

TEAM CODE: 151

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION

2017

IN THE MATTER OF

NEW AGE, CORPORATE DEBTOR

ON BEHALF OF

**FINANCIAL CREDITOR, OPERATIONAL CREDITOR, COMMITTEE OF
CREDITORS, THIRD PARTY, CORPORATE DEBTOR**

WRITTEN SUBMISSIONS ON BEHALF OF THE CONCERNED PARTIES

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AA	Adjudicating Authority
AFB	AFB Investment Pte.
CIRP	Corporate Insolvency Resolution Process
CoC	Committee of Creditors
Code	Insolvency and Bankruptcy Code of India, 2016.
IBBI	Insolvency and Bankruptcy Board of India
IBC	The Insolvency and Bankruptcy Code of India, 2016.
IM	Information Memorandum
IRP	Interim Resolution Professional
LAVCA	LAVCA Capital Advisors
MARVEL	Marvel Organics Ltd.
NCLT	National Company Law Tribunal
NCLAT	National Company Law Apellate Tribunal
REGULATIONS	Regulations of Insolvency and Bankruptcy Code of India, 2016.
Rs.	Rupees

RST	RST Bank
RHPL	Radha Hospitality Private Limited
RP	Resolution Professional
SECTIONS	Sections Of Insolvency and Bankruptcy Code of India, 2016.
THSPL	Ten Hospitality Services Private Limited

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STATEMENT OF FACTS

New Age Technology Limited is the largest solar panels manufacturer in the India with over 3000 employees. New Age has three solar plants, one located in Gujarat and two in Karnataka. Its shares are listed at BSE & NSE. New Age's registered office and corporate office are located in Delhi and Mumbai respectively. New Age has acquired various properties including a Hyderabad office on lease and renewal of which was subjected to 30% increase in rent , self-owned property in Jaipur which is given on lease to people's bank, an apartment in Mumbai, a land in Raipur and luxurious cars.

From 2008 to 2011, New Age obtained financial assistance and working capital assistance of Rs. 2195 from four banks. In 2014, a guesthouse in Hyderabad was taken on lease at a monthly rent of Rs. 12 lakh which can be extended by another three years at the option of the lessor.

In 2015, the promoters of New Age set up a company Radha Hospitality Private Limited. that bought a five star hotel managed by seven points, an international hotel operating company. New Age entered into a Joint Venture agreement with RHPL to develop a hotel on Raipur land. The agreement requires RHPL to contribute 50% cost while New Age is required to transfer the Raipur land for construction and remaining Rs. 65 core in cash. In the same year, New Age also raised Rs. 10 crore from the issue of Masala Bonds with maturity date of 18th July 2018.

Around 4th November, New Age paid the remaining balances to RHPL. On 4th December, board of directors sold the Mumbai house to its managing director for Rs. 5 crore whose market price was much higher. On 16th December, New Age got order from Karnataka HC to pay a total amount of 95 lakh after penalty for concealing the real value of the plant imported from France. New Age decided to default to the banks. On 31st December, New Age defaulted on its instalment interest to the Bank of North India.

On 4th march, RST bank filed before the NCLT under the Code and proposed Mr. S. Mahesh as IRP. New Age raised objections to the maintainability of the NCLT application. NCLT referred the appointment of IRP to IBBI and IBBI confirmed Mr. Amit Thakur as IRP. After appointment, Amit Thakur visited the Gujarat plant but was not allowed to take possession by the workers. He took appropriate steps to take possession and appointed XYL Security for preserving the Unit.

Subsequently, GSES issued a demand notice for Rs. 85 lakh and JSEW LTD refused to supply electricity and EVA Films until they clear their past dues. On 8th April, IRP appointed

two registered valuers to determine liquidation value but it was found that one of the valuers was a related party to New Age. On 9th April, IRP asked People's bank to deposit the lease rental from April 2015 to February 2017 amounting Rs. 79, 41,026, to which people's bank informed IRP that the bank has been adjusting the lease rental in its dues.

Pursuant to the public announcement, Marvel, a financial creditor, supplied transformers to New Age worth Rs. 20 crores. On receiving Marvel's claim, the IRP noticed that Marvel had filed its claim without submitting any evidence demonstrating how Rs.20 crore escalated to Rs.136 crore.

In 2012, New Age had invited public deposits. The RP refused to admit the claims received from the RP on the grounds that the public depositors were not operational creditors.

On 22nd April, 2017 IRP constituted the CoC. RHPL objected to its exclusion from the committee of the creditors. Pursuant to the decision of the CoC meeting held on 29th April, Mr. Dhivesh Sharma's appointment as the RP was confirmed by IBBI on 17th May.

Meanwhile, RP chose not to renew and terminate the lease of the guesthouse w.e.f. 31st March i.e. prior to the termination date.

In January 2017, the promoters of New Age acquired THSPL which raised private equity fund from LAVCA capital advisors of USD 50 million and for which security interest was created in favour of LAVCA's sister company AFB Investment. RP also received a letter from Mr. Chew John requesting the RP to stop further action in proceedings on the ground that the centre of main interest was in Singapore.

The RP prepared the IM and invited applications for the resolution plan. Blue plaza, New Age and JKL Pvt. Ltd requested a copy of the IM. The RP refused to provide IM to JKL Pvt. Ltd., an act that was subsequently challenged by JKL Pvt. Ltd. in the NCLT.

New Age and Blue Plaza submitted separate resolution plans in which RP pointed out defects. On 1st August, certain objections to New Age's resolution were raised during the CoC meeting. On 28th September 2017, the plan was approved with modifications regarding payment schedule to lender. The RP filed the plan with the NCLT.

ISSUES RAISED**ISSUES ON BEHALF OF NEW AGE**

1. Whether the CIRP Application filed by RST Bank is maintainable?
2. Whether the actions of the RP can be reversed?
3. Whether the resolution plan shall take effect?

ISSUES ON BEHALF OF OPERATIONAL CREDITORS

1. Whether the Resolution planned must be approved by NCLT?

ISSUES ON BEHALF OF IRP/RP

1. Whether the NCLT shall be approved by the NCLT?
2. Whether the RP is required to stay the insolvency resolution process in light of the Singapore Proceedings?
3. Whether People's bank is liable to be penalized for its set off of the amount due under the lease deed?

ISSUES ON BEHALF OF THE FINANCIAL CREDITORS

1. Whether the application filed by RST Bank was maintainable?
2. Whether the delay in the fourteen day time period prescribed by Section 7 is sufficient cause to dismiss the CIRP application?
3. Whether the appointment of Mr. Amit Thakur was ultra vires?
4. Whether the claim of public depositors was liable to be rejected?
5. Whether the sale of the Mumbai House may be avoided by the NCLT?
6. Whether there are sufficient grounds to dismiss the IRP?

Specific to dissenting Creditors

7. Whether the resolution plan satisfies the mandatory requirements under the Code?

ISSUES ON BEHALF OF THE LESSOR OF HYDERABAD PROPERTY & JKL

1. Whether the resolution plan filed with the NCLT shall be approved?

ISSUES ON BEHALF OF BLUE PLAZA

1. Whether the resolution plan filed with the NCLT can be over-turned in the event that the NCLT approves the resolution plan?

SUMMARY OF ARGUMENTS

1. FOR NEW AGE

The CIRP Application filed by RST Bank should not have been admitted. This is because RST Bank was not entitled to file the application. Alternatively, the application has been filed beyond the statutory time limit. Furthermore, Mr. Amit Thakur's appointment was irregular and therefore, all his actions must be reversed by the NCLAT. Furthermore, the NCLT shall not approve the resolution plan as it does not conform to the statutory requirements thereof. Alternatively, there has been a material irregular exercise of power by the RP and therefore, even if the resolution plan is passed.

2. FOR OPERATIONAL CREDITORS

Section 31 of the Code stipulates that NCLT shall by order approve the resolution plan if it satisfies the requirements referred in section 30(2) of the Code. Moreover, regulation 39(4) of the Regulations read with section 31 furthermore emphasizes that the contents of the resolution plan should meet all the requirements of the Code and the Regulations.

It is clear that the resolution plan of New Age does not conform to those conditions which are required to be confirmed during the corporate insolvency resolution process under Part II of the Code. Therefore, in the present case, NCLT shall not approve the Resolutions Plan submitted by New Age examined and approved by RP and CoC respectively under section 31 of the Code.

3. FOR RP/IRP

The CIRP application shall be admitted because the statutory time limit of admitting the application within 14 days of the filing of application is merely directory. Furthermore, The irregular appointment of the IRP shall not vitiate the actions done by the IRP. Moreover, it is argued that the adjustment of the lease agreement by People's bank amounts to a contravention of the moratorium. Additionally, the lessor of the Hyderabad property does not have the right to recover possession of the property because of Section 14(1) (d). Furthermore, the NCLT must pass an order dismissing Mr. Chew John's application as the centre of interest is in India. Lastly, the obstruction to the IRP's entry by the workmen to the Gujarat plant amounts of the Code..

4. FOR FINANCIAL CREDITORS

RST Bank is a financial creditor and thus entitled to initiate the CIRP on the occurrence of default [Default on financial debt is not required to be specific to the petitioner's loan. As a result, the non-payment of the instalment due to Bank of North India was sufficient for RST to file the said application and the same is maintainable. The time limit of 14-days is directory rather than mandatory, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice Thus despite exceeding the 14 day time period the application w.r.t New Age is not liable for dismissal.

The appointment of Mr Amit Thakur as the IRP despite RST Bank proposing otherwise is ultra vires. Mr Amit Thakur, the IRP appointed by NCLT on the reference of the IBBI failed in his duties and thus must be replaced He did not avoid either the preferential transaction in favour of RHPL or the undervalued sale of the Mumbai House to the Managing Director. Contrary to statutory requirements, he appointed valuers who were related parties to New Age .Further, he retained the inflated claim of Marvel Organics, People's Bank and Xi Mao

New Age had failed to identify the source of funds to pay dissenting creditors in the resolution plan it proposed. It is mandatory to identify the specific sources of funds that will be used to pay the liquidation value due to dissenting financial creditors Hence its plan is liable to be rejected by the NCLT.

5. FOR THE LESSOR OF HYDERABAD PROPERTY

The lessor being affected by the moratorium order is entitled to receive payment as CIRP Cost. Consequently, the resolution plan filed by the RP should be rejected by the NCLT for failing to provide for CIRP Costs to be paid in priority to the claims of the other creditors.

6. FOR JKL

The RP's refusal to provide a copy of the IM to JKL in absolute contravention of the mandatory provision of the Code results in a serious breach of duty and severely prejudices the rights and interest of JKL. For these reasons, JKL prays that the tribunal exercises its power to do complete justice by refusing to approve the resolution plan.

BLUE PLAZA

New Age's resolution plan filed by the RP should be rejected by the NCLT for failing to conform to the mandatory requirements of the resolution plan.

ARGUMENTS ADVANCED**I. ARGUMENTS TO BE PRESENTED ON BEHALF OF CORPORATE DEBTOR/ PROMOTERS OF CORPORATE DEBTORS.****1.1. The CIRP application filed By RST Bank should not have been admitted.**

The CIRP Application filed by RST Bank should not have been admitted for the following reasons: *First*, RST Bank is not entitled to file the application under the Code [1.1.1] and *second*, the CIRP Application has been filed beyond the permissible time frame [1.1.2].

1.1.1. RST Bank is not entitled to file the CIRP Application

Section 7(1) stipulates that only when a default has occurred may a financial creditor, acting either by itself or jointly with other financial creditors, file an application for initiating CIRP against the corporate debtor before the NCLT. Under the Code, default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable.¹

In the present case, New Age has duly paid the installment due to all the financial creditors except for BNI.² Therefore, the application for initiation of CIRP can either be independently filled by BNI or jointly filled by other financial creditors along with BNI. However, instead of BNI filling an independent application for the initiation of CIRP or a joint application by any other financial creditor along with BNI, the RST Bank (one of the financial creditor) has filled an independent application for the initiation of CIRP without any default on the part of New Age on the payment of the installment due to them. Therefore, in the present case, the independent application of RST bank cannot be admitted.

1.1.2. The CIRP Application has been filed beyond the permissible time frame

Section 7(4) of Code requires that the NCLT shall appoint an IRP within 14 days from the date of filing the application. Section 7(5) states that an application may be admitted when the NCLT is satisfied that a default has occurred and that there are no disciplinary proceedings against the proposed IRP. In *State of U.P. v. Manbodhan Lal Srivastava*³, the Supreme Court held that the use of the words “shall” raises the presumption that the

¹ The Insolvency and Bankruptcy Code 2016, § 5(12).

² Moot Proposition pg. 5.

³ *State of U.P. v. Manbodhan Lal Srivastava* AIR 1957 SC 912.

requirement is imperative. Thus, the failure to carry out the mandatory requirements under Section 7(4) and (5) shall render the application inadmissible.

In the given case, the application was filed on 4th March, 2017.⁴ However, the application has been admitted on 5th April, 2017 thereby breaching the mandatory 14 days requirement laid down under Section 7 (4). Thus, the CIRP Application must not be admitted.

1.2. The actions taken by Mr. Amit Thakur should be reversed.

Section 16(2) of the Code stipulates that where an application for CIRP has been filed by a financial creditor⁵, the NCLT shall, in the absence of any disciplinary proceedings against the proposed RP, appoint him as the interim resolution professional.

In the given case, the application has been filed by RST Bank proposing S Mahesh as the IRP. Furthermore, there are no disciplinary proceedings against the proposed IRP. However, the NCLT has referred the matter to IBBI which has recommended and confirmed Mr. Amit Thakur as the IRP.⁶ Given that RST Bank is a financial creditor and that there are no disciplinary proceedings pending against Mr. S Mahesh, the NCLT does not have the power to refer the matter to the IBBI. Therefore, the NCLT has exercised its powers erroneously and the Mr. Amit Thakur should not have been appointed as the IRP.

The wrongful appointment of the IRP vitiates the proceedings. In *M/s. Bhash Software Labs Pvt Ltd v. Mobme Wireless Solutions Ltd*⁷, the NCLAT reversed the actions of the IRP where the NCLT had failed to give notice of dispute to corporate debtor in a Section 9 application. In the given facts, the IRP has been appointed in contravention of the explicit language of Section 16(2) and therefore, the NCLAT should reverse the actions taken by the IRP while setting aside the NCLT order.

1.3. The NCLT shall not approve the resolution plan.

Section 30 states that a resolution plan must contain provisions for the management of the affairs of the company after the approval of the resolution plan and the implementation and

⁴ Moot Proposition, pg 5.

⁵ The Insolvency and Bankruptcy Code 2016, § 16(2).

⁶ Moot Proposition, pg 5.

⁷ *M/s. Bhash Software Labs Pvt Ltd v. Mobme Wireless Solutions Ltd*, [2017] Company Appeal (AT) (Insolvency) No. 139 of 2017 (NCLAT).

supervision of the resolution plan. Furthermore, Regulation 38(1) provides that a resolution plan must identify the source of funds that shall be used to pay the CIRP Costs, operational debtors and dissenting financial creditors. Section 31(2) states that where the NCLT is satisfied that the above-mentioned requirements have not been complied with, it may reject the resolution plan.

In the given facts, the resolution plan does not provide for implementation and supervision of the management of the company after the approval of the resolution plan. Furthermore, the resolution plan does not specifically identify the source of funds that shall be used to pay the CIRP Cost, operational creditors and dissenting creditors. Thus, it is clear that the resolution plan does not conform to the requirements laid down in the Code and the Regulations. Therefore, the NCLT ought to refuse to approve the resolution plan.

1.4. There has been a material irregularity in the exercise of powers by the RP.

The Lok Sabha's Joint Committee Report on Insolvency and Bankruptcy Code, 2015 conceded that the words "material irregular exercise of power" were vague and therefore, recommended excluding it as a ground for the NCLT rejecting the resolution plan.⁸ In this way, the Committee made the conscious decision of refusing to define the term "material irregular exercise of power" and left it to the exclusive determination by the NCLAT. It is humbly submitted that in *Badami Kaur v. Dinu Rai*⁹, "material irregularity" was defined as "...A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."¹⁰ Similarly, in *Keshardeo v. Radha Krishnen*¹¹, the Supreme Court held that "material irregularity" refers only to defects in procedure and not to defects in law or fact.

Applying these principles to the given facts, a material irregularity in exercise of powers by the RP would refer to instances of defects in procedure that have the effect of unfairly influencing the proceedings of the CoC. In the given facts, the RP did not give a hearing to New Age in the CoC [1.4.1]. Further, the RP defaulted in his duty to prepare a list of admitted claims along with the security interest [1.4.2]. Moreover, the RP defaulted in his

⁸16th Lok Sabha, Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf (accessed 7th September, 2017).

⁹ *Badami Kaur v. Dinu Rai*, (1886) ILR 8 All 111.

¹⁰ *Ibid.*

¹¹ *Keshardeo v. Radha Krishnen*, 1956 SCR 136

duty to prepare a list of admitted claims along with the security interest and in doing so unilaterally inflated the claim of Xi Mao [1.4.3]. The RP gave a false certification to the NCLT [1.4.4]. The RP acted beyond his powers in terminating the lease agreement of the Hyderabad property [1.4.5].

1.4.1. The RP did not give a hearing to New Age in the CoC.

The RP was required to give notice of the meetings of the CoC to the directors of New Age [1.4.1.1]. Alternatively, New Age was entitled to attend the meeting where its proposed resolution plan was being considered by the committee of creditors [1.4.1.2].

1.4.1.1. *The directors of New Age were not given notice of meetings of the CoC*

Section 24(3) is a mandatory provision which requires that the resolution professional shall give notice of the meeting of the committee of creditors to the members of the suspended Board of Directors. Section 24(4) grants the right, but not the obligation, to the directors of the company to attend the meetings of the committee of the creditors. The Explanation to this provision clarifies that the absence of the directors shall not invalidate the proceedings of the meeting.

In the given case, the RP did not send a notice to the directors of New Age. Therefore, the RP had violated the mandatory provisions of Section 24(3). Although the proviso to Section 24(4) states that the absence of the corporate debtor shall not vitiate the proceedings of the committee of creditors, it is humbly submitted that the proviso is strictly with regards to Section 24(4) and only protects acts of the CoC where the directors of the corporate debtor decide to not attend the meeting. It does not extend any protection to the RP's failure to carry out mandatory roles entrusted to him.

Therefore, New Age's right to attend to the meetings of the CoC had been violated.

1.4.1.2. *Alternatively, New Age was entitled to attend the meeting where its proposed resolution plan was being considered by the committee of creditors*

Section 30(5) states that the resolution applicant has the right to attend the meeting of the CoC in which the resolution plan of the applicant is under consideration.

In the given case, New Age had submitted a resolution plan which was placed before the CoC.¹² However, New Age was not given notice of the meeting and therefore, its statutory right to attend the meeting had been violated.

¹² Moot Proposition, pg 10.

1.4.2. The RP's defaulted in his duty to prepare a list of admitted claims along with the security interest

Regulation 13 states that the RP shall verify every claim and maintain a list of creditors containing their names, amounts claimed by them, amounts admitted by the RP and the security interest attached to these claims.

In the given case, the RP has merely prepared a list of the claims received by him without demonstrating the amounts that have been admitted. This amounts to a breach of Regulation 13 by the RP.

1.4.3. The RP has unilaterally inflated the claim of Xi Mao.

Regulation 13(1) requires the RP to maintain a list of creditors containing their names, amounts claimed by the creditors, amounts admitted and the security interest in respect of the claims.

In the given case, Xi Mao has filed a claim of Rs.10 crore.¹³ However, the RP has entered the proof of claim as Rs.15 crore while preparing a list of claims including interest.

It is humbly submitted that the regulation states that the RP does not have the authority to unilaterally inflate the claim/allow for inclusion of interest when the claim received does not provide for it.

1.4.4. The RP gave a false certification to the NCLT.

Regulation 39(4)(a) states that an RP shall file a certification that the resolution plan contents meet the requirements of the Code and the Regulations while filing the CoC approved resolution plan with the NCLT. In the given case, the resolution plan does not meet the requirements of the Code and the Regulations, in so far as it does not identify the source of funds that will be used to pay the CIRP Cost¹⁴, the operational creditors¹⁵ and dissenting financial creditors¹⁶.

¹³ Moot Proposition, pg 8.

¹⁴ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, IBBI/2016-17/GN/REG004, § 38 (1) (a).

¹⁵ *ibid*, 38 (1) (b).

¹⁶ *ibid*, 38 (1) (c).

Furthermore, the resolution plan is required to provide for the term of the plan, its implementation schedule, management and control of corporate debtor and adequate means for supervision of the plan. In the given case, the resolution plan does not provide for any of these conditions.

Therefore, the certification by the resolution professional that the resolution plan conforms to the requirements is false.

1.4.5. The RP acted beyond his powers in terminating the lease agreement of the Hyderabad property.

Section 25(1) states that the RP has the duty to preserve and protect the assets of the corporate debtor. However, this power is qualified and restricted to the conditions laid down in Section 25(2). In other words, an RP can fulfill his duty only on the grounds laid down in Section 25(2).

In the given case, the RP has terminated the lease agreement.¹⁷ Termination of a lease does not fall within the actions that an RP can take in order to preserve and protect the property.

Therefore, the RP's act of terminating is beyond the powers entrusted to him under the Code to preserve and protect the assets of the company. These material defects by the RP in the procedure amount to "material irregularity in exercise of powers" by the RP.

1.4.6. Consequence of material irregularity in exercise of powers.

The draft Code provided for material irregular exercise of power as a ground for the NCLT to reject the resolution plan. However, after incorporation the Lok Sabha's Joint Committee report's recommendation¹⁸, material irregular exercise of power was removed as a ground for the NCLT to reject the resolution plan as it was already mentioned as a ground for appeal to the NCLAT under Section 61 (3)(ii).

Therefore, even if the NCLT approves the resolution plan, the NCLAT shall overturn the resolution plan because of the material irregularity in exercise of power.

¹⁷ Moot Proposition, pg 9.

¹⁸ 16th Lok Sabha, Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf (accessed 7th September, 2017).

II. ARGUMENTS TO BE PRESENTED ON BEHALF OF OPERATIONAL CREDITORS.

2.1. The Resolution Plan shall not be approved by NCLT as it does not confirm the conditions referred in the Code and the Regulations.

Section 31 of the Code stipulates that NCLT shall by order approve the resolution plan if it satisfies the requirements referred in section 30(2) of the Code. Moreover, regulation 39(4) of the Regulations read with section 31 further emphasizes that the contents of the resolution plan should meet all the requirements of the Code and the Regulations.

In the present case, it has been found that the resolution plan does not determine the liquidation value [2.1], repayment scheme for the operational creditor is more than the permissible time limit [2.2], mandatory contents of the resolution plan as per the Code and the Regulation are not included [2.3] and the information memorandum based on which the resolution plan was made was incomplete [2.4]. It is clear that the resolution plan of New Age does not conform to those conditions which are required to be confirmed during the corporate insolvency resolution process under Part II of the Code. Therefore, in the present case, NCLT shall not approve the Resolutions Plan submitted by New Age examined and approved by RP and CoC respectively under section 31 of the Code.

2.1.1. The liquidation value was not determined as per the Regulations.

Regulation 35(3) of the Regulations stipulates that the RP shall provide the liquidation value to CoC in order to determine the amount which is required to be generated to repay operational creditors under section 30(2)(b) of the Code read with regulation 38(1)(b) of the Regulations. However, as per regulation 35(2)(a) read with regulation 27 of the Regulations the two registered valuers appointed by the IRP who shall determine the liquidation value of the corporate debtor cannot be a related party to the corporate debtor.

In the present case, after the appointment of M/s KGB Valuers and M/s AKP Valuers as the two registered valuers to determine the liquidation value of New Age, during the valuation, it was found that M/s AKP Valuers was a related party to New Age.¹⁹ Therefore, in the present case the appointment of M/s AKP Valuers as a registered valuers of the corporate debtor is prohibited under regulation 27. Hence, the liquidation value cannot be said to be determined as it violates regulation 35 read with regulation 27 of the Regulations.

¹⁹ Moot Proposition, pg 7.

2.1.2. The repayment scheme to operational creditors is in contravention to the mandatory conditions under the Regulations.

Under the mandatory contents of the resolutions plan in regulation 38 of the Regulations, clause (b) of sub-regulation (1) mandates that the payment to the operational creditors shall be made before the expiry of thirty days after the approval of a resolution plan by NCLT.

In the present case, the resolution plan of the New Age which is filed with the NCLT provides that the payment to the operational creditor shall be done within three years and does not specify the date from which the period of three years shall commence.²⁰ However, even if we were to assume that the three-year period commences from the date of approval of the resolution plan from the NCLT, the resolution plan still does not comply with the maximum period of thirty days within which the operational creditor needs to be paid the determined amount. Therefore, in the present that case the resolution plan of New Age which is filed for the approval of NCLT is in contravention of the mandatory regulation 38 under the Regulations.

2.1.3. The resolution plan of New Age does not provide the mandatory contents as per the Regulations.

Under regulation 38(2) of the Regulations a resolution plan should mandatorily provide for the terms of the plan and its implementation schedule, the management and control of the business of the corporate debtor during its term and adequate means for supervising its implementation.

In the present case, the resolution plan of New Age which is filed for approval with the NCLT does not state anything about the management and control of the business of the corporate debtor during the term of 5 years of the resolution plan. Neither does it state any such adequate means in order to supervise the implementation of the resolution plan of New Age.²¹ Therefore, it is clear that the resolution plan does not fulfill the requirement of mandatory content under regulation 38(2) of the Regulations.

2.1.4. The Information Memorandum based on which the resolution plan was made was incomplete.

²⁰ Moot Proposition, pg 10.

²¹ Moot Proposition, pg 11.

Under regulation 12 of the Regulations at the time of verification of the claim, the IRP is not only supposed to maintain the list of creditors and their claims but also the amount of their claims admitted and the security interest, if any, in respect of such claim. Furthermore, this information has to be mandatorily included in the information memorandum based on which all the resolution applicants proposes their resolution plan.²²

In the present case, the financial creditors i.e. RST Bank, People's Bank, Bank of North India and Indo Bank had preferential charges over the assets of the corporate debtor i.e. New Age.²³ Furthermore, the IRP verified the claims received and prepared a list containing the names of creditors along with the amount claimed by them including the rate of interest allowed in each case. However, the IRP did not maintain the amount of their claims admitted and the security interest in favor of the financial creditors.

Therefore, in the present case it is clear that the information memorandum based on which New Age made its resolution plan was not complete and was in contravention regulation 13(1) and 36(2)(d) of the Regulations.

²² Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 Regulation 36.

²³ Moot Proposition, pg 3.

III. ARGUMENTS TO BE PRESENTED ON BEHALF OF RESOLUTION PROFESSIONAL/INTERIM RESOLUTION PROFESSIONAL

3.1. The CIRP application is maintainable.

Section 7 (4) and (5) read together state that the NCLT shall admit an application within 14 days of filing the application. However, it is humbly submitted that this requirement should be held as directory instead of mandatory. In *P.T. Rajan v. T.M. Sahir*²⁴, the Supreme Court held that where an adjudicatory authority is required to perform a statutory function such as admitting/rejecting an application, the prescribed time-line shall be read as directory and not mandatory.

Furthermore, the NCLAT in *J.K. Jute Mills Company Limited v. M/s. Surendra Trading Company*²⁵, the NCLAT held that the time-line prescribed under Section 7 (4) shall be read as directory and not mandatory. Therefore, the mere failure on part of the NCLT to follow the prescribed time-line would not prejudice the maintainability of the application.

3.2. Irregular appointment does not prejudice acts of the IRP.

There is no provision under the Code that states that actions by the IRP/RP can be reversed on the grounds of an irregularity in appointment. The NCLT is only required to be satisfied that the resolution plan has received CoC approval in the manner prescribed under Section 31.

Although there has been an irregularity in the appointment of the IRP, the NCLT is not empowered to reverse his actions on this ground. Furthermore, such irregularity shall not vitiate the resolution plan. Therefore, it is humbly submitted that the actions taken by the IRP are valid and cannot be reversed.

3.3. The adjustment by People's Bank of the amount due from it as a lessee towards its own debt contravened the moratorium.

The moratorium prohibited any transfer, encumber disposal of any legal right or beneficial interest of the corporate debtor.²⁶ The set off the amount which accrues as a legal right under the contract of lease amounts to an encumbrance of the same. Where any creditor violates the provisions of the moratorium, any person who knowingly and wilfully authorised or

²⁴ *P.T. Rajan v. T.M. Sahir* (2003) 8 SCC 498.

²⁵ [2017] Company Appeal (AT)(Insolvency) No 11 of 2017.

²⁶ The Insolvency and Bankruptcy Code 2016, § 14 (1) (b).

permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.²⁷

New Age also owns a property “New Age House” in Jaipur, which has been given on lease to People’s Bank, Jaipur Branch under a registered. Lease rental of Rs. 15,06,900/- per month is payable to New Age.²⁸ Peoples Bank had been adjusting the said lease rental towards its term loan dues and refused to pay the IRP the lease rental in terms of the lease from April 2015 to February 2017, amounting to Rs. 79,41,026/-.²⁹

The adjustment of the lease amount payable contravened the moratorium. Thus, People’s Bank is liable to fine and its managers to be imprisoned.

3.4. The lessor does not have the right to recover the property during the moratorium period.

Section 14(1)(d) states that the moratorium declared by the NCLT shall prohibit the recovery of any property by a lessor where the property is in the possession of the corporate debtor.

In 2014, a guest house in Hyderabad was taken on lease by New Age. The agreement granted the lessor the option to extend the lease for a period of 3 years. However, the RP has terminated the agreement with effective from 31st March, 2017 and chose to not renew the agreement.

Even though the actions of the RP resulted in the breach of the contract, Section 14(1)(d) precludes the lessor from recovering the property during the moratorium period.

3.5. The centre of main interest is in India and hence the Indian adjudicatory authority is not required to recognize Singapore proceedings as main.

The main insolvency proceedings opened by a court of a state member to the UNCITRAL Model Law on Cross Border Insolvency must be recognised by the courts of other member States. [1.1]. To determine the main proceedings, the NCLI is required to determine the centre of main interest. [1.2] India is the centre of main interest. [1.3]. Thus the proceedings in India must not be stayed.

3.5.1. Recognition of “main” insolvency proceeding is required by law.

²⁷ The Insolvency and Bankruptcy Code 2016, § 74 (2).

²⁸ Moot Proposition, pg 2.

²⁹ Moot Proposition, pg 6.

The Model law on cross border insolvency requires the receiving court to make an order recognizing the foreign proceeding, either as a foreign “main” or “non-main” proceeding.³⁰ If the foreign proceeding is recognized as the main proceeding, the discretion of the authorities in the receiving state to initiate and carry out insolvency proceedings is severely restricted.³¹

Thus it’s imperative to characterize the Singapore proceedings.

3.5.2. It is imperative to decide the centre of main interest to ascertain which of the two is the main proceeding.

A main proceeding is one taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding.³²

3.5.3. India is the centre of main interest in the present matter.

The first set of factors is the location where a debtor regularly administered its own interests, as ascertainable by third parties, and the country in which it is incorporated.³³ The second set of factors arises from the location of the parent company which, by virtue of its ownership and power to appoint directors, is able to control the policy decisions of the subsidiary.³⁴ Where these factors point to different countries the court must determine the relative weight to give to each factor.

In the present matter while THSPL the subsidiary of the New Age is located in Singapore, the facts are silent on whether its interests are actually administered in Singapore.³⁵ On the other hand the parent company is registered in India where its Managing Director/ Promoter resides. Relative weightage thus indicates to India being the centre of main interest. There is

³⁰ Article 15 & 17, Model Law on Insolvency 2013.

³¹ UNCITRAL Model Law on International Commercial Arbitration 1985(UN), art 28. After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

³² UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation 1997

³³ M.Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels 3 May 1996. The report was published in July 1996 and is available from <http://aei.pitt.edu/952> (last visited 1 August 2013).

³⁴ *ibid.*

³⁵ Moot Proposition, pg 9.

thus no reason for the Indian Insolvency proceedings to be stayed or the adjudication of the Singapore proceedings as the main proceedings.

3.6. The IRP shall apply to NCLT due to contravention of the provisions of the Code.

Under section 19(2) and 45(1) of the Code, the IRP can file an application to NCLT if during the examination of the transactions undertaken by the corporate debtor, it determines that certain transactions of the corporate debtor were undervalued and the personnel of the corporate debtors was not cooperating with the IRP respectively. This ensure that the IRP is able to perform his duties under the Code and conduct the CIRP within 180 days.

In the present case, the IRP faces certain obstacles whilst performing his duties which includes avoidance of the undervalued transaction of the apartment in Juhu, Mumbai [3.4.1] and non-cooperation of the personnel of the corporate debtor [3.4.2]. Therefore, in order to avoid the undervalued transaction and make the personnel of the corporate debtor cooperation during the CIRP, the IRP can file an application with NCLT.

3.6.1. The sale of the apartment in Juhu, Mumbai to the managing director of New Age was an undervalued transaction and shall be avoided.

Section 45 read with section 48 of the Code clearly stipulates that if the RP during the examination of transactions of the corporate debtor determines that certain transactions of the corporate debtor are undervalued, in such cases he can apply to the NCLT in order to declare the transaction void and reverse the effect of such transaction. However, in order to avoid such an undervalued transaction§ via a declaratory order of NCLT, it has to be proved that such a transaction took place in relevant period. As per section 46(1)(ii) of the code, if the transaction was made with a related party then the relevant period for avoidable transaction is the period of two years preceding the insolvency commencement date. Moreover, for Part II of the Code, a director of the corporate debtor is presumed to a related party of the corporate debtor.³⁶

In the present case, the CIRP commenced on 5th April, 2017. However, on 4th December 2016 in order to raise funds to pay the next installment due to BNI Bank, the board of directors of New Age sold the apartment in Juhu, Mumbai to its managing director for Rs.5 crores which was much lower than the market price of the property at that time.³⁷ Therefore, it is clear that the property (apartment in Juhu, Mumbai) sold to a related party (managing

³⁶The Insolvency and Bankruptcy Code 2016, § 5(24).

³⁷Moot Proposition, pg 5.

director) in the relevant period of two years prior to the insolvency commencement date (4th December 2016) was an undervalued transaction. Hence, this transaction can be avoided upon application by RP under section 45 of the Code.

3.6.2. The personnel of corporate debtor did not extend cooperation to IRP.

Under section 19 of the Code the personnel of the corporate debtor including any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the IRP as may be required by the IRP in performing his duties in order to manage the affairs of the corporate debtor during the CIRP. One such duty includes taking control and custody of assets over which the corporate debtor has possession and ownership rights.³⁸ Furthermore, as per the Code, the word ‘personnel’ includes the director, manager, key managerial personnel, designate partners and employees of the corporate debtor.³⁹

In the present case, Mr. Amit Thakur was appointed as the IRP and upon his appointment he visited the plant in Gujarat to take over its possession. However, he was not allowed to enter the unit as the union workers along with local political leaders led an agitation against Mr. Amit Thakur to prevent him from undertaking his designated duties as §IRP.⁴⁰ Similarly, when the IRP wrote to the managing director asking him to give the possession of the apartment in Juhu, Mumbai the managing director neither replied nor handed over the possession of the flat.⁴¹

Therefore, it can be concluded that the personnel of the corporate debtor, which in our case was the workers and the managing director, have not extended any cooperation to the interim resolution as required under section 19 of the Code.

3.7. The claim of JKL Ltd. has not been correctly admitted.

The word “resolution applicant” has been defined as “any person who submits a resolution plan to the resolution professional”.⁴² Regulation 36 (1) states that the RP shall submit a copy of the IM to any “potential resolution applicant”. Neither the Code nor the Regulations have laid down any limitations on the conditions that a RP shall take into account while deciding whether a party seeking a copy of the IM is a ‘potential resolution applicant’. Therefore, the

³⁸The Insolvency and Bankruptcy Code 2016, § 18(f).

³⁹The Insolvency and Bankruptcy Code 2016, § 5 (23).

⁴⁰Moot Proposition, pg 6.

⁴¹Moot Proposition, pg 7.

⁴² The Insolvency and Bankruptcy Code 2016, § 5 (25).

RP shall exercise his discretion in determining whether a party seeking a copy of the IM is a ‘potential resolution applicant’.

In the given facts, the RP refused to provide a copy of the IM to JKL on the grounds that it was not a serious resolution applicant since it was a competitor of New Age. The RP exercised his powers to determine that JKL was not a ‘potential resolution applicant’ within the meaning of Regulation 36(1) and therefore, the RP was not required to provide a copy of the IM to JKL.

3.8. NCLT must approve the resolution plan.

The draft Code contained ‘material irregular exercise of power’ by the RP as a ground for the NCLT to refuse to approve the resolution plan⁴³. However, after incorporating the suggestions of the Lok Sabha’s Joint Committee Report on the Insolvency and Bankruptcy Code, 2015⁴⁴, the Code removed ‘material irregular exercise of power’ as a ground for the NCLT to reject the approval of the resolution plan. This has been done in order to ensure that the NCLT does not refuse to approve the resolution plan on mere technical/procedural inconsistencies as this would hamper the speedy approval of resolution plans.

In the given case, the RP has already filed a resolution plan with the NCLT. The presence of procedural errors on part of the RP cannot vitiate the entire proceedings and the NCLT is obliged to approve the resolution plan. Failure to do so would be against the intention of the Legislature.

⁴³ Clause 31 (1) (b), draft Insolvency and Bankruptcy Code Bill, 2015.

⁴⁴ 16th Lok Sabha, Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf (accessed 7th September, 2017).

IV. ARGUMENTS TO BE PRESENTED ON BEHALF OF FINANCIAL CREDITORS/ COMMITTEE OF CREDITORS.

4.1. The application to initiate the Corporate Insolvency Resolution Process filed by RST Bank is maintainable.

RST Bank is a financial creditor and thus entitled to initiate the CIRP on the occurrence of default [1.1]. Default on financial debt is not required to be specific to the petitioner's loan [1.2]. As a result, the non-payment of the instalment due to Bank of North India was sufficient for RST to file the said application.

4.1.1. RST Bank is a financial creditor who may initiate the CIRP.

When an insolvency resolution process is to be initiated in respect of a corporate debtor, an application may be made by a financial creditor on the occurrence of a default.⁴⁵ A financial creditor is one to whom a financial debt is owed.⁴⁶ Financial debt means a debt which is disbursed against the consideration for the time value of money⁴⁷ and includes money borrowed against the payment of interest.⁴⁸

New Age Technology Limited (hereinafter New Age) obtained financial assistance from a consortium of banks partially in the year 2008 and the remaining in 2011.⁴⁹ RST Bank is a term loan lender within this consortium and the principal amount it has lent is to the tune of Rs. 500 crores⁵⁰ and claims Rs 650 crores which is inclusive of the interest charged.⁵¹

Consequently, New Age is a financial creditor of New Age as it lent the principal amount of Rs. 500 Crores against the payment of interest promised by New Age. Thus, it is entitled to initiate the Corporate Insolvency Resolution Process subject to the occurrence of a default.

4.1.2. Default on financial debt is not required to be specific to the petitioner's loan,

⁴⁵ The Insolvency and Bankruptcy Code 2016, § 6.

⁴⁶ The Insolvency and Bankruptcy Code 2016, § 5(7).

⁴⁷ The Insolvency and Bankruptcy Code 2016, § 5 (8).

⁴⁸ The Insolvency and Bankruptcy Code 2016, § 5 (8) (a).

⁴⁹ Moot Proposition pg 3.

⁵⁰ Moot Proposition pg 3.

⁵¹ Moot Proposition pg 8.

Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable.⁵² The explanation of Section 7(1) holds that a default could be in respect of a financial debt owed not only to the applicant but to any other financial creditor of the corporate debtor.⁵³ On the occurrence of the default, a financial creditor may institute an individual or joint application with other financial creditors⁵⁴

In the matter of *Punjab National Bank v James Ms Hotels*, the National Company Law Tribunal has held that Section 7 (1) is inclusive, has wide implication and the eligibility of moving application by one of the creditors cannot be curtailed.⁵⁵ It also rejected the implication of a requirement for consensus or permission from other creditors, in case of an individual application.⁵⁶

A general default clause (not creditor specific) as a trigger for insolvency proceedings is standard practice and has been recognized by the United Nations Commission on International Trade Law (UNCITRAL) in its Legislative Guide on Insolvency Law.⁵⁷ Creditors holding unmaturing claims also have a legitimate interest in the commencement of insolvency proceedings especially in cases where they are holders of long term debts.⁵⁸

Bank of North India (the working capital lender) was to be paid its next instalment of interest on 31st December 2016. The instalment of Rs 35 Lakh went unpaid as New Age chose to pay the remaining money in its account to pay salaries and other banks. Bank of North India informed the applicant and the other banks of the default on part of New Age and on 4th March 2017, RST Bank filed the application.

Due to the lack of creditor specify in the commencement provision for financial creditors, the non-payment of the instalment due to Bank of North India constituted default and was sufficient for RST to file an individual application and the same is maintainable.

⁵² The Insolvency and Bankruptcy Code 2016, § 5(12) .

⁵³ The Insolvency and Bankruptcy Code 2016, § 7(1),Rule-4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority).

⁵⁴ *ibid.*

⁵⁵ *Punjab National Bank v Ms James Hotels Ltd*, CP(IB) No. 15/Chd/CHD/2017.

⁵⁶ *ibid.*

⁵⁷ UNITED NATIONS PUBLICATION Sales No. E.05.V.10 ISBN 92-1-133736-4 at pg 48.

⁵⁸ *ibid* 50.

4.2. The delay in the prescribed fourteen day period does not disentitle the admission of CIRP application by the Adjudicating Authority.

The time period prescribed to NCLT in admitting or rejecting an application for the initiation of the Corporate Insolvency Resolution process is to be calculated from the period the application is listed for hearing [2.1] The time limit of 14-days is directory rather than mandatory, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice [2.2]. Thus despite exceeding the 14 day time period the application w.r.t New Age is not liable for dismissal.

4.2.1. The relevant date for calculating the time period is the date of listing.

The NCLT is required to ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor⁵⁹ within fourteen days of the receipt of the application for CIRP initiation.⁶⁰

The National Company Law Appellate Tribunal in the recent J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co case has held that the above time period cannot be counted from the 'date of filing of the application' but has to be counted from the date when such application is 'listed for admission/order'.⁶¹

The date of filing the present application was 4th March, 2017⁶². The Application was listed for admission hearing before the NCLT on 17th March 2017. On 5th April 2017, NCLT admitted the application.

The relevant time period is thus the 18 day period between the dates for listing and admission.

4.2.2. The time period prescribed by the Code is directory and may be extended by the NCLT.

Relying on judicial precedents on the interpretation of procedural timelines under the Civil Procedure Code, the NCLAT held in the JK Jute Mills case that the time limit of 14-days is

⁵⁹ The Insolvency and Bankruptcy Code 2016, § 7 (3).

⁶⁰ The Insolvency and Bankruptcy Code 2016, § 7 (4).

⁶¹ Cite the effing case.

⁶² Paragraph 5.

directory rather than mandatory, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice.⁶³

In the present case while there was a delay of four days beyond the prescribed timeline to ascertain default and admit the CIRP application, it was validly condoned by the NCLT as the same was within its powers as a judicial body. As a result there can be no challenge to the subsequent actions carried out in furtherance of the insolvency resolution process due to the aforementioned delay.

4.3. The appointment of Mr Amit Thakur as the IRP despite RST Bank proposing otherwise is ultra vires.

A financial creditor is mandated to propose the name of an interim resolution professional in its application before the NCLT [3.1]. Such proposed IRP must automatically be appointed in the absence of any disciplinary proceedings against him [3.2]. Thus the reference by NCLT to the IBBI was an ultra vires exercise of discretion on its behalf.

4.3.1. It's mandatory for a financial creditor to propose the appointment of an interim resolution professional.

Section 7 (3) (b) of the Code mandates a financial creditor making a CIRP initiation application to furnish the name of the resolution professional proposed to act as an interim resolution professional.⁶⁴

In compliance with the same, the applicant creditor RST Bank had provided the name of Mr S. Mahesh, its empanelled lawyer as the Interim Resolution Professional.⁶⁵

4.3.2. In the absence of pending disciplinary proceeding, the IRP proposed must be automatically appointed.

Where the application for corporate insolvency resolution process is made by a financial creditor the resolution professional, as proposed in the application under section 7, is required

⁶³ [2017] Company Appeal (AT)(Insolvency) No 9 of 2017.

⁶⁴ Rules 9 (1) and 9 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 mandate that the proposed IRP provide a written communication in that regard and must be accompanied by a certificate confirming the eligibility of the proposed insolvency professional for appointment as a resolution professional in accordance with the Insolvency (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The facts are silent on whether these requirements were complied with.

⁶⁵ Moot Proposition pg 5.

to be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.⁶⁶

In the *Essar Steel v RBI* ruling, the NCLT observed that although they have discretion under the Code, an Adjudicatory Authority does not need to look into the merits of the application at the admission stage. They must not consider any factor beyond the application being in such form and manner as prescribed and the absence of any disciplinary proceedings against the proposed resolution professional.⁶⁷ Regardless, even a rejection of the IRP would entitle rectification by the applicant themselves⁶⁸ and no reference to the IBBI is envisaged.

Since, Mr S Mahesh had no disciplinary proceedings pending against him, he should have been appointed as the IRP as had been proposed by the financial creditor. The NCLT had no discretion to refer the matter to the Insolvency and Bankruptcy Board of India. Consequently the appointment of Mr. Amit Thakur is ultra vires of the Act.

4.4. Public Depositors are financial creditors and their claims may be subsequently added.

The public depositors are financial debtors of the company [4.4.1]. Their application as financial debtors does not disentitle them from relief [4.4.2]. Their claims may be subsequently added to the list of claims by submitting proof of their debt [4.4.3].

4.4.1. Public deposits accepted by an Indian Company are financial debt.

Every public deposit accepted by an Indian company implies an obligation of repayment with interest.⁶⁹ A financial creditor is one to whom a financial debt is owed.⁷⁰ Financial debt means

⁶⁶ The Insolvency and Bankruptcy Code 2016, § 16 (2) § 7(5).

⁶⁷ *Essar Steel v. RBI*, Order C/SCA/12434/2017.

⁶⁸ The Insolvency and Bankruptcy Code 2016, § 7 (5).

⁶⁹ The Insolvency and Bankruptcy Code 2016, § 73, Companies Act, 2013. The Insolvency and Bankruptcy Code 2016, § 2(31), “Deposit” includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India

⁷⁰ The Insolvency and Bankruptcy Code 2016, § 5(7).

a debt which is disbursed against the consideration for the time value of money⁷¹ and includes money borrowed against the payment of interest.⁷²

The Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or debt security. Operational creditors are those whose liabilities from the entity comes from a transaction on operations”.⁷³

In the matter of Roofit Industries, the Mumbai Bench of the NCLT has treated the public depositors’ equivalent to financial creditors with a right to have their claims accepted.⁷⁴

In the year 2012, New Age had invited public deposits for its working capital needs. However, due to financial crunch, New Age could not service the interest to the public depositors.

It is thus apparent that the public deposits implied money being provided to New Age against the payment of interest back to the depositors and would amount to a financial debt.

4.4.2. Application as operational creditors does not debar financial creditors from relief.

In the matter of Hind Motors v Adjudicating Authority, the appellant had prayed to include public depositors as ‘financial creditors’. However since the depositors had applied for relief claiming to be operational creditors, the NCLAT left their inclusion as financial creditors to be adjudicated by the NCLT. ⁷⁵

Thus the wrongful application of the public depositors as operational creditors⁷⁶ in the present matter does not debar them from relief.

4.4.3. Claims may be accepted by the RP or the IRP up until the approval of a resolution plan

⁷¹ The Insolvency and Bankruptcy Code 2016, § 5 (8).

⁷² *ibid.*

⁷³ The Bankruptcy Law Reforms Committee, paragraph 5.2.1.

⁷⁴ IA 45/2017.CP 1055/I&BP/NCLT/MAH/2017. The NCLT did not rebut that depositors have a right to submit claims and recover the amounts due to them.

⁷⁵ [2017] Company Appeal (AT)(Insolvency) No 11 of 2017.

⁷⁶ Moot Proposition pg 7.

The CIRP Regulations states that a creditor, who failed to submit proof of claim within the time stipulated in the public announcement, may submit such proof to the interim resolution professional or the resolution professional, as the case may be, till the approval of a resolution plan by the committee.⁷⁷

Thus the subsequent addition of the public depositors is envisaged within the framework of the Code and the resolution professional is required to include the same.

4.5. The sale of the Mumbai house was undervalued and since the IRP took no action, the financial creditors may seek to avoid it.

The transaction of sale between the promoter/ managing director of New Age and New Age was between two related parties [4.5.1]. It was an undervalued transaction and thus liable to be avoided [4.5.2]. In the absence of any action for avoidance on part of the IRP, financial creditors have the right to seek an order avoiding the transaction and reversing its effects [4.5.3].

4.5.1. The sale of the Mumbai House was between related parties.

Section 5 (24) of the Code defines related parties. A partner or director of the corporate debtor is a party related to the corporate debtor.⁷⁸

On 4th December 2016 the Board of Directors of New Age passed a resolution to sell the Mumbai house to its managing director for Rs. 5 crore.⁷⁹

Consequently, the sale of the Mumbai house was a transaction between related parties.

4.5.2. The sale of the Mumbai House was an undervalued transaction.

4.5.2.1. *The consideration for the sale was significantly lower than the value of the house.*

An undervalued transaction is one where a corporate debtor makes a gift or transfers one or more assets for consideration that is significantly lesser than the value of the asset⁸⁰

⁷⁷Insolvency and Bankruptcy board of India (Insolvency Resolution Process for Corporate Persons) Regulation 2016, § 12(2).

⁷⁸ The Insolvency and Bankruptcy Code 2016, § 5(24)(a).

⁷⁹ Moot Proposition pg 5.

⁸⁰ The Insolvency and Bankruptcy Code 2016, § 45 (2).

The Mumbai house was sold for a consideration of Rs. 5 Crores and the market value of the same is speculated to be much higher.⁸¹ There is an absence of an independent valuer to make a true determination of its value.⁸²

It can only be concluded that the true value of the Juhu is substantially higher.

4.5.2.2. *The sale was not in the ordinary course of business.*

For a transaction to be deemed to be undervalued, it must not be in the ordinary course of business of the corporate debtor.⁸³ While not to be restricted to the core services of the Company, transactions in the “ordinary course of business” may include transactions which are typically undertaken uniformly, routinely with an element of continuity and are essential to the conduct the business.⁸⁴

New Age Technology Limited (New Age) is the fourth largest manufacturer of solar panels in the world and the largest in India and has recently diversified in the hospitality business.⁸⁵ The Board decided on concluding the sale after it had already been informed that its captive client, Dan Morris would be unable to accept the next delivery⁸⁶. Further they were aware that there was no cash to service the next instalment to the working capital lender.⁸⁷

Such divestment for pitiful consideration to its own promoter, in light of the surrounding circumstances does not have any element of continuity or uniformity. Sale of its assets for an advance of merely 55 lakhs could not said to be essential to the conduct of or in the ordinary course of business.

⁸¹ Moot Proposition pg 5.

⁸² Moot Proposition pg 8.

⁸³ The Insolvency and Bankruptcy Code 2016, § 45 (1).

⁸⁴ Onassis Axles (P) Ltd vs. Commissioner of Income Tax, MANU/DE/0445/2014. Dilip Kumar Swain Vs. Executive Engineer, MANU/OR/0136/1996.

⁸⁵ Moot Proposition pg 1.

⁸⁶ Moot Proposition pg 5.

⁸⁷ Moot Proposition pg 4.

4.5.2.3. *The sale was within the relevant period for avoidance of undervalued related party transactions.*

For an undervalued transaction made with a related party the relevant period for avoidance is two years prior to the insolvency commencement date.⁸⁸ "Insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority.⁸⁹

The sale was made on the 4th of December 2016⁹⁰ and the insolvency commencement date is on the 5th April 2017⁹¹ well within the relevant period for avoidance of related party transactions.

It was an undervalued transaction and thus liable to be avoided

4.5.3. The financial creditors have the right to seek an order avoiding the transaction and reversing its effects

In case of undervalued transactions, a creditor has the right to make an application to Adjudicating Authority, if the liquidator or the resolution professional has not reported the same.⁹² The effect of the application is that the transactions are declared void and the effects are reversed.

Since the IRP has not initiated action to void the sale of the Mumbai House, the financial creditors seek.⁹³ The NCLT may pass orders requiring any property transferred as part of the transaction, to be vested in the New Age⁹⁴ Further it may require the MD of New Age to pay such sums at a value determined by an independent expert.⁹⁵

4.6. The financial creditors seek to replace the IRP, Mr Amit Thakur.

⁸⁸ The Insolvency and Bankruptcy Code 2016, § 46 (1) (ii).

⁸⁹ The Insolvency and Bankruptcy Code 2016, § 5(12).

⁹⁰ Moot Proposition pg 5.

⁹¹ Moot Proposition pg 5.

⁹² The Insolvency and Bankruptcy Code 2016, § 47.

⁹³ The Insolvency and Bankruptcy Code 2016, § 47(1).

⁹⁴ The Insolvency and Bankruptcy Code 2016, § 48.

⁹⁵ The Insolvency and Bankruptcy Code 2016, § 48.

Mr Amit Thakur, the IRP appointed by NCLT on the reference of the IBBI failed in his duties and thus must be replaced [6.1]. He did not avoid either the preferential transaction in favour of RHPL or the sale of the Mumbai House to the Managing Director [6.2]. Contrary to statutory requirements, he appointed valuers who were related parties to New Age [6.2]. Further, he retained the inflated claim of Marvel Organics, People's Bank and Xi Mao [6.4]. This application before the NCLT to replace the IRP evidences a prima facie case and must be accepted.

4.6.1. Financial creditors may make an application to replace a resolution professional if there is a prima facie case

Any financial creditor⁹⁶ may, at any time during the corporate insolvency resolution process, file an application before the NCLT to replace the interim resolution professional, if there is evidence to demonstrate that he failed to exercise due diligence in the performance of his powers and functions as enumerated in the Act and CIRP regulations.⁹⁷

In the present case the financial creditors raise this claim before the NCLT.

4.6.2. Non avoidance of the undervalued Mumbai flat sale and preferential payment of the remaining debt to RHPL required was a derogation of duty.

The interim resolution professional is duty bound to make applications for avoidance of transactions in accordance with Chapter III, if any.⁹⁸

4.6.2.1. *The sale of the Mumbai House was an undervalued transaction liable to be avoided.*

Pleading 5.2.2 of the financial creditor lays down the substantive claims in this regard.

4.6.2.2. *The payment of the remaining dues to RHPL was a preferential transaction.*

A preferential transaction is one which implies the transfer of property or interest⁹⁹ from the debtor to creditor on account of an antecedent financial obligation which has the effect of putting such a creditor in a beneficial position.¹⁰⁰ This beneficial position is with respect to

⁹⁶ The Insolvency and Bankruptcy Code 2016, § 27.

⁹⁷ The Insolvency and Bankruptcy Code 2016, § 27.

⁹⁸ The Insolvency and Bankruptcy Code 2016, § 25 (j).

⁹⁹ The Insolvency and Bankruptcy Code 2016, § 5(27).

¹⁰⁰ The Insolvency and Bankruptcy Code 2016, § 43 (2) (a) & (b).

liquidation waterfall provided by Section 53 which places the insolvency resolution costs followed by secured creditors (paripassu with workmen) at the highest priority.¹⁰¹ The minimum relevant period is one year.¹⁰²

As New Age paid nearly 90% of its obligations to RHPL, the balance was to be paid at the time of completion of the project in March 2018.¹⁰³ Around 4th November New Age paid the balance amount of 10% to RHPL for completing construction works.¹⁰⁴

By paying RHPL when it lacked sufficient capital to pay off its debts to the secured creditors certainly meant New Age made a preferential divestment of property. It was thus liable to be set aside by IRP.

4.6.3. Appointment of a related registered valuer was a derogation of duty.

Further the interim resolution professional is required to appoint a registered valuer who is not related to the corporate debtor.¹⁰⁵

On 08th April 2017, the IRP appointed M/s. KGB Valuers and M/s AKP Valuers, being registered valuers, to determine the liquidation value of New Age. However, during the valuation, it was found that M/s AKP valuers were a related party to New Age.

4.6.4. Non verification and maintenance of an updated list of claims was also a failure to exercise his functions as provided under the code.

The interim resolution professional is required to 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.¹⁰⁶

¹⁰¹ The Insolvency and Bankruptcy Code 2016, § 53 (1) & (2).

¹⁰² The Insolvency and Bankruptcy Code 2016, § 43 (b).

¹⁰³ Moot Proposition pg 2.

¹⁰⁴ Moot Proposition pg 5.

¹⁰⁵ The Insolvency and Bankruptcy Code 2016, § 27 (b).

¹⁰⁶ The Insolvency and Bankruptcy Code 2016, § 13 (1).

Mr Amit Thakur, the IRP appointed by NCLT on the reference of the IBBI failed to verify the natural reduction of the claim of People's Bank caused due to its illegal setoff.¹⁰⁷ Marvel did not file documents to support how its 20 crore had escalated to 136 crore. Irrespective IRP added the claim of Marvel to the list and invited it to the committee of creditors.¹⁰⁸ He further failed to update these claims as required under the Code. Xi Mao has filed a claim of Rs.10 crore. However, the IRP has entered the proof of claim as Rs. 15 crore while preparing a list of claims including interest.

As a result, the IRP is in breach of his duties and liable to be replaced.

4.7. The dissenting creditors pray that the NCLT reject the Resolution Plan as it does not satisfy mandatory requirements.

If a resolution plan does not comply with the specific criteria laid down by the Insolvency and Bankruptcy Board of India, the NCLT may reject such a resolution plan.¹⁰⁹ A mandatory requirement of a resolution plan is the identification of the specific sources of funds that will be used to pay the liquidation value due to dissenting financial creditors¹¹⁰.

New Age had failed to identify the source of funds to pay dissenting creditors in the resolution plan it proposed. Such a plan is liable to be rejected by the NCLT.

¹⁰⁷ Moot Proposition pg 6.

¹⁰⁸ Moot Proposition pg 7.

¹⁰⁹ The Insolvency and Bankruptcy Code 2016, § 61(3).

¹¹⁰ The Insolvency and Bankruptcy Code 2016, § 38 (1) (c).

V. ARGUMENTS TO BE PRESENTED ON BEHALF OF LEASOR OF PROPERTY IN HYDERABAD.**5.1. The lessor is entitled to the lease rental being included within CIRP costs.**

It is respectfully submitted that the termination of the lease agreement by the RP is not valid under the Code [5.1]. Consequently, the Lessor is entitled to receive the lease rental as CIRP Cost [5.2] and place claim before the CoC [5.3].

5.1.1. The termination of the lease agreement by the RP is not valid.

The lease agreement entered between the lessor and New Age grants the lessor the right to extend the contract for another 3 years and provides for a termination date. However, RP has terminated the lease prior to the given date and therefore, this unilateral termination of the contract by the lessor is not valid.

5.1.2. The Lessor is entitled to receive the lease rental as CIRP Cost.

Regulation 31(b) states that amounts due to persons whose rights are affected by the moratorium under Section 14(1)(d) fall within the meaning of “insolvency resolution process cost”. Section 14(1)(d) states that where the NCLT orders a moratorium on the insolvency commencement date, the lessor is prohibited from recovering any property during the moratorium period. In the given case, the RP’s decision to terminate the contract prior to the termination is not valid. Therefore, the lessor is entitled to receive the lease rental amounts as CIRP Costs.

5.1.3. The lessor shall be entitled to place a claim before the CoC.

The lease agreement contained a termination date after which the **lessor** was granted the right to renew the lease for a period of 3 years subject to an increase in rental amount by 30%. In the given case, the RP, on behalf of the lessee, has terminated the agreement prior to the termination date and therefore, the retrospective termination prior to the termination date is not valid. Furthermore, the lessee has taken away the right of renewal of lease that is exclusively in the hands of the lessor. These two actions by the lessor result in the breach of the lease agreement. Section 3(6) of the Code states that a claim means a right to remedy for breach of contract even where the right has not been reduced to judgment or has been disputed. Therefore, the right to claim a remedy for the breach of the lease agreement falls within the meaning of “claim”. Therefore, the lessor shall be entitled to submit a claim before the CoC.

5.2. The resolution plan is in breach of the statutory requirement to provide for payment of CIRP costs in priority to all other debts.

Section 30(2)(a) states that a resolution plan must mandatorily contain a provision for payment of CIRP Costs in priority to all other debts. Regulation 38(1) states that a resolution plan must mandatorily identify the source of funds for the payment of the CIRP Costs. Section 31(2) states that where the NCLT is satisfied that the provisions of the Section 30(2) have been not been complied with, it may reject the resolution plan.

In the present facts, the resolution plan provides for payment of only 60% of the CIRP Cost¹¹¹ while simultaneously providing for payment to financial creditors and operational creditors. This amounts to a breach of Section 30(2)(a). Furthermore, the resolution plan does not identify the source of funds to pay the CIRP Costs which is in direct contravention of Regulation 38 (1). Therefore, applying Section 31(2), the absence of mandatory contents in the resolution plan shall result in the NCLT rejecting the resolution plan.

VI. ARGUMENTS TO BE PRESENTED ON BEHALF OF JKL.

6.1. The RP was legally obliged to submit a copy of the IM to JKL.

Regulation 36 (1) states that the RP shall submit a copy of the IM to “**any potential resolution application**”. Therefore, there is no discretion in the hands of the RP to deny a copy of the IM to a third party. Sufficient safeguards have been provided for in Regulation 36 (4)¹¹² read with Section 29(2) which provide for an undertaking by the Resolution Applicant that he shall maintain confidentiality of the information received by him and not share the information with third parties or unduly gain benefit from the information. Furthermore, in *State of U.P. v. Manbodhan Lal Srivastava*¹¹³, the Supreme Court held that the use of the word “shall” gives rise to the presumption that the provision is mandatory. Therefore, breach of the mandatory provision shall vitiate the proceedings.

In the given case, the RP has refused to grant a copy of the IM to JKL on the grounds that it is not a “serious” applicant.¹¹⁴ Therefore, the RP’s refusal to submit an IM to JKL is in contravention of the mandatory provisions of the Code. Hence, it is humbly submitted that the Tribunal uses its power to do complete justice under Rule 11 of the Companies Act (National Company Law Tribunal) Rules, 2014 and refuse to approve the resolution plan.

¹¹¹ Moot Proposition, pg 10.

¹¹² Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) 2016, Regulation 36(4).

¹¹³ *State of U.P. v. Manbodhan Lal Srivastava* AIR 1957 SC 912.

¹¹⁴ Moot Proposition, pg 10.

VII. ARGUMENTS TO BE PRESENTED ON BEHALF OF BLUE PLAZA.

7.1. The RP's failure to present blue plaza's resolution plan before the CoC amounts to a material irregularity in exercise of power.

Section 25(2)(i) states that it is the duty of the RP to present **all** resolution plans at the meetings of the CoC. However, section 30(3) states that the resolution shall place only those resolution plans before the CoC that confirm to the mandatory requirements of Section 30(2). It appears that these two provision are in conflict and would require to be harmoniously construed in order to give effect to the intention of the legislation. This principle was upheld in *Venkataraman Devaru v. State of Mysore*¹¹⁵, the Supreme Court held that the rule of harmonious construction shall be applied in cases where two statutory provisions are in conflict with each other. In such cases, it is the duty of the Court to give effect to such an interpretation that would have the effect of rendering neither of them as inoperative.

Applying the rule of harmonious construction to the Code, the requirement to present the resolution plan at the CoC under Section 25(2)(i) has the effect of informing members of the CoC about the contents of the resolution plan. It does not dilute the provisions of Section 30(3) which requires the RP to submit only those resolution plans **for approval** before the CoC that have fulfilled the requirements of Section 30(2) . In other words, Section 25(2)(i) requires mere presentation of all resolution plans before the CoC whereas Section 30(3) applies to approval of resolution plans before the CoC. In the given case, Blue Plaza's resolution plan was not even presented before the CoC. While the RP had the power to refuse to present the resolution plan **for approval** before the CoC, it was his duty to present the resolution plan before the CoC. Therefore, the failure of the RP to present the resolution plan before the CoC vitiates the proceedings amounts to a material irregularity in exercise of power. Therefore, under Section 61 (3) of the Code, the NCLAT shall over turn the order of the NCLT if the tribunal approves the resolution plan.

7.2. The resolution professional should not have presented new age's resolution plan before the CoC.

¹¹⁵ *Venkataraman Devaru v. State of Mysore*, AIR 1958 SC 255

Section 30(3) of the Code stipulates that only those resolution plans that provide for the payment of insolvency resolution process costs in priority to the repayment of other debts¹¹⁶, the repayment of debt to operational creditors¹¹⁷, management of the debtor after the approval of the resolution plan¹¹⁸ and implementation of the resolution plan¹¹⁹ shall be approved by the NCLT. The RP has placed the plan submitted by New Age before the CoC which provides for payment of merely 60% of the CIRP cost.¹²⁰ Furthermore, it does not provide for the management of the debtor after the approval of the resolution plan. Therefore, the resolution plan does not fulfill the requirements under Section 30(2) of the Code and hence the RP should not have placed this resolution plan before the CoC. Furthermore, this deliberate breach of the provisions of the Code render the RP liable for misconduct under Code.¹²¹ Additionally, applying Section 31(2), the NCLT shall reject the resolution plan.

¹¹⁶ The Insolvency and Bankruptcy Code 2016, § 30(2)(a).

¹¹⁷ *ibid*, § 30 (2) (b).

¹¹⁸ *ibid* § 30 (2) (c).

¹¹⁹ *ibid* § 30 (2) (d).

¹²⁰ Moot Proposition, pg 10.

¹²¹ The Insolvency and Bankruptcy Code 2016, § 70(2).30(2)(a).

FINAL SUBMISSION/PRAYER

For the foregoing reasons, the concerned parties respectfully request this Honourable Tribunal/Court to find, adjudge, and declare that:

A. FOR CORPORATE DEBTOR:

Before NCLT

New Age humbly submits that this Hon'ble Tribunal be pleased to:

1. Refuse to approve the resolution plan filed by the RP.

Before NCLAT

New Age humbly submits that this Hon'ble Tribunal be pleased to:

2. Set aside the NCLT order appointing Mr. Amit Thakur as the IRP
3. Grant an order reversing the actions of the IRP
4. Over-turn the decision of the NCLT if it approves the resolution plan

B. FOR OPERATIONAL CREDITORS.

Operational Creditors humbly submits that this Hon'ble Tribunal be pleased to:

1. The resolution plan submitted by RP shall not be approved as it does not confirm the requirements provided in the Code.

C. IRP/RP

Before NCLT

The IRP/RP submits that this Hon'ble be pleased to:

1. Grant a declaration that India is the "centre of main interest" under the CIRP Regulations
2. Dismiss the application of Mr. Chew John seeking a stay on the Indian proceedings.
3. Confirm the resolution plan filed with the NCLT.
4. Order People's Bank must be liable to pay a fine which shall not be less than one lakh rupees but may extend to one crore rupees.

Before NCLAT

The IRP/RP submits that this Hon'ble be pleased to:

1. Uphold the order admitting the CIRP application

D. FOR FINANCIAL CREDITORS

Before NCLT

The Financial Creditors humbly submit that the Hon'ble Tribunal be pleased to:

1. Grant an order invalidating the undervalued sale of the Mumbai House.
2. Allow the application for the replacement of the IRP, Mr. Amit Thakur.
3. Reject the resolution plan filed by the RP.

Before NCLAT

The Financial Creditors humbly submit that the Hon'ble Tribunal be pleased to:

- 1) Hold that RST Bank's application was maintainable.
- 2) Hold that the resolution process may not be invalidated by a procedural delay.
- 3) Hold that the appointment of Mr. Thakur was ultra vires.
- 4) Allow a subsequent admission of the claim by public depositors.

E. LESSOR OF HYDERABAD PROPERTY, JKL & BLUE PLAZA

The parties humbly submit that this Hon'ble Tribunal be pleased to:

1. Refuse to approve the resolution plan filed by the RP