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

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TABLE OF ABBREVIATIONS

□	Paragraph
&	And
AIR	All India Report
Art.	Article
NDA	Non-Disclosure Agreement
IBC	Insolvency and Bankruptcy Code, 2016
p.	Page
SCC	Supreme Court Cases
Sec./S.	Section
UOI	Union of India
v.	Versus
SCR	Supreme Court Reporter
Pvt.	Private
Ltd.	Limited
Ors.	Others
et al.	And Ors.

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Black's Law Dictionary, (10th ed. 2014)

STATEMENT OF JURISDICTION

The Application filed by the Petitioner before the Hon'ble Tribunal for Initiation of Insolvency Resolution Process is filed under Section 8 & 9[1] of the Insolvency and Bankruptcy Code, 2016 by waiving the Arbitration Proceedings under Section 34(2)(b)[2] of the Arbitration and Concilliation Act, 1996.

[1] S.8 & 9 IBC, 2016

[2] S.34(2)(b) Arbitration and Concilliation Act, 1996

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 Crores 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 owner 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 plans 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 "Corporate Debtor" under Section 8 & 9 of t he 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 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 required to prove that the conditions for filing an application for initiation of Corporate Insolvency Resolution Process not satisfied by the Petitioner 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?

The Application filed by the Petitioner before the Hon'ble Tribunal for Initiation of Insolvency Resolution Process is filed by waiving the Arbitration Proceedings in accordance with Section 34(2)(b) of The Arbitration and Concilliation Act, 1996.

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

The action taken by the petitioner is not under the ambit of his prescribed duty as Section 23(1) , Section 25(1) and Section 25(2)(a) of IBC, 2016 clearly explains the duties and powers of the resolution professional and the done act of the petitioner is ultra vires

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% does not constitute a valid majority under the ambit of IBC 2016 under Section 30(4) and Section 31(1) of IBC 2016 where the code requires votes not less than 75% of the total votes of financial creditors.

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 not maintainable as it is proved that [A] the security deposit in a lease transaction of an immovable property does not fall under the scope and definition of "Operational Debt" as given under Section 5(21), and [B] the Petitioner is not an 'Operational Creditor' as given under Section 5(20) of the Insolvency and Bankruptcy Code, 2016.

A. THE SECURITY DEPOSIT IN A LEASE TRANSACTION OF AN IMMOVABLE PROPERTY WILL NOT 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 Code.

i. NON-PAYMENT OF SECURITY DEPOSIT IS NOT 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. The Counsel for the Respondent relies upon the

case **Vinod Awasthy v. A.M.R. Infrastructure Limited**[3]**.**

In the above mentioned case, the National Company Law Tribunal (NCLT) construed the provisions of Section 9 read with Section 5(20) and 5(21) of the Code. As per Section 9(1) of the Code, Corporate Insolvency Resolution Process can only be initiated by an "Operational Creditor" against the "Corporate Debtor" when an "Operational Debt" is owed. The definition of "Operational Debt" does not state that it also includes any debt other than "Financial Debt". Thus, 'Operational Debt' under the Code only covers four categories i.e., goods, services, employment and government dues.

NCLT observed that in the present case, the debt had neither arisen out of provision of goods or services, nor out of employment or the dues which are payable under the statute to the Centre/ State Government or local body. The refund sought to be recovered by the Applicants was associated with the delivery of the possession of immovable property i.e., residential flat which was delayed. The NCLT clarified that the debt, therefore, does not fall within the definition of "Operational Debt" as defined under Section 5(21) of the Code. NCLT deliberated whether the Applicants could be regarded as "Operational Creditor" under Section 5(20) of the Code.

Observing that according to Section 5(20) of the Code, 'Operational Creditor' is a person to whom 'Operational Debt' is owed. It was held that since the refund sought to be recovered does not fall within the ambit of 'Operational Debt' the Applicants can't be regarded as 'Operational Creditor'. NCLT held that the Section 9 read with Section 5(20) and Section 5(21) of the Code cannot be construed so widely to include within its ambit even the cases where the dues are on account of advance made to purchase the flat or a commercial site from a construction company, especially when remedies under the Consumer Protection Act and the General Law of the land are available.

The application for triggering the Corporate Insolvency Resolution Process was dismissed as the Applicants didn't fall within the meaning of 'operational Creditor' as defined under Section 5(20) of the IBC, thereby failing to satisfy the criteria laid down under Section 9 of the IBC for triggering Corporate Insolvency Resolution Process.

5) On the basis of the above mentioned case the Counsel for Respondent humbly submits before the Hon'ble Tribunal that the Non-Payment of security deposit does not fall under the definition of "Operational Debt" as given under Section 5(21) of IBC.

[3] C.P.NO. (IB)-10(PB)|2017

ii. RENTING OF IMMOVABLE PROPERTY IS NOT A "SERVICE"

6) The Counsel for Respondent has relied upon the case **Home Solutions Retail India Ltd. & Others v. Union of India**[4] to prove that Renting of an immovable property would not fall under the definition of "Service"**.**

> *In this case, the Supreme Court observed that service could not be struck down on the ground that it does not conform to a common understanding of the word "service". It further held that it does not certainly involve transfer of movable property nor does it involve transfer of movable property of any kind known to the law. The Supreme Court observed as under:-*
>
> *"Therefore, a levy of service tax on a particular kind of service could not be struck down on the ground that it does not conform to a common understanding of the word "service" so long as it does not transgress any specific restriction contained in the Constitution." The stand of the Government of India has been made clear by letter dated 26th February, 2010 issued by the Revenue Department, Ministry of Finance, Government of India, Tax Unit, New Delhi. It was brought to the notice of the Court by the learned counsel appearing on behalf the Union of India that with regard to service of renting of immovable property, stand of the respondent is that it was introduced in the year 2007 with a view to tax all commercial use of immovable property higher. The tax on rent paid is available as input credit if the commercial activity involves provision of taxable service or manufacture of dutiable goods. However, as Delhi High Court, by its judgment dated 18th April, 2009, in the case of Home Solutions Retail India Ltd. & Others v. Union of India has struck down the levy by observing that renting of immovable property does not involve any value addition and, therefore, it cannot be regarded as service, in order to clarify the legislative intent and also bring any certainty in tax liability, relevant definition of tax service is being amended to clarify the activity of renting of immovable property per se could constitute taxable service if made or used in the course or furtherance of business or commerce.*

[4] WP(C) No.3398/2010

7) Taking into consideration the above mentioned case, the renting of immovable property does not fall under the definition of Service as given under Section 5(21) of the Code and hence the non-payment of security deposit should be considered as an "Operational Debt" as given under Section 5(21) of the Code in the definition of "Operational Debt" under Section 5(21) of the Code.

B. THE PETITIONER IS NOT AN OPERATIONAL CREDITOR

8) It is on the aforesaid facts and circumstances 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) The Counsel for the Petitioner relies on the case **Col. Vinod Awasthy Vs. AMR Infrastructure Ltd[5].** to prove that the Petitioner will not fall under the definition of "Operational Creditor" . The case has discussed about the scope of "Operational Debt" as follows:

> *8) ……In the present Case, the debt has not arisen out of the provisions of goods or sevices. The debt has also not arisen out of employment or the dues which are payable under the statute to the Centre/State Government or local body. The refund sought to be recovered is necessarily associated with the delivery of the possession of immovable property, which has been delayed.*
>
> *9)…… The Petitioner in the present case has neither supplied any goods nor has rendered any service to acquire the status of an "Operational Creditor".*

10) Likewise we have decided the case of **Sajive Kanwar Vs. AMR Infrastructure[6]** which has also discussed the possibility of treating a person like the petitioner as an "Operational Creditor". In Para 6 to 10 we have expressed the following views:-

[5] C.P.NO. (IB)-10(PB)|2017

[6] C.P.No.(ISB)-03(PB)/2017

"6. From a bare perusal of Section 9(1) of IBC (Supra), it becomes evident that a cause of action to an "Operational Creditor" to file an application before NCLT would arise if after 10 days notice given by him to the "Operational Debtor", the "Operational Creditor" does not receive any payment form such a debtor or a corporate debtor or in the alternative he does not receive a notice of dispute. He must also satisfy the Tribunal about Demand Notice issued to the Operational Debtor / Corporate Debtor and is also requires to fulfil all the requirements of 9(3) of IBC.

7. In order to fall within the four corners of "Operational Creditor" as per Section 9 of the IBC, it must be shown that he is a person to whom an "Operational Debt". The expression "Operational Debt" has been defined by Section 5(21) of IBC and it was fulfilled following substantive elements namely:

a) Debt arising out of provisions of goods; or

b) Services; or

c) Out of employment.

It also covers dues arising under any law for the time being in force and payable to the Central or State Government or local authority. It is doubtful whether it would include all debts other than "Financial Debt" because we do not find any such "Legislative Intendment" from the Part 2 of the Code which deals with "Insolvency and Liquidation of Corporate Persons"

8. Learned Counsel for the Petitioner has argued that the expression "Corporate Debtor" means a person who owes a debt to any person as per Section 3(5) of IBC. It is further emphasized that the expression "Debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. However Part 2 specifically deals with "Insolvency resolution and Liquidation" and it has its own definition enumerating in Section 5 of IBC as is discussed in the preceding Para. Therefore the definition as enumerated in Section 5 of IBC are to apply the expression used in Section 7 and (of IBC and therefore, the expression used in Section 3 of IBC cannot be exclusively read to interpret various words used in Section 5 of IBC. Therefore we find no merit in the aforesaid submission.

9. Therefore the argument of the petitioner to treat this petition as the one under Section 9 of IBC is also without substance and we reject the same.

10. For the reasons stated above, this petition fails and the same is dismissed. Keeping in view the tenderness of the provision of IBC we refrain from

burdening the petitioner with cost. Before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy as we have refrained from entertaining the application at the initial stage itself when the respondents have not entered appearance and are not present before us. Therefore the right of Applicants

before any other forum shall not be prejudiced on account of dismissal of instant application.

12. As a sequel to above discussion, this petition fails and the same is dismissed.

11) Taking into account the above mentioned case, the Petitioner has neither supplied any goods nor rendered any service to fall within the ambit and scope of "Operational Creditor" as given under Section 5(20) of the Code.

12) Since it is proved that a lease transaction cannot be considered as 'Service' as given under Section 5(21) and that the non-payment of security amount is not an "Operational Debt" as given under Section 5(21) of the Code and the Counsel for Respondent humbly submits before the Hon'ble Tribunal that the Petitioners of this case would not fall under the definition "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?

13) On satisfying the maintainability of applications for initiating Corporate Insolvency Resolution Process, it is pleaded before the Hon'ble Tribunal that the conditions for filing an application for initiation of Corporate Insolvency Resolution Process as given under Section 8 of the Code are not satisfied.

A. INITIATION OF INSOLVENCY RESOLUTION PROCESS

14) 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.

i. *DEMAND NOTICE NOT IN THE PRESCRIBED FORM*

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.

17) The prescribed format for filing a Demand Notice is given in *Insolvency and Bankruptcy Rules*[7]. A Demand Notice can be submitted in Form No. 3 or a copy of an invoice attached with a notice in Form 4 as per Rule 5(1) of Insolvency and bankruptcy (Application to Adjudicating Authority) Rules, 2016.

[7] Insolvency and Bankruptcy *(Application to Adjudicating Authority) Rules, 2016*

18) In this case, the Petitioner has intimated the non-payment of Security Deposit through various letters and emails. These letters and emails, which contains merely an intimation of the non-payment of the debts, cannot be considered as a "Demand Notice" as given under Section 8(1) of the Code.

19) The prescribed format for filing a Demand Notice as given under Rule 5(1) of Insolvency and bankruptcy (Application to Adjudicating Authority) Rules, 2016 has not been satisfied and hence there exists no valid Demand Notice in this case. Since it is proved that the Demand Notice is not valid, the conditions for filing an application for initiation of Insolvency Resolution Process are not satisfied. So, the Hon'ble Tribunal must hold that Insolvency Resolution Process initiated by the Petitioner cannot be performed, as the basic conditions are not satisfied.

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

20) 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.

21) 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.[8] The parties must intend to make a submission to arbitration i.e., there must be animus arbitrandi.[9]

A. EXTENT OF JUDICIAL INTERVENTION

23) Section 5 of the Act, 1996 provides for the extent of Judicial Intervention which says that *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."* The word "Part" referred to in this Section is Part I of the Act, 1996 which shall apply where the place of

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

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

Arbitration is in India[10] and shall not affect any other law for the time being in force for virtue of which certain disputes may not be submitted to arbitration[11].

24) Therefore, the Judicial Intervention has been restricted and minimized. Under Section 5, the words used are "Judicial Authority" which is a wider term than the word "Court" and judicial authority includes all such authorities or agencies conferred with Judicial Powers of the Government. The Judicial Authority's intervention under the Act, 1996 is limited to the purposes as prescribed by the Act, itself.

25) If one of the parties to an arbitration agreement initiates Court Proceedings in contravention of the arbitration clause, the other party can and should object to the proceedings on the ground that there is an arbitration agreement between the parties. The court must refer the parties to arbitration under Section 8 of the Arbitration Act. However, any objection to such proceedings must be dealt with before filing the first statement. If the opposite party does not raise any such objection, the proceedings in the civil court will proceed. Usually, judicial intervention in arbitration is limited to the purposes mentioned in the Arbitration Act. There have been cases where the courts have directed the parties to approach an already subsisting arbitral tribunal for interim measures. The counsel for the Respondent has relied upon the case **GAIL (India) Ltd. v. Nagarjuna Cerachem Pvt Ltd[12].**

> *There was a government contract for supply of gas, which had an arbitration clause. However, the petitioner filed a writ petition under Article 226 of the Constitution of India, the maintainability of which was questioned in third case. The court held that the writ was not maintainable as there was an arbitration clause in the agreement under which all the disputes, if not settled mutually, will have to be referred for arbitration where the arbitrator would decide the dispute and grant appropriate relief. It is not permissible to invoke Article 226 because there is an existing effective remedy available in the contract itself. Availability of an alternative remedy is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.*

26) Section 8 of the Arbitration and Conciliation Act, 1996 is peremptory in nature. It provides that a judicial authority shall, on the basis of arbitration agreement between the parties, direct the parties to go for arbitration. It also enlists conditions

[10] S.2(2), Arbitration and Concilliation act, 1996.

[11] S.3

[12] 2005(1) RAJ 632 (AP)

precedent, which needs fulfilment before reference can be made as per the terms of the 1996 Act. The Counsel for Respondent relies upon the case **P. Anand Gajapathi Raju & Ors. v. P.V.G.Raju (Died) & Ors[13].**

> *According to the above mentioned case, the conditions which are required to be satisfied under Sub Sections (1) and (2) of Section 8 before the court can exercise its powers are: (1)there is an arbitration agreement; (2) A party to the agreement brings an action to the Court against another party;(3) subject matter of the action is the same as the subject matter of the Arbitration agreement; (4) the other party moves to the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.*

27) Considering the above mentioned case, the Counsel for Respondent satisfies the conditions as follows.

i. *THERE EXISTS AN ARBITRATION AGREEMENT.*

28) 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.

29) 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*

[13] (2000) 4 SCC 539

(c) an exchange of statements of claim and defense 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.

30). The Counsel for the Respondent relies upon the case **Hindustan Petroleum Corpn. Ltd. V. Pinkcity Midway Petroleums[14].**

In this case, the Court in Para 14 observed that if in an agreement, the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to arbitrator. In the said case, the existence of Arbitral Clause was not denied by either of the parties and hence in accordance with the mandatory nature of Section 8, the court referred the dispute to arbitration.

31) It has been given in the facts of the case in Paragraph 7, that the Petitioner and Respondent had entered in an Arbitration Agreement as given under Section 7 of the Arbitration and Conciliation Act, 1996.

ii. AN ACTION IN THE COURT AGAINST THE OTHER PARTY

32) As given in the aforesaid case, the Petitioner being a party in the Arbitral Agreement has brought an action to the Court against the Respondent. Though, there exists an agreement between the parties, the Petitioner has filed an application under the Insolvency and Bankruptcy Code, 2016. It has also lodged a caveat in National Company Law Tribunal, Delhi.

iii. SUBJECT MATTER OF THE ACTION IS THE SAME AS THE SUBJECT MATTER OF THE AGREEMENT

33) It has been given in the case **P.Anand Gajapathi Raju v. P.V.G.Raju[15]** that the essential conditions that are required to be satisfied, before the court directs the parties to go for arbitration, also includes the condition that the subject matter of the action should be the same as the subject matter of the agreement.

[14] (2003) 6 SCC 503

[15] (2000) 4 SCC 539

34) In our case, it is said that if any dispute arises between the parties it will first be referred to arbitration. The term "any dispute" given in the agreement includes all the disputes regarding the lease agreement between the Petitioner and the Respondent. So, the action brought before the Court is a claim to initiate Insolvency Resolution Process and this has been claimed by the Petitioner as the Respondent had failed to repay the security deposit. Since a dispute has arisen due to the non-payment of Security Deposit it is well and within the scope of "any dispute" mentioned in the agreement as there is a breach in the lease agreement between the Parties.
Since, (I), (II) and (III) os satisfied Arbitraion Proceedings cannot be waived and the Court must direct the parties to Arbitration Proceedings. The Counsel for Respondent relies upon the case **Magma Leasing & Fin. Ltd & Anr v. Potluri Madhavilata & Anr[16],** for the aforesaid argument.

> *23. Section 8 is in the form of legislative command to the court and once the pre-requisite conditions as aforestated are satisfied, the court must refer the parties to Arbitration. As a matter of fact, on fulfilment of conditions of Section 8, no option is left to the court and the court has to refer the parties to Arbitration.*

35) Since, there is nothing on record that the pre-requisite conditions of Section 8 are not fully satisfied in the present case, the Counsel for Respondents humbly plead the Tribunal that it must direct the parties to Arbitration as per the Arbitration Clause.

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

36) The action undertaken by Mr. Ramesh Singh is beyond the ambit if his prescribed duty in view of **[A.]** Action taken by the Resolution Professional **[B.]** Duty of the Resolution Professional **[C.]** Action of resolution professional is ultra vires.

A. ACTION TAKEN BY THE RESOLUTION PROFESSIONAL

37) 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.[17]
38) The resolution professional had appointed two registered valuers for the company and started with the valuation of the company and its assets.[18] The

[16]Civil Appeal No. 6399 of 2009

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

[18] ¶16, Moot Proposition

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 had to be changed. Without further inquiry, the Resolution Professional got the parts changed for Rs.75 Lakhs.[19] The creditors alleged this action as *ultra vires.*[20] The Resolution Professional filed a petition before the Adjudicating Authority claiming his action was not *ultra vires.*

B. DUTY OF THE RESOLUTION PROFESSIONAL

i. DUTY AS PRESCRIBED BY THE CODE

39) 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.[21] 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.[22]

40) Preservation refers to keeping safe from harm.[23] The resolution professional's duty is clearly explained in the Code that he can only protect and preserve the assets of the corporate debtor. His power is limited to take care of the assets with the corporate debtor from damage and other harm.

41) The Code allows the resolution professional to take immediate custody and control of all the assets of the corporate debtor but that does not impliedly allow him to make any changes to them without prior information to the committee of creditors when the Insolvency petition is pending before the Adjudicating Authority.

42) 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.[24] The operations of the corporate debtor refers to the day to day business activities of the corporate debtor.

43) *Ultra vires* refers to an act performed without any authority to act on subject.[25] The Code clearly says the resolution professional can protect and preserve the assets. He is not allowed to do anything beyond the powers given by the Code and the Committee of Creditors.

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[19] ¶17, Moot Proposition

[20] ¶18, Moot Proposition

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

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

[23] Preservation, Black's Law Dictionary (6th edition), 1997

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

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

ii. COMMITTEE OF CREDITORS APPROVAL FOR CERTAIN SITUATIONS

44) Section 28(1)[26] speaks about the situations where the resolution professional should get prior approval from the Committee of Creditors before performing such act. Nothing in this section mentions that the resolution professional can repair the assets when required. Further one of the creditors to the corporate debtor, Techno Electric Suppliers Pvt. Ltd from whom the corporate debtor has purchased the machinery stated that there is no immediate requirement for changing these parts especially when the company was under financial stress. The creditor has also mentioned that he has been looking after the machinery at regular intervals and were doing the needful repairs.[27]

45) When the resolution professional realized that some machinery required servicing and proper overhauling, he should have mentioned it to the Committee of Creditors to get their approval to change the required parts before changing them through third party mechanics Rolcon Engineers Pvt. Ltd. The resolution professional before entering into a contract with the third party mechanics should have asked prior permission to the Committee of Creditors and get their approval in the meeting of the Committee of Creditors. Such action by the resolution professional without approval of the Committee of Creditors cannot be considered to *intra vires.* An act is said to be *intra vires* of a person or corporation when it is within the scope of his or its power of authority.[28]

iii. REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE

46) The Council for the respondent has relied upon **Innoventive Industries Ltd. v. ICICI Bank and Ors.**[29] 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 judgment 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:

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*

[26] Insolvency and Bankruptcy Code, 2016

[27] ¶18, Moot proposition

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

[29] AIR 2017 SC 4084

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.

47) The same report was also mentioned in **Unigreen Global Private Limited v. Punjab National Bank**[30] by the National Company Law Appellate Tribunal, New Delhi.

C. ACTION OF THE RESOLUTION PROFESSIONAL IS ULTRA VIRES

48) The report mentioned above clearly states that the resolution professional will have the power and responsibility to monitor and manage the operations and assets of the enterprise. The report has clearly put a check over the powers of the resolution professional so that he does not act on his own without the approval or check of the committee of creditors.

49) The powers of the resolution professional should be limited to prevent them acting on their own which may harm the interest of the committee of creditors on the corporate debtor. The council thus concludes that, the action of the resolution professional in regard to the repairing of the assets was ultra vires and not within 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?

50) 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 passed by 66.67% vote does not constitute a valid majority under the ambit of IBC, 2016 in view of **[A.]** Approval of committee of creditors **[B.]** Approval of the Adjudicating Authority

A. APPROVAL OF COMMITTEE OF CREDITORS:

51) 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] The Code

[30] MANU/NL/0192/2017

[31] 25, Moot Proposition

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

expressly states that only when the resolution plan is approved by 75 percent of the voting shares of the financial creditors, the committee of creditors can approve such resolution plan.

52) In the present case, only 66.67 per cent of the voting shares of the financial creditors was given for the particular resolution plan which means the committee of creditors should not further approve such resolution plan unless they receive 75 per cent of the total financial creditors.

53) The council rely upon the case of **Innoventive Industries Pvt. Ltd v. ICICI Bank and Ors.**[33] where the Supreme Court has held that:

> *Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for the payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30.*

54) If a vote less than 75% is received then the Committee of Creditors cannot approve the resolution plan which the Resolution Professional presents before him. The Code has strongly emphasized such power to the Committee of Creditors in order to protect the interest of the financial creditors to bring back the corporate debtor back on his feet. Even though the Committee of Creditors fail the Adjudicating Authority shall not approve such resolution plan to bring back the company on its feet as the low percent of votes show that the financial creditors are not satisfied with such resolution plan.

55) In the present scenario, the Committee of Creditors have breached their duty by violating Section 30(4)[34] where it has been stated that the Committee of Creditors shall not approve a resolution plan if it has got less than 75% of the total voting shares of the financial creditors.

B. APPROVAL OF THE ADJUDICATING AUTHORITY:

56) 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.[35] The Council for the respondents rely upon the case of **K. Sashidhar v. Kamineni Steel & Power**

[33] MANU/SC/1063/2017

[34] Insolvency and Bankruptcy Code, 2016

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

India Pvt. Ltd.[36] where despite falling short of the 75% majority requirement stipulated under the Code, the resolution professional placed the plan before NCLT for approval. 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:

> *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.*

57) From the above judgement, it is clear that though the Committee of Creditors fail to follow the Code, the final decision is rested on to the Adjudicating Authority. The Adjudicating Authority should also consider the violation of the Code which has expressly stated that 75 per cent of the voting shares is required for the approval of the resolution plan.

58) The council also relies upon **Innoventive Industries Pvt. Ltd. v. ICICI Bank Ltd.**[37] where the Mumbai bench of the NCLT was faced with a similar question on whether to approve a resolution plan that had received the approval of 66.57% of the financial creditors in value, which was less than the prescribed majority in Section 30(4) of the Code. However the Mumbai bench framed the legal issues somewhat differently:

59) Whether this Adjudicating Authority has jurisdiction to exercise over a decision taken by Committee of Creditors as contemplated in the Code. In other words, the issue was not whether the NCLT has discretion to approve such a scheme, but a more fundamental one relating to whether it even has the jurisdiction or capacity to entertain, let alone approve, the resolution plan.

60) The Bench went on to observe that it was not open to the NCLT to treat an approval of the Committee of Creditors with less than 75% majority as a valid approval of the resolution plan. In fact, the Mumbai bench too delved into the rationale for the Code, but emerged with a different perspective in that the Code was intended to operate as a single window approach for resolution of corporate debts, and that the creditors were conferred appropriate powers and authority to act with the support of the requisite majority.

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[36] 2017 SCC(Online) NCLT 12610

[37] MANU/SC/1063/2017

61) From that viewpoint, the bench held that the NCLT's jurisdiction can be invoked only by the approval of a resolution plan by a 75% majority on financial creditors in value, falling which the NCLT is prohibited from delving into a consideration of the plan. Hence, in the absence of an approval from the financial creditors as required above, the Mumbai bench refused to look into the resolution plan.

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 Insolvency Petition as non-admissible.

Thereby, Declare the actions of the Resolution Professional as ultra vires .

And further disapprove the plan passed by 66.67% of the Committee of Creditors.

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 RESPONDENTS

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