TEAM CODE: P4

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

HOT ZINGS PVT. LTD. ……OPERATIONAL CREDITOR

versus

ALFREN LTD., NEW DELHI ……. CORPORATE DEBTOR

RESOLUTION PROFESSIONAL ……..... PETITIONER

versus

COMMITTEE OF CREDITORS ……RESPONDENT

RESOLUTION APPLICANTS …….....PETITIONER

versus

COMMITTEE OF CREDITORS ……RESPONDENT

COMMITTEE OF CREDITORS …….....PETITIONER

versus

CREDITORS OF ALFREN ……RESPONDENT

- WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONER -

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STATEMENT OF JURISDICTION

The Insolvency and Bankruptcy petition is filed under Section 8 of Insolvency And Bankruptcy Code, 2016[1] before the National Company Law Tribunal, New Delhi, constituted under Section 408 of the Companies Act, 2013[2] as Adjudicating Authority for the purpose of insolvency resolution and liquidation for corporate person.

[1] S.8 IBC, 2016

[2] S.408 Companies Act, 2013

STATEMENT OF FACTS

1. KingJet Ltd. ("Kingjet") is a public limited company which holds 4 subsidiaries including Alfren Ltd. Alfren wanted to set up another plant and took a loan from Pramod Bank of Rs. 271 Crores. Alfren took a loan from Lenden Bank of Rs. 150 Crore to import automobile products. Alfren took a loan of Rs.200 Crores from a consortium of banks which took charge of the plants and machinery of Alfren.
2. Alfren has a commercial tower, 'Jet circle' and it is given on rent to many small enterprises. Rent is to be paid monthly and a one time security will be given to the property. Any dispute between the tenant and the landlord will first be referred to Arbitration. The security amount is the rent for two months and has to be refunded by the when the tenant vacates.
3. Pramod Bank and Hot Zings Restaurant were two tenants. The possession of these two tenants was taken back on 25th February 2018 and the security amount was not returned. The companies expressed their concern about non-payment of the security amount through various emails and letters. The Board of Directors did not pay much attention towards the demand of its creditor.
4. Alfren on 18th March 2018 made a default on one of its EMI due to Pramod Bank. On 21st March, Hot Zings Pvt. Ltd. filed an application under Insolvency and Bankruptcy Code against Alfren Ltd. After much persuasion of their legal advisors, Alfren on 19th March lodged a caveat in NCLT, Delhi.
5. The Committee of Creditors appointed Mr. Ramesh Singh as the Resolution Professional. He appointed two registered valuers for the company and started the valuation of the company and its assets. He realized some of the machinery requires servicing and called upon some third party mechanics, Rolcon Engineers Pvt. Ltd. Without further inquiry, the Resolution Professional got the parts changed for Rs.75 Lakhs. The creditors alleged this action as *ultra vires.*
6. The resolution applicants presented the resolution plan in a meeting of the committee of creditors. The Committee of Creditors did not consider any plan fit for the revival of the company. However, the resolution professional sent the plan to NCLT for its assent though the plan was approved only by 66.67% of the Committee of Creditors, explaining that such action is within its powers and in the best interest of the company. Rest of the creditors raised objections against the plan on various grounds.

STATEMENT OF ISSUES

I. **Whether the petitioner is an operational creditor as given under Section 5(20) of the Code?**

II. **Whether the petitioner is entitled to initiate corporate insolvency resolution process against the respondent 'Corporate Debtor' under Section 8 & 9 of the Code?**

III. **Whether the application filed by Hot Zings Pvt. Ltd is admissible before the Hon'ble Tribunal without exhausting the other remedy?**

IV. **Whether the action undertaken by Mr. Ramesh Singh was beyond the ambit of his prescribed duty?**

V. **Whether the plan passed by 66.67% vote constitutes a valid majority under the ambit of IBC, 2016?**

SUMMARY OF ARGUMENTS

I. WHETHER THE PETITIONER IS AN OPERATIONAL CREDITOR AS GIVEN UNDER SECTION 5(20) OF THE CODE?

The maintainability of applications for initiating corporate insolvency resolution process chiefly depends on satisfying the Tribunal that it falls either within the definition of '*Financial Creditor'* or '*Operational Creditor'* under the IBC. Further, the petition has been instituted in accordance with Section 8 & 9 of the Insolvency and Bankruptcy Code, 2016.

II. WHETHER THE PETITIONER IS ENTITLED TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS AGAINST THE RESPONDENT "CORPORATE DEBTOR" UNDER SECTION 8 & 9 OF THE CODE?

On satisfying the maintainability of applications for initiating Corporate Insolvency Resolution Process, it is proved that the conditions for filing an application for initiation of Corporate Insolvency Resolution Process is satisfied as given under Section 8 of the Code.

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

On satisfying the conditions for filing an application for initiation of Insolvency Resolution Process this application is filed by the Petitioner before the Hon'ble Tribunal. The Application has been filed by waiving the Arbitration Proceedings in accordance with Section 34(2)(b) of The Arbitration and Concilliation Act, 1996.

IV. WHETHER THE ACTION TAKEN BY Mr. RAMESH SINGH IS UNDER THE AMBIT OF HIS PRESCRIBED DUTY?

The action taken by the petitioner is under the ambit of his prescribed duty under Section 23(1), Section 25(1) and Section 25(2)(a) of Insolvency and Bankruptcy Code, 2016 and it is intra vires of his powers and duties.

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

The plan passed by 66.67% vote constitutes a valid majority under the ambit of IBC, 2016 under Section 30(4) as it states it's upto the Committee of Creditors to decide the percentage of voting shares according to the circumstances of the corporate debtor.

ARGUMENTS ADVANCED

I. WHETHER THE PETITIONER IS AN OPERATIONAL CREDITOR AS GIVEN UNDER SECTION 5(20) OF THE CODE?

1) It is humbly submitted before this Hon'ble Tribunal that the Insolvency Petition filed by the Petitioner is maintainable as it is proved that [A] the security deposit in a lease transaction of an immovable property falls under the scope and definition of "Operational Debt" as given under Section 5(21), and [B] the Petitioner is an Operational Creditor as given under Section 5(20) of the Code.

A. THE SECURITY DEPOSIT IN A LEASE TRANSACTION OF AN IMMOVABLE PROPERTY WILL FALL UNDER THE DEFINITION OF "OPERATIONAL DEBT".

2) The maintainability of applications for initiating corporate insolvency resolution process chiefly depends on satisfying the Tribunal that it falls either within the definition of '*Financial Creditor'* or '*Operational Creditor'* under the IBC. Further, the petition has been instituted in accordance with Section 8 & 9 of the Insolvency and Bankruptcy Code, 2016.

1. *NON-REPAYMENT OF SECURITY DEPOSIT IS AN "OPERATIONAL DEBT"*

3) In order to ascertain whether a person would fall within the definition of an operational creditor, the debt owed to such a person must fall within the definition of an "Operational Debt" as defined under Section 5(21) of the IBC. An "Operational Debt" is defined under section 5(21) of the IBC to mean: "*a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".*

4) The Petitioner's claim is a default arose out of non-payment of the one-time security amount given to the Corporate Debtor in respect of the property taken on lease from the Corporate Debtor. Since the possession of the property was handed over to the Respondent, the lease agreement is terminated and in the circumstances due to the termination of lease as narrated above, the Corporate Debtor is liable to refund the sums paid as security deposit given at the time of entering into the respective leases by the Operational Creditor. Subsequent to the termination of the lease, the Operational Creditor has repeatedly been approaching the Corporate Debtor to refund the security deposit, however without much avail.

2. *RENTING OF IMMOVABLE PROPERTY IS A "SERVICE"*

5) It was rendered by Hon'ble Court of Gujarat at Ahmedabad reported in the matter of **Cinemax India Ltd. Vs. Union Of India**[3] in order to project the view that the lease transactions in relation to immovable, namely, renting of immovable property in furtherance of business or commerce to carry out the activity or business or commerce of service recipient amounts to rendition of service and would fall within the meaning of definition of "service tax" and hence the contention of the Corporate debtor that the transaction does not fall under the definition of "Operational Debt" cannot be taken into consideration as the renting of immovable property should be considered as service thereby satisfying the term "Service" as found in the definition of "Operational Debt" under Section 5(21) of the Code.

6) The Counsel for the Petitioner relies on the case **Jindal Steel and Power Limited Vs. DCM International Limited**[4] to prove that the lease transaction in relation to immovable property would fall within the meaning of definition of service tax. The Counsel for the Petitioner has relied upon this case, where the scope of the word "Service" was briefly explained as follows:

> *"7 . Ld. Counsel for the Operational Creditor has also filed written submissions as rebuttal to the above contentions of the Ld. Counsel for the Respondent along with certain case law as rendered by Hon'ble High Court of Gujarat at Ahmedabad reported in MANU/GJ/1053/2011*[5] *in the matter of Cinemax India Ltd. vs. Union of India in order to project the view that the lease transactions in relation to immovable property, namely, renting of immovable property in furtherance of business or commerce to carry out the activity or business or commerce of service recipient amounts to rendition of service and would fall within the meaning of definition of service tax and hence the contention of the Corporate Debtor that the transaction does not fall under the definition of Operational Debt cannot be taken into consideration as the renting of immovable property should be considered as "service" thereby satisfying the term 'service' as found in the definition of 'Operational Debt' under Section 5(21) of IBC, 2016. Ld. Counsel for the Petitioner has also placed reliance on the report of the Bankruptcy Law Reforms Committee as presented to the Govt. of India particularly at paragraph 5.2.1*[6]*, which is extracted for ready reference as below:*

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[3] MANU/GJ/1053/2011

[4] MANU/NC/1072/2017

[5] Cinemax India Ltd v. Union of India

[6] The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design November 2015

Here, the Code differentiates between financial creditors and operational creditors. Financial Creditors are those whose relationship with the entity is pure financial contract, such as a loan or a debt security. Operational creditors are those whose liability from the entity comes from transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by the car mechanic and who gets paid only after the spark plugs are sold is an operational creditor. 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. The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.

8. Ld. Counsel for the Petitioner/Operational Creditor relies on the above paragraph as extracted to reinforce that the transaction of lease of immovable property will fall within the term of services also under Section 5(21) of IBC, 2016."

7) Considering the above mentioned case, the lease transaction in relation to immovable property would fall within the definition of "Service" as given under Section 5(21) of the Code and hence the non-payment of the security deposit should be considered as an "Operational Debt" as given under Section 5(21) of the Code.

B. THE PETITIONER IS AN OPERATIONAL CREDITOR

8) It is on the facts and circumstances of the case that we have been called upon to consider whether the Petitioner could be regarded as an "Operational Creditor" within the meaning of Section 9 read with Section 5(7) & (8) of the Code.

9) In order to succeed in initiating corporate insolvency resolution process against a corporate debtor, it is *sine qua non* to prove that the creditor falls within the ambit and scope of the definition of '*Operational Creditor*' under Section 5(20) of the IBC. Prior to discussing the aforesaid, it is imperative to first understand the definition of '*Operational Creditor'* given under the Code. An "Operational Creditor" is defined under Section 5(20) of the IBC to mean "*any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*".

10) Since, it is proved that the non-payment of security amount is considered to be an "Operational Debt", the Petitioners of this case would fall under the definition of "Operational Creditor" as given under Section 5(20) of the Insolvency and Bankruptcy Code, 2016.

II. WHETHER THE PETITIONER IS ENTITLED TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS AGAINST THE RESPONDENT "CORPORATE DEBTOR" UNDER SECTION 8 & 9 OF THE CODE?

11) On satisfying the maintainability of applications for initiating Corporate Insolvency Resolution Process, it is humbly submitted before the Hon'be Tribunal that the conditions for filing an application for initiation of Corporate Insolvency Resolution Process are satisfied..

A. INSOLVENCY RESOLUTION BY AN "OPERATIONAL CREDITOR"

12) Section 8 and 9 of the Code provides the procedure for Insolvency Resolution by an "Operational Creditor". Insolvency Resolution Process by an Operational Creditor is defined under Section 8 as follows:

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor—

(a) existence of a dispute, [if any] , and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment] of unpaid operational debt—

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation.—For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding [payment] of the operational debt in respect of which the default has occurred.

1. DEFAULT MADE BY THE CORPORATE DEBTOR

13) An operational creditor has been empowered to invoke the insolvency resolution process in terms of the provisions of the Code only if there is a 'default' in payment of goods supplied or services rendered to an operational creditor.

14) The term "*Default*" has been defined in Section 3(12) of the Code as follows: *"Default" means non-payment of debt when whole or any part of installment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be;* In this case, there is a "default" made by Alfren Ltd. in the services rendered by them to the Operational Creditor.

2. DELIVERY OF DEMAND NOTICE

15) Section 8(1) provides that an Operational Creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the Corporate Debtor. An operational creditor is required to serve the "*Demand Notice*" on the corporate debtor requiring it to make the payment within a period of 10 days or send the notice of default.

16) The 'demand notice' or the copy of the invoice demanding payment may be delivered to the corporate debtor-

i) at the registered office by hand, registered post or speed post with acknowledgement due; or

ii) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

A copy of the demand notice or invoice demanding payment served by an operational creditor shall also be filed with an information utility, if any.

17) The non-payment of the security amount was intimated through various letters and emails by the Petitioner. The petitioners had also requested the Board of Directors to consider the matter critically in various meetings but the Respondent had not paid much attention towards the demand of the Petitioner. So, there exists a dispute between the Operational Creditor and the Corporate Debtor.

3. EXISTENCE OF DISPUTE

18) The term "*dispute*" is defined under Section 5(6) of the Code as follows;

"Dispute" includes a suit or arbitration proceedings relating to-

a) the existence of the amount of debt;

b) the quality of goods or service; or

c) the breach of a representation or warranty.

19) The above provisions has been held in the case law **Annapurna Infrastructure Pvt. Ltd and Ors. Vs. Soril Infra Resources Ltd[7].** The Corporate Debtor should respond to the Demand Notice within ten days of its filing. This has been given in Section 8(2) of the Code. It provides that;

"the Corporate Debtor shall, within a period of ten days the receipt of the demand notice or copy of the invoice, bring to the notice of the Operational Creditor-

a) existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

b) the repayment of unpaid operational debt-

i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

ii) by sending an attested copy of the record that the operational creditor has encashed a cheque issued by the corporate debtor."

20) If the payment has been made or a notice of 'Dispute' has been received by the Operational Creditor, then the petition filed for Initiating Insolvency Petition will be dismissed. This has been given in the case **Mobilox Innovations Pvt Ltd V. Kirusa Software Pvt Ltd[8].**

> *In this case, the Corporate Debtor had sub-contracted his work to the Operational Creditor and a Non-Disclosure Agreement (NDA) was also executed between the parties. The Corporate Debtor withheld the payments to the Operational Creditor contending that there was a breach of the Non-Disclosure Agreement. The Operational Creditor filed a demand notice which was replied to by the Corporate Debtor stating that there exists a bon fide dispute between the parties regarding the breach of the Non-Disclosure Agreement. The Operational Creditor filed an application to initiate Insolvency Resolution Process under Section 9 of the Code.*
>
> *The NCLT Mumbai Bench held that since the default of payment was disputed by the Corporate Debtor when the petitioner had filed a demand notice, the petition was rejected.* The Apex Court held that:
>
> *"40. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5(2)(d) if notice of dispute has been received*

[7] 2017 (3) TMI 1552

[8] Civil Appeal No: 9405 of 2017

by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defense which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defense is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application…….

45. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defence is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterising the defence as vague, got-up and motivated to evade liability.

46. Learned counsel for the respondent, however, argued that the breach of the NDA is a claim for unliquidated damages which does not become crystalised until legal proceedings are filed, and none have been filed so far. The period of limitation for filing such proceedings has admittedly not yet elapsed. Further, the appellant has withheld amounts that were due to the respondent under the NDA till the matter is resolved.

Admittedly, the matter has never been resolved. Also, the respondent itself has not commenced any legal proceedings after the e-mail dated 30th January, 2015 except for the present insolvency application, which was filed almost 2 years after the said e-mail. All these circumstances go to show that it is right to have the matter tried out in the present case before the axe falls.

47. We, therefore, allow the present appeal and set aside the judgment of the Appellate Tribunal. There shall, however, be no order as to costs."

21) But if , the payment has not been made or no notice of 'dispute' has been received by the operational creditor within the aforesaid statutory period of 10 (ten) days, the operational creditor has the right to initiate insolvency process by filing its application with the relevant bench of the Hon'ble NCLT, which has jurisdiction over

the place where the registered office of the corporate debtor is located. The Counsel for the Petitioner relies on the case **Essar Projects India Limited V. MCL Global Steel Pvt Ltd[9].**

> *In this case, the Tribunal held that the Corporate Debtor has not raised any objection disputing the existence of debt nor filed any civil suit or other proceedings against the Operational Creditor in respect of the defaulted amount, but disputed the liability only when the statutory notice under Section 8(1) was issued, there being no dispute in existence at the time of receipt of notice, the petition is liable to be taken as complete and liable to be admitted declaring moratorium with suitable directions.* Since, the Operational Creditor (Hot Zings Pvt Ltd) has not received any payment or any notice of 'dispute', the Counsel for Petitioners contend that the Operational Creditor in this case is entitled to file a petition for initiation of Insolvency Resolution Process as given under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 and that the petition is liable to be taken as complete and to be admitted.

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

22) Arbitration is the means by which parties to the dispute get the same settled through the intervention of a third person, but without having recourse to a Court of Law. When two persons agree to have the differences settled through arbitration, what they really mean is that the actual decision of the dispute will rest with the third person called an "Arbitrator", though court may have to intervene to regulate Arbitration Proceedings, or, to give the award of the arbitrator a sanction of law. The Arbitration and Conciliation Act 1996 is the key law governing arbitration in India. The law of Arbitration is based upon the principle of withdrawing the dispute from the ordinary quotes and enabling the parties to substitute a domestic tribunal.[10] The parties must intend to make a submission to arbitration i.e., there must be animus arbitrandi.[11]

I. EXISTENCE OF AN ARBITRATION AGREEMENT

23) Arbitration is a mechanism whereby which the parties enter into an agreement, either in advance or after the dispute crops up, to resolve their dispute privately and expeditiously. The Arbitration and Conciliation Act 1996 is the key law governing arbitration in India.

[9] Civil Appeal No: 10401 of 2017

[10] Fazalally Jivaji Raja v. Khimli Poonji & Co. AIR 1934 Bom 476

[11] Hormusji & Daruwala v. Distt. Local Board, AIR 1934 Sind 200

24) An "arbitration agreement" is a pre-condition for commencement of arbitral proceedings. An arbitration agreement may be a clause in a contract or a separate agreement to arbitrate all or certain disputes which have arisen or may arise on respect of a defined legal relationship, whether contractual or not. An Arbitration agreement is made by any two parties entering into a contract by which any disputes arising between them with regard to the contract agreement is to be resolved, without going to the Courts and with the help of an Arbitrator. Section 7 of the Arbitration and Conciliation Act of 1996 defines "arbitration agreement" as follows:

7. Arbitration agreement. —

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

25) So, the Petitioner and Respondent had entered in an Arbitration Agreement as given under Section 7 of the Arbitration and Conciliation Act, 1996.

2. SETTING ASIDE ARBITRATION PROCEEDINGS

Section 14(1)(a) of the Code provides that-

" The Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely;

a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree, or order in any court of la, tribunal, arbitration panel or other authority."

26) The Counsel for Petitioner relies upon the case of **Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd**[12]**.** In the above mentioned case, the Delhi High Court ruled that Section 14(1)(a) would not apply to proceedings which are beneficial to the Corporate Debtor.

> *The Petition was filed by the Power Grid Corporation of India Ltd.(hereinafter referred to as the 'Petitioner') under **Section 34** of the Arbitration and Conciliation Act, 1996, (hereinafter referred as "the Act") for setting aside the arbitral award dated May 20, 2016, passed by the arbitral tribunal in favour of the Jyoti Structures Ltd. (hereafter referred to as the Respondents). The award is in nature of a pure money decree in favour of the Respondent.*[13]
>
> *During the pendency of the proceeding under section 34 of the Act, an application under **Section 7** of the Code was filed by a financial creditor against the Respondent company before the National Company Law Tribunal, Mumbai, (hereinafter referred as "the NCLT") seeking initiation of the corporate insolvency resolution against the Respondent and by an order dated July 4,2017, the NCLT has admitted such application and has declared a moratorium in terms of **Section 14** of the Code.*
>
> *The question arose whether the proceedings under Section 34 of the Act need to be stayed, as per Section 14(1) (a) of the Code. The Respondents submitted that if the proceedings are stayed, they would be unable to execute the award given in their favour for an extended period till the moratorium exists and will be unable to recover the dues, thereby further impeding their financial condition.*

3. GROUNDS FOR SETTING ASIDE ARBITRAL PROCEEDINGS

27) Under the repealed 1940 Act three remedies were available against an award- modification, remission and setting aside. These remedies have been put under the 1996 Act into two groups. To the extent to which the remedy was for rectification of errors, it has been handed over to the parties and the Tribunal. The remedy for setting aside has been moulded with returning back the award to the Tribunal for removal of defects.

28) **Section 34** provides that an arbitral award may be set aside by a court on certain grounds specified therein. These grounds are:

1. *Incapacity of a party*
2. *Arbitration agreement not being valid*

[12] O.M.P. (COMM.) 397/2016

[13] O.M.P. (COMM.) 397/2016

3. *Party not given proper notice of arbitral proceedings*
4. *Nature of dispute not falling within the terms of submission to arbitration*
5. *Arbitral procedure not being in accordance with the agreement*

Section 34(2)(b) mentions two more grounds which are left with the Court itself to decide whether to set aside the arbitral award:

1. *Dispute is not capable of settlement by arbitral process*
2. *The award is in conflict with the public policy of India.*

29) According to Section 34(2)(b) when a dispute is not capable of settlement by Arbitral Process, then the Arbitration Proceedings can be set aside. In this case, since the Petitioner's claim is to prove that the Respondent is Insolvent, this cannot be satisfied by Arbitral Proceedings. Therefore, Judicial Proceedings can be waived if the dispute is not capable of being settled by Arbitral Process as given under Section 34(2)(b).

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

30) The action undertaken by Mr. Ramesh Singh was not beyond the ambit of his prescribed duty in view of **[A.]** Action taken by the Resolution Professional **[B.]** Duty of the resolution professional **[C.]** Action of resolution professional not ultra vires.

A. ACTION TAKEN BY THE RESOLUTION PROFESSIONAL

31) The Committee of Creditors after their first meeting had appointed the interim resolution professional Mr. Ramesh Singh as the Resolution Professional. Committee of Creditors shall comprise all financial creditors of the corporate debtor. A resolution professional means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional.[14]

[14] Section 5(27) of Insolvency and Bankruptcy Code, 2016

32) The resolution professional had appointed two registered valuers for the company and started with the valuation of the company and its assets.[15]The Resolution Professional realized that some of the machinery requires servicing had called upon some third party mechanics, Rolcon Engineers Pvt. Ltd. who said some parts of the machinery hadto be changed. Without further inquiry, the Resolution Professional got the parts changed for Rs.75 Lakhs.[16] The creditors alleged this action as *ultra vires.*[17]The Resolution Professional filed a petition before the Adjudicating Authority claiming his action was not *ultra vires.*

B. DUTY OF THE RESOLUTION PROFESSIONAL

1. DUTY AS PRESCRIBED BY THE CODE

33) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.[18] Further the resolution professional shall take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor.[19]

34) The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.[20] The operation of the corporate debtor apart from the business operation also includes the management, protection, preservation of the assets. This duty extends to the repairing of the assets from time to time in order to maintain the value of such assets.

35) As said in Section 23(1)[21], Section 25[22]& Section 25(2)(a)[23], the petitioner takes over all the activities of the corporate debtor which includes the management,

[15] ¶16, Moot Proposition

[16] ¶17, Moot Proposition

[17] ¶18, Moot Proposition

[18] Section 25(1) of Insolvency and Bankruptcy Code, 2016

[19] Section 25(2)(a) of Insolvency and Bankruptcy Code, 2016

[20] Section 23(1) of Insolvency and Bankruptcy Code, 2016

[21] Insolvency and Bankruptcy Code, 2016

protection and preservation of the assets. Such activity will also include the repairing of the assets if needed during the insolvency resolution process period.

2. ACTION IS INTRA VIRES OF HIS POWERS AND DUTIES

36) This action by the petitioner is implied and need not be expressly stated in the Insolvency and Bankruptcy Code, 2016. Preservation refers to keeping safe from harm; maintenance.[24] The first primary duty of the resolution professional as stated in Section 25(1) of the Code, 2016 is to preserve and protect the assets of the corporate debtor.

37) It is directly implied that his duty extends to the repairing of the assets if required during the insolvency resolution process period in order the evaluate the value of the assets properly. Such duty by the petitioner to repair and replace machinery in the present case is *intra vires.* An act is said to be *intra vires*("within the power") of a person or corporation when it is within the scope of his or its powers or authority.[25]

3. REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE

38) The Council for the petitioner has relied upon **Innoventive Industries Ltd. v. ICICI Bank and Ors.**[26]in which the Court has mentioned the points stated in the report of the Bankruptcy Law Reforms Committee of November, 2015. *The learned judges in the above case have mentioned that it was the first application that has been moved under the Code, they thought it was necessary to deliver a detailed judgement so that all Courts and Tribunals may take notice of a paradigm shift in the law and had relied upon the following report. This report was one of the most important reports and gives us a good insight into the purpose for which the Insolvency and Bankruptcy Code, 2016 was enacted:*

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[22] Insolvency and Bankruptcy Code, 2016

[23] Insolvency and Bankruptcy Code, 2016

[24] Preservation, *Black's Law Dictionary (6th Edition), 1997*

[25] *Intra vires,* Black's Law Dictionary (6th Edition), 1997

[26] AIR 2017 SC 4084

In the principles driving the design to why the Code was enacted as stated in the report*:*

> *4. It is stated that the law must appoint a resolution professional as the manager of the resolution period, so that the creditors can negotiate the assessment of the viability with the confidence that the debtors will not take any action to erode the value of the enterprise. 'The professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise.'*

39) The same report was also mentioned in **Unigreen Global Private Limited v. Punjab National Bank**[27] by the National Company Law Appellate Tribunal, New Delhi.

As a manager of the enterprise the resolution professional is required to take care of all the assets of the enterprise including the costs incurred in repairing them if needed during the resolution period. Since the Board of Directors are powerless any decision regarding the assets of the company should be taken by the resolution professional with the consultation of the Committee of Creditors in certain cases.

[C.] ACTION OF THE RESOLUTION PROFESSIONAL NOT ULTRA VIRES

40) In the present case it is impliedly understood that as per the law the petitioner had the power to repair the machinery in order to evaluate the value of assets and to further proceed with the resolution process and to prepare the information memorandum. This action of the petitioner cannot be claimed to be *ultra vires.* The term '*Ultra vires'*refers to an act performed without any authority to act on subject.[28]

41) Section 23(1), Section 25(1) and Section 25(2)(a)[29] impliedly states that repairing of assets comes under the normal duties of the resolution professional and it is intra vires of his powers. Moreover, the council states that apart from the Code,

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[27] MANU/NL/0192/2017

[28] *Ultra vires,* Black's Law Dictionary (6th edition), 1997

[29] Insolvency and Bankruptcy Code, 2016

the act of the petitioner was in good faith of the corporate debtor's assets and it was not done to sink the company into insolvency.

42) Further, the negligence of the costs to be incurred in repairing the machinery and moving forward to prepare the information memorandum would result in fraud committed by the resolution professional towards the resolution applicants and thereby resulting in no transparency of the corporate debtor.

43) Fraud refers to an intentional perversion of truth for the purpose of inducing another in reliance upon it to the part with some valuable thing belonging to him or to surrender a legal right.[30] It is obvious that if the petitioner fails to take care of the assets requiring repairs and values them, it is committing of fraud in the information memorandum thereby fraudulent information provided to the resolution applicants.

44) The council thus concludes that, the action of the petitioner in regard to the repairing of the assets was within the ambit of his prescribed duty impliedly and also in good faith of the corporate debtor's assets and transparency of the company to the resolution applicants.

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

45) The resolution applicants presented the resolution plan in a meeting of the committee of creditors which is duly convened by the resolution professional. The Committee of Creditors did not consider any plan fit for the revival of the company. However, the resolution professional sent the plan to NCLT for its assent even though the plan was approved only by 66.67% of the Committee of Creditors, explaining that such action is within its powers and in the best interest of the company. Rest of the creditors raised objections against the plan on various grounds.[31] The plan can be passed with 66.67% vote constitutes a valid majority under the ambit of IBC, 2016 in view of **[B.]** Approval of committee of creditors **[B.]** Approval of the Adjudicating Authority

[30] Fraud, Black's Law Dictionary (6th Edition), 1997

[31] ¶25, Moot Proposition

A. APPROVAL OF COMMITTEE OF CREDITORS:

46) The committee of creditors may approve a resolution plan by a vote of not less than seventy five percent of voting shares of the financial creditors.[32] Here the word 'may' plays a major role in deciding the percent of voting shares of the financial creditors for the approval of the the committee of creditors.

1. INTERPRETATION OF THE WORD 'MAY' OR 'SHALL'

47) The council for the petitioners rely upon the case of **Bachandevi v. Nagar Nigam, Gorakhpur**[33] where the Court has explained the use of the words 'may' and 'shall' in the statutory provision.

> *It is well settled that the use of the word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word ' may' the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like.*

48) With the above reference, the word 'may' in Section 30(4) taken in a conventional courtesy the committee of creditors, even though 75 percent of the voting shares of the financial creditors is not received can approve the resolution plan based on the circumstances of the particular case. In the present case, the corporate debtor is facing lot of debts and a resolution plan is required immediately to continue the business of the corporate debtor. So the committee of creditors approved the plan and it was sent to NCLT for further approval.

2. COC CAN APPROVE THE RESOLUTION PLAN

49) In the case of **K. Sashidhar v. Kamineni Steel & Power India Pvt. Ltd**[34], the NCLT in interpreting the statutory provision held that:

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[32] Section 30(4) of Insolvency and Bankruptcy Code, 2016

[33] (2008) 12 SCC 372

In the IBC at various places the word 'may' and 'shall' are used. However, Section 30(4) states that the Committee of Creditors may approve the resolution plan by a vote of not less than 75% of voting shares of the financial creditors.

50) The provision thus allows the Committee of Creditors to approve the resolution plan when all the conditions required for a resolution plan are satisfied as per Section 30(2)[35] along with the circumstances of the company.

B. APPROVAL OF THE ADJUDICATING AUTHORITY:

51) The adjudicating authority when satisfied that the resolution plan as approved by the committee of creditors under Section 30(4) meets the requirements as referred to in Section 30(2), it shall by order approve the resolution plan.[36]

1. SATISFACTION OF THE ADJUDICATING AUTHORITY

52) The phrase 'if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub – section (4) of Section 30…' in Section 31(1) says that if the NCLT is satisfied that the resolution plan has been approved by the committee of creditors then it can also approve such plan presented before them for approval.

53) The Council for the petitioners also rely upon the case of **K. Sashidhar v. Kamineni Steel & Power India Pvt. Ltd.**[37] where despite falling short of the 75% majority requirement stipulated under the Code, the resolution professional placed the plan before NCLT for approval. The Hyderabad bench of the NCLT emphasised the use of the expression 'may' in Section 30(4) which accordingly indicated the directory nature of the provision. Moreover the bench reasoned that, in interpreting the statutory provision, necessary regard must be had to the legislative intention surrounding the Code.

In interpreting the statutory provision, the Hyderabad bench held:

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[34] 2017 SCC(Online) NCLT 12610

[35] Insolvency and Bankruptcy Code, 2016

[36] Section 31(1) of the Insolvency and Bankruptcy Code, 2016

[37] 2017 SCC(Online) NCLT 12610

In the IBC at various places the word 'may' and 'shall' are used. However, Section 30(4) states that the Committee of Creditors may approve the resolution plan by a vote of not less than 75% of voting shares of the financial creditors. Further, under Section 31 it is provided that 'if the adjudicating authority is satisfied…' Therefore, we are of the considered view that even though the Committee of Creditors may approve a resolution plan with not less than 75% of the voting share, a discretion is given to the Adjudicating Authority to approve the Resolution Plan.

2. DISCRETION OF THE ADJUDICATING AUTHORITY

54) In exercising such discretion, the bench examined the facts and circumstances of the case, the National Company Law Tribunal, Hyderabad bench approved the resolution plan even though it had received the support of less than 75% of the financial creditors in value. In the present case, the resolution plan has met all the requirements as prescribed in Section 30(2)[38] and the plan was accepted only by 66.67% of the financial creditors of the corporate debtor. The Committee of Creditors accepted the plan with the view that the corporate debtor was in severe financial crisis and this resolution plan was the need for the hour.

55) The Adjudicating Authority has the power to accept the resolution plan approved by the Committee of Creditors though the plan was accepted only by 66.67% of the financial creditors. It is the discretion of the Adjudicating Authority to accept such plan based on the circumstances under which the plan should be accepted.

[38] Insolvency and Bankruptcy Code, 2016

PRAYER

WHEREFORE IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, IT IS PRAYED THAT THIS HON'BLE TRIBUNAL MAY BE PLEASED TO :

Declare the respondent's company insolvent thereby providing the plaintiff the security amount along with the interest from the date of transfer of possession till date.

Thereby declare the actions of Mr. Ramesh Singh was within the ambit of his duty.

And thereby considering 66.67% vote as a valid majority under the ambit of IBC, 2016.

AND ANY OTHER RELIEF THAT THIS HON'BLE COURT MAY BE PLEASED TO GRANT IN THE INTEREST OF JUSTICE, EQUITY AND GOOD CONSCIENCE, ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sd /-

COUNSEL FOR THE PETITIONER