

TEAMCODE:[TC-13]

**SURANA &SURANA AND UPES SCHOOL OF LAW**

**NATIONALINSOLVENCYLAW**

**MOOTCOURTCOMPETITION 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 RESPONDENTS**

## WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENTS

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WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENTS

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**TABLE OF ABBREVIATIONS**

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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
Cal	Calcutta
Civ.	Civil

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENTS

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UNCITRAL	United States Commission on International Trade Law
Ed.	Edition

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**STATEMENT OF JURISDICTION**

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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 Respondents*

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**STATEMENT OF FACTS**

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**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 3<sup>rd</sup> 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 21<sup>st</sup> Mar' 2018 initiated insolvency application.

**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**

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**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 is an exhaustive Code?
  - 3.2 Whether the provisions of the Code are mandatory in nature?
  - 3.3 Whether liquidation of Corporate Debtor is an object of the Code?
  - 3.4 Whether the Hon'ble Tribunal has jurisdiction to decide on the validity of Plan approved only by 66.67% voting share by CoC?

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**SUMMARY OF ARGUMENTS**

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**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 cannot be considered as an operational debt as the same lacks the spirit of 'commercial transaction'. It is not a consideration passed in lieu of tenancy, thus, failing to fall into the requisite criterion of 'provision for goods and services' which restricts the application of IBC, 2016 in the present matter. Moreover, such issue falls within the ambit of Arbitration clause and cannot be adjudicated by the Hon'ble Tribunal.

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

The wide powers conferred upon the RP are subject to the principle of 'going concern'. An exorbitant amount of Rs.75, 00,000 spent at the time of subsistence of financial stress in the Company can in no stretch of imagination be a 'necessary action' but a mere waste of money. Moreover, such expense forms a part of IRPC which must be fixed by the CoC beforehand. This *ex facie* shows that such act is *ultra vires* and a result of gross negligence by the RP.

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

The language of the provision laying down procedure for approval of Resolution Plan leaves no ambiguity for judicial interpretation. Moreover, the Adjudicating Authority can entertain such plan only when the precondition u/s 30(4) has been duly complied with. Additionally, the object of the Code is inclusive of Liquidation and not restricted to CIRP alone.

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**ARGUMENTS ADVANCED**


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**ARGUMENTS PRESENTED 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?**

I. It is humbly submitted that the Legislature has only empowered 'financial creditors' and 'operational creditors' and 'corporate debtor' to initiate CIRP<sup>1</sup> which *prima facie* manifests their intention to exclude any other creditor from initiating the process under IBC, 2016.<sup>2</sup>

**1.1 Whether the Petitioner has *locus standi* to initiate CIRP proceedings under the code?**

I. Operational creditors are those whose liability comes from transaction on operations with the entity.<sup>3</sup> *Ergo*, the claim must stem from making a provision for goods or service.<sup>4</sup>

*The transaction does not come within the ambit of 'operation'*

II. It is pertinent to note that the word "operational" or "operation" has neither been defined in IBC, 2016 nor under the General Clauses Act, 1897. *Ergo*, the dictionary meaning of "operational" needs to be referred which is '*of or relating to an operation*' and the meaning of 'operation' is '*ready to use*' or '*able to be used*'<sup>5</sup>. *Arguendo*, the expression 'operation' does not include every business transaction<sup>6</sup> but only known and accepted business notions.<sup>7</sup>

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<sup>1</sup>Insolvency and Bankruptcy Code, S.6, (2016).

<sup>2</sup>*Pawan Dubey and Ors. v. JBK Developers Pvt. Ltd.*, CP (IB) No. 385/(ND)/2017, (2017).

<sup>3</sup>Insolvency 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](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf); *Col. Vinod Awasthy v. AMR Infrastructure Ltd.*, C.P. No. (IB)10(PB)/2017, (2017); *Mukesh Kumar v. AMR Infrastructure Limited*, (C.P. No. (IB)-30 (PB)/2017, (2017).

<sup>4</sup>*Sports and Leisure Apparel Ltd. v. Ms. Bhasin Infotech and Infrastructure*, CP No. (IB)-105(PB)/2017, (2017).

<sup>5</sup>Merriam Webster Dictionary

<sup>6</sup>V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 94 (2<sup>nd</sup> ed. 2018).

<sup>7</sup>*Anglo French Textile Co. Ltd. v. Comm. Of Income Tax*, AIR 105 SC, 108, (1953).

III. It is humbly submitted that security deposit is for due performance of obligations of the lease and cannot be given the color of consideration passed in lieu of tenancy. Even if it is adjustable towards rent, its character does not change as the same is refundable on vacating the premises<sup>8</sup>. Henceforth, Petition cannot be allowed on mere assertion of debt in absence of any *prima facie* evidence of commercial transaction.<sup>9</sup>

IV. Additionally, transactions relating to immovable property unless having a correlation with direct input to output produced or supplied by the CD cannot be considered as a transaction falling under the terms ‘operation’ and ‘operational debt’<sup>10</sup>. *Arguendo*, neither the Petitioner has made any claim in respect of provision of goods and services.<sup>11</sup> nor w.r.t. dues arising under any law payable to CG or SG.<sup>12</sup>

*Respondents did not neglect the payment of debt*

V. It is humbly submitted that where the debt is undisputed the court will not act upon a defence that the company has the ‘ability to pay debt’ but it ‘chooses not to pay that particular debt’<sup>13</sup>. In light of the aforesaid submissions the Hon’ble High Court in *Mech Engineers P. Ltd. v. Arcoi Bio Refinery P. Ltd.*<sup>14</sup> opined that “...the plant of the company was closed and therefore it could not be said that the company has neglected to pay the statutory debt”.

VI. Additionally, neither any legislation nor the lease deed specifically highlights any time period for such refund, however, the same must be done within ‘reasonable time’.<sup>15</sup> According to Black’s Law Dictionary ‘reasonable time’ means ‘*period determined from trade practice, custom*

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<sup>8</sup>*MoideenKoya v. K. Girish Kumar*, AIR 198, DEL 249, (2013).

<sup>9</sup>*RheinChemieRheinauGmbH v. Standard Oil Additive P. Ltd.*, I BC 114, (2006).

<sup>10</sup>*Divine InfraconPvt.Ltd.*, IB-209/ND/2017, (2017).

<sup>11</sup>*Jindal Steel and Power Ltd. v. DCM International Ltd.*, TaxPub(CL) 0828 (NCLAT-Del), (2017).

<sup>12</sup>*Satish Mittal v. Ozone Builders and Developers Pvt. Ltd.*, CA (AT), (Insol) No. 75, (2017).

<sup>13</sup>*A Company, In re*, S.J. 369, (1894).

<sup>14</sup>V. S. Wahi, *Treatise on Insolvency and Bankruptcy Code* 153 (2<sup>nd</sup> ed. 2018).

<sup>15</sup>Transfer Of Property Act, S. 108(f), (1882).

*or circumstances like those at issue*'. A minimum time frame of 30 days to refund the deposit has been accorded in tenancy regulations of various countries as well as different state legislations. Hence, the present application has been initiated without giving 'reasonable time' to the respondent and shall be dismissed by the Hon'ble Tribunal.

*Third type of creditors cannot initiate and insolvency proceeding*

VII. On conjoint reading of Rule 4, 6 and 7 of the I & B (AAA) Rules, 2016<sup>16</sup> with Rule 9A<sup>17</sup> of the CIRP Regulations, 2016<sup>18</sup>, it is comprehensible that Adjudicating Authority can entertain applications for initiation of insolvency proceedings only by a FC, OC and CD and any other type of creditor has to submit proof of its claim to the IRP or RP after the initiation of CIRP.

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

*Petitioner has failed to send demand notice to the Respondent*

I. It is humbly submitted that the debts owed to OC tends to be small and recurring in nature and must be informed through a demand notice<sup>19</sup> set out in Form 3<sup>20</sup> of the Rules.<sup>21</sup> Failure to do the same will attract no cause of action for initiation of proceedings under S. 9.<sup>22</sup> Ergo, the claim of the petitioner without due compliance to the requisites u/s 8 of the Code is a not maintainable.<sup>23</sup>

<sup>16</sup>Insolvency And Bankruptcy Board of India (Application to Adjudicating Authority) Rules, (2016).

<sup>17</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 9A, (2016).

<sup>18</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Rules, (2016).

<sup>19</sup>Insolvency and Bankruptcy Code, S. 8, (2018); *Era infra Engineering Ltd. v. Prideco Commercial Projects Pvt. Ltd.*, CA (AT) (Ins) 31, (2017).

<sup>20</sup>Insolvency And Bankruptcy Board of India (Application to Adjudicating Authority) Rules, Form 3, (2016).

<sup>21</sup>Insolvency And Bankruptcy Board of India (Application to Adjudicating Authority) Rules, (2016).

<sup>22</sup>*Seemagupta v. Supreme Infrastructure India Ltd.*, CA (AT) (Ins) No. 53, (2017); *Smart City (Kochi) Infrastructure P. Ltd. v. Synergy Property Development Services (P) Ltd.*, 11 TMI 486, (2017).

<sup>23</sup>*Cf South Australia v. Wall*, 24 SASR, (1980).

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

Disputes agreed to be resolved by Arbitration not to be adjudicated by Court<sup>24</sup>

- I. A bare perusal of the arbitration clause reveals that every dispute in connection or arising out of the rental agreement has to be referred to Arbitration<sup>25</sup> thereby, satisfying the requirements of S.7 of the Act.<sup>26</sup> Henceforth, such issue has to be decided by the Arbitral Tribunal.<sup>27</sup>
- II. Additionally, the Court is under obligation<sup>28</sup> to refer the disputes between the parties to Arbitration without any in-depth examination of the disputes<sup>29</sup> on mere satisfaction that such disputes fall within the ambit of the Arbitration clause<sup>30</sup>. Non refund of security deposit is *prima facie* a subject of an Arbitration Agreement<sup>31</sup> thus the provisions of S.8<sup>32</sup> are applicable in *toto* and court is bound to refer the parties to Arbitration.<sup>33</sup> Also, the Arbitrator has jurisdiction to grant specific performance of contract relating to immovable property.<sup>34</sup>

Les specialis derogate les generali

- III. It is worthy to note that special law repeals general law<sup>35</sup>. Notwithstanding that the lease agreements are strictly governed by the provisions of ToPA, 1882<sup>36</sup> but it being a general

<sup>24</sup>*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, 1 SCC 267, (2009).

<sup>25</sup>As Stated in Para 11 of Facts

<sup>26</sup>Arbitration and Conciliation Act, (1996).

<sup>27</sup>*Reva Electric Car Co.(P) Ltd. v. Green Moble*, Arb. Pet. No. 18, (2010).

<sup>28</sup>*Anjuman Taraqqi Urdu (Hind) v. Vardhman Yarns & Threads Ltd.*, IA No. 10702/2011

<sup>29</sup>*Bharat Petroleum Corpn.Ltd.v.Great Eastern Shipping Co. Ltd.*, 1 SCC 503 (2008);*Everest Holding Ltd. v. Shyam Kumar Shrivastava*, 16 SCC 774, (2008).

<sup>30</sup>*Brig. Man Mohan Sharma v. Lt. Gen. Depinder Singh*, 2 SCC, 600, (2009).

<sup>31</sup>*Kirusa Software Private Ltd v. Mobilox Innovation Pvt. Ltd.*, CA 9405/2017, (2017).

<sup>32</sup>Arbitration and Conciliation Act, (1996).

<sup>33</sup>*Architectural Innovations v. Rajasthan Co-op. Group Housing Society*, 77 Delhi Law Times, 403, (1999); *P. Anand Gajapathi Raju v. P.V.G. Raju (died)*, 4 SCC, 539, (2000); *Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens*. 3 SCC 686, (2007).

<sup>34</sup>*Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*, 5 SCC 651, (1999).

<sup>34</sup>*Keventer Agro Ltd. v. Seegram Co. Ltd.* APO No. 498,(1997); *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan*, 5 SCC 651, (1999).

<sup>35</sup>*Radha Mohan Maheshwari v. D.C.I.T, ITAT Jaipur* MANU/IJ/0092/2016, (2016).

<sup>36</sup>Transfer of Property Act, S. 106, (1882).

Legislation cannot prevail over the object of special enactments i.e. the Arbitration and Conciliation Act, 1996 and *ipso facto* cannot exclude the jurisdiction of the Arbitrator.

Test of Arbitrability of dispute

IV. The three facets deciding the jurisdiction of the Arbitral Tribunal are<sup>37</sup>- (i) capability of dispute to be settled by Arbitration, (ii) disputes covered by the Arbitration Agreement, (iii) reference of the dispute to Arbitration by the parties. *Arguendo*, non-refund of deposit is a right in personam and can be resolved by a private forum. Moreover, the Agreement manifests the intention of the parties to refer the disputes to Arbitration<sup>38</sup> and such agreement is wide enough to include said dispute within its ambit<sup>39</sup>.

Insolvency proceedings shall not ipso facto take away the jurisdiction of the Arbitral Tribunal

V. It is humbly submitted that when an insolvent is a party to an Arbitration Agreement before the initiation of insolvency proceedings, the same shall be enforceable so far as it relates to any such dispute subject to adoption of the contract by the receiver.<sup>40</sup>

IBC, 2016 is not a recovery code

VI. IBC is not meant for recovery of monetary claim<sup>41</sup>, it relates to initiation of CIRP.<sup>42</sup> It cannot be set in motion against debtor for recovery of debts.<sup>43</sup> The tenant has an independent remedy to recover such amount<sup>44</sup> through Arbitration or Consumer Protection Act.<sup>45</sup>

<sup>37</sup> *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, 5 SCC, 532, (2011) : 2 SCC (Civ), 781, (2011).

<sup>38</sup> *Ganpatrai v. Moody* 86 CLJ, 136, (1950).

<sup>39</sup> *Baranagar jute v. Hulaschand*, AIR Cal 490, (1958).

<sup>40</sup> Arbitration and Conciliation Act, S. 41, (1996).

<sup>41</sup> *Vidul Sharma v. Technopak Advisors Pvt. Ltd.*, AT (Insol) No. 131, (2017).

<sup>42</sup> *Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustee Ltd.*, TaxPub(CL) 0393 (MUM), (2017)

<sup>43</sup> *Design Work Infrastructure India P. Ltd. v. Premier Restaurant P. Ltd.*, CA (AT) (Ins) No. 73, (2017).

<sup>44</sup> *Kamal Mangla & Ors. v. Tata Finance Ltd.*, CS(OS) 534/2004, (2004).

<sup>45</sup> *Satish Mittal v. Ozone Builders and Developers Pvt. Ltd.*, CA(AT) (Ins) No. 75, (2017)

## ARGUMENTS PRESENTED ON BEHALF OF COMMITTEE OF CREDITORS

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

I. It is humbly submitted that the RP by operation of law is appointed to take all decisions in respect of management of affairs of the CD<sup>46</sup> during CIRP. While performing such duty, RP has wide power to protect and preserve the assets under the directions of CoC.<sup>47</sup> However, the nature of such powers given to RP is to ensure that the CD may continue as a ‘going concern’<sup>48</sup>

**2.1 Whether the action undertaken by RP is in accordance with the principle of ‘Going Concern’?***Repairing of assets is not a ‘necessary action’*

I. “Going concern” refers to an assumption that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.<sup>49</sup> The Code emphasizes that the RP shall take all the ‘necessary’ actions to manage the operations of the corporate debtor as a “going concern”<sup>50</sup>. This implies that all the actions and duties conferred upon RP should satisfy the ‘test of necessity’ to constitute a valid action. The Hon’ble Court in *In Re Great Easter Electric Co.*<sup>51</sup> interpreted ‘necessary action’ as actions that are not merely beneficial, but something more, though the necessity must be determined by the Court having regard to the circumstances of the case. It is humbly submitted that the repair works carried out

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<sup>46</sup>Insolvency and Bankruptcy Code, S. 17(1), (2016).

<sup>47</sup>*M/s Ananram Developers Pvt. Ltd. v. The NCLT*, TaxPub(CL) 0942 (Mad-HC), (2017).

<sup>48</sup>*Powergrid Corporation of India Ltd. v. Jyoti Structures Ltd.*, CLA 142 (Del.), 285, (2018).

<sup>49</sup>Institute of Chartered Accountants of India, Accounting Standard (AS) 1 (Disclosure of Accounting Policies), P. 10

<sup>50</sup>Insolvency and Bankruptcy Code, S. 20, (2016).

<sup>51</sup>V. S. Wahi, *Treatise on Insolvency and Bankruptcy Code* 261 (2<sup>nd</sup> ed. 2018).

by the RP cannot be considered to be necessary action as the liquidity of the Company has been compromised within the time of financial stress.

II. The primary issue which business in financial distress faces is the debt overhang problem. The scheme of the code is to make an attempt, by divesting the erstwhile management to the RP so that the corporate body is able to pay back its debts and get back on its feet.<sup>52</sup> Moreover, on conjoint reading of S.25(1)<sup>53</sup> S.20(2)(a)<sup>54</sup> elucidates that the RP can appoint any professional to preserve and protect the assets and managing the operations of corporate debtor as a 'going concern'. It is brought to the notice of this Hon'ble Tribunal that Techno Electric Suppliers were already doing the needful repairs at regular intervals<sup>55</sup> which suffices the purpose of management of entity as 'going concern'.

## **2.2 Whether RP is authorized to repair the assets of the CD under the Code?**

### *Expense incurred by RP comes under the ambit of 'Insolvency Resolution Process Costs'*

I. It is pertinent to note that the cost of repairing of asset incurred by the RP is not a 'necessary action' and thereby does not constitute the costs incurred in keeping the business a 'going concern'. On conjoint reading S.5(13)(e)<sup>56</sup> with Regulation 31<sup>57</sup> CIRP it is patently clear that costs forming a part of S.5(13)(e)<sup>58</sup> is outlined in Regulation 31<sup>59</sup> of the CIRP Regulations.

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<sup>52</sup>*M/s. Apple Valley Developers and Ors. v. M/s Coastal Project Ltd. and Ors*, Ex. Petition No 19, (2017).

<sup>53</sup>Insolvency and Bankruptcy Code, S. 25(1), (2016).

<sup>54</sup>Insolvency and Bankruptcy Code, S. 20(2)(a), (2016).

<sup>55</sup>As stated in the Facts, Paragraph 18.

<sup>56</sup>Insolvency and Bankruptcy Code, S. 5(13)(e)

<sup>57</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 31(d), (2016).

<sup>58</sup>Insolvency and Bankruptcy Code, S. 5(13)(e), (2016).

<sup>59</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 31, (2016).

Regulation 31<sup>60</sup> is inclusive of expenses incurred on or by the RP fixed under Regulation 34.<sup>61</sup> Regulation 34<sup>62</sup> of the CIRP is inclusive of “*any other expenses to be incurred by the RP*” which connotes a wide meaning to the expenses incurred by the RP. *Arguendo*, the expenses incurred for repairing of the assets by the RP is included under Resolution Professional Costs thus forms a part of IRPC.

*Expenses incurred by RP must be authorized by the CoC*

II. It is humbly submitted that Regulation 34<sup>63</sup> of CIRP begins with- “*the committee shall fix the expense to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs*”. The word ‘shall’ appearing in this regulation implies that the provision is mandatory in nature<sup>64</sup>. It is *ex facie* clear that any expense incurred by the RP constituting IRPC shall be fixed approved by the CoC before it is incurred.

III. It is further submitted that according to Doctrine of Colourable Legislation (“*Quando aliquid prohibet ex directo, prohibet per obilquum*”) when anything is prohibited directly, it is also prohibited indirectly.<sup>65</sup> In light of the above principle it is submitted that when RP is not authorized to perform such repair directly under the Code, the same cannot be done indirectly.

## **2.2 Whether Techno Electric Suppliers Pvt. Ltd. can object to the act undertaken by RP?**

I. It is humbly submitted Techno Electric Suppliers Pvt. Ltd. *viz.* operational creditor, should be

<sup>60</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 31, (2016).

<sup>61</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 31(d), (2016).

<sup>62</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 34, (2016).

<sup>63</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 34, (2016).

<sup>64</sup>*P.T. Rajan v. T.P.M. Sahir*, Appeal (Civil) No. 3602, (2002).

<sup>65</sup>*CCE v. Acer India Ltd.*, Appeal (Civil) No. 10185-10186, (2003).

allowed to attend the meeting of the CoC as they have genuine concerns to raise before the CoC and their rights would be prejudicially affected if they are not allowed to do the same.

II. It is apposite to note that Regulation 2(1)(1)<sup>66</sup> of the CIRP Regulations defines a participant as “*a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting.*” Similarly, Regulation 24(2)(b)<sup>67</sup> of the requires every participant attending the meeting to state to RP whether he is attending the same in the capacity of a member of the committee or any other participant. Ergo, this indicates that there is a possibility of including participants other than financial creditors in the meeting of the CoC. Moreover, when two different words are used in the same Statute, it must *prima facie* be construed that these different words carry different meanings<sup>68</sup>, depending upon the context.<sup>69</sup>

III. *Arguendo*, the word ‘participant’ is meant to be wider and more inclusive than ‘members’ in relation to the CoC. Thus, operational creditors who do not meet the threshold of membership in the committee can be participants under the regulations and are entitled to raise objections against the acts of RP.

#### **2.4 Whether the action of RP is in accordance to the obligations laid under the Code?**

##### *Absence of ‘good faith’ in the Act done by RP*

I. It should be noted that ‘Good faith’ not only means good faith<sup>70</sup> but also the exercise of due care and attention.<sup>71</sup> A mere subjective belief without there being reasonable grounds for such a plea

<sup>66</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 2(1)(1), (2016).

<sup>67</sup>Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons Regulation), Reg. 24(2)(b), (2016).

<sup>68</sup>*Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Crpn. of UP Ltd.* 20, 4 SCC 305, (2003)

<sup>69</sup>*Sunil Kumar Kori v. Gopal Das Kabra*, 15, 10 SCC 467, (2016).

<sup>70</sup>*Chemfab Alkalis Ltd., Gnananda Place, Kalapet, Pondicherry v. S. Balasubramanian, Editor*

<sup>71</sup>*Kedar Nath v. State of UP*, 3 ESC 1995, (2005).

is not synonymous with good faith.<sup>72</sup> Also, an absence of malice is not enough to prove it.<sup>73</sup> For deciding the element of lack of good faith, the entire surrounding circumstances will have to be taken note of.<sup>74</sup>

II. *Arguendo*, the act of the RP of appointing Rolcon Engineers Pvt. Ltd. for repairing the machinery even when Techno Electric Suppliers Pvt. Ltd. were looking after the machinery at regular intervals and paying them an exorbitant amount of Rs.75, 00,000 *prima facie* shows that RP has failed to note that the priority of the CD is to meet the liabilities of its creditors which will bolster the working capital needs of the distressed debtor and kick start its recovery. However, RP has provided no reasonable grounds of spending such enormous amount and thereby is not immune by virtue of S.233<sup>75</sup> of the Code.

*RP has failed in complying with his obligations under the Code*

III. It is humbly submitted that 'due diligence' means diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation.<sup>76</sup> It means doing everything reasonable, not everything possible.<sup>77</sup> S. 208(2)(a)<sup>78</sup> of the Code lays down obligation upon RP to act with reasonable care and diligence without negligence.<sup>79</sup> Thus RP has to take every effort to repay the creditors as per a structured plan, which will benefit the whole system<sup>80</sup> and balance the interest of all stakeholders. Also, calling upon some third party in haste and incurring unreasonable IRPC without consulting the CoC is

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<sup>72</sup>G. Sudhir Chandrashekar Pillai v. K. Karthikeyan, AIR Ker 277, (1964).

<sup>73</sup>J. Sudhir Chandrashekar v. T. Lokaprakash, R.F.A. No. 363/1995, (1995).

<sup>74</sup>A. Paranjothi v. Official Assignee, High Court of Madras, O.S.A. No. 147/85, (1988)

<sup>75</sup>Insolvency and Bankruptcy Code, (2018).

<sup>76</sup>Sitaben Madhubhai v. Divisional Controller, SCA No. 15353, (2013).

<sup>77</sup>Chander Kantabansal v. Rajinder Singh Anand, Appeal (Civil) No. 1893, (2008).

<sup>78</sup>Insolvency and Bankruptcy Code, S. 208(2)(a), (2016).

<sup>79</sup>Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, Pt. 14 Sch I. (2016).

<sup>80</sup>V. S. Wahi, Treatise on Insolvency and Bankruptcy Code 258 (2<sup>nd</sup> ed. 2018).

violative of the Code of Conduct of the RP by the virtue of Rule 27<sup>81</sup> of the IP Regulations.

ARGUMENTS PRESENTED ON BEHALF OF CORPORATE DEBTOR

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

**3.1 Whether IBC, 2016 is an exhaustive Code?**

*Insolvency and Bankruptcy Code, 2016 is an “exhaustive” Code.*

I. The Hon’ble Tribunal in the case of *Palogix Infrastructure Private Limited vs. ICICI Bank Limited*<sup>82</sup> interpreted the nature of IBC, 2016 and opined that

*“63. There can be no doubt, therefore, that the Code is a Parliamentary law that is an exhaustive code on the subject matter of insolvency in relation to corporate entities, and is made under Entry 9, List III in the 7th Schedule.” Ergo, this Code by that canon is self-contained and complete and is distinct from an ordinary enactment.*<sup>83</sup>

II. The IBC, 2016 provides for the Procedure under which the stakeholders should “Act” for Resolution of Insolvency, Liquidation or Bankruptcy and how the same “Should” be “conducted”<sup>84</sup>. Thus, it is a comprehensive legislation, consolidating solvency statutes into one single legal ecosystem resolving the issue of solvency to the jurisdiction the code applies.

III. It is humbly submitted that wherein S.30(4)<sup>85</sup> of the Code mandates resolution to be approved by vote not less than 75% of the Voting Share of CoC reference need not be looked for outside the Code and the same if done shall not be acceptable.

<sup>81</sup>Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, Pt. 14 Sch I. (2016)

<sup>82</sup>*Palogix Infrastructure Pvt. Ltd. v. ICICI Ltd.*, CLA 141, 83, (2017).

<sup>83</sup>*Joseph Peter v. State of Goa*, AIR 1812, (1977).

<sup>84</sup>*K. Sashidhar v. Kamineni Steel and Power India Pvt. Ltd. and Ors.*, MANU/NC/1688/2017, (2017).

<sup>85</sup>Insolvency and Bankruptcy Code, S. 30(4), (2016).

### 3.2 Whether the provisions of the code are mandatory in nature?

#### Statute to be interpreted 'word by word' unless it leads to absurdity

- I. The intent of Legislature can be apprehended by adhering to the cardinal principles of Interpretation. Thus, the words of a Statute must *prima facie* be given their ordinary meaning, unless such construction leads to absurdity or there is something in the context or in the object of the Statute to the contrary<sup>86</sup>.
- II. The Hon'ble Court in *Gurudev datta VKSSS Maryadit and Ors v. State of Maharashtra and Ors*<sup>87</sup> highlighted, "... statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary."
- III. *Arguendo*, S.30(4)<sup>88</sup> r/w S.21(8)<sup>89</sup> makes it out and clear that all decisions taken by the CoC shall be taken by a vote not less than 75% of voting shares of the financial creditors.<sup>90</sup> Moreover, the language of the provisions are clear and neither a proviso, nor any exception is carved out to this section thereby setting a cap out as an inbuilt measure in a Statute without leaving any ambiguity for judicial interpretation and non-compliance to the same is *non est* in law.

#### Procedure laid in S.21(8) is mandatory in nature

- IV. It is equally settled law that when a Statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, the same are

<sup>86</sup>*Manilal Shah v. Saradar Syed Ahmed*, 1 SCR 108, (1955).

<sup>87</sup>*Gurudev datta VKSSS Maryadit and Ors v. State of Maharashtra and Ors.*, 4 SCC 534, (2001).

<sup>88</sup>Insolvency and Bankruptcy Code, S. 30(4), (2016).

<sup>89</sup>Insolvency and Bankruptcy Code, S. 21(8), (2016).

<sup>90</sup>Insolvency and Bankruptcy Code, S. 21(8), (2016).

considered to be essential to the validity of such thing, and would be mandatory<sup>91</sup>. S.30(4) lays the procedure of approval to the resolution plan by a vote not less than 75% of the Voting Share of CoC, thus, the word ‘shall’ u/s 21(8)<sup>92</sup> ought to be construed as mandatory.<sup>93</sup>

### 3.3 Whether liquidation of Corporate Debtors is an object of the Code?

#### “Insolvency” is inclusive of “Liquidation”

I. It is necessary to analyze the name of the Code to determine the true intent of Legislature behind enacting the Code.<sup>94</sup> That being the case, the code name itself is “The Insolvency and Bankruptcy Code” where the term Insolvency w.r.t. corporate persons cannot be understood in isolation to liquidation process laid under chapter III of the Code.<sup>95</sup>

#### Primacy of the Statements of Object is not restricted to CIRP alone

II. The Statement of Objects and Reasons of the IBC, 2016 states as follows-“*the objective of the code is to consolidate and amend laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets....*”

III. It is *prima facie* evident that the Code came into force to consolidate various insolvency statutes and avoid answering legal issues such as overlapping issues, repugnancy issues, jurisdictional issues, likewise plethora of issues<sup>96</sup>.

IV. On scrutinizing the object of enactment it is evident that the word “reorganization” is included before the phrase “and insolvency resolution of corporate persons” so as to say that the phrase

<sup>91</sup>*State of Haryana and ors. v. Raghubir Dayal*, 1 SCC, 133, (2017).

<sup>92</sup>Insolvency and Bankruptcy Code, S. 21(8), (2016).

<sup>93</sup>Insolvency 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](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf).

<sup>94</sup>*State of U.P. v. Babu Ram Upadhyaya*, AIR SC 751, (1961).

<sup>95</sup>*Innoventive Industries Ltd. v. ICICI Bank and Anr.* CA No. 8337-8338/2017, (2018)

<sup>96</sup>*Innoventive Industries Ltd. v. ICICI Bank and Anr.* CA No. 8337-8338/2017, (2018)

does not indicate CIRP alone but the law must order the liquidation of an enterprise when all other negotiations fail to establish viability.<sup>97</sup> Had the legislature intended only reconstruction of company there where many mechanisms and acts like CDR, JLF and SICA for the same.

- V. The primacy of this Code also emphasizes to leave every decision to the domain of creditors to avoid abrasion of their rights to minimum. It has been mandated to take all decisions with super majority which cannot be jumped by using the interpretation about “may” and “shall” or “and”.

### **3.4 Whether the Hon’ble Tribunal has jurisdiction to decide on the validity of 66.67% voting share by CoC?**

- I. It is humbly submitted that the Court must interpret a Statute without seeking to add words which are not to be found in the Statute<sup>98</sup>. It is not permissible to interpret any statutory<sup>99</sup> instrument when the language of the instrument leaves no option for it<sup>100</sup>.

*The word “shall” cannot be interpreted as “may”*

- II. To ascertain the intention of the Legislature the words and phrases of the Code has to be aligned with the objective of the Code and purpose of it being enacted and failure to do so will almost entirely destroy the utility and frustrate the very object of its enactment.<sup>101</sup> The intent of the Legislature to give mandatory compliance or directory effect to the language depends upon the language couched in the Statute and its object, purpose and effect<sup>102</sup>. It is pertinent to note that S.31<sup>103</sup> of the Code empowers the adjudicating authority to approve a resolution plan only if all requirements including approval of CoC by a vote not less than 75% of voting share of CoC has

<sup>97</sup>*Innoventive Industries Ltd. v. ICICI Bank and Anr*, CA No. 8337-8338/2017, (2018).

<sup>98</sup>*Innoventive Industries Ltd. v. ICICI Bank and Anr*. CA No. 8337-8338/201, (2018).

<sup>99</sup>*Dhukham Gupta v. Cooperative Agricultural Association Ltd.*, AIR MP 272, (1960).

<sup>100</sup>*Liberty Oil Mills & Ors. v. UoI and Ors.*, AIR 1271, (1984).

<sup>101</sup>*Bank of England v. Vagliano Bros*, 60 LJQB 145, (1891).

<sup>102</sup>*Sarla Goel and Ors. v. Kishan Chand*, CA No. 4162, (2009).

<sup>103</sup>Insolvency and Bankruptcy Code, S. 31, (2016).

been satisfied. This implies that S.31<sup>104</sup> can be given effect only when the criterion of 75% voting is complied with which *prima facie* shows that the word “shall” in S.31(1)<sup>105</sup> is mandatory in nature.

III. It is humbly submitted that where a general obligation is created by the Statute and statutory remedy is provided for its violation, such remedy is mandatory<sup>106</sup>. The general obligation laid for approval of resolution plan is approval by a vote not less than 75% of voting share of CoC<sup>107</sup>. Moreover, on non-compliance the statutory remedy under the Code is rejection of the Plan by the Hon’ble Tribunal and initiation of liquidation proceedings against the corporate debtor<sup>108</sup>.

IV. It is worthy to note that the initiation of liquidation proceedings is mandatory in the present case as the resolution plan does not comply with the obligation of approval by requisite percentage. Moreover, surpassing the statutory remedies outlined under S.33(1)<sup>109</sup> in this exhaustive Code, giving any other adjudication is not a jurisdiction that lies with the Hon’ble Tribunal. The Adjudicating Authority has no such jurisdiction to venture into the interpretation of a statute when Legislation in clear terms says what the mandate is. Therefore, the Authority cannot exercise its jurisdiction to override a specification already given in this code by giving an interpretation contrary to the mandate in that particular section<sup>110</sup>.

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<sup>104</sup>Insolvency and Bankruptcy Code, S. 31, (2016).

<sup>105</sup>Insolvency and Bankruptcy Code, S. 31(1), (2016).

<sup>106</sup> Rays on Statute Law

<sup>107</sup>Insolvency and Bankruptcy Code, S. 30(4), (2016).

<sup>108</sup>Insolvency and Bankruptcy Code, S. 33(1), (2016).

<sup>109</sup> Insolvency and Bankruptcy Code, S. 33(1), (2016).

<sup>110</sup>*Nasiruddin. Sitaram Agarwal*, 2 SCC 577, (2003).

**PRAYER**

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**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 Corporate Debtor*

- [1] Hold that the CIRP Application filed by the Hot Zingsbedismissed as non-maintainable.
- [2] Hold that the Arbitral Tribunal has jurisdiction to decide the issue of non-refund of deposit.

*On behalf of Committee of Creditors*

- [1] Hold that the act of Resolution professional is *ultra vires*.
- [2] Hold that Resolution Professional be replaced.
- [3] Hold that a Penalty be imposed on Resolution Professional worth Rs.2, 25, 00,000.

*On behalf of Creditors of Alfren*

- [1] Hold that the procedure laid down under the Code for approval of Resolution Plan is mandatory.
- [2] Pass an order requiring the Corporate Debtor to be liquidated.

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 RESPONDENTS**