

TEAM CODE: [TC-13]

SURANA &SURANA AND UPES SCHOOL OF LAW

NATIONAL INSOLVENCY LAW

MOOT COURT COMPETITION 2018

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI

(IB)-001 (ND)/2018

IN THE MATTER OF INSOLVENCY BETWEEN

HOT ZINGS PVT.LTD

.....OPERATIONAL CREDITOR

VERSUS

ALFREN LTD., NEW DELHI

...CORPORATE DEBTOR

WRITTEN SUBMISSIONS ON BEHALF OF PETITIONERS

WRITTEN SUBMISSION ON BEHALF OF THE PETITIONERS

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TABLE OF ABBREVIATIONS

AAA Rules	Application to Adjudicating Authority Rules
AIR	All India Reporter
CA	Company Appeals
CIRP	Corporate Insolvency Resolution Process
IB	Insolvency Board
IBC	Insolvency and Bankruptcy Code
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
SC	Supreme Court
SCC	Supreme Court Cases
S.	Section
TaxPub	Tax Publication
Insol.	Insolvency
Mah	Maharashtra
Ker	Kerala
Del	Delhi
Guj	Gujarat
Kar	Karnataka
CLJ	Company Law Journal
CriLJ	Criminal Law Journal
Pet.	Petition
WP	Writ Petition

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Cal	Calcutta
Civ.	Civil
UNCITRAL	United States Commission on International Trade Law
Ed.	Edition

TABLE OF AUTHORITIES

Cases

<i>A. Paranjothi v. Official Assignee, High Court of Madras</i> , O.S.A. No. 147/85, (1988).....	25
<i>Agarwal Marketing and Services (Energy) Pvt. Ltd. v. Max Tech Oil & Gas Services Pvt. Ltd.</i> , (CP No. (IB)-48(PB)/2017	21
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RazaBuland Sugar Co Ltd. v. The Municipal Board, Rampur, 1 SCR, 970, (1965)	28, 29
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<i>Smt. Bachahan Devi &Anr. v. Nagar Nigam, Gorakhpur & Anr</i> , Civil Appeal No. 992, (2008)	28
<i>State of Haryana and Ors. v. Raghubir Dayal</i> , MANU/SC/0518/1995, (1995).....	31
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<i>Vikash Metal and Power Ltd.</i>	21

Books Referred

1. C.S. (Dr.) D.K. Jain, Guide to Insolvency & Bankruptcy Code (1st Ed.)
2. Nandi's, Trasfer of property 1882 (2nd Ed., 2007)
3. N.D. Basu's, Arbitration and Conciliation (13th Ed. 2016)
4. R.P. Sethi, Commentary on Arbitration & Conciliation Act (2nd Ed.)
5. SumantBatra's, Corporate Insolvency Law and Practice (1st Ed., 2017)
6. Sir Dinshaw Fardunji Mulla, The Law of Insolvency In India (5th Ed.)
7. Taxmann's Insolvency and Bankruptcy Law Digest (1st Ed.)
8. V.S. Datey, Guide to Insolvency and Bankruptcy Code (5th Ed. June 2018)
9. V.S. Wahi, Treatise on Insolvency and Bankruptcy Code (2nd Ed. 2018)
10. Wolters Kluwer, Compendium on The Insolvency and Bankruptcy Code,2016 (2nd Ed.)

Academic Portals

1. www.jstor.org last accessed on 20th August, 2018.
2. www.lexisnexis.com last accessed on 11th August, 2018.
3. www.supremecourtindia.nic.in last accessed on 2nd August, 2018.
4. www.nclat.nic.in last accessed on 24th August, 2018.
5. www.manupatra.com last accessed on 25th August, 2018.
6. www.sconline.co.in last accessed on 23rd August, 2018.
7. www.westlawindia.com last accessed on 5th August, 2018.
8. www.claonline.com last accessed on 5th August, 2018.

Statutes

1. The Insolvency and Bankruptcy Code, 2016.
2. The Transfer of Property Act, 1882

Journals

1. ICSI IPA Insolvency and Bankruptcy Journal, Vol. 1, No. 6, April 2018
2. ICSI IPA Insolvency and Bankruptcy Journal, Vol. 1, No. 8, June 2018

International Law

1. UNCITRAL MODEL LAW ON INSOLVENCY.

STATEMENT OF JURISDICTION

The Hon'ble NCLT, New Delhi has inherent jurisdiction to try, entertain and dispose of the present case by virtue of S. 60(1) of The Insolvency and Bankruptcy Code, 2016. The Hon'ble Tribunal has territorial jurisdiction over the place where the registered office of the corporate person is located.

The sincere submissions on behalf of the Respondents are further substantiated in the written submissions.

All of which is most respectfully submitted.

Counsels on behalf of the Petitioners

STATEMENT OF FACTS

BACKGROUND

KingJet Ltd. holds 4 subsidiaries, namely, Alfren Ltd., Burrens Pvt. Ltd., Starwood Petroleum Ltd., and Intercontinental Shipping Ltd. Alfren Ltd. having registered office in Delhi is the 3rd largest manufacturer of Automobiles in Asia.

INSOLVENCY

Respondent took a loan of Rs.271 Crore from Pramod bank in addition to other loans of Rs.150 Crore from Lenden Bank and Rs.200 Crore from consortium of banks.

APPLICATION BY HOT ZINGS INITIATING CIRP

Petitioner is a tenant of Respondent's Commercial tower 'Jet Circle'. As per the tenancy agreement, any dispute arising out of the tenancy was to be resolved through arbitration. Respondent took back possession of the tenanted premises on 25th Feb' 2018 and did not refund security deposit after which Petitioner on 21st Mar' 2018 filed insolvency proceedings.

APPOINTMENT OF RESOLUTION PROFESSIONAL

NCLT admitted the application and declared moratorium. The RP (Mr. Ramesh Singh) appointed Rolcon Engineers Pvt. Ltd to repair the assets of the CD and paid Rs. 75 Lacs for the same. Techno Electric Suppliers Pvt. Ltd. from whom the machinery was purchased and full payment was yet to be made objected on the ground that this was mere waste of money. Other creditors alleged this action to be *ultra vires*.

THE RESOLUTION PLAN

The resolution plans were presented to the CoC. One among these was given an approval by 66.67% votes. The plan was sent to NCLT for its assent which was objected by the creditors.

STATEMENT OF ISSUES

On behalf of Corporate Debtor

1. WHETHER THE APPLICATION FILED BY HOT ZINGS PVT. LTD. IS ADMISSIBLE BEFORE THE HON'BLE TRIBUNAL WITHOUT EXHAUSTING THE OTHER REMEDY?
 - 1.1 Whether the Petitioner has *locus standi* to initiate CIRP proceedings under the Code?
 - 1.2 Whether the procedure laid down for initiation of insolvency proceedings have been complied by the Operational Creditor?
 - 1.3 Whether the remedy of Arbitration should be exhausted by Hot Zings?

On behalf of Committee of Creditors

2. WHETHER THE ACTION UNDERTAKEN BY MR. RAMESH SINGH WAS BEYOND THE AMBIT OF HIS PRESCRIBED DUTY?
 - 2.1 Whether the action undertaken by RP is in accordance with the principle of 'Going Concern'?
 - 2.2 Whether RP is authorized to repair the assets of the CD under the Code?
 - 2.3 Whether Techno Electric Suppliers Pvt. Ltd. can object to the act undertaken by RP?
 - 2.4 Whether the action of RP is in accordance to the obligations laid under the Code?

On behalf of Creditors of Alfren

3. WHETHER THE PLAN PASSED BY 66.67% VOTE CONSTITUTES A VALID MAJORITY UNDER THE AMBIT OF IBC, 2016?
- 3.1 Whether IBC, 2016 has to be interpreted in harmony with mechanisms dealing with rehabilitation of companies?
- 3.2 Whether the threshold of assent by 75% voting share is mandatory in nature?
- 3.3 Whether the power of Hon'ble Adjudicating Authority is limited to initiate liquidation proceedings on rejection of the Resolution Plan?

SUMMARY OF ARGUMENTS

1. WHETHER THE APPLICATION FILED BY HOT ZINGS PVT. LTD. IS ADMISSIBLE BEFORE THE HON'BLE TRIBUNAL WITHOUT EXHAUSTING THE OTHER REMEDY?

Non refund of security deposit falls within the ambit of operational debt being a 'provision of service'. Moreover the Petitioner has complied with all the pre requirements laid u/s 8 of the Code which gives Petitioner the right to initiate CIRP u/s 9. Further, the present suit is for initiating CIRP proceedings and not for recovery of debts which is not the jurisdiction lying with the Arbitrator.

2. WHETHER THE ACTION UNDERTAKEN BY MR. RAMESH SINGH WAS BEYOND THE AMBIT OF HIS PRESCRIBED DUTY?

RP is accorded with wide powers to take such actions that are necessary to keep the business of CD as a "going concern". Repairing of assets is for preservation of its value and the costs incurred in doing the same is within the ambit of powers accorded under the Code to which Techno Electric Suppliers, not a part of CoC and stands in no position to raise any objection.

3. WHETHER THE PLAN PASSED BY 66.67% VOTE CONSTITUTES A VALID MAJORITY UNDER THE AMBIT OF IBC, 2016?

The voting threshold laid down in the Code has to be read in harmony with the object of the Code which is rehabilitating the company. Moreover provisions cannot be interpreted to take away the discretion of the Tribunal. Additionally the majority voting shareholders in CoC have approved the plan which shows that such plan is beneficial for all stakeholders.

ARGUMENTS ADVANCED

ARGUMENTS PRESENTED ON BEHALF OF THE OPERATIONAL CREDITOR
1. WHETHER THE APPLICATION FILED BY HOT ZINGS PVT. LTD. IS ADMISSIBLE BEFORE THE HON'BLE TRIBUNAL WITHOUT EXHAUSTING THE OTHER REMEDY?
1.1 Whether the Petitioner has *locus standito* initiate CIRP proceedings under the Code?

I. It is humbly submitted that the Petitioners have initiated the CIRP proceedings against the CD by the virtue of S.6 r/w S. 9 of the IBC, 2016.

Hot Zings is an Operational Creditor

I. The Petitioner has a claim in respect of provision of service¹ which comes under the ambit of 'Operational Debt' and default in its payment gives Petitioner the right to initiate CIRP.

Claim of Petitioner over security deposit

II. It is worthy to note that 'claim' has an extensive signification embracing every species of legal demand². Moreover, in accordance to the doctrine of *non-est factum* the parties are bound³ by the rights and liabilities arising from the agreement executed between them.⁴ Ergo, the right to refund arises from the tenancy agreement and binds the landlord to refund the same on vacation of the premises⁵ Neglect to do the act to which he is bound to do gives the tenant an undisputed and legal claim over the amount.⁶

¹Insolvency and Bankruptcy Code, S. 5(21), (2016).

²P. Ramanatha Aiyar, The Law Lexicon, (2nd ed. Reprint) (2010).

³*Thoroughgood v. Coal, 2 Co. Kep 9a* (1584); *Kameshwar Sharma v. The State Of MP*, WP No. 20647, (2017).

⁴N. Nandi, *Transfer Of Property Act, 772*, (3rd ed.) (2015).

⁵As stated in Paragraph 11 of the Facts.

⁶ *Transfer Of Property Act, S.108 (g)*, (1882).

Respondent is 'obligated' to pay the claim of Petitioner

III. It is worthy to note that an existing obligation to pay a sum of money is *sine qua non* for debt⁷. Moreover, debt payable on contingency becomes payable on happening of such contingency⁸. *Arguendo*, upon surrendering possession on 25thFeb. 2018⁹ the landlord has no right to retain the deposit.¹⁰ Failure to do the same makes the debt due presently due to the existence of a relationship of a debtor and creditor¹¹.

Debt owed by the Respondent is in nature of 'Operational Debt'

IV. It is humbly submitted that the lease of immovable property comes under the ambit of 'service'. The Hon'ble Apex Court in *Mobilox Innovations Private Limited V. Kirusa Software Private Limited* opined that-

“....Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three year lease....” It is patently clear that dues arising from renting of immovable property come under operational debt. *Ergo*, renting of immovable property is a 'service' within the meaning of IBC, 2016.

V. Notwithstanding that payment of rent is a consideration¹² for availing the service of tenancy, however depositing a security amount is a condition precedent.¹³ On scrutinizing the definition of “Operational Debt” under S.5(21)¹⁴ of the Code it is apparent that it includes 'a claim' in respect of 'supply of goods or services'.¹⁵ *Arguendo*, the lessee has an undisputed

⁷*Registrar of Companies v. Kavita Benefit P. Ltd.*, 48 Comp Cas 231 (Guj), (1978).

⁸*People v. Arguello*, Calif 521, 37, (1869).

⁹As stated in Paragraph 12 of the Facts.

¹⁰*Uberoisons v. Samtal Colour Ltd.*, VAD 105 Delhi 138, (2003).

¹¹*NEG Micon v. NEPC India Ltd.*, 3 CTC, 107, (2000).

¹²Transfer Of Property Act, S. 105, (1882).

¹³*State of WB v. Mahendra Chandra Das*, 2 Cal LJ, 1, (1990).

¹⁴Insolvency and Bankruptcy Code, S. 5(21), (2016).

¹⁵V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 95 (2nd ed. 2018).

and legal claim¹⁶ over the security amount and such claim is in respect of supply or provision of service, thereby, giving it a nature of operational debt. Moreover, it is the duty of law to protect the security deposit as it is tenant's money.¹⁷ It is humbly submitted that such transaction is commercial in nature as the premises was rented for business purpose.¹⁸ *Arguendo*, the Petitioner has *locus standi* to initiate CIRP process.

1.2 Whether the procedure laid down for initiation of insolvency proceedings have been complied by the Operational Creditor?

I. It is humbly submitted that the conditions precedent for triggering the Code in so far as OC is concerned¹⁹ have been duly complied by the petitioner.

Occurrence of default by the corporate debtor

II. S.3(12)²⁰ r/w S.6²¹ of the Code implies that the term 'default' is wider than 'inability to pay debts' and mere default by the corporate debtor can trigger CIRP.²² Security deposit is a guarantee paid to the landlord against any damage done by the tenant thereby giving no right to the landlord to retain the same²³. Henceforth, omission or failure to perform such legal and contractual duty²⁴ even on numerous requests shows that a default has been committed by the Respondent.²⁵ *Ergo*, a default on the debt owed gives Petitioner a right to initiate CIRP u/s 9 of the Code.²⁶

¹⁶V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 95 (2nd ed. 2018)

¹⁷H.S. Bedi v. NHAI, RFA No. 784, (2010).

¹⁸As stated in Paragraph 11 of the Facts

¹⁹*Mobilox Innovations Private Limited v. Kirusa Software Private Limited*, CA No. 9405/2014, (2014).

²⁰ Insolvency and Bankruptcy Code, S. 3(12), (2016).

²¹ Insolvency and Bankruptcy Code, S. 6, (2016).

²²*Capri Bathaid (P) ltd v. Angel Infra Realcon P.Ltd.*, CS No. 473/2014, (2015).

²³*Uberoisons v. Samtal Colour Ltd.*, VAD 105 Delhi 138, (2003).

²⁴*Mobilox Innovations Private Limited v. Kirusa Software Private Limited*, CA No. 9405/2014, (2014).

²⁵*Nazamunnessa Begum V. Vidyasagar Cotton Mills Ltd.*, AIR Cal, 380, (1964).

²⁶*Nimish S.Mehta v/s Maharaja Dyeing (P) Ltd.*, 145 SCL 229, (2018).

Demand notice demanding payment of the amount has been duly sent to Respondent

III. It is worthy to note that information about such debt has been communicated to the Respondent through various sources like letters, emails and meetings²⁷. S.8²⁸ r/wRule 5²⁹ of the IBC(AAA) Rules, 2016³⁰ lays down the form and manner in which notice demanding payment of operational debt has to be sent. FORM 3 as prescribed under Rule 5(1)(a)³¹ is the set format of delivering the demand notice to the corporate debtor. It is pertinent to note that such form is akin to a letter, thereby, making it patently clear that the letter so sent was consonant to demand notice. Moreover delivery through letter and email constitutes to be a valid notice by the virtue of Rule 5(2)³². Failure to raise any concern within 10 days of sending such notice gives Petitioner the right to initiate CIRP proceedings.³³

1.3 Whether remedy for arbitration should be exhausted by Hot Zings?

The claim in the petition is for insolvency of the Corporate Debtor

- I. It is humbly submitted the subject matter of a suit cannot be bifurcated, thereby if a part of a dispute arising in the suit is beyond the ambit of Arbitration Agreement the same is not arbitrable³⁴. The Hon'ble Court in *Kailash v. Thakur Paper*³⁵ opined that "*Arbitration clause could not cover the question whether the company should be wound up in accordance to the provision of Companies Act, 2013 and thus this question cannot be referred to Arbitration*".
- II. The claim in the present petition is for initiating insolvency and not for recovery of money

²⁷As stated in Paragraph 12 of the Facts.

²⁸Insolvency and Bankruptcy Code, S. 8, (2016).

²⁹Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, R. 5, (2016).

³⁰Insolvency And Bankruptcy Board of India (Application to Adjudicating Authority) Rules, (2016).

³¹Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, R. 5(1)(a), (2016).

³²Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, R. 5(2), (2016).

³³*Mobilox Innovations Private Limited v. Kirusa Software Private Limited*, CA No. 9405/2014, (2014); *Seemagupta v. Supreme Infrastructure India Ltd.*, CA (AT) (Ins) No. 53, (2017).

³⁴*Sukanya Holdings (P) Ltd. v. JayeshPandya and Anr*, Appeal (Civil) No. 1174, (2002).

³⁵*In re, Thakur Paper Mills*, AIR Patna 289, (1968).

as the company has become commercially insolvent. Moreover, only this Hon'ble Tribunal has the power to declare a corporate entity as insolvent under the Code³⁶ and such disputes are non-arbitrable.³⁷

Corporate debtor is 'unable to pay its debts'

III. It is apposite to mention that the security amount is not disputed³⁸ by either parties and requires no investigation on its merits.³⁹The CD is 'unable to pay its debts'⁴⁰ as it is not in a position to meet its liabilities. In the absence of any dispute or proper cause for such neglect,⁴¹ from the side of Respondent the application is maintainable⁴².

Transfer of Property Act, 1882 governs lease agreements

IV. It is vehemently asserted that the lease agreements are strictly governed by the Transfer of Property Act, 1882.⁴³ The inapplicability of the Delhi Rent Act, 1995 does not mean that the applicability of Arbitration Act⁴⁴ *ipso facto*.⁴⁵ Henceforth, any suit in relation to the rights of the parties and the demised premises would be triable by the Civil Court and not by the arbitrator.⁴⁶

³⁶*Haryana Telecom Ltd. v. Sterelite Industries India Ltd.*, SLP No. 3695, (1999).

³⁷*Booz Allen and Hamilton v. SBI Homes*, SCC 5, 532, (2011).

³⁸*Canara Bank V. National Thermal Power Corp.*, Appeal (Civil) No. 7103-7104/2000.

³⁹*Mobilox Innovations Private Limited v. Kirusa Software Private Limited*, CA No. 9405/2014, (2014).

⁴⁰V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 153 (2nd ed. 2018).

⁴¹V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 105 (2nd ed. 2018).

⁴²*S.R. Constructions v. International Recreation and Amusement Ltd.*, (CP No. (IB)-68(PB)/2017, Order dated 28/04/2017; *Agarwal Marketing and Services (Energy) Pvt. Ltd. v. Max Tech Oil & Gas Services Pvt. Ltd.*, (CP No. (IB)-48(PB)/2017

⁴³*National Textile Corporation Ltd. v. AshvalVadaraa*, DLT 221, 155, (2008).

⁴⁴Arbitration and Conciliation Act, (1996).

⁴⁵*Hemangini Enterprises v. Kamaljeet Singh Ahluwalia*, CA No. 16850, (2017).

⁴⁶*Hemangini Enterprises v. Kamaljeet Singh Ahluwalia*, CA No. 16850, (2017)

 ARGUMENTS PRESENTED ON BEHALF OF THE RESOLUTION PROFESSIONAL

2. WHETHER THE ACTION UNDERTAKEN BY MR. RAMESH SINGH WAS BEYOND THE AMBIT OF HIS PRESCRIBED DUTY?

I. RP exercises certain powers and control over the CD's assets with a duty to protect those assets and their value, as well as interests of creditors and employees.⁴⁷

2.1 Whether the action undertaken by RP is in accordance with the principle of 'Going Concern'?
Repairing of assets is a 'necessary action'

I. "Going concern" refers to an enterprise continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.⁴⁸ It is pertinent to note that to carry on the business of CD as 'going concern' the RP steps into the shoes of the Director and is empowered to make all 'necessary' decisions for the same during the CIRP.⁴⁹ Further, what constitutes to be 'necessary' has not been defined under the Code. The dictionary meaning of the word 'necessary' is "needed to be done; essential"⁵⁰. Henceforth, the necessity of an act must be determined by the Court having regard to the circumstance of the case.⁵¹

II. It is humbly submitted that object of IBC is to 'revive' the CD by declaring a moratorium period.⁵² Going Concern hence should be in sync with the purpose of moratorium.⁵³ A company which has suffered a temporary financial setback may be revived, by granting a

⁴⁷UNCITRAL, Legislative Guide on Insolvency Law.

⁴⁸Institute of Chartered Accountants of India, Accounting Standard (AS) 1 (Disclosure of Accounting Policies), 10.

⁴⁹*M/s Edelweiss Asset Reconstruction Co. Ltd. v. M/s Bharati Defence and Infrastructure Ltd.*, Appeal (Comm.) No. 26, (2016).

⁵⁰Oxford Dictionary, (2nd ed. 2014).

⁵¹*Great Eastern Electric Co.* (1942) 111 LJ Ch 1.

⁵²*Psl Ltd. v. Jotun India Pvt.Ltd.* 2 AIR Bom R 350, (2018).

⁵³*Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.*, O.M.P. (COMM.) No. 397, (2016).

temporary reprieve, giving it an opportunity to put itself back on its feet.⁵⁴The well-functioning of machinery for a manufacturing plant is ‘necessary’ in order to produce a defect free product and any compromise in the same will cost in terms of loss of goodwill which cannot be afforded by the 3rd largest manufacturer of automobiles in Asia especially in the present circumstances, thereby posing a threat to the revival of the business.

III. Also, Techno Electric Suppliers themselves pointed out that there isn’t ‘immediate requirement’⁵⁵ for changing of parts of machinery, nonetheless, requirement to do so is not objected, whether now or later some time. *Ergo*, the act of reparation of assets by the RP is a ‘necessary action’ as it is done to preserve the value of the machinery till the formulation of a resolution plan and for carrying on the business as ‘going concern’.

2.2 Whether RP is authorized to repair the asset under the Code?

Wide powers conferred upon RP to carry on business as a ‘Going Concern’

- I. It is most respectfully submitted that the powers conferred upon the RP under the Code are wide enough to include every endeavor made to protect and preserve the value of the assets of the CD.⁵⁶ The UNCITRAL guidelines confer an obligation upon the RP to maximize the value and protect the assets of the insolvency estate and a duty to get the best price reasonably obtainable on the sale of the estate.⁵⁷
- II. Also, S.20 r/w S.25 of the Code makes is patently clear that the RP can take the custody and control of all the assets of the CD to preserve and protect them for carrying on the business

⁵⁴*National Textile Workers’ Union v. P.R. Ramakrishnan & Ors.*, 3 SCR, 12, (1983).

⁵⁵ As stated in Paragraph 18 of the Facts.

⁵⁶*M.K. Shah Exports Ltd. v. Assam Co. India Ltd.*, I.A. No. 24, (2018).

⁵⁷V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 50 (2nd ed. 2018)

as ‘going concern’.⁵⁸

Expense incurred by RP comes under the ambit of ‘IRPC’

- III. S.20(2)(a)⁵⁹ r/w S.25 (2)(d)⁶⁰ confers power upon the RP to appoint any professional which may be necessary for management of operations of CD as ‘going concern’. *Ergo*, appointment of Rolcon Engineers Pvt. Ltd. is within the prescribed duties of the RP.
- IV. On conjoint reading of S.5(13)(c) with s.23(1) and S.25(1) of the Code it is clear that RP is given wide powers to take every action to preserve and protect the assets of the Company and incur costs for running it as ‘Going Concern’. *Ergo*, RP in lieu performing this statutory duty need not require any prior authorization to incur such costs.

2.3 Whether Techno Electric Suppliers can object to the act undertaken by the RP?

Acts performed by RP can only be objected by CoC

- I. It is humbly submitted that Techno Electric Suppliers Pvt. Ltd. has a claim in respect of provision of ‘goods and services’ provided to the CD thereby qualifying its claim as operational debt. Thus, making him an OC of the CD.
- II. The OC are typically not able to decide on matters relating to ‘commercial viability’ of the CD, nor are they typically willing to take the risk of restructuring their debt in order to make the CD a ‘going concern’.⁶¹ Furthermore, S.21(2)⁶² r/w Regulation 16(1)⁶³ clarifies that the CoC shall comprise of all FCs and in absence of any financial debt, the CoC shall comprise of OCs. It is *ex facie* clear that any act of RP is questionable only by Adjudicating

⁵⁸*Bank of New York Mellon, London Branch v. Zenith Infotech Ltd.*, Appeal (Civil) No. 3055, (2017).

⁵⁹Insolvency and Bankruptcy Code, (2016)

⁶⁰Insolvency and Bankruptcy Code, (2016)

⁶¹*Akshay Jhujhunwala and Anr. v. UOI*, W.P. No. 672, (2017).

⁶²Insolvency and Bankruptcy Code, S. 62, (2016).

⁶³Insolvency and Bankruptcy Board Of India (Insolvency Regulation Process for Corporate Persons) Regulation, Reg. 16(1), (2016).

Authority or CoC in the present case. *Arguendo*, it is worth your kind attention that the debts owed to the CD do not stand free of financial debt and so OC is not in a position to take part in CoC and object the act of RP.

2.4 Whether the act of RP is in accordance to the obligations laid under the Code?

'Repairing of assets' of the CD is done in 'good faith' by the RP

- I. IBC lays an obligation upon the CD to carry all actions during CIRP in 'good faith',⁶⁴ however nowhere defines it. S.3(22) of the Indian General Clauses Act, 1897 defines 'good faith' as "*a thing shall be deemed to have been done in good faith where it is in fact done honestly, whether it is done negligently or not.*"
- II. The Hon'ble Court in *Kailas Sizing Works v. Municipality of Bhiwandi and Nizampur*⁶⁵ laid down the test of good faith as- "*A person who acts in a particular manner in the discharge of his duty in spite of the knowledge and consciousness that injury to someone or group of persons is likely to result from his act or omission or acts with wanton or wilful negligence in spite of such knowledge or consciousness cannot be said to act with fairness or uprightness and therefore he cannot be said to act with honesty or in good faith*". Moreover, in deciding the element of lack of 'good faith' the entire surrounding circumstances will have to be taken note of.⁶⁶
- III. *Arguendo*, the RP in exercise of his statutory duties laid down under the Code and for operating the ongoing business operations of the CD as 'going concern' incurred expenses for reparation of assets. Also, the Code intends to make an attempt to revive the Company and start its operations as it would always be in the interest of all that the Company starts

⁶⁴*Jayaswal Neco Industries Limited & Ors. v. Reserve Bank Of India And 12 Ors*, W.P. (Lodging) No. 56, (2018).

⁶⁵*Kailas Sizing works v. Municipality of Bhiwand*, 2 SCR, 123, (1975).

⁶⁶*A. Paranjothi v. Official Assignee, High Court of Madras*, O.S.A. No. 147/85, (1988).

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production again.⁶⁷ *Ergo*, it is *prima facie* evident that such repair will help the CD to stand on its feet and is not likely to cause any harm or inconvenience to the other creditors. Henceforth, no suit, prosecution or any other legal proceeding shall lie against the RP as such act is done in good faith in compliance to the rules and regulations made thereunder.⁶⁸

RP has duly complied with his obligations under the Code

IV. S.208,⁶⁹ lays an obligation upon RP to take reasonable care and diligence while conducting actions that may be necessary during CIRP. Due diligence as defined under Black's law Dictionary is '*a measure of prudence, activity or assiduity, as is properly to be expected from an ordinarily exercised by, a reasonable and prudent man under the particular circumstances*'.⁷⁰ Furthermore, the concept of prudence is elastic and variable⁷¹ and cannot be measured by any absolute standard.⁷² *Ergo*, RP has acted diligently by taking second opinion of Rolcon Engineers Pvt. Ltd. and acting upon the latter's advice in taking out repairs of the machinery which serves the purpose of maintaining efficiency of both, the asset as well as the process of resolution.⁷³ Such act is to be carried out in a time bound manner as is the object of the Code i.e. 180 days⁷⁴ which justifies the urgency in carrying out the needful repairs by the RP. *Arguendo*, RP has duly complied with the entire obligation and such act is not beyond the ambit of his statutory duties laid under the Code.

ARGUMENTS PRESENTED ON BEHALF OF THE RESOLUTION APPLICANT

⁶⁷ *Jme Employees Cooperative Credit*, SCC OnLine Raj 472, (2018).

⁶⁸ Insolvency and Bankruptcy Code, S. 233, (2016).

⁶⁹ Insolvency and Bankruptcy Code, S. 208, (2016).

⁷⁰ Bryan A. Garner, *Black's Law Dictionary*, (9th ed. 2009).

⁷¹ *Rishi Kesh Singh and Ors. v. The State*, CriLJ 132, (1970).

⁷² *Perry v. Cedar Falls*, 87 Iowa, 3315, 54 N.W. 225.

⁷³ Insolvency and Bankruptcy Code, S. 5(21), (2016)

⁷⁴ Insolvency and Bankruptcy Code, S. 12, (2016).

3. WHETHER THE PLAN PASSED BY 66.67% VOTE CONSTITUTES A VALID MAJORITY UNDER THE AMBIT OF IBC, 2016?

3.1 Whether IBC, 2016 has to be interpreted in harmony with mechanisms dealing with rehabilitation of companies?

Voting thresholds across other guidelines and statutes

- I. It is humbly submitted that the threshold for voting by CoC is very high and proves to be a road block in the resolution process when the approval of resolution plan is concerned⁷⁵. It is pertinent to analyze the voting thresholds across other statutes and guidelines which deal/have dealt with rehabilitation of companies to determine if the threshold limit in the Code is prejudicial to the cause of justice.
- II. The JLF framework formulated by the RBI⁷⁶ has reduced its prescribed voting threshold to 60% (reduced from 75%) of creditors by value and 50 % (reduced by 60%) of creditors by number⁷⁷.Also, the SARFAESI Act, 2002 provides a voting threshold of not less than 60%(reduced from 75%) in value to the secured creditors for deciding various issues⁷⁸.
- III. It is worthy to note that the voting threshold has been reduced considerably under various enactments to provide for easy approval and effective implementation.In the light of the above deliberations the high threshold of 75% under IBC, 2016 must not be interpreted to be mandatory by the Tribunal.

Voting thresholds globally in Bankruptcy laws

⁷⁵Insolvency and Bankruptcy Board of India, Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, (August 16, 3:30 PM),http://ibbi.gov.in/BLRCReportVol1_04112015.pdf

⁷⁶*K. Shashidhar v. Kamineni Steel & Power India (P.) Ltd.*, TaxPub(CL) 0951 (NCLT-Hyd), (2017)

⁷⁷Insolvency and Bankruptcy Board of India, Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, (August 16, 3:30 PM),http://ibbi.gov.in/BLRCReportVol1_04112015.pdf

⁷⁸Enforcement Of Security Interest and Recovery Of Debt Laws (Amendment) Act, S.5(c), (2012).

IV. It is pertinent to note that in USA, approval of a plan requires 66% or more voting share and 50% or more voting share in number for each class of creditors⁷⁹. The position is similar in Canada, however, such requirement applies to each class of unsecured creditors⁸⁰. *Arguendo*, after noting and factoring in the experience of past restructuring laws in India and international best practices, it cannot be denied that the object of the Code is to promote resolution, thereby voting share for approval of plan and other critical decisions may be reduced from 75 % to 66 % or more of the voting share of the FCs.⁸¹

3.2 Whether the threshold of assent by 75% voting share is mandatory in nature?

I. It is apposite to mention that there cannot be any sweeping generalization or straight jacket rule to determine the mandatory or directory effect of a provision.⁸²It should depend upon the facts of each case.⁸³ The object of the statute is the determining factor for the same.⁸⁴

II. Also in *Smt. Bachahan Devi and Another vs. Nagar Nigam, Gorakhpur and Another*⁸⁵, the court laid down two main considerations for regarding a rule as directory-

“(i) Absence of any provision for the contingency of any particular rule not being complied with or followed, and (ii) serious general inconvenience and prejudice to the general public would result if the act in question is declared invalid for non-compliance with the particular rule.”

Discretionary power is accorded to the Adjudicating Authority

⁷⁹11 US Code S. 1126(c); BLRC Report, p.68, (n.15)

⁸⁰Bankruptcy and Insolvency Act, S.54, 1985(Canada).

⁸¹Abcaus, Report on The insolvency Law Committee, (Aug. 18, 2018, 5:00 PM), <https://abcaus.in/wp-content/uploads/2018/04/REPORT-OF-THE-INSOLVENCY-LAW-COMMITTEE.pdf>.

⁸²*Prabha Shankar Dubey v. State of M.P.*, Appeal (Cri.) No. 634, (2003).

⁸³*Church’s Auxiliary For Social ... v. Director General Of Income Tax*, 325 ITR362, (2010).

⁸⁴*Raza Buland Sugar Co Ltd. v. The Municipal Board, Rampur*, 1SCR 970, (1965); *Dattatraya Moreshwar v. State of Bombay*, AIR SC 181, (1952); *M. Balakrishna Reddy v. CBI*, 4 SCC 409, (2008).

⁸⁵*Smt. Bachahan Devi & Anr. v. Nagar Nigam, Gorakhpur & Anr*, Civil Appeal No. 992, (2008).

- I. It is worthy to note that the provision is to be read as a whole while interpreting, the intention and object of the legislation⁸⁶ and determining the contingency arising out of its noncompliance.⁸⁷
- II. It is pertinent to note that the Hon'ble Court in the case of *Dalchand vs. Municipal Corporation, Bhopal and Ors.*⁸⁸ opined that-
- “Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory...”
- III. The object of the Code is to balance interest of all stakeholders and to carry the re-organisation of the company in a time bound manner which will improve the ease of doing business.⁸⁹ Moreover, the Code aims to promote resolution over liquidation of CD⁹⁰ which will *ex facie* promote the ease of doing business.
- IV. S. 31(2)⁹¹ uses the expression “satisfied” and “may” which accords discretionary power to Adjudicating authority to reject the plan if the same does not confirm to the requirements referred in 31(1). *Arguendo*, on conjoint reading of S. 31(1) with object of the Code it can be deduced that word ‘may’ points out that even if the plan has not qualified the threshold of 75%⁹² laid down in the Code, the word ‘may’ used, in the provision shows that such threshold

⁸⁶*Institute of C.A. of India v. Ajit Kumar Iddya* AIR Kant.187, (2003); *Harish VithalKulkarni v. PradeepMahadevSabnis*, TP No. 610, (1993).

⁸⁷*Ammal Chandra Dutt v. Ind ADJ*, 1 SCC 1, (1989).

⁸⁸*Dalchand v. Municipal Corporation, Bhopal & Ors.*, AIR SC 303, (1983).

⁸⁹ Statement of objects

⁹⁰ Ministry of Corporate Affairs, Restructuring and Liquidation (Aug. 20, 2018, 4:00 PM), <http://www.mca.gov.in/MinistryV2/restructuring+and+liquidation.html>.

⁹¹ Insolvency and Bankruptcy Code, S. 31(2), (2016).

⁹² Insolvency and Bankruptcy Code, S. 30(4), (2016).

is only permissible or directory in the sense and non-compliance to the same will not render the further proceeding to be invalid.⁹³

Non-compliance of the provision will not cause inconvenience to general public

- V. It is humbly submitted that for carrying on the ‘test of inconvenience’ the interest of various has to be considered where by FCs have to be preferred amongst them.
- VI. It is cognizant that 66.67% of voting share of the FCs gave assent to the resolution plan presented by the RP. The assent was given by Pramod Bank having 56.80%, Bank of Borrowers having 7.64% and the showroom owners having 2.29%, thus totaling 66.67%.
- VII. The FCs having largest percentage of stake should be given preference over the stakeholders having nominal percentage of voting rights.⁹⁴ On conjoint reading of S. 5(28) and 30(4) of the Code a viable solution to remove the dead lock can be derived which is to give the preference to the decision taken by the largest percentage in voting rights of the FC(s).⁹⁵ Ergo, Pramod bank being the holder of the largest percentage of voting share has approved the plan and therefore such plan ought to have passed the criteria laid under Section 30(4) of the code. Moreover, there is a need to relook at the current majority requirement as just 33.33% members cannot take a company to liquidation.⁹⁶
- VIII. *Arguendo*, noncompliance to the high threshold laid down under S. 30(4)⁹⁷ is *prima facie* not causing any inconvenience to the CoC as FCs having majority voting share support the resolution plan which shows that such plan is beneficial in the interest of all stake holders.

⁹³ *Raza Buland Sugar Co Ltd. v. The Municipal Board, Rampur*, 1 SCR 970, (1989).

⁹⁴ *In re Raj Oils*, TaxPub(CL) 0794 (NCLAT-Mum), (2017).

⁹⁵ *In re Raj Oils*, TaxPub(CL) 0794 (NCLAT-Mum), (2017).

⁹⁶ *K. Shashidhar v. Kamineni Steel & Power India (P.) Ltd.*, TaxPub(CL) 0951 (NCLT-Hyd), (2017).

⁹⁷ Insolvency and Bankruptcy Code, S. 30(4), (2016).

3.3 Whether the power of Hon’ble Adjudicating Authority is limited to initiate liquidation proceedings on rejection of the Resolution Plan?

“Shall” can be interpreted as “may”

- I. It is humbly submitted that rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit.⁹⁸
- II. The word “shall” used in the provision of the Code has to be read with the objective of the enactment. As already cited *supra* the legislature intends to promote rehabilitation over liquidation of the corporate debtor. *Arguendo*, “shall” used in a section or rule of a statute has to be construed as “may”⁹⁹ to adhere to the object of enactment.
- III. The tribunal has to ascertain the real intention of the legislature by foreseeing the consequences that would flow from the construction to be placed thereon.¹⁰⁰ If the use of word “shall” makes the court powerless to grant any relief even when the case so demands it shall not be mandatory in nature.¹⁰¹
- IV. It is humbly submitted that mere technical defect cannot supplant the cause of justice.¹⁰² Henceforth, once a default is found to be of a very technical nature, the court must have power to relieve against a drastic consequence when it is satisfied.¹⁰³ *Arguendo*, the court has wide power and jurisdiction to accept the resolution plan or grant any other remedy that it deems fit.

⁹⁸*M/S. Ota Falloons Forwarders Pvt. ... v. Union Of India &Anr*, W.P. No. 691, (2017).

⁹⁹*Ammal Chandra Dutt v. Hind ADJ*, 1 SCC 1, (1989).

¹⁰⁰*State of Haryana and Ors. v. RaghubirDayal*, MANU/SC/0518/1995, (1995).

¹⁰¹*Ganesh Prasad SahKesari v. Lakshmi Narayan Gurpa*, 3 SCC 53, (1985).

¹⁰²*Severn Terent Water Purification Inc. v/s VidyaSagar Cotton Mills Ltd.*, Comp Cas 36 (Cal), 33, (1963).

¹⁰³*BhikhabhaiDevshivs State Of Gujarat And Ors.* on 28 August, AIR Guj 136, (1986).

PRAYER

WHEREFORE, IN THE LIGHT OF THE FACTS STATED, ISSUES RAISED, ARGUMENTS ADVANCED, REASONS GIVEN AND AUTHORITIES CITED, THIS HON'BLE TRIBUNAL MAY BE PLEASED TO ADJUDGE AND DECLARE:

On behalf of Operational Creditor

- [1] Hold that the CIRP Application filed by the Hot Zings be maintainable.
- [2] Hold that the Arbitral Tribunal has no jurisdiction to decide the present matter.

On behalf of Resolution Professional

- [1] Hold that the act of Resolution professional is within the ambit of the Code.
- [3] Hold that the applicant must refund expense incurred by the Resolution Professional.

On behalf of Committee of Creditors

- [1] Hold that the procedure laid down under the Code for approval of Resolution Plan is directory.
- [2] Hold that the Resolution Plan is passed and order the restructuring the Corporate Debtor.

AND ANY OTHER RELIEF THAT THIS HON'BLE TRIBUNAL MAY BE PLEASED TO GRANT.

-ALL OF WHICH IS MOST RESPECTFULLY SUBMITTED

SD/-

COUNSELS ON BEHALF OF THE PETITIONERS