

INSOLVENCY AND BANKRUPTCY MOOT COURT
COMPETITION 2017

IN THE MATTER OF
NEW AGE TECHNOLOGY LTD., CORPORATE DEBTOR
ON BEHALF OF
RST BANK & OTHERS, FINANCIAL CREDITOR

WRITTEN SUBMISSIONS ON BEHALF OF THE
CONCERNED PARTIES

T A B L E O F C O N T E N T S

TABLE OF CONTENTS	[II]
LIST OF ABBREVIATIONS	[IV]
INDEX OF AUTHORITIES	[V]
STATEMENT OF FACTS	[XI]
ISSUES RAISED	[XIII]
SUMMARY OF ARGUMENTS	[XV]
ARGUMENTS ADVANCED	[1-25]

On Behalf of Corporate Debtor

1. CIRP APPLICATION BEFORE NCLT BY THE RST BANK IS NOT MAINTAINABLE.
 - [1.1] Violation of the principle of Natural Justice.
 - [1.2] New Age is not a Wilful Defaulter.
 - [1.3] Insolvency Mechanism cannot be used as a Recovery Mechanism.
 - [1.4] Hearing of Debtor in Creditor's Meeting.
2. ACTIONS OF RESOLUTION PROFESSIONAL WERE DETRIMENTAL TO THE INTEREST OF CORPORATE DEBTORS.

On Behalf of Operational Creditors

1. OPERATION CREDITORS HAVE A VALID CLAIM IN THE INSOLVENCY PROCEEDINGS.

On Behalf of Resolution Professional/Interim Resolution Professional

1. DUTIES DISCHARGED BY THE RP/IRP WERE IN COMMENSURATE WITH GOOD FAITH.
 - [1.1] Decision of RP of not to renew lease.
 - [1.2] Decision of RP to take the possession of Mumbai Flat.
 - [1.3] Decision of not Including Public Depositors in the List of Claims.
 - [1.4] Decision in Relation to Providing of Information Memorandum.

On Behalf of Financial Creditors

1. CIRP APPLICATION IS MAINTAINABLE.
2. IRP HAS BEEN PREJUDICIAL IN PERFORMING ITS DUTIES.
3. THE SUBMISSION OF RST BANK IN CHALLENGING PEOPLE'S BANK AND MARVEL ORGANICS' CLAIM IS VALID.
4. RESOLUTION PROFESSIONAL CAN BE REPLACED.

[TABLE OF CONTENTS]

On Behalf of Other Parties

1. APPLICATION MOVED BEFORE THE NCLT FOR RECOGNITION OF SINGAPORE PROCEEDINGS IS MAINTAINABLE.
2. JKL LTD. HAS THE RIGHT TO CLAIM A COPY OF INFORMATION MEMORANDUM.
3. PUBLIC DEPOSITORS HAS THE RIGHT TO HAVE THEIR CLAIMS ACCEPTED BY THE RP

PRAYER

[XVII]

[LIST OF ABBREVIATIONS]

L I S T O F A B B R E V I A T I O N S

AIR	All India Reporter
Art.	Article
CIRP	Corporate Insolvency Resolution Process
Comp. Cas.	Company Cases
CompLJ	Company Law Journal
cr.	Crore
EWHC	England and Wales High Court
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
Sec.	Section
Supp	Supplementary

I N D E X O F A U T H O R I T I E S

TABLE OF CASES

Judicial Pronouncements	Citation
A.K. Kraipak v. Union of India	AIR (1970) SC 150
Amalgamated Commercial Traders Pvt. Ltd. v. ACK Krishnsawami	[1965] 35 Comp Cas 456
Ambey Flour Mills (p) Ltd. v. Vimal Chand Jain	1990 (1) CompLJ 289
American Energy Group Limited v. Hycarbex Asia Pte Limited (In Liquidation)	[2014] EWHC 1091 (Ch)
Ashok Kumar Sonkar v. Union of India	(2007) 2 SCC (L&S) 19
Baby Paul v. Hindustan Paper Corporation	AIR 1978 Ker 223
Bachchulal v. State	AIR 1951 All 836
Bank of New York Mellon, London Branch v. Zenith InfoTech Limited	AIR 2017 SC 1735
Banwari Lal v. State	AIR 1956 All 385
Canara Bank v. Debasis Das	AIR 2003 SC 2041
Col Vinod Awasthy v. AMR Infrastructure	[2017] 141 SCL 70
Dalco Engineering Private Ltd. v. Shree Satish Prabhakar Padhye	AIR 2010 SC 1576
Dhani Ram v. Sub-Divisional Judge, Theog	AIR 1965 HP 25
District Collector of Stores v. Ram Govinda	AIR 1964 Cal 68
Dukhram Gupta v. Co-operative Agricultural Association Ltd.	AIR 1960 MP 272
Edelweiss Asset Reconstruction Company Limited v. Synergies- Dooray Automotive Limited	Company Petition (IB) No. 01/HDB/2017 (National Company Law Tribunal, Hyderabad Bench, 23/01/2017)

[INDEX OF AUTHORITIES]

Essar Steel India Limited v. Reserve Bank of India	Special Civil Application No. 12434 of 2017 (Gujarat High Court, 17/07/2017)
Express Newspapers Private Limited v. UOI	AIR 1986 SC 872
Gujrat W.S. & S.B. v. Unique Erectors (Gujarat) (P) Ltd.	AIR 1989 SC 973
H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scinida Bahadur of Gwalior v. Union of India	AIR 1971 SC 530
Indian Bank v. Kadevi Industries Limited	Company Petition (IB)/10/7/HDB/2017 (National Company Law Tribunal, Hyderabad Bench, 15/03/2017)
Innoventive Industries Ltd. v. ICICI Bank	[2017] 142 SCL 11
Ivan Cherkasov, William Browder, Paul Wrench v. Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (In Liquidation)	[2017] EWHC 756 (Ch)
Jai Ram v. State	AIR 1937 All 137
Jaisinghari v. Union of India	AIR 1967 SC 1427
Kaliber Associates Pvt. Ltd. v. Mrs. Tripat Kaur	Company Appeal (AT) (Insolvency) No. 52 of 2017 (National Company Law Appellate Tribunal, 26/05/2017)
Kedarnath v. State of U.P.	AIR 1965 All 233
Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central), Calcutta	AIR 1966 SC 1370
Liberty Oil Mills v. UoI	AIR 1984 SC 1271
M.S.T. Corporation v. Official Liquidator	AIR 1978 SC 47

[INDEX OF AUTHORITIES]

M/s. Starlog Enterprises Limited v. ICICI Bank Limited	Company Appeal (AT) (Insolvency) No. 5 of 2017 (National Company Law Appellate Tribunal, 24/05/2017)
Madhavrao Narayanrao Patwardhan v. Ram Krishan Govind Bhanu	AIR 1958 SC 767
Moti Ram Prem Chand v. Kewal Ram Dharam Chand	AIR 1928 Lah 202
Mr. Sanjay Kumar Ruia v. M/s Magna Opus Hospitality Pvt. Ltd.	Company Petition No.65/I & BP/NCLT/MB/MAH/2017 (National Company Law Tribunal, Mumbai Bench, 12/04/2017)
Nawabkhan Abbaskhan v. State of Gujrat	AIR 1974 SC 1471
Nordic Trustee ASA v. OGX Petr�leo e G�s SA	[2016] EWHC 25 (Ch)
Oraganon Ltd. v. Collector of Excise	AIR 1994 SC 2489
Organo Chemical Industries v. Union of India	AIR 1979 SC 1803
Pashupati Nath Sukul v. Nem Chandra Jain	AIR 1984 SC 399
Premier Enterprises v. State of Meghalaya	AIR 1992 Gau 98
Probodh Chandra Ghosh v. Urmila Dassi	AIR 2000 SC 2534
R.R.R. Gopala Rao v. N.G. Sehararao	AIR 1989 SC 2185
Raj Rajendra Sardar Maloji Narsing Rao v. Shankar Saran	AIR 1958 All 775
Rajkot Municipal Corporation v. Manjulben Jayantilal Nakem	(1997) 9 SCC 552
Ram Niwas v. Bano	AIR 2001 SC 2921
Ramanathan Chettiar v. Ramanathan Chettiar	AIR 1968 SC 1047

[INDEX OF AUTHORITIES]

Rural Electrification Corporation Ltd. v. Ferro Alloys Corporation Ltd.	Company Petition (I.B) No. 251/KB/2017 (National Company Law Tribunal, Kolkata Bench, 22/07/2017)
S. Raghbir Singh Sandhawalla v. C.I.T.	AIR 1958 Punj. 250
S.L. Kapoor v. Jagmohan	AIR 1981 SC 136
Safdar Khan v. State of Assam	2017 1 GLT 365
Sahara India (Firm), Lucknow v. CIT	AIR 2008 SC (Supp) 308
Sajive Kanwar v. AMR Infrastructure	Company Petition No. 06/2017 (National Company Law Tribunal, Principal Bench, 16/02/2017)
Sanko Holdings Co Ltd (formerly The Sanko Steamship Co Ltd), Jinichi Tabata (as foreign representative of Sanko Holdings Co Ltd) v. Glencore Ltd.	[2015] EWHC 1031 (Ch)
Seawolf Tankers Inc., Heidmar Inc. v. Pan Ocean Co. Limited	[2015] EWHC 1500 (Ch)
Sham Saheb M. Multtani v. State of Karnataka	AIR 2001 SC 921
Sree Metaliks Limited & Anr. v. Union of India	Writ Petition 7144 (W) of 2017 (Calcutta High Court, 07/04/2017)
State Bank of India v. Essar Steel Ltd.	Company Petition No. (I.B.) 40/7/NCLT/AHM/2017 (National Company Law Tribunal, Ahmedabad Bench, 02/08/2017)
State of Bihar v. P.P. Sharma	AIR 1991 SC 1260

[INDEX OF AUTHORITIES]

State of H.P. v. Raja Mahendra Pal	AIR 1999 SC 1786
Sterling General Insurance Co. Ltd. v. Planters Airways P. Ltd.	AIR 1975 SC 415
Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja	AIR 1980 SC 52
Swadeshi Cotton Mills v. Union of India	AIR 1981 SC 818
Tirupati Balaji Developers (P.) Ltd. v. State of Bihar	AIR 2004 SC 2351
Union of India and Another v. W.N. Chadha	AIR 1993 SC 1082
Union of India v. Delhi Cloth and General Mills	AIR 1963 SC 791
Urban Infrastructure Trustee Limited v. Neelkanth Township and Construction Pvt. Ltd.	Company Petition No. 69/I&BP/NCLT/MAH/2017 (National Company Law Tribunal, Mumbai Bench, 01/23/2017)
Willie Slancy v. State of M.P.	AIR 1956 SC 116

BOOKS REFERRED

1. SIR DINSHAW FARDUNJI MULLA, THE LAW OF INSOLVENCY IN INDIA (5th ed. 2013).
2. EDWARD BAILEY & HUGO GROVES, CORPORATE INSOLVENCY (3rd ed.).
3. MANZAR SAEED, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (2nd ed. 2017).
4. S. KRISHNAMURTHI AIYAR, LAW OF INSOLVENCY (7th ed. 2013).
5. MR. PAVAN KUMAR VIJAY, COMPENDIUM ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (1st ed. 2017).

ACADEMIC PORTALS REFERRED

1. www.jstor.org last accessed on 31st August, 2017.
2. www.lexisnexis.com last accessed on 31st August, 2017.
3. www.supremecourtfindia.nic.in last accessed on 2nd September, 2017.
4. www.nclat.nic.in last accessed on 3rd September, 2017.
5. www.manupatra.com last accessed on 4th September, 2017.
6. www.sconline.co.in last accessed on 4th September, 2017.
7. www.westlawindia.com last accessed on 5th September, 2017

[INDEX OF AUTHORITIES]

STATUTES REFERRED

1. The *Insolvency and Bankruptcy Code*, 2016.

INTERNATIONAL LAW

1. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY.

[STATEMENT OF FACTS]

S T A T E M E N T O F F A C T S

1. New Age Technology Limited is the fourth largest manufacturer of solar panels in the world and the largest in India having three plants, one located in the State of Gujarat and the other two in Karnataka. The company 3000 employees in its various establishments.
2. In 2015, the promoters of New Age diversified into the hotel and real estate business. They set up a company, Radha Hospitality Private Limited that bought an operational 5-star hotel in Jaipur. New Age entered into a JV with RHPL to develop a hotel on its Raipur land. New Age paid its obligation in the form of contribution of land and funds amounting to ₹ 65 cr. The project was to start in 2018 and good returns were expected.
3. New Age obtained financial assistance from a consortium of banks between the year of 2008 and 2011, a total term loan and working capital assistance of ₹ 2195 cr. from Indo Bank, RST Bank and People's Bank and Bank of North India was taken.
4. In the year 2016, whilst diversifying into the hospitality and real estate business, the promoters also acquired Ten Hospitality Services Pvt. Ltd., a Singapore based company, which owns a 5 Star hotel, The Davisson Continental, in Singapore. In January 2017, THSPL raised capital through LAVCA Capital Advisors to the tune of USD 50 million against which THSPL created security interest in favour of LAVCA's sister company AFB Investment Pte.
5. New Age has 85% of its production is captive with two major clients - Dan Morris Energy Inc. and Texas Power International (TPI). New Age has large orders from these two clients that was supposed to keep the plants busy for at least four years. But On 15th September 2016, Morris filed for proceeding under the U.S. Bankruptcy Code due to the stress caused by military coup and TPI faced a major legal action from the US government for bribing government officials in one of the South East Asian countries. On 18th September, Morris conveyed its inability to pay the next tranche of purchase and TPI wrote to New Age and expressed inability to take delivery of solar panels already ready for delivery.
6. On 4th December 2016 the Board of Directors of New Age passed a resolution to sell the Mumbai house for ₹ 5 cr. to raise funds to pay the next instalment against which an advance of ₹ 55 lakh was received. The High Court pursuant to an order passed by them for concealment of real value of plant imported from France in 2011 allowed Customs

[STATEMENT OF FACTS]

Department to attach the amount of ₹ 55 lakh lying in New Age's bank account in Mumbai. New Age's bank account in Mumbai had only ₹ 14 lakh left hence, it decided to default to the banks.

7. On 4th March 2017, RST Bank filed an application before the NCLT under the Insolvency and Bankruptcy Code, 2016. On 5th April 2017, NCLT admitted the application whilst declaring Moratorium and referred the appointment of the IRP.
8. Meanwhile, various operational creditors namely GSES, GSEW Ltd. and Xi Mao refused supply till the time past dues are cleared by New Age. On the other hand accusation of escalating the claim were made by RST Bank against Marvel Organics and Peoples Bank.
9. There were various actions taken by the RP/IRP, for instance IRP filed an application before the NCLT, seeking appropriate orders for taking possession of the Mumbai flat. IRP also rejected the claims of the public depositors on the ground that they do not fall within the purview of operational creditors. The RP also chose not to renew the lease of Hyderabad Office and terminate the lease w.e.f. 31st March 2017.
10. There was a list of claims prepared and Resolution Professional also arranged an information memorandum to invite expression of interest for Resolution Plans from promoters as well as Blue Plaza, a Thailand based hotel.

[ISSUES RAISED]

I S S U E S R A I S E D

I S S U E S R A I S E D O N B E H A L F O F C O R P O R A T E D E B T O R

- 1. WHETHER APPLICATION FOR CIRP BEFORE NCLT BY THE RST BANK IS MAINTAINABLE?**
- 2. WHETHER THE ACTIONS OF RESOLUTION PROFESSIONAL WERE DETRIMENTAL TO THE INTEREST OF CORPORATE DEBTORS?**

I S S U E S R A I S E D O N B E H A L F O F O P E R A T I O N A L
C R E D I T O R

- 1. WHETHER OPERATION CREDITORS HAVE A VALID CLAIM IN THE INSOLVENCY PROCEEDINGS?**

I S S U E S R A I S E D O N B E H A L F O F R E S O L U T I O N
P R O F E S S I O N A L / I N T E R I M R E S O L U T I O N
P R O F E S S I O N A L

- 1. WHETHER THE DUTIES DISCHARGED BY THE RESOLUTION PROFESSIONAL/INTERIM RESOLUTION PROFESSIONAL WERE IN COMMENSURATE WITH GOOD FAITH?**

I S S U E S R A I S E D O N B E H A L F O F F I N A N C I A L
C R E D I T O R S

- 1. WHETHER CIRP APPLICATION IS MAINTAINABLE?**
- 2. WHETHER IRP HAS BEEN PREJUDICIAL IN PERFORMING ITS DUTIES?**
- 3. WHETHER THE SUBMISSION OF RST BANK IN CHALLENGING PEOPLE'S BANK AND MARVEL ORGANICS' CLAIM IS VALID?**
- 4. WHETHER RESOLUTION PROFESSIONAL CAN BE REPLACED?**

I S S U E S R A I S E D O N B E H A L F O F O T H E R P A R T I E S

- 1. WHETHER THE APPLICATION MOVED BEFORE THE NCLT FOR RECOGNITION OF SINGAPORE PROCEEDINGS IS MAINTAINABLE?**
- 2. WHETHER JKL LTD. HAS THE RIGHT TO CLAIM A COPY OF INFORMATION MEMORANDUM?**

[ISSUES RAISED]

3. WHETHER PUBLIC DEPOSITORS HAS THE RIGHT TO HAVE THEIR CLAIMS ACCEPTED BY THE RP?

S U M M A R Y O F A R G U M E N T S

Arguments on behalf of Corporate Debtors

It is humbly contended that the CIRP application as submitted before the NCLT is not maintainable on various grounds that neither a notice was provided to New Age before submitting of application nor was any opportunity of being heard provided at COC therefore, violating the principles of natural justice. Also, New Age is not a wilful defaulter and hence, Insolvency Mechanism cannot be used as a recovery mechanism. Duties of Resolution Professional also were not duly effectuated which proved to be tyrannical to the corporate debtors.

Arguments on behalf of Operational Creditors

There have been defaults in the payment of number of operational creditors such as Bank of North India, GSES, JSEW Ltd., Xi Mao and Customs and Excise Department. The counsel humbly submits before the Hon'ble Tribunal that various operational creditors have a valid claim of operational debt as the amount not paid by New Age to the above mentioned creditors will be considered a valid operational debt which stands to be paid by the corporate debtor.

Arguments on behalf of Resolution Professional/Interim Resolution Professional

It is humbly contended that duties discharged by the RP/IRP were in commensurate with utmost prudence and under good faith and is protected by Companies Act, hence cannot be challenged. This included the decision of RP of not to renew lease, to take the possession of Mumbai Flat, to not Including Public Depositors in the List of Claims, to decision in Relation to Providing of Information Memorandum.

Arguments on behalf of Financial Creditors

It is humbly contended that CIRP application is maintainable as RST Bank has fulfilled all the conditions which are required. Also, IRP/RP has been negligent in performing its duties as it overlooked the fact that AKP Valuers is a related party to New Age and there have been escalation of claim by Peoples Bank as well as Marvel Organics. Also, due to the following issues it is contended that resolution professional should be replaced.

[SUMMARY OF ARGUMENTS]

Arguments on behalf of other parties

It is submitted that application moved before the NCLT for recognition of Singapore proceedings is maintainable as India is signatory to UNCITRAL Model Law on Cross-Border Insolvency and has also ratified the same. It is also submitted that JKL Ltd. is a competent party to ask for information memorandum and thus should be provided the same. It is also submitted that Public Depositor has every right to receive their claim during the liquidation of New Age Technology Ltd. as per the latest release of IBBI.

ARGUMENTS ADVANCED

ARGUMENTS PRESENTED ON BEHALF OF CORPORATE
DEBTOR/PROMOTERS OF CORPORATE DEBTOR

**1. WHETHER APPLICATION FOR CIRP BY THE RST BANK IS MAINTAINABLE BEFORE
NCLT?**

The Counsel humbly submits before the Hon’ble Tribunal that the said application for Corporate Insolvency Resolution Process (CIRP) should be dismissed at the first instance itself. The submissions in this regard are fourfold:

Firstly,

[1.1] Violation of the principle of Natural Justice

1. *Audi alteram partem*¹ or *audiatur et altera pars* is the most basic principle of natural justice which means “the right to a fair hearing or listen to the other side.”² It is therefore, to be brought before the attention of Hon’ble Tribunal that no notice was given prior to the submission of the said petition to New Age Technology Ltd. regarding its default. According to the principles of natural justice³ in situation like these, notice prior is bound to be produced before the application is admitted⁴. The rationale being that the proceedings before NCLT are adversarial in nature and such proceedings have drastic consequences, hence, person cannot be condemned unheard.⁵
2. Providing such notice to Corporate Debtor can give him the opportunity to bring its face of the facts to the observation of the Tribunal as to whether any such default as contended by the creditor has actually occurred or such application deserves to be dismissed on account of invalidity,⁶ deprivation of which they can put the rights of corporate debtor to defend themselves before the initiation of corporate insolvency resolution process in grave peril.

¹ Nawabkhan Abbaskhan v. State of Gujrat, AIR 1974 SC 1471.

² Sham Saheb M. Multtani v. State of Karnataka, AIR 2001 SC 921.

³ Canara Bank v. Debasis Das, AIR 2003 SC 2041.

⁴ S.L. Kapoor v. Jagmohan, AIR 1981 SC 136.

⁵ Sree Metaliks Limited & Anr. v. Union of India, Writ Petition 7144 (W) of 2017 (Calcutta High Court, 07/04/2017).

⁶ Sahara India (Firm), Lucknow v. CIT, AIR 2008 SC (Supp) 308.

[ARGUMENTS ADVANCED – CONTENTION I]

Therefore, this is a clear abrogation of the principles of natural justice as no notice was given to New Age Ltd.

3. Further, it is important to note that, where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken as compliance with the principles of natural justice.⁷ Hence, even though the provision of notice is unexpressed in Sec. 7 of ‘Insolvency and Bankruptcy Code, 2016,’ but where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a particular manner, natural justice will have to be observed unless statutory provision specifically or by necessary implication excludes the application of any rules of natural justice⁸ before admitting application.
4. This also stands in violation of Sec. 420(1) of the Companies Act, 2013 which clearly stipulates ‘reasonable opportunity of being heard’⁹ to be given to the parties before admitting the application. Further, Sec. 424 of the Companies Act, 2013 requires the NCLT and NCLAT to adhere to the principles of the natural justice above anything else. The adjudicating authority acknowledged that principles of natural justice require an opportunity for hearing before admitting and directing corporate debtor to file his argument before the application is listed for final hearing.¹⁰
5. Moreover, it is stated that in administrative law also, a prima facie right to prior notice¹¹ and opportunity to be heard was held to be excluded by implication in the presence of some factors, singly or in combination with another.¹²
6. In *Innoventive Industries Ltd. v. ICICI Bank and Another*¹³, the aggrieved party, i.e., the corporate debtor appealed against the said order of the NCLT, Mumbai Bench, as the Tribunal admitted the application under Sec. 7 of the Code without ascribing the corporate debtor the right to notice and the right to be heard. Consequently, on appeal the view of the NCLT was reversed by the NCLAT. The appellant claimed a violation of the principles of natural justice. The NCLAT cited a plethora of landmark Supreme Court judgments indicating the importance of principles of natural justice as a part of “procedure established

⁷ Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818.

⁸ Safdar Khan v. State of Assam, 2017 1 GLT 365.

⁹ District Collector of Stores v. Ram Govinda, AIR 1964 Cal 68.

¹⁰ Rural Electrification Corporation Ltd. v. Ferro Alloys Corporation Ltd., Company Petition (I.B) No. 251/KB/2017 (National Company Law Tribunal, Kolkata Bench, 22/07/2017).

¹¹ Ram Niwas v. Bano, AIR 2001 SC 2921.

¹² Union of India and Another v. W.N. Chadha, AIR 1993 SC 1082.

¹³ [2017] 142 SCL 11.

[ARGUMENTS ADVANCED – CONTENTION I]

by law”, from which the NCLAT observed that the principles of natural justice apply in all cases except where they are expressly or impliedly excluded.

7. Also, in *Kaliber Associates Pvt. Ltd. v. Mrs. Tripat Kaur*¹⁴, the Appellant (corporate debtor) appealed¹⁵ against an order admitting an application under Sec. 7 of the Code. The NCLAT, while citing the *Innoventive Industries*¹⁶ decision, held that the order passed was in violation of principles of natural justice.
8. Again, in *Liberty Oil Mills & Ors. v. UoI & Ors.*¹⁷, a Full Bench of the Apex Court held:
“*We do not think that it is permissible to interpret any statutory*¹⁸ *instruments so as to exclude natural justice, unless the language of the instrument leaves no option to the court.*”
9. It is imperative for the adjudicating authority to adopt a cautious approach in admitting insolvency applications and also ensuring adherence to the principles of natural justice¹⁹. Hence, NCLT must make every effort to salvage this cardinal rule to the maximum extent permissible by dismissing the present application.

Secondly,

[1.2] *New Age is not a Wilful Defaulter*

10. It is contended that New Age is the largest company of solar panels in the Country and is not in such a substandard condition that insolvency proceedings are initiated against it. All the production units of New Age are of world class facilities making it the fourth largest in the world. New Age has a good history with its bankers and has substantial assets to counterbalance its debts.
11. Furthermore, the company retains offices all over the country viz. Delhi, Bombay, Jaipur. It also owns a property of high commercial value, “New Age House” in Jaipur, which is granted on lease to People’s Bank, Jaipur Branch. Further, the lands on which its major plants in Karnataka and Gujarat are built, are also self-owned along with its plant and machineries. Other assets also include Flat in Juhu, Mumbai as well as six luxury cars.

¹⁴ Company Appeal (AT) (Insolvency) No. 52 of 2017 (National Company Law Appellate Tribunal, 26/05/2017).

¹⁵ *Tirupati Balaji Developers (P.) Ltd. v. State of Bihar*, AIR 2004 SC 2351.

¹⁶ *supra* note 13.

¹⁷ AIR 1984 SC 1271.

¹⁸ *Dukhram Gupta v. Co-operative Agricultural Association Ltd.*, AIR 1960 MP 272.

¹⁹ *M/s. Starlog Enterprises Limited v. ICICI Bank Limited*, Company Appeal (AT) (Insolvency) No. 5 of 2017 (National Company Law Appellate Tribunal, 24/05/2017).

[ARGUMENTS ADVANCED – CONTENTION I]

12. Moreover, New Age also entered in a joint venture with Radha Hospitality Private Limited (RHPL), which owns an operational 5 star hotel in Jaipur. Both the companies planned to develop a hotel and commercial tower in Raipur on the land owned by New Age. New Age duly paid its share of the venture and the project is expected to start from March, 2018, which will most certainly give good returns.
13. But, a series of mis-happenings occurred in 2016 which resulted in such dire consequences. New Age's 85% of the production was retained by Dan Morris Energy Inc. and Texas Power International which were supposed to keep the plants engaged in full capacity for next four years. Taking that into consideration, New Age took financial assistance from the consortium of Banks so as to effectuate the orders placed. But, in 2016, Morris filed for proceedings under Bankruptcy Code and at around same time TPI was facing corruption charges for bribing South East Asian Countries.
14. This resulted in severe operational consequences for New Age as one of the above mentioned companies in October, 2016 conveyed its inability to pay while the other one to the worst expressed its incapacity to even take the delivery of solar panels that were exclusively produced for them. Both the events were entirely unforeseen due to which financial pattern of the company was gravely affected.
15. The initiation of proceedings²⁰ under the Code will result in coercive steps including mandatory suspension of the functioning of the Board of Directors and handover of management to Insolvency Resolution Professional²¹. Such harsh consequences ought to be resorted only when there is no other resolution or reconstruction of the company is possible²², but in the present case, any reasonable²³ person can draw a conclusion that a significant period of time is to be provided to the company for restructuring.
16. It is worthy to note that, there is no opinion that the New Age's industrial units are not viable but it is unfortunate that, the Financial Creditors has not taken into consideration any other relevant factors except focusing on the large stressed accounts. For mere delaying the payment to the creditors is not per se an act of insolvency.²⁴ The Financial condition before

²⁰ Jai Ram v. State, AIR 1937 All 137.

²¹ State Bank of India v. Essar Steel Ltd., Company Petition No. (I.B.) 40/7/NCLT/AHM/2017 (National Company Law Tribunal, Ahmedabad Bench, 02/08/2017).

²² Essar Steel India Limited v. Reserve Bank of India, Special Civil Application No. 12434 of 2017 (Gujarat High Court, 17/07/2017).

²³ Gujrat W.S. & S.B. v. Unique Erectors (Gujarat) (P) Ltd., AIR 1989 SC 973.

²⁴ MANZAR SAEED, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 71 (2nd ed. 2017).

[ARGUMENTS ADVANCED – CONTENTION I]

the falling of two clients was stable. Consequentially, New Age was not provided reasonable time to restructure pursuant to the huge losses suffered.

17. It is also submitted that such financial crunches is conventional in nature in such large scale operations. Also, considering the amount of asset New Age holds and its clean history, such crunches will be soon done away with. New Age has been servicing its debts regularly and had excellent relation with the banks. It is well evident²⁵ from the fact itself that New Age post conquering solar panel business even diversified itself into hospitality.
18. It is highly crucial to note that when the first default of payments of banks occurred it was concurrent to the crisis that New Age was facing due to its clients. This draws special attention to the fact that New Age is not a wilful defaulter²⁶ as there was no diversion of funds, fraud or malfeasance. A debtor can be said to have committed an act of insolvency only when there is a profound intention to defeat or delay the creditors²⁷.
19. It is notable that the operation of New Age is very complex yet inter-dependant involving large number of stake holders including suppliers, creditors, employees, promoters and customers. Any disruption by handing over management to a third party i.e., the IRP is bound to cause erosion in value²⁸. Moreover, it is submitted that the Company has vast operation with multi-location facilities, the impact of the decision would be severe and may result in the company going into serious problem because such large turnover requires skilled and experienced management for the operations.
20. Hence, sudden change of management from the Board of Directors to a single individual i.e., the Insolvency Resolution Professional is likely to disrupt the smooth functioning and operations of the company, for an instance suppliers withdrawing their continuous supply of raw material. This may result in, retrenchment of 3000 employees for no valid reason being gravely affected.
21. It is in the interest of bankers and all stakeholders that the company continues to operate smoothly without such colossal interruption which if not controlled will ultimately result in the company's downfall.

²⁵ Banwari Lal v. State, AIR 1956 All 385.

²⁶ R.R.R. Gopala Rao v. N.G. Sehararao, AIR 1989 SC 2185.

²⁷ MANZAR SAEED, COMMENTARY ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 59 (2nd ed. 2017).

²⁸ *supra* note 21.

Thirdly,

[1.3] Insolvency Mechanism cannot be used as a Recovery Mechanism

22. The objective of the Code, 2016 is clearly for reorganization of insolvency resolution, it is against the unnecessary litigations by the creditors who wish to recover their money from the company.
23. A debt²⁹ means “a sum of money which is now payable or will become payable in future by reason of present obligation,” “*debirua in presenti, solvedum in future*”³⁰. Therefore it can be said that, what was payable to consortium of banks including RST bank was a financial debt³¹ and such creditors have the option of approaching appropriate forum³² but with due consideration insolvency in this case is not that appropriate mechanism.
24. The Code, 2016 was introduced not as a method for claiming of debts. It is something parallel to the process of winding up under the regime of Companies Act before the inception of the Code³³. It is also submitted even when the Code was not in existence, winding-up petition was not a legitimate means for seeking to enforce payment of the debt which is bona fide disputed by the company³⁴.
25. This has also been held in the case of *Ambey Flour Mills (p) Ltd. v. Vimal Chand Jain*³⁵, that, the machinery for winding up will not be allowed to be utilized merely as a means for realizing dues from a company.
26. It can be drawn from the above arguments that, insolvency is parallel to winding up³⁶ and neither of them can be used as a mechanism for recovery of money. Hence, it can be concluded from the above sub issues that New Age was not provided with any opportunity to restructure itself and in such a case initiating a insolvency proceeding against it would be a scandalous abuse of the Code.

²⁹ Sec. 3 (11), The Insolvency and Bankruptcy Code, 2016.

³⁰ *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central), Calcutta*, AIR 1966 SC 1370.

³¹ *Ramanathan Chettiar v. Ramanathan Chettiar*, AIR 1968 SC 1047.

³² PAVAN KUMAR VIJAY, COMPENDIUM ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016 x|vi (1st ed. 2017).

³³ *Id.*

³⁴ *Amalgamated Commercial Traders Pvt. Ltd. v. ACK Krishnsawami*, [1965] 35 Comp Cas 456.

³⁵ 1990 (1) CompLJ 289.

³⁶ *M.S.T. Corporation v. Official Liquidator*, AIR 1978 SC 47.

Fourthly,

[1.4] Hearing of Debtor in Creditor's Meeting

27. It is duly submitted that the provision regarding Committee of Creditors for collation of all claims received shall comprise of only financial creditors³⁷ is violation of the rights³⁸ of New Age as it abrogates the principle of natural justice. As highlighted in the previous sub-issue, the importance of natural justice especially in NCLT, a Tribunal setup by a statute cannot be underestimated. Principle of natural justice³⁹ needs to be widely pervasive⁴⁰ in nature.
28. But Sec. 21 of the Code along with Sec. 24 focuses only on the presence and say of creditors in the committee. The fact that it is the debtor who has been administering the complex affairs of the company and thus has a better knowledge of the daily affair, has been completely overlooked.
29. The Committee takes over the management of the company without the corporate debtor having a say in it, this is in complete violation of the principle – “*Audi Alterem Partem*”. The omnipotence which is inherited in the doctrine is that no one should be condemned unheard.⁴¹ Hence, taking into consideration the importance of natural justice and the understanding of corporate debtor in controlling the company, Sec. 21 and 24 are arbitrary in nature. Hence, New Age should also be provided with an opportunity to have a say to regulate it's affairs in the committee.
30. Moreover, a debtor cannot be adjudicated as an insolvent unless he makes out a prima facie case to the satisfaction of the court that he is unable to pay his debts⁴². Hence, considering the above issues as well as complexity involved in the pressing matter, the Counsel humbly submits that the petition is liable to be dismissed.
31. Sec. 7(5)(a) lays down the word may and not shall, which implies that there is a discretion available with the tribunal when the application is initiated by financial creditor like in the case at hand, unlike Sec. 9 and 10. Hence, it is requested to the Tribunal to determine the situation and put use of their discretion wisely.

³⁷ Indian Bank v. Kadevi Industries Limited, Company Petition (IB)/10/7/HDB/2017 (National Company Law Tribunal, Hyderabad Bench, 15/03/2017).

³⁸ Raj Rajendra Sardar Maloji Narsing Rao v. Shankar Saran, AIR 1958 All 775.

³⁹ Joint Committee on Insolvency and Bankruptcy Code 2015, Lok Sabha, REPORT OF JOINT COMMITTEE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2015.

⁴⁰ A.K. Kraipak v. Union of India, AIR (1970) SC 150.

⁴¹ Ashok Kumar Sonkar v. Union of India and Ors., (2007) 2 SCC (L&S) 19.

⁴² Moti Ram Prem Chand v. Kewal Ram Dharam Chand, AIR 1928 Lah 202.

2. WHETHER THE ACTIONS OF RESOLUTION PROFESSIONAL WERE DETRIMENTAL TO THE INTEREST OF THE CORPORATE DEBTORS?

32. The role of Resolution Professionals is vital to the efficient operation of the Insolvency Resolution Process⁴³. The entire insolvency and bankruptcy process under the Code is managed by them. They play a critical role in transactions under the Code as laid down in Sec. 25(1) that – *“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.”*
33. The Resolution Professional occupies a pivotal position⁴⁴ and acts as an intermediary between the debtor/creditors on the one hand and the Adjudicating Authority on the other. But it is unfortunate that in the case at hand the working of the Resolution Professional is not just inconsistent but also contradictory to the duties as defined in the Code.
34. Resolution Professional is duty-bound⁴⁵ to ensure that the company continues to function on a “going concern basis”⁴⁶. There have been instances where Resolution Professional was delinquent in performing his duties which were in direct violation of Sec. 25(2) (b) that provides– *“Resolution Professional represents and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial⁴⁷, quasi-judicial⁴⁸ or arbitration proceedings⁴⁹.”*
35. Firstly, RP accepted the inflated claim of Marvel Organics Ltd., one of the creditors of New Age, which had an original claim of ₹ 20 cr. for providing transformers but, subsequently it irrationally escalated it’s claim to an amount on ₹ 136 cr. It is significant to note that such claim was escalated without any substantial documentary proof but was unreasonably accepted by Resolution Professionals and eventually added to the official list of claims.
36. Furthermore, it also rigged the claims of People’s Bank, one of the financial creditors to whom an amount of ₹ 790 cr. was payable. It is worthy to observe that New Age had given its property in Jaipur on lease to People’s Bank under a registered lease deed dated 6th

⁴³ Bank of New York Mellon, London Branch v. Zenith InfoTech Limited, AIR 2017 SC 1735.

⁴⁴ Committee on Bankruptcy Law Reforms, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE VOLUME – I RATIONALE AND DESIGN, 2015.

⁴⁵ Oraganon Ltd. v. Collector of Excise, AIR 1994 SC 2489.

⁴⁶ Edelweiss Asset Reconstruction Company Limited v. Synergies- Dooray Automotive Limited and other, Company Petition (IB) No. 01/HDB/2017 (National Company Law Tribunal, Hyderabad Bench, 23/01/2017).

⁴⁷ Dhani Ram v. Sub-Divisional Judge, Theog, AIR 1965 HP 25.

⁴⁸ State of H.P. v. Raja Mahendra Pal, AIR 1999 SC 1786.

⁴⁹ Baby Paul v. Hindustan Paper Corporation, AIR 1978 Ker 223.

[ARGUMENTS ADVANCED – CONTENTION II]

January 2011 and when on 9th April 2017 IRP specifically corresponded with the bank regarding the lease rental amounting to ₹ 79,41,026 it responded that the rent has been adjusted towards New Age's dues. But, it distinctly appears that the Resolution Professional has atrociously overlooked this fact as no adjustment of the rent was made in the dues and the amount in the official list of claims remained to be ₹ 790 cr.

37. It is also submitted that New Age's payments to its suppliers have been regular in nature but after the initiation of insolvency proceeding, Xi Mao has claimed a huge amount of ₹ 10 cr. which has been added by RP in the official list of claims without paying heed to its past record. This highlights the negligent practise of RP/IRP.
38. Further, it is clearly evident that New Age has excellent relation with the bankers and all the dues were regularly furnished till October 2016. After settling of the dues of October, 2016 it cannot be possible that the amount originally claimed by Financial Creditors remained the same. This falls in clear dismay of New Age and raises suspicions on the obligations of the Resolution Professional.
39. The role of the Resolution Professional in the corporate insolvency resolution process is immensely sensitive⁵⁰ and their actions are clearly infringing Sec. 25(2) (e) of the Code which lays down that "*Resolution Professional shall maintain an updated list of claims*". Suffice it is to say that, it was the duty of Resolution Professional to scrutinise, update or even rectify if needed various claims including those of Marvel Organic Ltd. as well as People's Bank and by failing to do so it was capricious to not only corporate debtors but other stakeholder of the company as well.

⁵⁰ *supra* note 39.

ARGUMENTS PRESENTED ON BEHALF OF OPERATIONAL CREDITORS

1. WHETHER OPERATION CREDITORS HAVE A VALID CLAIM IN THE INSOLVENCY PROCEEDINGS?

1. In regards to this issue the Counsel humbly submits before the Hon'ble Tribunal that various operational creditors have a valid claim of operational debt which stands to be paid by the corporate debtor. An operational creditor can be defined under Sec. 5(20) of the Code to mean- *“a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred”*. 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 Sec. 5(21) of the Code.⁵¹
2. An operational debt is defined under Sec. 5(21) of the Code to mean- *“A claim⁵² in respect of the provision 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”*. In the same context, *“default⁵³”* means *“non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.”*
3. The following is the list of operational creditors from whom operational debt is due by New Age against the default they made in payment.

Regarding Bank of North India

4. Between the period of 2008 to 2011 for setting up Karnataka Plant, New Age took a loan for working assistance of ₹ 195 cr. from the Bank of North India against which an amount of ₹ 279 cr. was outstanding. An instalment was due on 31st December 2016 which was not paid by New Age and hence will be considered a default. Hence, Bank of North India as being a part of consortium of banks, would have a valid claim against the New age in the insolvency proceeding which includes the principle amount as well as the interest.

⁵¹ Col Vinod Awasthy v. AMR Infrastructure, [2017] 141 SCL 70.

⁵² Probodh Chandra Ghosh v. Urmila Dassi, AIR 2000 SC 2534.

⁵³ Organo Chemical Industries v. Union of India, AIR 1979 SC 1803.

Regarding GSES, Electricity supplier

5. In the present case, GSES was the electricity supplier for all New Age's operation of various plants, it is significant to take note of the fact that GSES had been providing electricity to New Age for the past 6 months even though no amount against the same had been paid to it. The amount that was defaulted will fall in operational debt and GSES thus, strictly falls in the criteria of operational creditor because the debt that had been pending to be paid by New Age was for being provided a service.
6. GSES had also fulfilled its duties⁵⁴ by providing demand notice on 6th March 2017 demanding ₹ 85 Lakhs and hence has a valid claim.

Regarding JSEW Ltd.

7. In the case at hand, JSEW Ltd. was a regular supplier of EVA Film which is important for the manufacturing of solar panels. JSEW is also an operational creditor considering the fact that the goods supplied by it were used in the process of manufacturing. Also, on 8th March 2017, it was informed by the JSEW Ltd. that it will not further provide the EVA films because of prior dues.
8. There is a significant operational debt which makes JSEW Ltd.'s claim valid for being an operational creditor.

Regarding Xi Mao

9. Default in the form of non-payment was also done by New Age to Xi Mao, a Chinese Company who was an operation creditor. Xi Mao used to supply raw material and had a previous claim of ₹ 10 cr. excluding the interest which had to be added thereon. This claim will be considered as an unquestionable operational debt and will be liable to be paid by New Age.

Regarding Statutory Authority including Custom and Excise Department

10. Custom and Excise Department also falls into the purview of operational creditor because operational debt also includes repayment of dues to any central or state or local authority for the time being in force. Hence, Custom and Excise department has due of ₹ 2 cr. including penalty of ₹ 95 lakh that were ordered by High Court of Karnataka against some

⁵⁴ Rajkot Municipal Corporation v. Manjulben Jayantilal Nakem, (1997) 9 SCC 552.

[ARGUMENTS ADVANCED – CONTENTION I]

concealment of real value of a plant imported from France in 2011.

11. There have been defaults in the payment of number of creditors. The amount not paid by New Age to the above mentioned creditors will be considered a valid operational debt and will be added to the list of claims so as to recover the amount from corporate debtor.

**ARGUMENTS PRESENTED ON BEHALF OF RESOLUTION
PROFESSIONAL/INTERIM RESOLUTION PROFESSIONAL**

**1. WHETHER THE DUTIES DISCHARGED BY THE RESOLUTION PROFESSIONAL/INTERIM
RESOLUTION PROFESSIONAL WERE DONE IN GOOD FAITH?**

After the application of CIRP is initiated against a corporate debtor, it is upon the RP/IRP to preserve and protect the functioning as well as the legacy of the company.⁵⁵ In the case at hand, New Age was a colossal organisation having multifarious stakeholders including its 3000 employees and the duty of maintaining them was soldiered by RP/IRP solely. It is contended that the RP/IRP effectuated their obligations with utmost good faith⁵⁶. Good faith refers to “Honesty; absence of fraud, collusion or deceit. A state of mind indicating honesty and lawfulness of purpose”⁵⁷. The resolution professional comprehends its duty with sincere intentions⁵⁸ having regards to his sensitive role and responsibility. The submissions in this regard are fourfold:

Firstly,

[1.1] *Decision of RP of not to renew lease*

1. Under Sec. 25(2) (b) of the Code, 2016 RP has a duty – “*to represent and act on behalf of Corporate Debtor with third parties to exercise rights for the benefit of the corporate debtor*”. In the case at hand, stupendous amount of dues were already payable to New Age’s financial and operational creditors and the lease amount of the guesthouse was ₹ 12,00,000 subjected to 30% increase. Hence, keeping the priorities of the payment of dues, RP made the decision of terminating the lease of the guesthouse.
2. Also, New Age’s claim against the RP for termination of lease are utterly groundless considering Sec. 233 of the Code grants protection of action of an insolvency professional or liquidator for anything which is done in good faith under the Code or the rules or regulations made thereunder and the decision of termination of lease was done for the best of New Age.

⁵⁵ *supra* note 43.

⁵⁶ *Kedarnath v. State of U.P.*, AIR 1965 All 233.

⁵⁷ *Express Newspapers Private Limited v. UOI*, AIR 1986 SC 872.

⁵⁸ *S. Raghbir Singh Sandhawalla v. C.I.T.*, AIR 1958 Punj. 250.

[ARGUMENTS ADVANCED – CONTENTION I]

3. In *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scinida Bahadur of Gwalior v. Union of India*,⁵⁹ it was pointed out that –

“Good faith according to the definition in General Clauses Act means a thing, which is in fact done honestly whether it is done negligently or not.”

4. Again, in the case of *Madhavrao Narayanrao Patwardhan v. Ram Krishan Govind Bhanu*,⁶⁰ it was observed that –

“Anything done with due care and attention which is not mala fide⁶¹ is presumed to have been done in good faith.”

5. Therefore, it can be concluded from the above arguments that the act of RP was done with the sole intentions of reviving the company as well as to pay company’s dues and therefore no actions will lie against any duty obligates for the actual interest of the corporate debtor.

Secondly,

[1.2] Decision of RP to take the possession of Mumbai Flat

6. On 4th December 2016 the Board of Directors of New Age, decided to dispose of the Mumbai flat to its managing director for ₹ 5 cr. in order to raise funds to pay the upcoming instalment, however, it is interesting to note that considering the location of the house, its commercial value was conjectured to be much higher than it was sold.

7. Against that sale, only an advance amount of ₹ 55 lakh was received, which was ceased almost immediately by Customs and Excise Department with the permission of the High Court of Karnataka. The rest of the amount was never asked for by the corporate debtor and neither received.

8. In the process of insolvency under Sec. 18(f) (ii) IRP has a duty to- *“take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including— assets that may or may not be in possession⁶² of the corporate debtor.”* Hence, when the insolvency proceeding started, IRP tried to correspond with the Managing Director regarding the rest

⁵⁹ AIR 1971 SC 530.

⁶⁰ AIR 1958 SC 767.

⁶¹ State of Bihar v. P.P. Sharma, AIR 1991 SC 1260.

⁶² Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, AIR 1980 SC 52.

[ARGUMENTS ADVANCED – CONTENTION I]

of the amount but the Managing Director neither replied nor handed over the possession of the flat.

9. Considering the vulnerable financial condition of New Age, it was important to have the remaining amount of ₹ 4.5 cr. and hence, taking note of the duty as laid down in the Code, IRP accordingly filed an application before the NCLT, seeking appropriate orders⁶³ for taking possession of the Mumbai flat.

Thirdly,

[1.3] Decision of not Including Public Depositors in the List of Claims

10. In the case at hand, public depositor's claims were rejected by IRP because they neither fell in the purview of operation creditors nor financial creditors. Operational creditors has been defined under Sec. 5(20) as –

“5. (20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.”

11. Further, operational debt has been defined under Sec. 5(21) as –

“5. (21) "operational debt" means a claim in respect of the provision 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.”

12. Further, in *Mr. Sanjay Kumar Ruia v. M/s Magna Opus Hospitality Pvt. Ltd.*⁶⁴ it was held that –

“However, as per dictionary, service is an intangible commodity in the form of human effort, such as labour, skill, advice.”

13. Hence, it is clear that, for any financial borrowing to be included in the scope of operational debt, the following elements should be existing –

- “a) Debt arising out of provisions of goods; or*
- b) Services⁶⁵; or*
- c) Out of employment.*

⁶³ *Bachchulal v. State*, AIR 1951 All 836.

⁶⁴ Company Petition No.65/I & BP/NCLT/MB/MAH/2017 (National Company Law Tribunal, Mumbai Bench, 12/04/2017).

⁶⁵ *Jaisinghari v. Union of India*, AIR 1967 SC 1427.

[ARGUMENTS ADVANCED – CONTENTION I]

*It also covers dues under any law for the time being in force and payable to the central government or state government or local authority.*⁶⁶

14. But, public deposits are nothing but medium and short-term requirements of funds and operational debt would be confined only to four categories as highlighted in the Sec. 5(21) of the Code like goods⁶⁷, services, employment and government dues⁶⁸. Public deposits falls into neither of the above mentioned categories and therefore, the public depositors cannot ask for a claim as operational creditors of the Company.

Fourthly,

[1.4] Decision in Relation to Providing of Information Memorandum

15. Sec. 233 of the Code grants protection of action of an insolvency professional or liquidator for anything which is done in good faith under the Code or the rules or regulations made thereunder. Also, it is the duty of the RP as specifically laid down in Sec. 25(2) (b) to run the Company efficiently in absence of its Board of Directors. Under the obligations that have to be effectuated by the RP, it is of paramount importance that it act in good faith.⁶⁹
16. Here is one of the instances when RP decided not to give the Information Memorandum to JKL Ltd. as it was not a serious buyer. It is worthy to note that New Age is the largest producer of Solar Panels in India. Their product market is in its developing state and has high intellectual value, any kind of disclosure of which will add on to the already existing losses of the corporate debtor.
17. Thus, according to Sec. 29(2) resolution applicant shall be provided Information Memorandum or access to all relevant information provided the resolution applicant undertakes to protect the intellectual property of the corporate debtor and to comply with the provisions of law for time being in force relating to confidentiality and insider trading.
18. Hence, in the case at hand the RP rejected the application of JKL Ltd. on the clear-cut basis that JKL was a competitor for New Age and was not a serious party. Further, it is to be noted that JKL is also the fourth largest company producing solar panels and any such information if supplied to it would increase the trouble for corporate debtor who is already

⁶⁶ Sajive Kanwar v. AMR Infrastructure, Company Petition No. 06/2017 (National Company Law Tribunal, Principal Bench, 16/02/2017).

⁶⁷ Union of India v. Delhi Cloth and General Mills, AIR 1963 SC 791.

⁶⁸ *supra* note 51.

⁶⁹ *Code of Conduct for Insolvency Professionals*, Insolvency Professional Agency of Institute of Cost Accountants of India, available at <http://www.ipaicmai.in/IPA/Upload/Code-Conduct-IPs.pdf>.

[ARGUMENTS ADVANCED – CONTENTION I]

suffering. Therefore, if any information would have been released to JKL, there were huge chances that it can be used in a capricious manner against the interest of New Age.

19. No suit, prosecution or other legal proceeding⁷⁰ shall lie against the Government or any officer of the Government⁷¹ or any other person in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder, or in respect of the publication by or under the authority of the Government or such officer, of any report, paper or proceedings⁷². Whatever the RP did was a part of his duty to manage such an enormous organisation which was already in a troublesome condition.
20. Scrutinizing the decisions of the IRP/RP, it is clear that each one of them is taken with utmost prudence and under good faith and is protected by Companies Act, hence cannot be challenged.

⁷⁰ *supra* note 20.

⁷¹ Pashupati Nath Sukul v. Nem Chandra Jain, AIR 1984 SC 399.

⁷² Sec. 456, Companies Act, 2013.

ARGUMENTS PRESENTED ON BEHALF OF FINANCIAL CREDITORS

1. WHETHER CIRP APPLICATION IS MAINTAINABLE?

1. It is humbly submitted that the CIRP application filed by RST Bank on 4th March 2017 is duly maintainable for the default of payment outstanding on 31st December 2016. In 2011, considering the creditability of New Age Technology Ltd. based on its excellent relations with the bankers, the consortium of banks including INDO Bank, RST Bank and Peoples Bank provided a working assistance of a principle amount of ₹ 2000 cr. for establishment of its Karnataka plants.
2. It is an explicit fact that when New Age had insufficient funds, they consciously chose to pay for salaries and bills instead of the instalment payable to banks. The last instalment was paid in October, 2016 and although the next instalment was due and defaulted in December 2016, RST Bank was liberal enough to file the application in March, 2017 giving the Corporate Debtor substantial time to indemnify.
3. In accordance with Sec. 6 of Code, 2016 the moment New Age made a default, RST Bank had the competence to file the CIRP application before NCLT. Hence, considering the purview of Sec. 7 which specifically talks about initiation of CIRP by Financial Creditors, RST bank has fulfilled all the conditions and thus is capable of filing the CIRP application.

2. WHETHER IRP HAS BEEN PREJUDICIAL IN PERFORMING ITS DUTIES?

4. The parliament enacted Code, 2016 concerning the purpose of embarking strict provision regarding the reduction of Non-performing assets⁷³ along with strengthening the efficiency of liquidation process.
5. Under this act, the obligation of the IRP/RP plays an important role considering the fact that, after the CIRP application is accepted, it is IRP/RP who has to under Sec. 25 of the Code, 2016 take immediate custody and control of the assets as well as the management of the corporate debtor.⁷⁴ But the above mentioned duties were subjected to prejudice⁷⁵ in the case at hand.

⁷³ Sec. 2(1) (O), The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

⁷⁴ *supra* note 43.

⁷⁵ Willie Slancy v. State of M.P., AIR 1956 SC 116.

6. Further, IRP appointed M/s. KGB Valuers and M/s AKP Valuers to determine the liquidation value of the New Age Ltd. but M/s AKP Valuers was related to the corporate debtor which makes the creditors question the whole process. The concept of Related Party is defined under Sec. 2(76) of The Companies Act, 2013.
7. The importance of the process of liquidation and the influence that a related valuer can have on the whole process should not be underestimated. The consortium of Financial Creditors had given a loan of ₹ 2000 cr. which without a doubt is a very stupendous amount and such a biased action of the IRP not only raises suspicion in the eyes of creditors but to an extent defeats the whole purpose of the act.
8. The integrity of IRP by being honest, straightforward, and forthright in all professional relationships is highly stressed upon.⁷⁶ Hence, in such a case overlooking the fact that M/s AKP Valuers is related with New Age was a huge fault.
9. An insolvency professional shall not influence the decision or the work of the committee of creditors or debtor, or other stakeholders under the Code, so as to make any undue⁷⁷ or unlawful gains for himself or any related parties⁷⁸, but on 29th March 2017, when the first meeting of COC was scheduled, the IRP Mr. Thakur used his position in the COC to influence the parties that IRP be continued as RP which had to done away with much deliberation, this cannot be accepted as ethical on the part of IRP.
10. Hence, it can be concluded that such actions including that of appointing liquidation valuers as well as influencing COC are not only violation of code of conduct but would also cause a huge loss to the financial creditors.

3. WHETHER THE SUBMISSION OF RST BANK IN CHALLENGING PEOPLE’S BANK AND MARVEL ORGANICS’ CLAIM IS VALID?

11. It is humbly submitted that, originally Marvel Organics which is one of the financial creditors had a claim of ₹ 20 cr. When insolvency proceeding started, it later escalated its claim to ₹ 136 cr. without the presence of any documents that can substantiate its claim. The only documents that were present were against the amount unpaid of ₹ 20 cr. which were due for providing the transformers. Further, it is unfortunate to note that, IRP even after acknowledging the fact that the claim did not have any factual basis, accepted it and

⁷⁶ *supra* note 69.

⁷⁷ Sterling General Insurance Co. Ltd. v. Planters Airways P. Ltd., AIR 1975 SC 415.

⁷⁸ *supra* note 69.

added it in the list of claims which was completely unreasonable.

12. Further, in *Urban Infrastructure Trustee Limited v. Neelkanth Township and Construction Pvt. Ltd.*⁷⁹, NCLT observed that in the application filed by financial creditor, the amount claimed was ₹ 250 plus cr. including interest but the actual documented default occurred was stated as ₹ 51 cr. The bench held that there should be parity between the amount of default occurred and the amount claimed to be in default and hence dismissed⁸⁰ that application restricting the claim to ₹ 51 cr.
13. Moreover, it is contended that the claim of People's Bank was also misleading in nature. It is submitted that, New Age, between the period of 2008 and 2011 took a loan for Karnataka plant against which an amount of ₹ 790 cr. was payable. It is also interesting to note that New Age had given its property in Jaipur on lease to People's Bank under a registered lease deed dated 6th January 2011 for a rent of ₹ 15,06,900 per month and on 9th April 2017, when IRP specifically corresponded with the bank regarding the lease rental amounting to ₹ 79,41,026 it responded that the rent has been adjusted towards New Age's dues.
14. But, the rent was never adjusted against the dues of New Age by the IRP which the RP has overlooked. The original claim and the claim as laid down by IRP remained the same. It is worthy to note that, each creditor in the Committee of Creditors votes in accordance with the voting share assigned to him based on the financial debts owed to such creditor.⁸¹ Hence, such an inflation didn't only affect the amount that were to receive by them but also affected their rights in the Creditor's meeting to manage the affairs of the company.
15. Hence, it can be concluded from the above stated arguments that the submission of RST Bank against the negligence that had been done by IRP is valid.

4. WHETHER RESOLUTION PROFESSIONAL CAN BE REPLACED?

16. Sec. 25(1) of Code, 2016 states that –

*“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.”*⁸²

⁷⁹ Company Petition No. 69/I&BP/NCLT/MAH/2017 (National Company Law Tribunal, Mumbai Bench, 01/23/2017).

⁸⁰ Premier Enterprises v. State of Meghalaya, AIR 1992 Gau 98.

⁸¹ Sec. 21(6) and (7), The Insolvency and Bankruptcy Code, 2016.

⁸² *supra* note 43.

17. The entire insolvency and bankruptcy process under the Code represented and supervised by RP/IRP.⁸³ But it is unfortunate that, in the case at hand the working of the RP is inconsistent with the duties defined in the Code.
18. The dues payable to Marvel Organics Ltd. who had an original claim of ₹ 20 cr. was irrationally escalated to an amount of ₹ 136 cr. Also, such claim was escalated without any substantial documentary proof and was unreasonably accepted by RP and added to the list of claims.
19. There was violation of Sec. 13(1) of IBBI Regulations, 2016⁸⁴ which lays down that “*The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.*” But in the case at hand, the amount was added without verifying which will cause a huge loss to other creditors. The following negligence⁸⁵ of RP also violated Sec. 25 (e) of the Code, 2016 which specifically focuses upon maintaining an updated list of claims.
20. It also distorted the claims of People’s Bank, one of the banks from whom a loan of ₹ 500 cr. was taken. It is worthy to observe that New Age had given its property in Jaipur on lease to People’s Bank under a registered lease deed against which lease rental amounting to ₹ 79,41,026 was payable. Although RP communicated it with the Bank and acknowledged the fact that the rent has been adjusted towards New Age’s dues, but did not make any kind of adjustments in the final claim.
21. This stood in violation of Sec. 14(1) of IBBI Regulations, 2016 which states that-
“*Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.*”
22. Further, it is submitted that there is a duty on “*the interim resolution professional or the resolution professional, as the case may be, to verify every claim, as on the insolvency*

⁸³ *supra* note 39.

⁸⁴ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

⁸⁵ *supra* note 54.

[ARGUMENTS ADVANCED – CONTENTION IV]

*commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.*⁸⁶ But the IRP failed to do such duty in respect of claims filed by Marvel Organic Ltd. as well as People’s Bank.

23. Hence, scrutinising such grave inaccuracy, the financial creditors in the Committee of Creditors are left with the only option of replacing the RP by exercising its right as laid down in Sec. 27(1) which says – *“Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under Sec. 22 is required to be replaced, it may replace him with another resolution professional in the manner provided.”*

⁸⁶ Sec. 13, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS, 2016.

ARGUMENTS PRESENTED ON BEHALF OF OTHER PARTIES

1. WHETHER THE APPLICATION MOVED BEFORE THE NCLT FOR RECOGNITION OF SINGAPORE PROCEEDINGS IS MAINTAINABLE?

1. It is humbly submitted before the Hon'ble Tribunal that the application submitted by AFB Investment Pte. is maintainable considering the fact that India is signatory to UNCITRAL Model Law on Cross-Border Insolvency and has also ratified the same. One of that most significant objective of which is –

“Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor.”⁸⁷

2. In the case at hand, the promoters of the Company in 2016 acquired Ten Hospitality Services Pvt. Ltd. (THSPL), a Singapore based Company. In January 2017, THSPL raised capital through a private equity fund of USD 50 million, LAVCA Capital Advisors for its re-development. THSPL created security interest in favour of LAVCA's sister company AFB Investment Pte. and created first charge by way of equitable mortgage on immovable properties of THSPL which was required to pay back within a period of 3 years.
3. When THSPL defaulted in making payment of debt to AFB, AFB was not left with any option but to have its proceeding recognised under Art. 15, Para. 1 of UNCITRAL Model Law on Cross-Border Insolvency which makes AFB Investments competent to file application in NCLT by fulfilling the requirements of Art. 15,⁸⁸ as it lays down that – *“Foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.”⁸⁹*
4. The following proceeding will be recognized as a Foreign non-main proceeding as laid down in Art. 2, Para. 5 of UNCITRAL Model Law on Cross-Border Insolvency which lays down that – *“Foreign non-main proceeding” means “a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment”.*⁹⁰ In the case at hand, New Age, the corporate debtor has an establishment in Singapore in the form of THSPL which strictly falls under the purview of establishment as laid down in

⁸⁷ Seawolf Tankers Inc., Heidmar Inc. v. Pan Ocean Co. Limited, [2015] EWHC 1500 (Ch).

⁸⁸ Nordic Trustee ASA and Another v. OGX Petróleo e Gás SA and Another, [2016] EWHC 25 (Ch).

⁸⁹ Ivan Cherkasov, William Browder, Paul Wrench v. Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (In Liquidation), [2017] EWHC 756 (Ch).

⁹⁰ Sanko Holdings Co Ltd (formerly The Sanko Steamship Co Ltd), Jinichi Tabata (as foreign representative of Sanko Holdings Co Ltd) v. Glencore Ltd, [2015] EWHC 1031 (Ch).

Art. 2⁹¹, Para. 6 of UNCITRAL Model Law on Cross-Border Insolvency and hence, is under the scope of non-main proceeding.

5. Hence, considering the huge amount of finance involved, the application is requested to be duly accepted. Thereafter, in concern for interest of the creditor as well as assets of the debtors and to maintain the certainty of trade relations between the two countries, the Tribunal is also requested to take appropriate relief measures as it deems fit under Art. 19 and Art. 21 of UNCITRAL Model Law on Cross-Border Insolvency, otherwise the whole purpose of the Model Law will be defeated.

2. WHETHER JKL LTD. HAS THE RIGHT TO CLAIM A COPY OF INFORMATION MEMORANDUM?

6. It is humbly submitted that JKL Pvt. Ltd. should be provided with Information Memorandum in the present insolvency proceeding. It is worthy to note that, JKL Pvt. Ltd. is an established Company⁹² which is the fourth largest manufacturer of solar panels in India and when, New Age who was also one of the prestigious companies involved in manufacturing of the same product went through insolvency proceedings, JKL saw an opportunity to expand its business by acquiring New Age's Infrastructure.
7. Business is an on-going concern and JKL Pvt. Ltd. by owning the infrastructure of New Age saw an ambitious opening to escalate its operations which makes it a potential buyer for New Age. Hence, under Sec. 36 of IBBI Regulations, 2016 which lays down that – *"The interim resolution professional or the resolution professional, as the case may be, shall submit an information memorandum in electronic form to each member of the committee and any potential resolution applicant,"* JKL is competent to request for information memorandum and under Sec. 36 it has the right to receive a copy.

3. WHETHER PUBLIC DEPOSITORS HAS THE RIGHT TO HAVE THEIR CLAIMS ACCEPTED BY THE RP?

8. It is most humbly submitted that Public Depositor has every right to receive their claim during the insolvency proceedings of New Age Technology Ltd. In the case at hand, New Age to fulfil its working capital needs accepted public deposits in the year 2012. But, when

⁹¹ American Energy Group Limited v. Hycarbex Asia Pte Limited (In Liquidation), [2014] EWHC 1091 (Ch).

⁹² Dalco Engineering Private Ltd. v. Shree Satish Prabhakar Padhye, AIR 2010 SC 1576.

[ARGUMENTS ADVANCED – CONTENTION III]

the time came, it could not furnish the interest against those deposits. Hence, they have the right to claim their interest from New Age.

9. It is worthy to note that IBBI in its Press Release dated 16th August, 2017 has specifically laid down that – “*There could be claims from a creditor who is not a financial creditor or an operational creditor and introduced specific form for submitting its claim.*”⁹³ This step was needed to be taken as IBBI Regulations, 2016 only provide for Forms for submission of claims by operational creditors and financial creditors but overlooks the presence of any other creditor except these two like public depositors who are very segregated in nature and do not have any legislative support to demand their claims.
10. Therefore, observing the above statement of IBBI, public depositors have the absolute right to have their claim considered by the RP for the list of claims. Moreover, it is unfortunate to note that the claim of public depositor from Singapore amounting to ₹ 45 cr. was considered by RP and then added to the list of claims but the claim of other public depositors was blatantly refused.
11. Hence, considering the above actions of the RP and latest release of IBBI, the claims of public depositors should be duly contemplated and added to the list of claims.

⁹³ Provision of a Form for Submission of Claims by Creditors other than Financial Creditors and Operational Creditors of the Corporate Debtor under Corporate Insolvency Resolution Process, released by Insolvency and Bankruptcy Board of India, available at <http://ibbi.gov.in/FormforSubmissionofClaims.pdf>.

[PRAYER]

WHEREFORE, IN THE LIGHT OF FACTS STATED, ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE RESPECTIVE PARTIES RESPECTFULLY SUBMITS BEFORE THIS HON'BLE TRIBUNAL TO ADJUDGE AND DECLARE:

C O R P O R A T E D E B T O R

- [1] The CIRP application filed by RST Bank is not maintainable.
- [2] Replacement of the Resolution Professional considering his detrimental actions.

O P E R A T I O N A L C R E D I T O R S

- [1] The claim of the operational creditors be declared valid in the insolvency proceedings.

R E S O L U T I O N P R O F E S S I O N A L / I N T E R I M R E S O L U T I O N

P R O F E S S I O N A L

- [1] Duties discharged by the RP/IRP to be declared in good faith.

F I N A N C I A L C R E D I T O R S

- [1] The CIRP application filed by RST bank to be declared maintainable.
- [2] Replacement of the resolution professional.
- [3] The submission of RST bank in challenging People's Bank and Marvel Organics' claim to be declared valid.

O T H E R P A R T I E S

- [1] The application moved by AFB Investment Pvt. Ltd. for recognition of Singapore proceedings to be declared maintainable.
- [2] JKL Pvt. Ltd. to be provided with Information Memorandum in the present insolvency proceeding by the Resolution Professional.
- [3] Public Depositor should be allowed to be a claimant for the purpose of receiving their claim during the liquidation of New Age Technology Ltd.

AND TO PASS ANY SUCH ORDER OR JUDGMENT AS THIS HON'BLE TRIBUNAL MAY DEEM FIT IN THE INTERESTS OF JUSTICE, EQUITY AND GOOD CONSCIENCE.

All of which is respectfully submitted

*Sd/-*_____