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VI SURANA & SURANA AND UPES SCHOOL OF LAW,

NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION 2023

BEFORE THE HON'BLE SUPREME COURT OF MALTA

IN THE APPEAL UNDER SECTION 62 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

CIVIL APPEAL NO. ___ OF 2023

AGAINST THE ORDER OF THE HON'BLE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

IN THE MATTER OF-

MR. PIPARA…….....*APPELLANT*

VERSUS

DEORA NRE COKE LTD. …….……. ……*RESPONDENT*

&

MR. SHROFF…….*APPELLANT*

VERSUS

FU-SAM POWER SYSTEMS LTD. THROUGH UDIT KUMAR RALHAN, LIQUIDATOR……..……*RESPONDENT*

&

AXIS TELECOM PRIVATE LIMITED …… …….*APPELLANT*

VERSUS

DANOBE INFO TECHNOLOGY LIMITED ……*RESPONDENT*

&

TIPSRA MSCL (INDIA) LIMITED & ORS. ……*APPELLANT*

VERSUS

VNTEK AUTO LIMITED …… ……..…….*RESPONDENT*

[THE ABOVE MATTERS HAVE BEEN CLUBBED UNDER ARTICLE 145 OF THE CONSTITUTION OF INDIA, 1949, READ WITH RULE 3 OF ORDER LV OF THE SUPREME COURT RULES, 2013]

-WRITTEN SUBMISSION FOR RESPONDENT-

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TABLE OF ABBREVIATIONS

ABBREVIATIONS	WORDS
&	And
¶	Paragraph
§	Section
r/w	Read with
u/s	Under Section
Act	The Companies Act, 2013
Art	Article
CD	Corporate Debtor
CoC	Committee of Creditors
Code	Insolvency and Bankruptcy Code 2016
FC	Financial Creditor
HC	High Court
Hon'ble	Honourable
IBBI	Insolvency and Bankruptcy Board of India
IRP	Insolvency Resolution Process
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
OC	Operational Creditor
S.	Section
SC	Supreme Court
v.	Versus

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D. IMPORTANT DEFINITIONS

1. **DNCL:** Deora NRE Coke Ltd is a private company and is registered at the Registrar of Companies, Melvi. It is one of the largest metallurgical coke manufacturers in the country with an installed capacity of 1.18 MTPA. The company also generates electricity through wind power projects with an installed capacity of 87.5 MW. DNCL is a major company in Darbhanga district of Devkhand in the metcoke sector which is operational and has the largest industrial setup both in terms of manpower and scale of operations
2. **SGOC:** Singhania Group of Companies s was established in the year 1993 and forms a part of the Singhania Group LLP. The company is a leading player in the Steel, Power, Mining, Oil & Gas, and infrastructure industries. It produces economical and efficient steel and power through backward integration from its own captive coal and iron–ore mines and passes on the benefits to its customers. It is an unsecured Operational Creditor of DNCL.
3. **Fu-Sam:** Fu-Sam Power Systems Limited provides a one stop solution for all types of power backup issues for both domestic and industrial markets. Their focus is on solar power which is an eco-friendly energy solution. Being one of the biggest names in the power back up industries of India, Fu-Sam is spread in more than 90 countries worldwide.

4. **ATPL: (**Axis Telecom Pvt. Ltd.) is a company established in the year 1993 and is Asia's leading integrated telecom services provider with operations in Malta and Tri Lanka. It has been at the forefront of the telecom revolution and has transformed the sector with its world–class services built on leading edge technologies. Part of ATPL's success is due to its excellent relations with the customers.

STATEMENT OF JURISDICTION

The Respondent humbly submit before the Hon'ble Supreme Court of Malta, the Memorandum for the Respondent as Civil Appeal no. __of 2023 u/s. 62 of the Insolvency and Bankruptcy Code, 2016.

Section 62 of the Insolvency and Bankruptcy Code, 2016 reads as

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

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

The present memorial sets forth the facts, contentions, and arguments in the present case in the jurisdiction of the Respondent.

STATEMENT OF FACTS

SCENARIO – I

Mr. Pipara, a promoter of DNCL, submitted a resolution plan for DNCL on 1st October 2020, which was presented by the Resolution Professional before the Committee of Creditors. The plan was to be put to a vote in a meeting of the CoC scheduled on 23-24 October 2020. Before the conclusion of the voting, he was informed that he is ineligible u/s 29A of the Code of 2016 to submit a resolution plan, and is also barred from proposing a scheme of compromise and arrangement u/s 230 of the Companies Act, 2013. The decision of the NCLAT dated 24th September 2022 is challenged in the appeal before this Court.

SCENARIO – II

The Appellant- Mr. Shroff was the promoter and director of Fu-Sam Power Systems Limited. As a part of the CIRP that was ongoing since 5th March 2021, Mr. Shroff submitted a Resolution Plan. Mr. Shroff was informed by an email dated 27th November 2021 issued by the RP, that the CoC had found him to be ineligible u/s 29A(h) of the Insolvency and Bankruptcy Code, 2016 (*hereinafter referred to as "the code")* and consequently annulled his resolution plan. Thereafter, he submitted his plan u/s 230 of the Act. However, he was informed that he was ineligible for the same in view of his ineligibility under IBC. An appeal has been filed challenging an order dated 19th November 2022 of the NCLAT.

SCENARIO – III

ATPL filed a Company Petition u/s 7 of IBC, alleging a default by Danobe. Despite executing a consent term between the parties, the petition was admitted. However, on appeal, the tribunal allowed the withdrawal of the petition on 9th February, 2022. Subsequently, Danobe failed to make the payment as per the consent terms, leading ATPL to approach NCLT for the revival of the Company Petition, which the Tribunal rejected.

SCENARIO – IV

MSCL (India) Limited, VRS Malta Financial Services Ltd. and M&N Finance Ltd. extended a short-term facility of INR 700 Crores to Kapro Engineering Limited and M.L.D Investments Private Limited, group companies of Vntek Auto Ltd (Corporate Debtor). The loan was secured by pledging shares of KMP Auto Limited held by CD. The CIRP proceedings were initiated against the Corporate Debtor and the creditors approached the Adjudicating Authority claiming their right on the basis of pledged shares, which was rejected. A subsequent dismissal by the Appellate Authority has led the creditors to approach this Hon'ble Supreme Court.

ISSUES RAISED

A.

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

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 CODE TO SUBMIT A 'RESOLUTION PLAN'?

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?

D.

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

SUMMARY OF ARGUMENTS

A. THE SCHEME FOR COMPROMISE AND ARRANGEMENT UNDER SECTIONS 230 TO 232 OF THE COMPANIES ACT, 2013 CAN BE MADE WHEN THE PROCEEDING FOR LIQUIDATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 ARE ONGOING.

Considering the outcome of the process of liquidation which majorly results in the dissolution of a Company, and in order to protect the creditors in a situation giving rise to a Corporate Insolvency Resolution Process a procedure such as one u/s 230 of The Companies Act, 2013 caters to the objective of the Code as well as the Companies Act.

It is humbly submitted that the scheme for Compromise and Arrangement u/s 230 to 232 of the Companies Act can be made when the proceeding for liquidation under the Code is ongoing as the scheme for Compromise and Arrangement lies in the similar continuum as that of the Insolvency and Bankruptcy Code, 2016. Further, the maintainability of such Scheme lies in the statute and regulations and it therefore is a well settled position of law.

B. THE APPELLATE AUTHORITY IS JUSTIFIED IN BARRING THE PROMOTER FROM FILING AN APPLICATION FOR COMPROMISE AND ARRANGEMENT

It is humbly contended that the Appellate Authority has rightly held that a Promoter ineligible under section 29A of the Insolvency and Bankruptcy Code, 2016 cannot make an application for Compromise and Arrangement under Section 230 of Companies Act as the ineligibility u/s 29A the ineligibility extended to a scheme for Compromise and Arrangement concerns only a liquidation proceeding and moreover the eligibility of the promoter does not extinguish merely by the reason that such a Scheme is considered as a last resort.

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

It is humbly submitted before this Hon'ble Supreme Court that the security interest created on the assets of corporate debtor will be extinguished even while the same has been created for loan availed by a third party and not the corporate debtor as the filing of the claim based on this belated appeal cannot be allowed and therefore. Moreover, allowing such Claim goes against the spirit of the code.

D. THE APPELLANT AUTHORITY IS JUSTIFIED IN DECLINING THE RESTORATION OF COMPANY PETITION IN CASE OF DEFAULT OF THE CONSENT TERMS.

It is humbly submitted that the interim application filed by Appellant to seek revival of the Company Petition was justly denied by the Adjudicating Authority and reaffirmed by the Appellate Authority as there is no provision under the Code for the revival of a withdrawn Company Petition and even if the Adjudicating Authority exercises its powers the Company Petition dated September 8th, 2021 does not qualify to be revived.

ARGUMENTS ADVANCED

A. A SCHEME FOR COMPROMISE AND ARRANGEMENT CAN BE MADE IN TERMS OF SECTION 230 TO 232 OF THE COMPANIES ACT, 2013 IN A LIQUIDATION PROCEEDING UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016.

1. It is humbly submitted that a scheme for Compromise and Arrangement can be made in terms of section 230 to 232 (*hereinafter referred to as "**Scheme")*** of the Companies act while a company is undergoing liquidation under the Insolvency and Bankruptcy Code, 2016 (*hereinafter reffered to as "***Code***")
2. In the instant case, the companies DNCL and Fu-Sam have been ordered into liquidation[1] after no resolution plan could be approved by the CoC. Thereafter, a scheme for compromise and arrangement was made by the Appellants who were the promoters[2] of the Companies DNCL and Fu-Sam respectively.
3. The objective of the Code is "*to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation*"[3] and it provides for liquidation only as a last resort.
4. Considering the outcome of the process of liquidation which majorly results in the dissolution of a Company, and in order to protect the creditors in a situation giving rise to a Corporate Insolvency Resolution Process (*hereinafter referred to as "***CIRP***")*, a procedure such as one u/s 230 of The Companies Act, 2013 (*hereinafter referred to as* "**Companies Act**")* caters to the objective of the Code as well as the Companies Act.
5. It is humbly submitted that the scheme for Compromise and Arrangement u/s 230 to 232 of the Companies Act can be made when the proceeding for liquidation under the Code is ongoing as the scheme for compromise and arrangement *[i] lies in similar continuum as that of the Code, and, [ii] find its maintainability under the statue, and, [iii] is a well settled position of law.*

(i) The scheme for compromise and arrangement u/s 230 to 232 is in continuation of the liquidation process under IBC

6. It is humbly submitted that the scheme for compromise and arrangement u/s 230-232 of Companies Act while the company is undergoing liquidation under the provisions of the Code lies in a *similar continuum*. It caters to the interest of the Code as it provides

[1] Moot Proposition, ¶ 11, 19.
[2] Moot Proposition, ¶ 6, 18.
[3] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17.

last resort to the company undergoing liquidation for revival and saves the corporate debtor as well as the creditors from an undesirable outcome of liquidation.

7. The primary objective of the Code is resolution of the corporate debtor, the second object is "*maximization of value of values of assets of the corporate debtor"* and the third is "*balancing the interests of the corporate debtor and the creditors".*[4] Furthermore, the Adjudicating Authority orders liquidation when either the resolution plan is not submitted or is rejected by the Adjudicating Authority thereby leaving no option to revive the Company through CIRP.[5] Therefore, it strikes the right balance between resolution and liquidation.

8. A scheme for Compromise and Arrangement u/s 230-232 furthers the said objectives of the Code. It provides a mechanism to enter into a compromise or to amicably settle with an arrangement by mutual concessions including reorganization of share capitals, etc. between members, creditors, and corporate debtors of the class who are being affected by such a Scheme.[6] It has to be reasonable such that it is beneficial to both the sides entering it.[7]

9. It is submitted that the Compromise or Arrangement '*relieves the company and its contributories from ability further than that which is contemplated or imposed by the scheme.*'[8] It is a fact that a compromise can be a win-win situation for both the company and its creditors as it offered reconciliation with much less court's intervention.

10. The observations of the Bankruptcy Law Reforms Committee[9] (*hereinafter reffered to as "***BLRC**") in its interim report stated that liquidation should be used as the last option which was later confirmed by the judicial authorities leading to an ammendment u/s 230.

11. In the instant case, the Respondent (the liquidator of Fu-Sam) was justified inviting the expressions of interest for submitting the schemes of compromise and arrangement and subsequently rejecting the scheme proposed by Mr. Shroff owing to his ineligibility. In another scenario, DNCL, is undergoing CIRP proceedings. In furtherance of the same, the promoter, Mr. Pipara submitted a Resolution Plan which was not considered because he was termed ineligible.[10] Henceforth, the Appellant Mr. Pipara moved an

[4] Binani Industries Ltd v. Bank of Baroda, (2018) SCC Online NCLAT 112.
[5] Insolvency and Bankruptcy Code, 2016, § 33, No.31, Acts of Parliament (India).
[6] AVTAR SINGH, INDIAN COMPANY LAW (Eastern Book Company 1966).
[7] Alabama,'Neiu Orleans, Texas and Pacific Junction RailwayCo,re, (1891) 1 Ch 213: 64 LT127: 7TLR171.
[8] Motilal Kanji and Co. v. Natvarlal M. Jhaveri, AIR 1932 Bom 78.
[9] MINISTRY OF FINANCE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (2015).
[10] Moot proposition, ¶11.

application u/s 230 to 232 of the Companies Act proposing a scheme of arrangement between the promoters and creditors.[11]

12. Hence, on the basis of the above submission there is no bar on proposing a scheme for compromise and arrangement however the appellants are ineligible for doing so as per Section 29-A of the Code.

(ii) A scheme for compromise and arrangement can be made during a liquidation proceeding as it is statutorily backed.

13. It is respectfully submitted that a scheme for compromise and arrangement proposed while a company is undergoing liquidation find its basis in the statutory amendments brought in the Companies Act as a result of the enactment of the Code. Moreover, the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (*hereinafter reffered to as* "**IBBI Regulations**") explicitly recognize the possibility of such scheme under the Code.

14. Section 230 of the Companies Act, which provides for the scheme of Compromise and Arrangements was amended through Section 255 of the Code r/w schedule XI thereto. These amendments were recommended by the Joint Parliamentary Committee[12] (*hereinafter reffered to as* "**JPC**") by giving a green signal for the extension of such Schemes under Companies Act while a company is undergoing liquidation. This expansion aligns seamlessly with the established objective of the Code, as already submitted.

15. Section 255 of the Code r/w XI th Schedule has brought liquidation within the scope of winding up[13] under Companies Act. Moreover, the insertion of the phrase "*liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016…*" in Section 230(1) and 230(2) of the Companies Act grants right to the liquidator to present an application of a Scheme before the Tribunal. If such Scheme fulfills the necessary requirements[14], it becomes binding on the concerened parties.

16. A perusal of the above Sections in both the Code and the Companies Act, along with the JPC report, reveals a clear intent of the legislature to allow the scheme of compromise and arrangement to be proposed while a company is undergoing liquidation.

[11] Moot proposition, ¶ 12.
[12] Report Of The Joint Committee on The Insolvency and Bankruptcy Code, 2015, Lok Sabha.
[13] The Companies Act, 2013, § 2(94)(b), No.18, Acts of Parliament, 2013 (India).
[14] The Companies Act, 2013, § 230 (6) No.18, Acts of Parliament, 2013 (India).

17. The same view is further substantiated by referring to the IBBI Regulations. The 2019 amendment inserted Regulation 2B which provides for a scheme of Compromise and Arrangement u/s 230 of the Companies Act to be concluded within ninety days of the 'liquidation order'[15]. This indicates the intention of the regulator to enable the interested parties [16,17] to propose a scheme through the liquidator, in accordance with the provisions specified u/s 230(1) of the Companies Act.

18. Further, a scheme made during liquidation proceeding will not be overridden by the Code by virtue of Section 238. It aligns with the objectives of the Code and derives the procedure from the Companies Act. Therefore, there exists no inconsistencies in the two procedures and should be allowed in order to achieve the objective of reviving the Corporate Debtor[18].

19. Conclusively the Appellant submits that the scheme for Compromise and Arrangement u/s 230 of the Companies Act, 2013 can be made during liquidation proceeding under the Code of 2016 as it is just, serves a legitimate purpose and protects the rights of all the stakes in consideration

(iii) A scheme for compromise and arrangement can be made in terms of sections 230 to 232 of the companies act as it is a settled position of law

20. It is respectfully submitted that a scheme for Compromise and Arrangement can be made during a liquidation proceeding as it is a settled position of law. Through a number of judgments, the Appellate Authority as well as this Hon'ble Supreme Court has strengthened the position by *[i] directing the liquidator to accept the applications for compromise and arrangement, and, [ii] interpreting Section 230 of the Companies.*

a. Directing the liquidator to accept the scheme during liquidation

The Appellant places reliance on the authority of NCLAT in the case of *S.C. Sekaran v Amit Kumar*[19] to submit that the authority itself has paved the way for a Scheme to be made during the liquidation proceedings under the Code. The Court has in several instances directed the liquidator to invite applications for the scheme for compromise and arrangement under the Companies Act.

[15] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 2B (Dec. 15, 2016).
[16] National Steel & General Mills v. Official Liquidator, 1989 SCC OnLine Del 118.
[17] Rajendra Prasad Agarwalla v. Official Liquidator, 1977 SCC OnLine Cal 189.
[18] The Companies Act, 2013, §230(1), No. 18, Act of Parliament, 2013 (India).
[19] 2019 SCC OnLine NCLAT 1527.

21. Furthermore, it is submitted that a liquidator has to proceed in accordance with the law, i.e, to verify the claims of all the creditors[20] and take into control all the assets and actionable claims of the 'corporate debtor'. The liquidator is bound to carry on the business of the 'corporate debtor' for its beneficial liquidation, as per Section 35 of the Code. In furtherance of this, the liquidator before proceeding to sell the assets of the corporate debtor, has to take steps in terms of Section 230 of the Companies Act, 2013. Upon approval of such Scheme by the concerned parties the Adjudicating Authority, if so required, would pass appropriate order and only on the failure of revival, the Adjudicating Authority and the Liquidator will first proceed with liquidation in accordance with law.[21]

22. In another case of *Y Shivam Prasad v. S Dhanapal*[22] (herein after "**Y. Shivram**"), the Supreme Court dealt with a similar issue. The facts being germane to those of the case at hand, the company was ordered into liquidation. This Hon'ble Court held that

"*during the liquidation stage, 'Liquidator' is required to take steps to ensure that the company remains a going concern and instead of liquidation and for the revival of the 'Corporate Debtor' by taking certain measures"*

the Court had then directed the Liquidator to invite a scheme for compromise and arrangement before the process of liquidation is triggered. Therefore, it is clear that during the liquidation process, steps required to be taken for the revival and continuance of the 'Corporate Debtor' by protecting the 'Corporate Debtor' from its management and from death by liquidation.

23. Thus, the steps which have to be taken by the liquidator before proceeding with liquidation itself are:

i) By compromise or arrangement with the creditors, or class of creditors or members or class of members in terms of Section 230 of the Companies Act, 2013.

ii) On failure, the liquidator is required to take steps to sell the business of the 'Corporate Debtor' as a going concern in its totality along with the employees.[23]

24. In coherence with this approach by this Hon'ble Court in the case of *Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr*.[24] has placed reliance on the above

[20] S.C. Sekaran v. Amit Kumar, (2019) SCC OnLine NCLAT 1527.
[21] S. Irudaya Nathan v. G.V. Ravikumar, 2021 SCC OnLine NCLAT 636.
[22] 2019 SCC OnLine NCLAT 172.
[23] 2019 SCC OnLine NCLAT 172.
[24] (2021) 7 SCC 47.

two judgments and substantiated the issues in the case. It explicitly recognized the judicial intervention by the NCLAT in the case of *Y Shivram case.*

25. It is henceforth submitted that the Companies DNCL and Fu-Sam both received the order for liquidation vide. orders dated December 11, 2020, and March 3, 2022, respectively. In the scenario of Fu-Sam, the liquidator was explicitly directed[25] to accept the applications for a scheme of compromise and arrangement under sections 230-232 of the Companies Act, 2013. Although the schemes made by the members of the corporate debtors were not in furtherance of the settled position of law by this Hon'ble Court.

b. Interpretation of Section 230 of the Companies Act, 2013

26. A referral to Section 230 of the Companies Act also substantiates that a 'liquidator' is an eligible person to make a scheme for compromise and arrangement during liquidation. The interpretation of the provision as done by this Hon'ble Court in *Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samiti & Ors*.[26] confirms that the scheme was enacted with the intent to provide an opportunity for the revival of the CD. The Court categorically stated that

"*scope of provision 391* (now Section 230) *considering the purpose for which it is enacted, namely, the revival of a company including a company that is liable to be wound up or is being wound up, and normally, the attempt must be to ensure that rather than dissolving a company it is allowed to revive. Moreover, Section 391(1)(b) gives a right to the liquidator in the case of a company that is being wound up, to propose a compromise or arrangement with creditors and members indicating that the provision would apply even in a case where an order of winding up has been made and a liquidator had been appointed."*

27. Hence it is submitted that Section 230 itself has an underlying interpretation to it which makes it a viable option for revival during liquidation. It provides the liquidator with a right to propose a scheme for compromise and arrangement. The intent of this interpretation is to let the corporate debtor to have the last resort but it also aims to save him from the death by its own management.

[25] Moot proposition, ¶19.
[26] Meghal Homes Pvt. Ltd. v. Shree Niwas Girni K.K. Samiti & Ors. (2007) 7 SCC 753.

B. THE APPELLATE AUTHORITY IS JUSTIFIED IN BARRING THE PROMOTER FROM PROPOSING A SCHEME FOR COMPROMISE AND ARRANGEMENT UNDER SECTION 230 OF COMPANIES ACT

28. It is humbly contended that the Appellate Authority in the case of *Mr. Pipara v. Singhania Group of Companies* vide order dated September 24, 2022, has rightly held that a Promoter ineligible under section 29A of the Insolvency and Bankruptcy Code, 2016 cannot make an application for Compromise and Arrangement under Section 230 of Companies Act for taking back the immovable and movable property or actionable claims of the corporate debtor'.[27]

29. In the instant case, the promoters Mr. Pipara and Mr. Shroff attempted to do something indirectly which they couldn't do directly. When informed about their ineligibility under the Code to propose a resolution plan[28], the promoters turned to propose a scheme for Compromise and Arrangement[29], with the ultimate goal to get back the companies in their pockets. The Respondents submit that the said act of revival should be in consonance with the objective of the Code and should attempt saving the corporate debtor from its undesirable management.

30. Therefore, the Respondents submit that the Appellate Authority is just in holding that an ineligible promoter under Section 29A is conclusively ineligible to propose a scheme for Compromise and Arrangement under the Companies Act. The arguments advanced for this contention are two folded, *[i] the ineligibility extended to a scheme for Compromise and Arrangement concerns only a liquidation proceeding [ii] secondly, The ineligibility of the promoter does not extinguish merely because the Company advances to the last resort for its revival.*

(i) The ineligibility under section 29A of the Code is extended to a scheme for Compromise and Arrangement only when it is made during a liquidation proceeding under the Code.

31. A referral to Regulation 2B of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016[30] (*hereinafter reffered to as* "**IBBI** Regulations") lays the stencil for a Scheme to be made during a liquidation proceeding.

[27] Moot Proposition, ¶ 7.
[28] Moot Proposition, ¶ 11, 18.
[29] Moot Proposition, ¶ 12, 20.
[30] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 2B (Dec. 15, 2016).

As has been submitted above, the said Scheme can be made during a liquidation proceeding upon invitation from the liquidator. It acts as the last resort for the corporate debtor concerned before the business is liquidated in order to provide the creditors with the recourse based on their claims.[31] Section 230(1) envisages that an application in the case of a company that is being wound up may be presented by a liquidator to the NCLT, acting as the Tribunal.[32]

32. It is submitted that the Scheme operates on the procedure that is laid for it under the Companies Act. By the extension of the ineligibility to the Scheme, the legislature[33] and the Appellate Authority[34] do not regulate the procedure of the Scheme but cater to the approach of the resolution process under the Code. The ineligibility exists to protect the corporate debtor from its management which led to its downfall. [35] Upon the sanctioning of the Compromise or Arrangement by the NCLT, it binds the company, all the creditors or members or a class of them, as may be, or in the case of a company being wound up, the liquidator appointed under the Companies Act or the Code and the contributors.[36]

a. Is part of the post-CIRP Mechanism

33. The amendment made in the year 2020[37] inserted Sections 29A and 35(1)(f) which apply both pre-CIRP and post-CIRP.[38] The pre-CIRP application relates to the classification of people ineligible to submit a resolution plan for the corporate debtor undergoing CIRP and the post-CIRP application relates to the restriction on the sale of assets to the people ineligible under section 29A during liquidation as stated in Section 35(1)(f) of the Code.

34. The understanding of a Scheme being made during a liquidation proceeding considers the said scheme to be a way of resolution for the corporate debtor after the CIRP has failed and before the assets of the body corporate are liquidated. The rule u/s 29A plays a crucial role in the hybrid process of compromise during liquidation under the Code,

[31] Swiss Ribbons Pvt. Ltd.. & Anr. v. Union of India & Anr., (2019) 4 SCC 17.
[32] The Companies Act, 2013, §230(1), No. 18, Act of Parliament, 2013 (India).
[33] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 2B (Dec. 15, 2016).
[34] Clarification, ¶ 13.
[35] Swiss Ribbons Pvt. Ltd.. & Anr. v. Union of India & Anr., (2019) 4 SCC 17.
[36] Effectuating the Process of Resolution as Against Liquidation: A Promoters' Perspective, 1.1 ILR (2020) 192
[37] Moot proposition, Annexure I, ¶2.
[38] S. Irudaya Nathan v. G.V. Ravikumar, 2021 SCC OnLine NCLAT 636.

by way of a device of incorporation by reference.[39] Hence it is posited that the post-CIRP application of the ineligibility principle as laid in the Code will, as a reasonable inference applies to the Scheme proposed u/s 230 of the Companies Act.

35. Further, the decision of the Appellate Authority has only extended the ineligibility when the Scheme is made during a liquidation proceeding. The ambit of Section 230 under the Companies Act, as has been contented, goes beyond the liquidation proceedings. It is henceforth submitted, that this otherwise wide ambit of the scheme was not a concern when the ineligibility was extended by the Appellate Authority.

b. In the nature of an External Remedy

36. It is submitted that the nature of this remedy by virtue of section 230 of the Companies Act can be one which is external.[40] This revival process would then be a remedy[41] i.e., the means by which the violation of a right is prevented, redressed, or compensated in an external[42] form that is in an outward manner derived from the provisions of another statute. The failure of this external remedy will have the resolution process revert to liquidation i.e., if the remedy fails, the corporate debtor will still be under the premises of the Code and will thus be liquidated in terms of the Code only. Further, the timeline of one year[43] for completion of liquidation would be applicable from the date on which the Scheme is declared to have failed.[44]

37. It is posited that this Hon'ble Court in the case of *Meghal Homes Pvt. Ltd. v Shree Niwas Girni K. K. Samiti*[45] has categorically held that where a scheme of Compromise and Arrangement is proposed in respect of the company in liquidation, additional requirements need to be established, namely that the scheme must be for the revival of the business of the company. The inference is that a Scheme is made as a last resort to provide a resolution that the Code could not. This proposed last resort is crucial for the corporate debtor which would otherwise suffer the outcomes of liquidation which in most cases is a corporate death. The intent of the legislature through the Code has been

[39] *Supra* at note 19.
[40] Bansal, Sikha, Resurrecting the Dead: A Discussion around Schemes of Arrangement in Liquidation (October 22, 2019). http://dx.doi.org/10.2139/ssrn.3474777.
[41] *Remedy,* Black's Law Dictionary (10th ed. 2014).
[42] *External,* Black's Law Dictionary (10th ed. 2014).
[43] The Insolvency and Bankruptcy Board of India (Liquidation) Regulations, 2016, Regulation 44.
[44] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (LIQUIDATION PROCESS) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 2B (Dec. 15, 2016).
[45] (2007) 7 SCC 753.

to save the corporate debtor from this corporate death and provide a resolution. The last resort here acts as the resolution even when the CIRP fails.

38. Further, in the case of *Miheer H Mafatlal v. Mafatlal Industries Ltd*.[46], this Hon'ble Court held that in the case of a company that has been wound up, it would have to perceive aspects of public interest, commercial morality, and the existence of a bona fide intent to revive the company while considering whether a Scheme put forward under Section 391 (now Section 230) should be accepted. In a similar continuum, it can be argued that in order to align the scheme made during the liquidation proceeding with the intent that it was allowed in the first place, the Courts have taken due consideration of laying down the proper guidelines while enforcing it. No Scheme should be such that it attempts to hamper the already-ridden state of the company going into liquidation.

39. Henceforth, it is submitted that while the intention, as specified by the above authority of the cases, is to revive the company, the scheme cannot be treated severely *vis-a-vis* the application of the ineligibility criteria listed u/s 29A of the Code on the process. It is evident that the clear statutory intent behind the acceptance of this Scheme under the procedure of the Code was not to provide for leeway to the otherwise barred management, in this case, the promoter.

40. If the promoters Mr. Pipara and Mr. Shroff have been adjudged ineligible for proposing a resolution plan during the CIRP because of the presumed underlying malafide intent in their participation in the affairs of the company, they cannot be given an undue exemption from the application of section 29A owing to the external nature and post-CIRP applicability of the Scheme.

41. Therefore, the Respondents respectfully submit that the ineligibility under Section 29A ought to also extend to a scheme for Compromise and Arrangement made during a liquidation proceeding as it operates as a part of the resolution mechanism that is provided for a corporate person under the Code and thereby barring the promoters Mr. Pipara and Mr. Shroff from proposing the Scheme.

(ii) The ineligibility of the promoter does not extinguish merely because the Company advances to the last resort for its revival

42. It is submitted that merely because the Scheme has been established as an external remedy and as the last resort before the company is pushed into liquidation, it does not

[46] (1997) 1 SCC 579.

do away with the ineligibility of the persons under section 29A of the Code. It serves as part of the resolution mechanism with the end goal of the revival of the corporate debtor.

43. The promoters may claim that since the company is heading to a permanent death by way of liquidation, such Scheme should be used to revive it or save it. As laid by this Court in the case of *Swiss Ribbons v. Union of India,*[47] the rationale of the legislature while inserting sections 29A and 35(1)(f) in the code, was to protect the corporate debtor from its management being the reason for corporate debtor's fall. Merely because the body is heading to liquidation, the defaulting management shall not be allowed to take the defense of the precarious situation of the company to get back as the management and continue defaulting the creditors.

44. It is therefore contended that the promoters would be ineligible to propose a scheme for Compromise and Arrangement if they were classified as ineligible to propose a resolution plan because the moniker of undesirability attached to the incompetent management of the corporate debtor would not disappear at the stage of liquidation, and the promoters cannot submit their bonafide intent when they refused to act in a manner that would not render them ineligible in the first place.

a. The undesirability of incompetent management doesn't change

45. It is submitted that in the case of *Swiss Ribbons vs Union of India*[48], this Hon'ble Court deliberating upon the aims of the CIRP stated that '*it is aimed at rendering ineligible persons who are undesirable in the widest sense of the term, i.e., persons who are unfit to take over the management of a corporate debtor.*' (Emphasis Supplied)

46. It has been vociferously contended by the Appellants that the scheme plays the role of the last resort in cases where the CIRP has failed. As far as the occurrence of a default by the corporate debtor is concerned, it is the management of the company that ought to be blamed. It is the management that owes the duty to keep the business of the company running and not default in the payment of any dues. A promoter, by virtue of the definition under Section 2 (69) of the Companies Act,[49] acts as someone on whose direction the Board of Directors (*hereinafter reffered to as* "**BoD**") acts. It would then

[47] (2019) 4 SCC 17.
[48] (2019) 4 SCC 17.
[49] The Companies Act, 2013, § 2 (69), No. 31, Act of Parliament, 2016 (India).

be safe to assume that he is a part of the management of the company and that a piercing of the corporate veil[50] provided by Section 29A has to objectively impact the promoter.

47. Further, on the rights of the promoters it stated that 'there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable property of the corporate debtor in liquidation.' The position of promoters is one where they are jointly and severally liable for all the affairs of the company.[51] It is then concluded that promoters are a legitimate part of the management of the company and by virtue of the definition given in Section 2(69) of the Companies Act, they bear the advisory jurisdiction on the BoD. The class of promoters classifies as the persons who are equally at fault as the other members of the management.

48. Henceforth, it is conclusively submitted that this undesirability of the promoters has arisen out of a rationale that stands does not dissuade merely because the company has to fall down to a Scheme and the CIRP has failed. The legislation, IBC, intends to save the creditors as well as the corporate debtor from a corporate death by liquidation and if the ineligibility under section 29A is not extended to the Scheme proposed during liquidation, the corporate debtor will revert to the hands of those that brought it to shams in the first place.[52]

49. In the case at hand, the promoters Mr. Pipara and Mr. Shroff cannot take the defense of being the protector or the rescuer of the Companies DNCL and Fu-Sam respectively. They are classified as ineligible under section 29A and this makes them undesirable for continuing with the business of the Corporate Debtor altogether. Whether it be a resolution plan or a scheme for compromise and arrangement as has been the case here, both the Promoters would not be assumed free of their undesirability and incompetence merely because the companies have been provided with a different option for recovery i.e., the scheme.

b. The ineligibility of the Promoters under the Code is classified

50. It is humbly submitted that as per the provision of Section 29A (1)(c) and Section 29A (1)(g) of the Code of 2016, Promoters are classified ineligible under two types of disabilities. The first ineligibility as under Section 29A (1)(c) illustrates that a promoter in this purview would be ineligible if the said person has an Non Performing Assets

[50] Swiss ribbons v. Union of India, (2019) 4 SCC 17.
[51] Priyadarshani Kumari, PROMOTERS UNDER THE COMPANY ACT, 2013, Indian Journal of Integrated Research in Law, PROMOTERS-UNDER-THE-COMPANY-ACT-2013.pdf (ijirl.com) (last visited 09/08/2023).
[52] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) 7 SCC 47.

(*hereinafter referred to as* "**NPA**") account or an NPA account of a corporate debtor under the management or control of such person or of whom such person is a promoter.[53] The section further states that the ineligibility will be triggered when the said NPA account has been in existence for over a year.

51. As per the RBI which is the central bank and regulatory body responsible for the regulation of the Country's banking system,

"a non-performing asset (NPA) is a loan or an advance where—

in respect of a term loan, interest and/or installments of the principal remain overdue for a period of more than 90 days;

in respect of an Overdraft/Cash Credit, the account remains 'out of order;

in respect of bills purchased and discounted, the bill remains overdue for a period of more than 90 days…"[54]

52. A conjoint reading of the definition of NPA and provision 29A(1)(c) provides that a company has a year and 90 days before the promoters are classified as ineligible to propose a resolution plan during CIRP. The Hon'ble Court has previously noted that the gap of one year, in addition to the ninety day period after a default that needs to elapse before an asset is classified as an NPA, gives sufficient time to any resolution applicant to pay off their dues before proposing a resolution plan.[55]

53. Further, the proviso to the said section 29A (1)(c) also enables previously ineligible promoters to remove their ineligibility by clearing the dues related to the NPA account. It states that "if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan."[56]

54. Thusly, it is submitted that the ineligibility of Mr. Pipara and Mr. Shroff was not a disability rendering them to be disqualified but a criterion imposed by the law which operates in the right interest of the problem of NPA in Malta.[57]

55. The second ineligibility clause for the promoters is their being qualified under section 29A(1)(g). This provision categorically states that a promoter would be ineligible if the said person is part of the management of the corporate debtor which has been a party

[53] Insolvency and Bankruptcy Code, 2016, § 29 (1) (c), No. 31, Acts of Parliament, 2016 (India).
[54] *Master Circular- Income Recognition, Asset Classification, Provisioning and Other Related Matters – UCBs***,** RBI Notification no. RBI/2011-12/48 (01/07/2011) available at https://www.rbi.org.in/commonperson/English/Scripts/Notification.aspx?Id=889#L3, last visited 12/08/2023**.**
[55] Arun Kumar Jagatramka v. Jindal Steel and Power Ltd. & Anr., (2021) 7 SCC 47.
[56] Insolvency and Bankruptcy Code, 2016, § 29 (1) (c), No. 31, Acts of Parliament, 2016 (India).
[57] Moot proposition, ¶3.

to a preferential transaction, undervalued transaction, extortionate credit transaction, or fraudulent transaction for which the Adjudicating Authority under the Code has also passed an order under sections 44, 48, 50 and 49 of the Code, respectively.

56. The preferential transaction, undervalued transaction, extortionate credit transaction, and fraudulent transaction together are termed as avoidance transactions meaning those transactions whose effects, an administrator or insolvency professional seeks to avoid against the entity undergoing insolvency for the reason that such transactions have eroded the value of the said entity and taken place during the twilight period, or the period during which the management of the entity is presumed to be aware of the possibility of commencement of insolvency proceedings.[58]

57. The promoters, subsequently, cannot claim to protect or revive the corporate debtor when they did not act in consonance with the options available to them initially. The legislature has rightly classified the eligible and ineligible promoters along with a mechanism to do away with that ineligibility.

58. Hence the provision rightly adjudges the participants of such fraudulent transactions including the promoter to be ineligible for proposing a resolution plan. Conclusively, it is submitted that the promoters Mr. Pipara and Mr. Shroff should be ineligible to propose a scheme for compromise and arrangement owing to the ineligibility accorded to them under Section 29A. This ineligibility is backed by the rationale of preventing the corporate person from slipping into the hands of undesirable management.

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

59. It is humbly submitted before this Hon'ble Supreme Court that the security interest created on the assets of corporate debtor will be extinguished even while the same has been created for loan availed by a third party and not the corporate debtor. It is further submitted that the Appellate Authority was justified in barring the Appellants from raising the claim as there was no appeal filed during the course of CIRP when the claim

[58] Rajeev Vidhani & Ors., *Related Party Transaction under IBC: Concept and Evolution, The Chamber's Law Journal*, KHAITAN & CO. (Aug. 10, 2023) https://www.khaitanco.com/sites/default/files/2020-11/TheChamberJournal-October2020.pdf.

was rejected.[59] The filing of the claim based on this belated appeal cannot be allowed.[60] The Appellate Authority has effectively followed the principle of *Vigilantibus Non Dormientibus Jura Subveniunt* i.e., law assists those who are vigilant and not those who sleep over their rights[61] while barring the appellants from raising the claim.

60. Therefore, the contentions with regards to the same are three-fold, *[i] The Adjudicating Authority is justified in barring the appellants from filing the claim at a belated stage [ii] Allowing the claim goes against the spirit of the code. [iii] The extinguishment of the claim is justified.*

(i) The Adjudicating Authority is justified in barring the appellants from filing the claim at a belated stage.

61. It is humbly submitted before this Hon'ble Supreme Court that the Adjudicating Authority is completely justified in debarring the Appellants from raising the claim at a belated stage. The rationale behind the same can be considered as three folded, *firstly,* that the Appellants failed to file their claim within the stipulated time and *secondly,* Appellants failed to file their claim within stipulated time and *lastly,* reconsideration of resolution plan is immaterial for filing belated claims.

a. Appellants failed to file their claim within the stipulated time.

62. The IBBI(CIRP) Regulations, 2016 released clearly provide that any creditor who fails to submit the claim within the time stipulated in the public announcement can submit the same before the ninetieth day of the insolvency commencement date.[62]

63. Consequently, all creditors having claims are required to submit their claims within the last date mentioned in the public announcement and in case of failure to do so within 90 days. The failure in adherence to the same leads to the extinguishment of any remaining claims by any creditor whatsoever.

64. In the instant case, the CIRP Proceedings were initiated against the corporate debtor on June 24, 2020[63] and the Appellants filed their claim as secured financial creditor on

[59] Moot Proposition, ¶36.
[60] New Boilers Engineering v. IDBI Bank Limited, NCLAT, Company Appeal (AT) (Insolvency) No. 479 of 2021.
[61] H. Dohil Constructions Co. P. Ltd. v. Nahar Exports Ltd., 2015 (1) SCC 680.
[62] Regulation 12(2), IBBI(CIRP) Regulations 2019. INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (CIRP Regulations) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 12(2) (Dec. 15, 2016).
[63] Moot Proposition, ¶33.

October 2nd, 2020.[64] The total days passed in between the initiation and filing of the claim happen to be a total of 101, much more than the time of 90 days stipulated as per the regulations.

65. Conclusively, the respondent has rightly rejected the claim of the Appellants as secured financial creditor. The failure to appeal against the same before the Adjudicating Authority has led the Adjudicating Authority to rightly dismiss the application of the appellants and the Appellate Authority to declare that they are barred to raise the same.

b. The claims of Appellants stand extinguished.

66. It is humbly submitted that S.31 of the Code makes it amply clear that a Resolution Plan approved by Adjudicating Authority becomes binding over all stakeholders and leads to extinguishment of all claims which are not included in the Resolution Plan. In the landmark case of *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd*[65], the Hon'ble Supreme Court reaffirming this held that,

"*Once a resolution plan is duly approved by the adjudicating authority u/s 31(1) of the code, the claims provided in resolution plan shall stand frozen and will be binding on the CD and its creditors, guarantors, and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of resolution plan*."

67. It is an established position of law that on the approval of a resolution plan in terms of section 31of the Code, all the claims not part of the resolution plan, get extinguished and no proceedings for a period prior to the date of approval under Section 31 can continue.[66] As a result, post approval by the Adjudicating Authority, all claims stand frozen, and no claims which are not a part of the resolution plan survive.[67]

68. In the instant case before the Hon'ble Supreme Court, the resolution plan has been approved by the CoC and the Adjudicating Authority alike[68] and subsequently all the claims against corporate debtor stand frozen henceforth. Therefore, the present appeal for filing the claims becomes liable to be dismissed.

[64] Moot Proposition, ¶34.
[65] (2021) 9 SCC 657.
[66] West Bengal State Electricity Distribution Company Limited v. Sri Vasavi Industries Limited And Another, 2022 SCC ONLINE CAL 1918.
[67] Ruchi Soya Industries Ltd. v. Union of India & Ors., (2022) SCC 6 343.
[68] Moot Proposition, ¶35.

69. Once a resolution plan is approved, the resolution applicant is provided with a clean slate.[69] This Hon'ble Supreme Court in the landmark case of *Committee of Creditors of EssorSteel v. Satish Kumar Gupta & Ors.*[70] has held that,

"*A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant."*

70. As a result, any consideration for allowing the claims filed by appellants will culminate in opening up a wide possibility of late filing of claims in CIRPs, turning an otherwise time-bound process into a never-ending process.[71] Consequently, the acceptance of any new claims post approval from the Adjudicating Authority would jeopardise[72] the CIRP process and the resolution process would become more difficult.

c. Reconsideration of resolution plan is immaterial for filing belated claims.

71. It is humbly submitted before, that in the present case, the Successful Resolution Applicant (i.e., 'SHG') has failed to fulfil the obligations as per the approved Resolution Plan and as a result the CoC has been asked to *reconsider* the resolution plan of PVI, which was initially withdrawn.

72. It is respectfully submitted before this Court that the term 'Reconsideration' has been defined by Merriam Webster's law dictionary as an act "*to consider something again*".[73] Herein, the claim of the appellant was rejected by Mr. Kasi, the Resolution Professional in October 2020 itself, much before the acceptance of any resolution plan. The appellants failed to challenge this rejection before the Adjudicating Authority. [74] Principally all claims are to be submitted to the Resolution Professional, so that a prospective resolution applicant knows what exactly has to be paid, in order to take over and run the business of the corporate debtor.[75] Consequently, the rejection of appellant's claim by the RP has led to resolution plans of SHG and PVI being formulated devoid of the appellant's claim.

[69] Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657.
[70] (2020) 8 SCC 531.
[71] Reliance Commercial Finance Limited v. Vista Mining Pvt. Ltd. ,2021 SCC OnLine NCLT 11537.
[72] Mukul Kumar RP of KST Infrastructure Ltd. v. M/s RPS Infrastructure Ltd., Company Appeal (AT) (Insolvency) No. 1050 of 2020.
[73] MERRIAM WEBSTER, MW DICT OF LAW 672 (Merriam Webster 2016).
[74] Moot proposition, ¶34.
[75] Shree Sidhivinayak Cotspin Private Limited & Anr. v. Resolution Professional of Maruti Cotex Limited & Anr, Company Appeal No. 694 of 2020.

73. The approval of SHG's resolution plan by the Adjudicating Authority has crystalised[76] the claims of all creditors subsequently leading to formation of a CoC. A mere reconsideration of another plan would not allow the appellants to file a belated claim as any interruption in the CIRP at this stage by including a delayed claims would mean setting the clock back. Although, PVI would be required to reformulate the resolution plan, and seek a subsequent approval from the CoC & Adjudicating Authority,[77] the same cannot be allowed to be a ground for the claims to be filed at such a belated stage. This would not not only be unfair to the other creditors who were unable to file their claims but also to PVI who would suddenly be faced with undecided claims.

74. Furthermore, even if belated claims of creditors are accepted at the stage when PVI's resolution plan is pending approval before the CoC, the Resolution Professional will have to amend the stakeholders list and the PVI will have to modify its resolution plans. This will significantly hamper the objective of timely completion of the CIRP, rendering the objective of the Code completely otiose. As a result, the Adjudicating Authority's order asking the CoC to reconsider the resolution plan submitted by PVI would bear no effect on the acceptance of Appellant's claims.

(ii) Allowing the claim would go against the intent of the legislation

75. It is humbly submitted before this Hon'ble Supreme Court that allowing the claim of the appellants would go against the intent of the legislation which is to ensure an expeditious time bound Resolution Process for the corporate debtor.[78] BLRC while advocating for time bound resolution of the CIRP process firmly vehemently stressed that *"It is critical for the Code to preserve the time value of the entity by ensuring that negotiations in the IRP are time bound."*[79]

76. The Code has been enacted to ensure that an industry under distress does not fade into oblivion and can be revived by virtue of the resolution plan. Once the offer of the resolution applicant is accepted and the resolution plan is approved by the

[76] Swiss Ribbons Pvt. Ltd and Ors. v. Union of India and Ors, 2019 SCC OnLine SC 73.
[77] Office of the Asst. State Tax Commissioner, Govt. of Maharashtra v. Shri Parthiv Parikh Resolution Professional, M/s Jaihind Projects Ltd. & Ors. Company Appeal No. 583 of 2020.
[78] Arcelor Mittal India Private Limited v. Satish Kumar Gupta & Ors, (2019) 2 SCC 1.
[79] Ministry of Finance, The report of the Bankruptcy Law Reforms Commiittee Volume I: Rationale and Design (2015).

Adjudicating Authority, the same becomes binding on all concerned to whom the corporate debtor may be having dues. [80]

77. It is contended that if the claims of Appellants are being accepted on a belated stage after the stipulated time provided for submitting claims, the Resolution Professional would keep on receiving claims which would lead to a situation wherein any Resolution Plan would never get materialized[81]and subsequently there would be no resolution of corporate debtor, defeating the object of the Code.[82]

78. The legislative intent is to freeze all claims so that the resolution applicants start on the clean slate and is not flung by any surprise claims. If the claim is allowed at this stage, the very calculations on the basis on which the PVI submitted submits its plans, would go haywire and the same would become unworkable.[83] This would extend the time taken to complete the CIRP while the period within which the CIRP ought to be completed is strictly mandatory in nature and cannot be extended. [84]

79. Section 31(1) of the Code makes it clear that once a resolution plan is approved by the CC it shall be binding on all stakeholders, including guarantors. This provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were. Consequently, beneficiaries under this Code cannot be allowed to keep on adopting strategies and techniques which would delay progress in CIRP and defeat objective of the Code.[85]

80. It is an established position that the Resolution process is a time-bound one, and any action resulting in delay of the process, and consequent loss in value of the assets of the corporate debtor, is against the objectives of the Code. In the present case, the delay in filing of the claims have been beyond the approval of the resolution plan by the Adjudicating Authority. Any acceptance of such claim will lead to a subsequent delay violating the basic tenets of the Code. As a result, the prayer of the Appellants with respect to acceptance of claims cannot be allowed.[86]

[80] Ultra Tech Nathdwara Cement Ltd. v. Union Of India, Through The Joint Secretary And Others 2020 SCC OnLine Raj 1097.
[81] Harish Polymer Product v. George Samuel And Anr., 2021 SCC ONLINE NCLAT 210.
[82] K.N. Rajakumar v. V. Nagarajan, (2022) 4 SCC 617.
[83] NRC limited v. State of Maharashtra and Anr. [2022] 174 SCL 427 (Bombay).
[84] Arcelor Mittal India Private Limited v. Satish Kumar Gupta & Ors, (2019) 2 SCC 1.
[85] Centrum Financial Services Ltd v. Cfm Asset Reconstruction Pvt Ltd, Company Appeal (AT) (Ins.) No. 302 of 2021.
[86] Devdeep Cotton Industries through its Partner v. Sh. Nipan Bansal. Resolution Professional, (2022) 09 NCLT CK 0043.

(iii) Extinguishment of the claim is justified

81. It is humbly submitted before this Hon'ble Supreme Court that a resolution plan is required to provide for the maximisation of corporate debtor's assets irrespective of whether the assets are subject to security interest or not.[87] The existence of any security interest does not exempt the Resolution Plan to deal with any asset of the corporate debtor.[88]

82. Furthermore, even Financial Creditors having security interest in the assets of the corporate debtor can be dealt with in the resolution plan in any manner as per the commercial wisdom[89] of the CoC. Subsequently, a third-party having security interest in the assets of the corporate debtor cannot be allowed a higher status than the financial creditors. A person having only security interest over the assets of corporate debtor would nevertheless stand outside the definition of 'financial creditors' as per the code.[90] As a result, a security interest can be extinguished without consent of the secured creditors.

83. In the instant case, it is a settled position that the Appellants do not qualify to be considered as financial creditors[91] and as a result they cannot be accorded a status higher than that of financial creditor possessing security interest over the assets of corporate debtor to retain the interest would lead to them being accorded a status higher than that of financial creditor. Consequently, the Appellants cannot be allowed to retain the security interest over the assets of corporate debtor and the same is liable to get extinguished.

D. THE APPELLATE AUTHORITY IS JUSTIFIED IN DECLINING THE RESTORATION OF COMPANY PETITION IN CASE OF DEFAULT OF THE CONSENT TERMS

84. It is humbly submitted before the Hon'ble Supreme Court of Malta that the Adjudicating Authority was justified in rejecting the Interim Application filed by ATPL. The said application sought revival of the Company Petition dated August 5th,

[87] INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (CIRP Regulations) REGULATIONS, 2016, Gazette of India, Extraordinary, Part III, Regulation 37 (b),(d) (Dec. 15, 2016).
[88] Edelweiss Asset Reconstruction v. Mr. Anuj Jain & Ors Company Appeal (AT) (Insolvency) No.517 & 518 of 2023.
[89] Vallal RCK v. Siva Industries & Holdings Ltd., (2022) 9 SCC 803.
[90] Insolvency and Bankruptcy Code, 2016, § 5 (7), No. 31, Acts of Parliament, 2016 (India).
[91] Phoenix ARC (P) Ltd. v. Ketulbhai Ramubhai Patel, (2021) 2 SCC 799.

2021, which was further reaffirmed by the Appellate Authority[92]. The Authority rightly observed that *"when the Company Petition was withdrawn after the settlement, there is no specific provision in IBC, 2016 for reopening of the Company Petition"*. [93]

85. The courts have time and again[94,95] stated that "*IBC is legislation to ensure revival and continuation of the Corporate Debtor and not a mere recovery legislation for the creditors"*[96] wherein because of the non-payment of debt the party repeatedly comes to the court. This distinction is crucial as it shifts the focus from a mere debt recovery, which could lead to recurrent litigation due to non-payment, to a broader objective of corporate revival and sustainability.

86. Therefore, in the present case the arguments raised by the counsel of Respondent are two-folded: - *[i]There is no provision under the Code for the revival of a withdrawn Company Petition and [ii]In arguendo, the Company Petition dated September 8th, 2021 does not qualify to be revived.*

(i) There is no provision under the code for the revival of a withdrawn Company Petition

87. It is humbly submitted that the Adjudicating Authority's observation of nonexistence of provision under the Code is absolutely justified. Chapter II of the Code provides for the applications triggering a CIRP and the necessary criteria for doing so. Section 12A mentioned thereunder, inserted through an amendment,[97] allows for the withdrawal of the application admitted for commencing CIRP after fulfilling the prescribed conditions[98]. Further, Section 60 under Part VI of the Code specifies the Adjudicating Authority and its powers relating to Corporate Person. A perusal of the provisions of the Code as well as the regulations make it amply clear that there is no explicit provision mentioned under the Code for revival of a withdrawn Company Petition for any reason whatsoever.

88. Furthermore, the NCLT Rules, 2011 grants certain powers to the NCLT, however even in the Rules applicable to the Code there is no mention of the power for revival. It is

[92] Clarification, ¶ 30.
[93] Moot Proposition, ¶ 30.
[94] Binani Industries Limited v. Bank of Baroda & Anr, 2018 SCC OnLine NCLAT 565.
[95] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, 2019 SCC OnLine SC 1005.
[96] Swiss Ribbons Pvt. Ltd. v. Union of India (2019) 4 SCC 17.
[97] The Insolvency and Bankruptcy Code (Second Amendment) 8 37, No. 26, Acts of Parliament 2018 (India).
[98] The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 30-A.

pertinent to note that the Apex Court putting restrictions on the power of NCLT has emphasized that the NCLT derives power from the Code and therefore cannot go beyond the Code and do what Code consciously did not provide it the power to do.[99]

89. However, in certain cases the Adjudicating Authority has revived the withdrawn Company Petition by the residuary jurisdiction[100] u/s 60 of the Code read with Rule 11 of the NCLT Rules which confers upon the Adjudicating Authority an inherent power.

90. The inherent powers may be invoked for two reasons namely, [a] *to meet the ends of justice*' or [b] or '*to prevent the abuse of process of the Tribunal*'. Therefore, the Tribunal has to thoroughly examine whether the rejection of revival would lead to either of the aforementioned scenarios in order to accept the petition under Rule 11.[101]

91. Moreover, the provision here aims to address unjust treatment of the creditors due to the 'unscrupulous' Corporate Debtors who deceive the innocent and gullible creditors[102] and has therefore no application on scenarios like in the instant case.

92. It is humbly submitted that in the present case, the Company Petition was admitted on September 8th, 2021[103], the settlement terms were executed on August 5th, 2021[104] and subsequently the Company Petition was withdrawn on 9th February, 2022.[105] Further, as of now no CoC has been constituted.[106] Upon perusal of these facts, it can be safely concluded that the proceedings, prior to the execution of the consent terms were in a preliminary stage. Therefore, the rejection of the application filled by the Appellant seeking revival of the CIR proceedings does not constitute an abuse of the process of the Tribunal nor does it cause injustice to the Creditor i.e., the Appellant.

93. Henceforth, the Adjudicating Authority Authority has not erred in rejecting the application seeking for revival of the Company Petition via its order dated December 21st, 2022.[107] On the basis of the aforementioned argument advanced and the authorities cited, it is humbly submitted before the Hon'ble Supreme Court to uphold the order given by the Adjudicating Authority/Appellate Authority.

[99] Gujrath Urja Vikas Nigam Ltd v. Amit Gupta [2021] 167 SCL 241 (SC).
[100] Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2020) 8 SCC 531.
[101] M/s. Netfinity Solutions v. M/s Karvy DigiKonnect Limited, Company Appeal No. 1067 of 2022.
[102] Krishan Kumar Mittal v. GRJ Distributors & Developers Pvt. Ltd. 2020 SCC ONLINE NCLAT 531.
[103] Clarification, ¶ 30.
[104] Moot Proposition, ¶ 28.
[105] Moot Proposition, ¶ 29.
[106] Moot Proposition, ¶ 29.
[107] Moot Proposition, ¶ 30.

(ii) In arguendo, the Company Petition does not qualify to be revived.

94. It is humbly submitted that even if the Tribunal invokes its jurisdiction to entertain the application seeking the revival of Company Petition, the said Company Petition *in arguendo* does not qualify to be revived. A perusal of judgements of the Tribunals[108],[109] wherein such applications have been accepted reveals a consistent pattern for seeking restoration in instances of non-adherence to the settlement terms. Through this pattern, two essential grounds for revival are deciphered *firstly*, that there shall be a specific clause under the consent terms stating the revival of the petition in case of default or non-adherence, or *secondly*, specific liberty to revive the company petition in case of default of the consent terms shall be granted by the Adjudicating Authority at the time of withdrawal of such Company Petition.

The Respondent humbly submits that,

a. There is no clause mentioned under the Consent Terms seeking for revival in case of default

95. The Appellate Authority has observed that if the consent terms executed between the parties include a specific clause for revival and such terms are placed on record at the time of withdrawal of the company petition, such clause itself shall be treated as a part of the order which *inter alia* shall entitle the creditor to revive the petitioner in case of default.[110]Therefore, inferring that such clause shall itself form a part of the decree of the court [111]and in case of non-compliance a revival can be sought[112].

96. It is to be noted that, in the present case it is an undisputed fact that the consent terms executed between the parties were placed on record before the Adjudicating Authority on August 5th, 2021.[113] However, these terms do not contain any clause seeking the revival of the CIRP in case of default or non-adherence to the Consent Terms. Therefore, while the terms were indeed put on record, they cannot be construed as a court decree seeking revival in case of non-adherence or default in the said executed terms.

[108] IDBI Trausteeship Services Limited v. Nirmal Lifestyle Limited, 2023 SCC OnLine NCLAT 225.
[109] Himadri Foods Lmt. v. Credit Suisse Funds Ag, 2021 SCC ONLINE NCLAT 48.
[110] Pooja Finlease limited v. Auto Needs (India) Private Limited, Company Appeal No. 103 of 2022.
[111] Himadri Foods Lmt. v. Credit Suisse Funds Ag, 2021 SCC ONLINE NCLAT 48.
[112] Vivek Bansal v. Burda Druck India Pvt. Ltd. & Anr., 2020 SCC OnLine NCLAT 582.
[113] Moot Proposition, ¶ 28.

b. No specific liberty was granted by the Adjudicating Authority at the time of withdrawal of the Company Petition

97. It is humbly submitted before this Hon'ble Court that the Adjudicating Authority did not grant any specific liberty at the time of withdrawal of the Company Petition to the Appellant to revive the Petition in case of non-adherence to the Consent Terms.

98. It is submitted that, a directive issued by a judicial or quasi-judicial authority, whether instructing the performance or omission of an act, shall be deemed as a liberty granted by said judicial authority. Such granted liberty shall be considered as directory in nature, rather than discretionary, and shall thereby form a part of the decree issued by the judicial authority.[114]

99. It is pertinent to be noted that the Adjudicating Authority has in some cases granted specific liberty to revive the company petition in case of the default of consent terms taken on record. Further, even if the settlement agreement does not prescribe any particular clause for revival of the CIRP in case of default, the revival will be granted if such liberty[115] has been granted by the authority that accepted the withdrawal of company petition under Section 12-A of the Code[116].

100. The Appellate Authority in the case of *Himadri Foods Limited v. Credit Suisse Funds Ag*[117], observed that wherein a repayment schedule was incorporated in the withdrawal order, and a liberty was granted to the Financial Creditor to 'come back' and this has to be interpreted as granting a liberty for revival of the CIR proceedings.[118]Moreover, granting of liberty is inconsequential only in the case wherein there is a clear clause containing revival in the case of default in the consent terms and such terms have been brought on record[119].

101. In the present case, it is an undisputed that the consent terms executed between ATPL and Danobe Info Technology Limited were placed on record before the adjudicating authority on August 5th, 2021[120]. Therefore, the consent terms obtained the decree of court but there was no clause for revival thereunder. Furthermore, at the time of

[114] AVANT Garde Clean Room & Engg. Solutions Private Limited v. HLL Biotech Limited, Restoration Application No.2 of 2022.
[115] Gagan Deep Singh Dugal v. Ninaniya Estates Limited, Company Petition No. 86 of 2018.
[116] Howrah Mills Company Limited v JM Financial Asset Reconstruction Company Limited, 2023 SCC OnLine NCLAT 19.
[117] 2021 SCC OnLine NCLAT 48.
[118] *Ibid.*
[119] Ruchita Modi v. Mrs. Kanchan Ostwal [2020] 157 SCL 705 (NCLAT).
[120] Moot Proposition, ¶ 28.

withdrawal of the Company Petition, the Adjudicating Authority allowed the application for withdrawal via an order dated February 9th, 2022[121] without granting any liberty whatsoever to the Appellant.

102. Therefore, the Adjudicating Authority is absolutely justified in rejecting the application seeking for revival of the company petition and on the basis of aforementioned argument advanced and the authorities cited, it is humbly submitted before this Hon'ble Supreme Court to reaffirm this order and dismiss the present appeal.

[121] Moot Proposition, ¶ 29.

PRAYER

Wherefore in the light of facts presented, issues raised, arguments advanced and authorities cited, the Counsel on behalf of the Respondents humbly prays before this Hon'ble Supreme Court that it may be pleased to adjudge and declare that:

1. A Scheme of Compromise and Arrangement can be made in terms of Section 230 to 232 of the Companies Act in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016.
2. The Promoters are not eligible to file application for Compromise and Arrangement, as he is under Section 29A of the IBC to submit a 'Resolution Plan'.
3. The security interest created on the assets of Corporate Debtor are extinguished when the interest has been created for the loan availed by the third party, not by the Corporate Debtor.
4. The Hon'ble NCLT is justified in rejecting the revival of Company Petition and that an insolvency proceeding cannot be restored in case of default when Consent term is entered between parties.

and/or

Pass any other order, direction or relief that it may deem fit in the interest of justice, equity, fairness and good conscience.

For this act of kindness of your lordship, the Respondents shall duty bound forever pray.

Place: *S/d-*

Date: **COUNSELS** *for* the **RESPONDENTS**