. Mere breach of terms of any agreement including a Settlement Agreement by a party, whereby some payment was due, would not fall within the scope of Section 5(8) of IBC, so as to constitute a 'Financial Debt'. Accordingly, it was observed that mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money, and thus, breach of such obligation would not entitle a party to invoke CIRP against the other party. It was also observed that dishonour of cheques handed over pursuant to the settlement agreement cannot be termed as a financial debt.[74]

73. Applying this principle decided in the matters referred to Supra, it is submitted that the case of the Respondent is also covered with the aforesaid decision. Therefore, the default of payment of settlement agreement do not come under the definition of financial debt. Hence, this Hon'ble court may be pleased to disallow the prayer of the Appellant.

IV. NO LIBERTY HAS BEEN GIVEN TO REVIVE THE COMPANY PETITION.

74. On mere perusal of the order dated 09.02.2022, it is evident that the Company Petition was allowed to be withdrawn on the submissions of the suspended Director only and no liberty was granted by this Adjudicating Authority to restore the application.

75. In a case with similar facts, the Hon'ble National Company Law Appellate Law Tribunal (NCLAT), New Delhi, in ***SRLK Enterprises LLP vs Jalan Transolutions India Ltd***[75], refusing to recall the petition, has held as follows;

> *"We notice that vide order dated 09.05.2019 passed by this Bench, the petition was withdrawn at the instance of the Financial Creditor, and the CIRP was terminated. We further notice that no liberty was given to the Petitioner to revive the application. So, considering this, we are of the considered view that since this Adjudicating Authority was not part of the settlement arrived at between the parties, rather the*

[74] Effect of Breach of Settlement Agreement Under IBC, SINGHANIA & PARTNERS (2022), https://singhania.in/blog/effect-of-breach-of-settlement-agreement-under-insolvency-bankruptcy-code (last visited Jul 28, 2023).
[75] SRLK Enterprises LLP vs Jalan Transolutions India Ltd, Company Appeal (AT) (Ins) No. 294 of 2021, Para 5.

settlement was arrived outside the Tribunal. It was on the submissions of the Applicant; the main petition was dismissed as withdrawn and the CIRP was terminated. Therefore, we have no reason to recall our earlier order. Accordingly, the prayer of the Applicant to recall the earlier order is hereby rejected."

76. It is submitted that there was no liberty granted in the order dated 09.02.2022 to revive CIRP, hence, the Adjudicating Authority has rightly rejected the application for revival. Reference can be made to the judgment of this Tribunal in '***Krishna Garg and Anr. v. Pioneer Fabricators Pvt. Ltd.***[76]', which fully supports this proposition. In para 3 of this judgment, it has been stated:

"*It cannot be said that the Settlement Terms not incorporated in the order of the Adjudicating Authority assumed the character of the decree of the Court, breach whereof would entitle the Appellants-Financial Creditors to come back and seek restoration/ revival of CIRP."*

V. NEITHER THE CONSENT TERM CONTEMPLATES A 'REVIVAL CLAUSE' NOR THE IBC ENTAILS A SPECIFIC PROVISION FOR THE REOPENING OF THE COMPANY PETITION.

77. It is submitted that the Consent term in the present case nowhere expressly stipulates a 'revival clause'. A strong presumption is drawn towards the absence of a revival clause based on the Moot Proposition. As such, in the absence of a revival clause, the Company Petition cannot be revived. Thus, the Financial Creditor cannot seek revival of the **Section 7** petition in the event of default of consent terms.

78. The corollary of this has been held in ***IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd.***[77]**,** wherein the NCLAT has held that when consent term itself contemplates a clause for revival in the event of default having been committed by the Corporate Debtor, the CIRP can be reinstated; meaning thereby, that when does not contemplate a revival clause, there cannot be a revival. The ratio, in this case, is thus, not applicable to the present

[76] Krishna Garg and Anr. vs. Pioneer Fabricators Pvt. Ltd, Company Appeal (AT) (Insolvency) No. 117 of 2023.
[77] IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd, 2023 SCC OnLine NCLAT 225.

case.[78]

79. It is lastly submitted that there is no Specific Provision in IBC, 2016 for reopening the Company Petition. In other words, once an insolvency petition has been withdrawn after settlement, there is no specific provision in the Code allowing the revival or reopening of an insolvency application in a Company Petition. Thus, the present Civil Appeal seeking revival of the Company Petition ought to be dismissed.

[78] Ritu, Insolvency proceeding can be restored when Consent term entered between parties includes a revival clause: NCLAT, SCC BLOG (2023), https://www.scconline.com/blog/post/2023/06/09/nclat-allows-revival-of-cirp-process-scc-blog-legal-news-research/ (last visited Jul 28, 2023).

THE PRAYER

Wherefore, in light of issues raised, arguments advanced, and authorities cited, this Hon'ble Court may be pleased to:

1. **UPHOLD** the Judgment dated 24.09.2022 of NCLAT in *Mr. Pipara* v. *Singhania Group of Companies*.
2. **DISMISS** the present Appeal of Mr. Pipara ("Appellant No. 1") and Mr. Shroff ("Appellant No. 2").
3. **DECLARE** Appellant No. 1 and Appellant No. 2 ineligible under section 230 to 232 of the Companies Act in view of their ineligibility under Section 29 A of IBC to propose a scheme for compromise and arrangement.
4. **DECLARE** that Tipsara MSCL (India) Ltd. ("Appellant No.4") does not come within the purview of 'financial creditor'.
5. **DECLARE** that Appellant No. 4 is barred from raising the present Appeal as the claim form rejected by Respondent No. 4 was not challenged before the Adjudicating Authority.
6. **UPHOLD** the Order of the Adjudicating Authority dated 21.12.2022.
7. **REJECT** the Appeal of Axis Telecom Pvt. Ltd. ("Appellant No. 3") seeking revival of the Company Petition.

AND / OR

Pass any order, direction, or relief that this Hon'ble Court may deem fit in theinterest of Justice, Equity and Good Conscience.

For this act of kindness, the counsels on behalf of the Respondents shall duty bound forever pray.

Sd/-

(COUNSELS FOR THE RESPONDENTS)