

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION, 2017

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI, INDIA

**IN THE MATTER OF
NEW AGE TECHNOLOGY LTD. AND OTHERS.**

VERSUS

PEOPLES BANK AND OTHERS

APPLICATION FILED UNDER SECTION 7 OF INSOLVENCY AND BANKRUPTCY CODE, 2016 READ WITH RULE 4 OF INSOLVENCY AND BANKRUPTCY (APPLICATION TO ADJUDICATING AUTHORITY) RULES, 2016.

WRITTEN SUBMISSIONS ON BEHALF OF THE CONCERNED PARTIES

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TABLE OF ABBREVIATIONS

&	And
§	Section
Addl.	Additional
A.I.R.	All India Reporter
Anr.	Another
Art.	Article
Assn.	Association
BOD's	Board of Directors
C.L.B.	Company Law Board.
Co.	Company
CA.	Companies Act
C.A.	Company Application
Cl.	Clause
Corpn.	Corporation
Cr.	Crore
edn.	Edition
eds.	Editor
Id.	IBID
In re.	In the matter of
IBC	Insolvency and Bankruptcy Code
IP	Insolvency Professional

IR	Insolvency Resolution
IRP	Insolvency Resolution Professional
JKL	Joint Lender Forum
Ltd.	Limited
L. Rev.	Law Review
M/s	Messer's
Mag.	Magazine
Manu.	Manupatra.
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
RBI	Reserve Bank of India
RPT	Related Party Transaction
SARFAESI	The Securitisation and Reconstruction of Financial Assets and Enforcement of Security
SBI	State Bank of India
SCA	Singapore Companies Act
SCC	Supreme Court Cases
SCL	SEBI and Corporate Laws
SOT	Selected order of Tribunals
Trib.	Tribunal
UK	United Kingdom
u/s	Under Section
w.e.f.	With effect from

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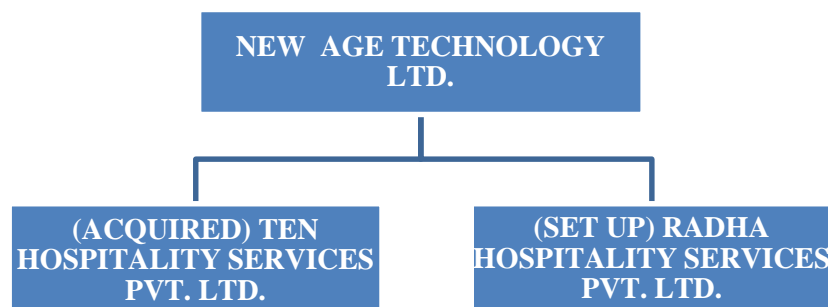
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STATEMENT OF FACTS

The Corporate Debtor in the name and style of New Age Technology Limited having registered office in New Delhi is the fourth largest manufacturer of solar panels in the world and the largest in India. New Age received loan from consortium of banks of Rs. 2195 Crores and Rs. 195 Crores from Bank of North India.



One of New Age's main client Dan Morris Energy Inc. (Morris) file for a chapter 11 proceeding under the US Bankruptcy Code. Texas Power International (TPI), another major client, conveyed to New Age its inability to take delivery of Solar Panels in September 2016. New Age made a willful default to Bank of North India. On 4th March 2017 filed an application before NCLT under Insolvency and Bankruptcy, 2016 and proposed S. Mahesh as IRP. NCLT accepted the application whilst declaring moratorium and referred the appointment of IRP to IBBI where Amit Thakur was appointed as the IRP.

On 6th March 2017, Electric supplier GSES issued a demand notice of Rs.85 Lakh towards the dues of the electricity for the past 9 months to be paid within 10 days, failing to which electricity will be disconnected. On 8th March 2017, JSEW Ltd, one of New Age's suppliers, refused to supply EVA films until the past dues are not cleared.

On 9th April 2017, IRP to run the company as going concern wrote to the People's Bank Jaipur Branch to deposit the rental dues amounting to Rs.79,41,026/- of the periods within April 2015 to February 2017. People's bank refused to pay & adjusted towards the outstanding dues of New Age payable to the bank. After public announcement IRP segregated the claims and while scrutinizing realized that Marvel inflated the claims from 20 Crores to 136 Crores and filed no documents. In the year 2012, New Age invited public depositors for its working capital after that aggrieved public depositors approached NCLT. On 22nd April 2017, IRP constituted the committee of creditors (COC) & on 29th April 2017, the first meeting of COC was scheduled where COC resolved to appoint Mr. Dhivesh Sharma as the Resolution Professional (RP) on the recommendation of

NCLT. On 31st March 2017, RP chose not to renew the lease on the guesthouse at Hyderabad & New Age filed an application against this decision of the RP before NCLT. Mr. Chew John initiated insolvency proceedings against THSPL and asked RP not to interfere but their disagreement led to Mr. Chew John filing an application in NCLT for recognition of Singapore proceedings.

RP prepared information memorandum (IM) and invited expression of interest for Resoltuion Plan. Only 3 applicants appeared Blue Plaza, New Age and JKL Pvt. Ltd. to which RP refused to provide IM to JKL Pvt. Ltd. on the ground that JKL was not a serious party. Thereafter, the promoters of both New Age and The Blue Plaza submitted separate resolution plans. On 20th July 2017, RP received a claim from PEG Developers Ltd. of Rs.15 Crore. On 1st August 2017, Objections were raised with regards to modification of the resolution plan with regards to reduction in the amount payable to the creditors.

LENDER	CLAIM FILED (In Cr.)
Indo Bank	1650
RST Bank	650
People's Bank	790
Bank of North India	279
Marvel Organics Ltd.	136
JSEW Ltd.	20
GSES	1.20
Public Depositors	45
Customs & Excise	2
EPF Dues	12
Xi Mao	15

On 28th September 2017, the plan was approved with modifications that repayment will be made in 5 years as against 10 years and accordingly the RP filed the plan with the NCLT.

ISSUES RAISED

➤ **ON THE BEHALF OF CORPORATE DEBTOR**

ISSUE 1: THE RP ACTED *ULTRA VIRES* BY NOT RENEWING THE LEASE

ISSUE 2: THE RESOLUTION PLAN SUBMITTED BY NEW AGE IS TO BE ACCEPTED

➤ **ON BEHALF OF OPERATIONAL CREDITOR**

ISSUE 3: GSES AND JSEW ARE ENTITLED TO TERMINATE THE SUPPLIES

➤ **ON BEHALF OF RP/INTERIM RP**

ISSUE 4: THE RP WAS NOT ENTITLED TO RENEW THE LEASE OF THE GUESTHOUSE AT HYDERABAD

ISSUE 5: GSES AND JSEW LTD. WERE NOT ENTITLED TO DISCONNECT THE SUPPLY OF ESSENTIAL MATERIAL

ISSUE 6: THE INSOLVENCY PROCEEDINGS INITIATED IN SINGAPORE CANNOT BE RECOGNIZED AS THE CENTRE OF MAIN INTEREST IS IN INDIA

ISSUE 7: THE APPLICATION SUBMITTED BY JKL IS NOT MAINTAINABLE

ISSUE 8: THE IRP WAS JUSTIFIED TO EXCLUDE RHPL FROM THE CoC

ISSUE 9: THE DIRECTOR OF NEW AGE IS BOUND TO TRANSFER THE POSSESSION OF MUMBAI FLAT TO THE IRP

ISSUE 10: THE CLAIMS FILED BY MARVEL AND PEOPLE'S BANK IS TO BE ACCEPTED

ISSUE 11: THE CLAIMS SUBMITTED BY THE PUBLIC DEPOSITORS ARE NOT TO BE ACCEPTED

ISSUE 12: NEW AGE WILL HAVE TO BEAR THE OVERHEAD CHARGES FOR APPOINTING SECURITY AGENCY

ISSUE 13: PEOPLE'S BANK CANNOT ADJUST THE CLAIMS OF NEW AGE

➤ **ON THE BEHALF OF FINANCIAL CREDITOR/COMMITTEE OF CREDITOR**

ISSUE 14: AMIT THAKUR CANNOT BE APPOINTED AS INTERIM RP

ISSUE 15: PEOPLE’S BANK CAN ADJUST THE CLAIMS OF NEW AGE

ISSUE 16: THE RESOLUTION PLAN SUBMITTED BY NEW AGE SHOULD NOT BE ACCEPTED

➤ **ON BEHALF OF OTHER PARTIES**

ISSUE 17: THE INSOLVENCY PROCEEDINGS INITIATED IN SINGAPORE SHOULD BE RECOGNIZED IN INDIA.

ISSUE 18: THE APPLICATION FILED BY JKL PVT. LTD. BEFORE NCLT SHOULD BE ADMITTED

ISSUE 19: THE IRP CANNOT CLAIM CONTROL OVER THE MUMBAI FLAT

ISSUE 20: THE CLAIMS SUBMITTED BY PEOPLE’S BANK AND MARVEL ORGANICS LTD CANNOT BE ACCEPTED BEING INFLATED

ISSUE 21: THE CLAIMS OF THE PUBLIC DEPOSITORS CANNOT BE REJECTED BY THE IRP

SUMMARY OF ARGUMENTS

ISSUE 1: THE RP ACTED *ULTRA VIRES* BY NOT RENEWING THE LEASE: It is humbly submitted that RP did not made efforts as per the rules provided and did not to preserve or protect the assets of the corporate debtor.

ISSUE 2: THE RESOLUTION PLAN SUBMITTED BY NEW AGE IS TO BE ACCEPTED: It provides for the payment of insolvency process costs, i.e., by paying 60% of the same. The resolution plan also provides for the repayment of debts to the operational creditors.

ISSUE 3: GSES AND JSEW ARE ENTITLED TO TERMINATE THE SUPPLIES: They are entitled to terminate the supply as the corporate debtor has not paid its dues.

ISSUE 4: THE RP WAS NOT ENTITLED TO RENEW THE LEASE OF THE GUESTHOUSE AT HYDERABAD: It is the duty of the RP to exercise rights for the benefit of the corporate debtor.

ISSUE 5: GSES AND JSEW LTD. WERE NOT ENTITLED TO DISCONNECT THE SUPPLY OF ESSENTIAL MATERIAL

ISSUE 6: THE INSOLVENCY PROCEEDINGS INITIATED IN SINGAPORE CANNOT BE RECOGNIZED AS THE CENTRE OF MAIN INTEREST IS IN INDIA: India is the place from where debtor conducts its regular business which is ascertained by third party.

ISSUE 7: THE APPLICATION SUBMITTED BY JKL IS NOT MAINTAINABLE: As JKL is not a serious party to which IM has to be given and it didn't exhaust its alternate remedy.

ISSUE 8: THE IRP WAS JUSTIFIED TO EXCLUDE RHPL FROM THE CoC: CoC is not a creditor and creditors have voting and representation rights in the committee.

ISSUE 9: THE IRP WAS JUSTIFIED TO EXCLUDE RHPL FROM THE CoC: The Mumbai flat is still an asset of the Company and the IRP is duty bound to take custody of the Mumbai Flat.

ISSUE 10: THE CLAIMS FILED BY MARVEL AND PEOPLE'S BANK IS TO BE ACCEPTED: Both Marvel and People's Bank are creditors of the Corporate Debtors and the claims accepted are subject to amendments.

ISSUE 11: THE CLAIMS SUBMITTED BY THE PUBLIC DEPOSITORS ARE NOT TO BE ACCEPTED: Operational and financial creditors can submit claims, public depositors are not operational creditors and the question of financial debt cannot be raised.

ISSUE 12: NEW AGE WILL HAVE TO BEAR THE OVERHEAD CHARGES FOR APPOINTING SECURITY AGENCY: As the workers of New Age did not let IRP to take the possession. Hence, IRP appointed security expenses of which have to be paid by New Age.

ISSUE 13: PEOPLE'S BANK CANNOT ADJUST THE CLAIMS OF NEW AGE: Peoples bank has no right to adjust the claims and hamper the going concern nature of the company.

ISSUE 14: AMIT THAKUR CANNOT BE APPOINTED AS INTERIM RP: As the name was not mentioned in the application submitted.

ISSUE 15: PEOPLE'S BANK CAN ADJUST THE CLAIMS OF NEW AGE: Every bank has the authority to set off the accounts if the costumer has made a default.

ISSUE 16: THE RESOLUTION PLAN SUBMITTED BY NEW AGE SHOULD NOT BE ACCEPTED: The plan submitted is nothing but unprofessional behavior and influenced decision on the part of RP and creditors in support of the plan for undue preference

ISSUE 17: THE INSOLVENCY PROCEEDINGS INITIATED IN SINGAPORE SHOULD BE RECOGNIZED IN INDIA: The foreign proceeding should be recognized as either foreign main proceedings or non main proceedings

ISSUE 18: THE APPLICATION FILED BY JKL PVT. LTD. BEFORE NCLT SHOULD BE ADMITTED: The application filed by JKL should be admitted because it is a 'potential investor'.

ISSUE 19: THE IRP CANNOT CLAIM CONTROL OVER THE MUMBAI FLAT: It is humbly submitted that the IRP cannot claim the property from the director. *Firstly*, there is a valid sale *Secondly*, there was no related party transaction.

ISSUE 20: THE CLAIMS SUBMITTED BY PEOPLE'S BANK AND MARVEL ORGANICS LTD CANNOT BE ACCEPTED BEING INFLATED: The claims are inflated and IRP was wrong in accepting the claims.

ISSUE 21: THE CLAIMS OF THE PUBLIC DEPOSITORS CANNOT BE REJECTED BY THE IRP: The public depositors are creditors and the claims of the creditors are to be admitted by the IRP.

ARGUMENTS ADVANCED

ON BEHALF OF THE CORPORATE DEBTOR

ISSUE 1: THE RP ACTED *ULTRA VIRES* BY NOT RENEWING THE LEASE

1. It is submitted that the termination of lease of the guest house¹ by Resolution Professional (hereinafter referred to as RP) is not only unprofessional but was also under the duty of the RP to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.²
2. The guesthouse was a part of the business operations of the Corporate Debtor which was neglected for due care and diligence³ and the RP was not performing and delivering the delegated functions for which he was appointed.
3. The RP acting not adverse to the interest of the company have the authority to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts⁴ but he does not have any power to terminate any contract on its own without prior approval of CoC (hereinafter referred to as CoC). RP can transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business⁵ with the prior approval of the COC & the act of terminating the lease⁶ was of transferring the rights in the property as lessee back to the lesser⁷. Lease is a material contract. If the prior approval is not granted for such act by the COC then the act will be considered void.⁸
4. Therefore, the act of RP to terminate the lease of the guesthouse was *ultra vires* to its powers⁹ and should be considered a void act¹⁰.

¹ Fact Sheet pg. 9.

² Cl. 25, Insolvency and Bankruptcy Code, No. 31 of 2016.

³ Cl. 208, Supra note 2.

⁴ Cl. 25, Supra note 2.

⁵ Cl. 28(1)(k), Supra note 2.

⁶ §105, The Transfer of Property Act, No. 4 of 1882.

⁷ The Deveton Corrie Protestant Schools Association v. M/s. Bharat Petroleum Corporation Ltd., 2016 SCC OnLine Mad 9765.

⁸ Cl. 28 (4), Supra note 2.

⁹ Regulation 1, first Schedule, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, IBBI/2016-17/GN/REG003.

¹⁰ Regulation 14, First Schedule, Supra note 9.

ISSUE 2: THE RESOLUTION PLAN SUBMITTED BY NEW AGE IS TO BE ACCEPTED

5. The Resolution plan¹¹ submitted is in consonance with the provisions of IBC. It provides for the payment of insolvency process costs¹², i.e., by paying 60% of the same. The resolution plan also provides for the repayment of debts to the operational creditors¹³. As the plan is submitted by Corporate Debtor, the management and control¹⁴ will also not be an issue and the affairs will be controlled by Corporate Debtor itself. The resolution plan is not in contravention with any provisions of the Code¹⁵. The resolution plan has all the contents which according to the Code are necessary for the approval of the same.
6. The RP was presented to the CoC for its approval¹⁶ on 1st August 2017 where certain modifications in resolution plans were considered. In the CoC meeting held on 28th September 2017¹⁷, the plan was approved with modifications and accordingly the RP filed the plan with the NCLT¹⁸. It is humbly requested that lack of lender consensus on resolution plan can push the borrower into liquidation which is not the object of the Code and hence the resolution plan should be approved.

ON THE BEHALF OF THE OPERATIONAL CREDITORS

ISSUE 3: GSES AND JSEW ARE ENTITLED TO TERMINATE THE SUPPLIES

7. It is humbly submitted before the Tribunal that GSES and JSEW Ltd. are operational creditors¹⁹. GSES has issued a demand notice for Rs. 85 Lakhs to the corporate debtor for the dues of electricity. JSEW Ltd. has refused to supply EVA Film till New Age clears the past dues²⁰.

¹¹ Fact Sheet pg. 10.

¹² Cl. 30, *Supra note 2*.

¹³ *Id*

¹⁴ *Id*

¹⁵ *Id*

¹⁶ Cl. 30(3), *Supra note 2*.

¹⁷ Fact Sheet pg. 11.

¹⁸ Cl. 30(6), *Supra note 2*.

¹⁹ Cl. 5(20), *Supra note 2*.

²⁰ Fact Sheet pg. 3.

8. During the period of Moratorium only the supply of essential goods and services will not be terminated or suspended or interrupted during the period of Moratorium²¹. The essential goods and services shall be supplied to the extent these are not a direct input to the output produced or supplied by the corporate debtor²². The list has the word ‘means’ which is an exhaustive list²³.

9. Electricity Act²⁴ stipulates board's right, to recover charges for energy and to discontinue supply of energy if consumer neglects to pay the charges.²⁵ Consumer is liable to pay consumption charges of energy²⁶. The list does not include raw materials. Hence, GSES and JSEW can discontinue the supply.

ON BEHALF OF RP/INTERIM RP

ISSUE 4: THE RP WAS NOT ENTITLED TO RENEW THE LEASE OF THE GUESTHOUSE AT HYDERABAD

10. It is humbly submitted that the lease deed was correctly terminated and was well within the powers and duties of RP. In terms of the lease, renewal for next three years can be done subject to 30% increment in rent of the said guesthouse. It is the duty of the RP to exercise rights for the benefit of the corporate debtor in judicial proceedings²⁷.

11. The Corporate Debtor was going through insolvency process and this could have led to liquidation, and in such a situation non renewal of the lease deed for the guest house was beneficial for the Corporate Debtor. Further, it is the duty of Insolvency RP to take decision in order to protect the interest of the company²⁸.

ISSUE 5: GSES AND JSEW LTD. WERE NOT ENTITLED TO DISCONNECT THE SUPPLY OF ESSENTIAL MATERIAL

²¹ Cl. 14(2), *Supra note 2*.

²² Regulation 31 of Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, No. IBBI/2016-17/GN/REG004.

²³ *Executive Engineer & Anr v. Sri Seetaram Rice Mill*, (2012) 2 SCC 108 ¶32.

²⁴ Electricity Act, No. 36 of 2003.

²⁵ *Swastic Industries v. Maharashtra SEB*, (1997) 9 SCC 465.

²⁶ *Thirven Steels (P) Ltd. v. A.P SEB*, (1994) 1 AP LJ 24 (SN).

²⁷ Cl. 25, *Supra note 2*.

²⁸ Cl. 20(1), *Supra note 2*.

12. The Respondent humbly contends that GSES and JSEW ltd. are operational creditors as they owe operational debt²⁹ and the period of moratorium has been applied over New Age Pvt. Ltd³⁰. The demand notice issued by GSES holds no validity because once the moratorium is applied all debt recovery options are prohibited³¹. The motive behind the moratorium is value maximizing for the entity to continue operations even as viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP³². Hence, for the same reason operational creditors will have to supply the electricity and the solar panels. Further, all the rights which are prejudicially affected due to moratorium or supply of essential goods and services will be included³³ in insolvency resolution process costs³⁴.

ISSUE 6: THE INSOLVENCY PROCEEDINGS INITIATED IN SINGAPORE CANNOT BE RECOGNIZED AS THE CENTRE OF MAIN INTEREST IS IN INDIA

13. The Counsel humbly advocates that at the outset, the application filed by Ten Hospitality Services Pvt. Ltd. (THSPL) which is a subsidiary company³⁵ of New Age through its representative officer Mr. Chew John (Applicant) is liable to be dismissed. The basis on which both the insolvency proceedings are established and commenced upon are regarding completely divergent subject matters and prima facie of different contexts and therefore are neither sustainable nor tenable. The periphery of the issue can be determined *viz firstly*, Concept of a separate legal entity, *secondly*, Establishment of Centre of Main Interest (COMI) and *thirdly*, Purpose of the Code.

A. HOLDING COMPANY AND SUBSIDIARY COMPANY ARE SEPARATE LEGAL ENTITIES

14. Salmond defines a person as “any being to whom the law regards as capable of rights and duties. Any being that is so capable, is a person, whether human being or not and nothing that is not so capable is a person even though he be a man”³⁶

²⁹Cl. (21), Supra note 2.

³⁰ Fact Sheet pg. 5.

³¹Cl. 14, Supra note 2.

³² ICSI, Corporate Bankruptcy – A Primer, The Institute of Company Secretaries of India, July 2016, (Jan (September 7, 2017, 8:15 AM), <http://icsiipa.com/Portals/0/docs/Corporate%20Bankruptcy-%20A%20Primer.pdf>).

³³Regulation 39, Supra note 22.

³⁴Cl. 5(13), Supra note 2.

³⁵§2(87), Companies Act,

³⁶FITZERALD P.J., SALMOND ON JURISPRUDENCE 299 (12th Ed., 1988).

15. Law envisages ‘Company’ as a person distinct³⁷, from the person composing it³⁸ and its members.³⁹The Company holds its separate rights⁴⁰, and an analogy on its entity can be drawn from concept of *persona ficta*⁴¹. Subsidiary company is considered itself as a separate legal entity⁴² and its business; both are entirely different and separate⁴³. Subsidiary deals solely with its own assets and business. Hence, it is surmised that even a subsidiary company shall portray a separate legal entity apart from the holding company and it will not be liable for the act of subsidiary.⁴⁴

16. The Counsel relies upon the observations of the Hon’ble Apex Court in reference to relationship of Holding and Subsidiary company in the case of *Vodafone International Holdings BV v. Union of India*⁴⁵ wherein both are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the businesses also vested with it Board of Director. Hence, it had been held that the parent company has nothing to do with the business of the subsidiary company.

17. Arguendo: The counsel humbly contends that the defaults committed by THSPL cannot be cart loaded and burdened upon New Age since they are two different separate legal entities and this doctrine cannot be invoked⁴⁶, even in case of wholly owned subsidiary⁴⁷ and should be governed by their own rules⁴⁸

(a) Position of law as per UNCITRAL

18. Counsel humbly pleads that the only circumstance in which the liability of the subsidiary can be imposed on the parent company when it has given a guarantee in respect of its Subsidiaries.⁴⁹ Certain parameters have been prescribed for determining the liability i.e., the extent of business, management, finance of concerned companies are fuse together and expectation of the

³⁷Solomon V Solomon & Co. Ltd, (1897) AC 22 P. 51.

³⁸ Farrar V Farrar Ltd, (1898) 40 Ch. D 395, 409.

³⁹ People’s Pleasure Park V Rohleder, 61 South Eastern Rep. 794.

⁴⁰SETHNA JEHANGIR M.J., JURISPRUDENCE 593-595 (3RD REVISED ED., 1973).

⁴¹Savigny developed the concept of the *persona ficta*. He called fictitious persons by the term “juridical persons”. Juridical persons are those who exist only for juridical purposes.

⁴² Ban Hashem v. Ali Shayif, (2008) EWHC 2380.

⁴³ Hungerford Investment Trust Ltd. v. Turner Morrison & Co. Ltd., ILR (1972) 1 Cal 286.

⁴⁴United States v. Best foods [141 L Ed 2d 43 : 524 US 51 (1998)].

⁴⁵Vodafone International Holdings BV v. Union of India (2012) 6 SCC 613.

⁴⁶Lim Chee Twang v Chan Shuk Kuen Helina [2010] 2 SLR 209.

⁴⁷ M/s. CRRC Corporation Ltd v. Metro Link Express for Gandhinagar & Ahmedabad (MEGA) Company Ltd., 2017 SCC OnLine SC 579.

⁴⁸ Arun Sharma v. Indian Oil Corporation & Anr., 2017 SCC OnLine Del 7984.

⁴⁹ UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW 278 (ed. 1) ¶87.

creditor that with whom they are dealing with one entity or with group of company.⁵⁰ On the perusal of these considerations, court has to decide to consolidate or pool the asset and liabilities of the related company⁵¹.

19. Arguendo: Counsel draws attention to the facts in the present situation wherein the respondent has not guaranteed regarding pecuniary liability of THSPL and therefore not responsible for the default committed by THSPL.

B. CENTRE OF MAIN INTEREST (COMI) IS IN INDIA

20. As per UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation 1997 (**Model Law**), a foreign proceeding⁵² can be considered as foreign main proceeding when it commenced in the State where the debtor has COMI. Furthermore, *the location in which the debtor is readily ascertainable by creditors and the location where the central administration of debtor takes place are the principal factors.*⁵³ It is pertinent to note that if aforementioned parameters fail to determine the COMI then additional grounds can also be considered⁵⁴, such as the debtor's headquarters, debtor's Management, the debtor's main assets, the majority of the debtor's creditors and the jurisdiction whose law is applicable to most disputes⁵⁵.

21. Counsel contends that the determining factors for the purpose of evaluation of place of default, COMI is in India because it is the principal place of business from where regular business take place⁵⁶, location⁵⁷ of majority creditors and primary assets⁵⁸ and it is easily ascertainable by

⁵⁰ ¶88, *Supra note 49*.

⁵¹ Decision that a corporate group has operated as one economic entity will give rise to application of other provisions of the insolvency law, for example, the duty of directors to prevent insolvent trading. Some laws also allow, in limited circumstances, companies to voluntarily pool assets and liabilities.

⁵² Art. 2(a), Model Laws: 'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

⁵³ United Nations Commission on International Trade Law Working Group V (Insolvency Law) Forty-Third session, *Interpretation and Application of Selected Concepts of the Model Law on (COMI)* 22 ¶123F. (New York, April 15, 2013).

⁵⁴ United Nations Commission on International Trade Law Working Group V (Insolvency Law) Fortieth session, *Interpretation and Application of Selected Concepts of the UNICITRAL Model Law (COMI)* 10 ¶39 (Vienna, November 31, 2011).

⁵⁵ *Re SphinX, Ltd., et al*, No. 06–11760 RDD (US United States Bankruptcy Court September 6, 2006).

⁵⁶ *In Re Tri-Continental Exchange Ltd.*, 349 BR 627.

⁵⁷ *Lightsquared LP (Re)* 2012 ONSC 2994 (Ont. SCJ [Commercial List]) [CLOUT case no. 1204].

⁵⁸ *British American Ins. Co. Ltd (In re)* 425 B.R. 884 (Bankr. S.D. Fla. 2010).

the third party i.e. creditors of New Age⁵⁹. Mere presence of asset in another state will not be reasonable rebuttable presumption solely⁶⁰ for the conclusion of the COMI.

22. Arguendo: It is substantially proved in the preceeding paragraphs COMI is where THSPL conducts its regular business, etc. hence India should be considered as COMI because there is no valid reason to prove the contrary⁶¹.

C. INTENT OF THE CODE⁶²

23. The counsel humbly supplicates that the basic intent of the IBC is restructuring and rejuvenation. The law must ensure that time value of money; liquidation value tends to go down with time, as assets suffer from a high economic rate of depreciation. Thus, it will eventuate into destruction of the asset. In such a case, if recognition has been granted in favor of the applicant, then it will defeat the basic purpose of IBC and interest of the creditor will be vitiated which will go against the public policy whereas it is pertinent to mention that Article 6⁶³ of the Model Law allows recognition to be refused if it is found contrary to the “Public policy”⁶⁴.

24. Arguendo: counsel humbly contends that the New Age is on Moratorium⁶⁵ period which “*Suspend*” and “*Stays*” the commencement of any new action⁶⁶. The motivation behind the moratorium is that it is value maximizing for the entity to continue operations even as viability is being assessed during the Insolvency resolution process (IRP). There should be no additional stress on the business after the public announcement of the IRP."

⁵⁹Eurofood IFSC Ltd [2006] Case no C– 341/04 (European Union|EU.INT The European Court of Justice, May 2, 2006).

⁶⁰Interedil Srl v FallimentoInterdil Srl, Intesa Gestione Crediti Sp A, [2011] Case no C– 396/09 (Europa.eu European Court of Justice, October 20, 2011).

⁶¹ Art. 3(1) of EC Regulation: The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

⁶² The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design. November 2015.

⁶³ Article 6 of the Model Law: Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State, pg. 52, ¶102

⁶⁴ In some States the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.

⁶⁵ Section 14 (1) of IBC

⁶⁶UNCITRAL Legislative Guide on Insolvency Law, Page 83, ¶26

ISSUE 7: THE APPLICATION SUBMITTED BY JKL IS NOT MAINTAINABLE

25. Counsel humbly contends that, the present application filed by the JKL Pvt. Ltd. (“JKL”) does not hold the valid ground to be admitted before the National Company Law Tribunal (“NCLT”). The periphery of the issue can be determined *viz. Firstly*, decision taken by the RP (“RP”) was in the ambit of its vested rights and *Secondly*, exclusion of alternative remedy.

A. DENIAL OF PROVIDING COPY OF INFORMATION MEMORANDUM

26. It is humbly submitted that, it is duty of the Insolvency professional (IP) to do professional dealings by ensuring that his decisions are made without the presence of any bias, conflict of interest⁶⁷ and must maintain complete independence in his professional relationship⁶⁸. It is duty of the member to work in a *bonafide* manner and endeavor to maximize the value of asset of the debtor⁶⁹ and to take such necessary action to keep the corporate debtor as a going concern⁷⁰.

27. **Arguendo:** it is humbly submitted before the Hon’ble Tribunal that JKL is on the same business and a competitor in market where ⁷¹the corporate debtor⁷² carry it business. Whereas providing JKL the copy of IM may affect the future business of the New Age because it consist of *relevant information*⁷³ of corporate debtor furthermore having access to that information there is a probability of discrepancies which may arise in mere future it can also kill the future business of the New Age, the decision of not providing copy of IM is a prudent and well acknowledged reason taken by the RP.

B. EXCLUSION OF ALTERNATIVE REMEDY

28. It is humbly submitted, before the learned tribunal that, it is pertinent to mention that any person aggrieved by the decision of IP may file a complaint to the Board⁷⁴ and in receipt of that

⁶⁷ Regulation 7(2)(g), Supra note 9.

⁶⁸ Regulation 5, Supra note 9.

⁶⁹Notification: IBBI/2016-17/GN/REG001: Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, [Under Regulation 3 read with Regulation 2(1)(c)] Rule VII.

⁷⁰ Cl. 20(e), Supra note 2.

⁷¹ Fact Sheet pg. 10.

⁷² Cl. 3(8), Supra note 2.

⁷³ Cl. 29, Supra note 2.

⁷⁴Any person aggrieved by the functioning of an insolvency professional agency or insolvency professional or an information utility may file a complaint to the Board in such form, within such time and in such manner as may be specified.

complaint, board by an order direct a person to conduct an investigation in that matter⁷⁵. Board is vested with such powers to investigate in receipt of the complaint⁷⁶ against IP.

29. In the present matter JKL excluded the alternative remedy and file application before NCLT. Exclusion of the alternative remedy may have adverse effect⁷⁷. Essentially it is rule of policy, if somebody excludes the alternative remedy⁷⁸, there should be a good strong reason⁷⁹ to proceed further

30. **Arguendo:** Counsel humbly contends that, the decision of not providing IM is taken in good faith and for going concern of the business moreover it is pertinent to bring in knowledge of the Hon'ble Tribunal that JKL erroneously excluded the alternative remedy and filed the application before NCLT, the same stand to be dismissed at the *prima facie* stage because no proceeding lies against the insolvency professional in respect of the decision taken in good faith⁸⁰.

ISSUE 8: THE IRP WAS JUSTIFIED TO EXCLUDE RHPL FROM THE CoC

31. The counsel on behalf of the IRP contends before the Hon'ble Tribunal that there is procedure of formation of CoC provided in the code and subsequent rules. RHPL should not be included in the CoC. *Firstly*, CoC is not a creditor. *Secondly*, creditors have voting and representation rights in the committee.

A. RHPL IS NOT A CREDITOR

32. 'Creditor' has been defined in the code exhaustively to mean any financial, operational, secured and unsecured creditor.⁸¹ A creditor can own either a financial debt or operational debt.⁸² RHPL is not a creditor. New Age had a liability to pay for 50% for construction of the Rajasthan hotel. New Age had to pay 65 crore towards the liability in cash. New Age had paid the entire amount as required in the JV by 4th November 2016.⁸³ Therefore RHPL has no 'right to payment' in order to be a creditor.

B. CREDITORS HAVE VOTING AND REPRESENTATION RIGHT IN CoC

⁷⁵ Cl. 218(1), *Supra note 2*.

⁷⁶ No. IBBI/2017-18/GN/REG011 on Date: 12th June, 2017:

⁷⁷ *United Bank of India v. Satyawati Tondon* (2010) 8 SCC 110.

⁷⁸ *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Others* (1985) 1 SCC 260.

⁷⁹ *State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.* (AIR 2005 SC 3856).

⁸⁰ Cl. 218(1), *Supra note 2*.

⁸¹ Cl. 3(10), *Supra note 2*.

⁸² Cl. 3(11), *Supra note 2*.

⁸³ Fact Sheet pg. 4.

33. The committee of creditor shall comprise all financial creditors of the corporate debtor.⁸⁴ On a conjoint reading of cl. 102, cl. 104 and cl. 109 it is evident that a creditor who is not part of the list of creditors shall not have voting rights in the meeting of the creditor. New Age has no liability towards RHPL and RHPL did not submit any claims to the IRP. Therefore RHPL was not mentioned in the list of creditors prepared by the IRP and subsequently it has no voting or representation right.

ISSUE 9: THE DIRECTOR OF NEW AGE IS BOUND TO TRANSFER THE POSSESSION OF MUMBAI FLAT TO THE IRP?

34. It is humbly submitted before the Learned Tribunal that the director of New Age is bound to hand over the possession of the property to the IRP. *Firstly*, the Mumbai flat is still an asset of the Company. *Secondly*, the IRP is duty bound to take custody of the Mumbai Flat.

A. THE MUMBAI FLAT IS AN ASSET OF THE COMPANY

35. The counsel humbly contends that there was no reasonable conjecture regarding the sale of Mumbai flat to the MD because (a) the sale transaction has not been completed; (b) there is a related party transaction and (c) the transaction was not at arm's length.

a. The sale transaction has not been completed

36. It is humbly submitted that in order to constitute a sale, the parties must intend to transfer the ownership of the property, and they must also ensure that the consideration would be paid either in present or in future.⁸⁵ The intention is to be gathered from the intention of the parties.⁸⁶ The director was notified by the IRP that the possession of the flat is to be given. However the MD ignored such notice and thus his intention of not constituting the sale by paying the entire consideration is evident. Therefore a valid sale is not constituted and the transferee has no ownership right over the property.

b. There is a related party transaction

37. MD is the key managerial person⁸⁷ and the company with the consent of the board vide resolution entered into an arrangement with him. This is a prohibited case of related party

⁸⁴ Cl. 21(2), IB Code.

⁸⁵ MULLA, THE TRANSFER OF PROPERTY ACT 366 (10th Edn, 2006) .

⁸⁶ Vidhyadhar v. Manikrao & Anr., (1999) 3 SCC 573 ¶36.

⁸⁷ §2(51)(i), Companies Act, No. 18 of 2013.

transaction.⁸⁸ The transaction⁸⁹ is subject to prescribed conditions wherein no company shall enter into an agreement with a related party⁹⁰, transfer resources, services and obligation between the company and its related party⁹¹ or an arrangement or contract⁹² and it should adhere to the principle of no conflict rule⁹³. It is non-negotiable that no conflict of interest should arise⁹⁴ between the interest of company and the related party⁹⁵ which inhibits the interest of the company. Such *mala-fide* arrangement pertaining to conflict of interest tends to potentially abuse the interest of investors⁹⁶ likewise termed as abusive self-dealing⁹⁷.

38. Transactions pertaining against the rule of common law⁹⁸ are liable to be annulled by the company. The general duties of directors include two strands of fiduciary duties, i.e. the no-conflict rule and the no profit rule⁹⁹. Furthermore, as per section 166(2)¹⁰⁰ of the companies act, it is duty of the director to act in good faith and the interest of the company. The corporation's director owe a duty of undivided loyalty, and they may not so use corporate assets, or deal with the corporation, as to benefit themselves at the expense of the corporation and its shareholders¹⁰¹.

c. The transaction was not on arm's length basis

39. The expression 'arm's length transaction' under companies act¹⁰² means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.¹⁰³

⁸⁸ §188(1)(b), *Supra note 87*.

⁸⁹ Fact Sheet pg. 5.

⁹⁰ A.R Sundarsanam v. Madras Purasawalkam Hindu Janapokara Saswatha Nidhi Ltd, (1985) 57 Comp. Cas. (Mad) 776.

⁹¹ Revised Clause 49(VII) (E) 43 of the Listing Agreements, 2014 CIR/CFD/POLICY CELL/2/2014, (7th September, 2017) http://www.sebi.gov.in/sebi_data/attachdocs/1397734478112.pdf; master circular No. SEBI/CFD/DIL/CG/2004/12/10 dated October 29, 2004 on Clause 49 of the Equity Listing Agreement.

⁹² Padmini Srinivasan, An Analysis of Related-Party Transactions in India 402 IIM BANGALORE (2013).

⁹³ GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW 559 (9th ed. 2012).

⁹⁴ Bray v. Ford, 1896 AC 44 (HL), Gore-Browne on Companies 1034 (45th ed. 2015).

⁹⁵ Palmer'S Company Law 652 (22nd ed. 1977).

⁹⁶ A. Asharipour, Corporate Governance Convergence: Lessons from the Indian Experience, 29 NWJIL 335, 364 (2009); Rajesh Chakrabarti, Corporate Governance in India - Evolution and Challenges, (7th September, 2017) 11 (2005) available at <http://ssrn.com/abstract=649857>.

⁹⁷ DEOBORAH LEIPZIGER, THE CORPORATE RESPONSIBILITY CODE BOOK, 392 (3RD ED. 2015)

⁹⁸ Regal (Hastings) Ltd. v. Gulliver, (1967) 2 AC 134: (1942) 1 All ER 378: 1942 UKHL 1 (HL).

⁹⁹ LVV IYER GUIDE TO THE COMPANY DIRECTORS - POWERS, RIGHTS, DUTIES, LIABILITIES, CORPORATE SOCIAL RESPONSIBILITIES AND COMPANY PRECEDENTS (4TH EDN. 2016).

¹⁰⁰ §166(2), *Supra note 87*.

¹⁰¹ Professor Robert C Clark Corporate Law (1986), pg. 34, 41.

¹⁰² §188, *Supra note 87*.

¹⁰³ *Id.*

40. The ALT is used to describe the collusive situation, unless there is a perfect fair dealing such transactions would not be allowed to stand.¹⁰⁴ Court will evaluate the nature of transaction¹⁰⁵ between the related parties when they are less than ALT.¹⁰⁶ Moreover this transaction can only be allowed to proceed when they are concluded legitimately¹⁰⁷ and in good faith.¹⁰⁸

41. In the present case, transaction carried between related parties doesn't lie under the umbrella of APT and such transaction is thus *mala fide* in nature. Hence the directors of the company are liable under section 188(5) and section 166(7)¹⁰⁹ of the CA and be punished with highest punitive punishment.

B. THE IRP IS DUTY BOUND TO TAKE POSSESSION OF THE FLAT

42. The code provides that the IRP shall take control and custody of any asset over which the company has ownership rights including assets that are not in possession of the corporate debtor.¹¹⁰ The Mumbai flat is an asset of the company as the sale transaction was not properly constituted and the remaining consideration not paid. Therefore the application for taking possession of the Mumbai Flat is to be admitted.

ISSUE 10: THE CLAIMS FILED BY MARVEL AND PEOPLE'S BANK ARE TO BE ACCEPTED

43. It is humbly submitted before the Learned Tribunal that the claims submitted by Marvel and People's Bank are to be accepted. *Firstly*, both Marvel and People's Bank are creditors of the Corporate Debtor. *Secondly*, the claims accepted are subject to amendments.

A. BOTH MARVEL AND PEOPLE'S BANK ARE CREDITORS OF NEW AGE

44. 'Creditor' means any person to whom a debt is owed and *inter alia* includes financial and operational creditors.¹¹¹ The creditors shall register the claims with the RP.¹¹² Once the resolution process is initiated, the financial or operational creditors are entitled to file their claims with the

¹⁰⁴ Walter C. Newman, Legal Use of the Arm's Length Concept, 11 U. Toronto L.J. 139, 147 (1955).

¹⁰⁵ Giuseppina M. Galloro, Pennsylvania's Use of the Sham Transaction Doctrine to Plug the Intangible Holding Company Loophole, 109 Penn St. L. Rev. 1223, 1250 (2005).

¹⁰⁶ Robert S. Holzman, Arm's Length Transaction and Section 45, 25 Taxes 389, 403 (1947).

¹⁰⁷ Cavendish Square Holding BV v Makdessi, [2015] 3 WLR 1373.

¹⁰⁸ Cf, in French law, the non-adoption of lesion as a general ground for relief (Code civil art 1118) and its restriction to particular cases of partition of estates, infants' contracts, and sale of land (Code civil arts 887, 1305, 1674).

¹⁰⁹ § 166(7), *Supra note 87*.

¹¹⁰ Cl. 18(1)(f), *Supra note 2*.

¹¹¹ Cl. 3(11), *Supra note 2*.

¹¹² Cl. 103(1), *Supra note 2*.

IRP.¹¹³ The CoC shall comprise of the financial creditors of New Age. Therefore Marvel and People's Bank shall form part of the CoC.¹¹⁴

45. Both Marvel and People's bank are financial creditors of the company and thus are entitled to submit the claims and form part of the CoC. Therefore their claims are to be accepted.

B. THE CLAIMS ACCEPTED BY THE IRP CAN BE AMENDED

46. Claim is a right to payment even it is disputed.¹¹⁵ A creditor who fails to submit proof of a claim within a stipulated time may submit such proof till the resolution plan is accepted by the committee.¹¹⁶ Collation of claim will lead to forming the CoC¹¹⁷, which is essential for running of the company once moratorium starts.¹¹⁸ A RP shall prepare a list of creditors on the basis of the claims received after passing of public notice.¹¹⁹ A creditor shall be entitled to vote only if he is a creditor in the list of creditors.¹²⁰ The object of the code is to balance the interest of the stakeholders.¹²¹

47. By not accepting the claims on the ground of inflation, the creditors would be devoid of their genuine interest protected by the code. Therefore the claims cannot be rejected merely on the ground that they are inflated in nature. The claims can be reduced or increased if such alteration is proved in the future.

ISSUE 11: THE CLAIMS SUBMITTED BY THE PUBLIC DEPOSITORS ARE NOT TO BE ACCEPTED

48. It is humbly submitted from the side of the Interim RP that the claims submitted by the public depositors cannot be accepted. *Firstly*, operational and financial creditors can submit claims. *Secondly*, public depositors are not operational creditors. *Thirdly*, the question of financial debt cannot be raised.

¹¹³ Rubina Chadha v. AMR Infrastructure Ltd., [2017] 84 taxmann.com 150 ¶12.

¹¹⁴ *Id* at 110.

¹¹⁵ Innovative Industries Ltd. v. ICICI Bank Ltd., [2017] 84 taxmann.com 320 ¶27.

¹¹⁶ Regulation 12(2), IBBI (Insolvency resolution for corporate person) Regulations, 2016.

¹¹⁷ Cl. 21(1), *Supra note 2*.

¹¹⁸ Edelweiss Asset Reconstruction Co. Ltd. v. Bharti Defence & Infrastructure Ltd., [2017] 83 taxmann.com 197 (NCLT-Mum) ¶6.

¹¹⁹ §104(1)(b), *Supra note 2*.

¹²⁰ §109 (4)(a), *Supra note 2*.

¹²¹ Innovative Industries Ltd. v. ICICI Bank Ltd., [2017] 84 taxmann.com 320 ¶12.

A. OPERATIONAL AND FINANCIAL CREDITORS CAN SUBMIT CLAIMS

49. The IB code defines a 'claim' to be a right to payment.¹²² An outstanding liability or obligation in respect of a claim is a debt.¹²³ The definition of debt provided in the code is exhaustive in nature¹²⁴ and there is no scope to read anything further into the definition.¹²⁵ Therefore 'debt' extends to the two categories mentioned in the definition, i.e., (i) *Financial* and (ii) *Operational*.

B. PUBLIC DEPOSITORS ARE NOT OPERATIONAL CREDITOR

50. 'Operational creditor' means a person to whom an operational debt is owned.¹²⁶ The public depositors don't hold an operational debt as the *definition of 'operational debt' is not satisfied in the instant matter*.

51. The public depositors cannot be treated as 'operational creditor' as the debt incurred by the respondents has not arisen out of the provisions of goods, services or employment.¹²⁷ Operational debt as defined u/s 5(21) of the code is restrictive.¹²⁸ Furthermore, the code doesn't define 'operational debt' as 'debts other than financial debt' but specifies it as any debt arising out of specific categories like goods or services or employment.¹²⁹ Therefore an operational debt must be confined to the four categories mentioned u/s 5(21) of the Code. The public depositors in this case have neither supplied any goods nor have rendered any service to acquire the status of an 'operational creditor'.¹³⁰

C. THE QUESTION OF FINANCIAL DEBT CANNOT BE RAISED

52. It is humbly submitted before the Learned Tribunal that the public depositors doesn't hold any financial debt as it is not money loaned to be recovered with interest.¹³¹ Furthermore, the public depositors submitted their claims as operational and not financial. Thus this question cannot be decided under the application filed by the public depositors.¹³²

¹²² Cl. 2(6), *Supra note 2*.

¹²³ Cl. 2(11), *Supra note 2*.

¹²⁴ *Mahalakshmi Oil Mills v. State of A.P.*, (1989) 1 SCC 164 ¶11.

¹²⁵ *Shabina Abraham v. CCE & Customs*, (2015) 10 SCC 770 ¶18.

¹²⁶ Cl. 5(20), IB Code, 2016.

¹²⁷ *Mukesh Kumar & Anr v. AMR Infrastructure Ltd.*, C.P NO. (IB) – 30(PB)/2017 ¶4.

¹²⁸ *Executive Engineer & Anr v. Sri Seetaram Rice Mill*, (2012) 2 SCC 108 ¶32.

¹²⁹ *Col. Vinod Awasthy v. AMR Infrastructure Ltd.*, C.P NO. (IB) – 10(PB)/2017 ¶8.

¹³⁰ Fact Sheet pg. 7.

¹³¹ *Divesh Singh v. Mega Soft Infrastructure (P.) Ltd.*, [2017] 82 taxmann.com 15 (NCLT New-Delhi) ¶5.

¹³² *Gurucharan Singh Soni & Kuldeep Kaur Singh v. Unitech Ltd. & Anr*, CA (AT) (Insol.) No. 55/2017 ¶11.

53. Therefore IRP was right to not accept the claims filed by the public depositors on the ground that they are not operational creditors.

ISSUE 12: NEW AGE WILL HAVE TO BEAR THE OVERHEAD CHARGES FOR APPOINTING SECURITY AGENCY

54. The IRP can file an application under section 19(2) of IBC¹³³ if any personnel of the corporate debtor does not assist or cooperate with the Interim RP.¹³⁴ Section 19 imposes an obligation on the personnel¹³⁵ to extend all assistance and cooperation required by the interim RP. Section 20 of the code gives power to protect and preserve the value of the property of the corporate debtor¹³⁶. Hence, New Age Ltd. will have to bear the costs of the security and other overhead charges.

ISSUE 13: PEOPLE'S BANK CANNOT ADJUST THE CLAIMS OF NEW AGE

55. The Respondent humbly contends before this Learned Tribunal that People's Bank has the possession of New Age's property, "New Age House" in Jaipur through a registered lease deed dated 06.01.2011¹³⁷. As on 9th April, 2017 the outstanding lease rental was amounting to Rs. 79,41,026/- which people's bank started adjusting towards the loan dues¹³⁸. All claims provable in the winding-up may be the subject of set-off, provided that there is mutuality¹³⁹. The corporate debtor did not make any default of the debt due from People's Bank.

A. AS PER INSOLVENCY AND BANKRUPTCY CODE

56. The code itself prohibits the creditor or any other person to recover the property which is owned by the corporate debtor¹⁴⁰. The code forbids any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFESI Act, 2002¹⁴¹. If the Tribunal allows the bank to set off then it will violate the 'priority of payments'¹⁴², because if the company starts to wind up the debt of People's Bank would

¹³³Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd. [2017] 82 taxmann.com 450 (NCLT - New Delhi).

¹³⁴Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd. [2017] 83 taxmann.com 359 (NCLT - Mum.).

¹³⁵ Cl. 2(23), Supra note 2.

¹³⁶Reliance Commercial Finance Ltd. v. Ved. Cellulose Ltd. [2017] 83 taxmann.com 276 (NCLT - New Delhi).

¹³⁷Fact Sheet pg. 2.

¹³⁸Fact Sheet pg. 6.

¹³⁹ Supra 48, Gore-Browne in his book *On Company Law*, 43rd Edn., at Page 34-14.

¹⁴⁰Cl. 14(1)(d), Supra note 2.

¹⁴¹Cl. 14(1)(c), Supra note 2.

¹⁴²Cl. 53, Supra note 2.

already be paid from the money which is a right of other Financial Creditors also leading to low recovery rate.¹⁴³

B. NO MUTUAL DEALINGS BETWEEN THE PARTIES

57. There must be mutual dealings between the parties before a mutual account between them. There must be independent obligations on both sides and reciprocal transactions on both sides¹⁴⁴. A 'demand' in relation of account means a claim for money accruing out of a contractual business relationship between the parties¹⁴⁵.

(a) No reciprocity of Transactions

58. Reciprocity of dealings is one of the most essential conditions to prove that there are mutual dealings between the parties in the mutual account¹⁴⁶. The test to determine mutual account is to see whether under the agreement the goods, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or it was sent in the course of dealings designed to create a credit to the defendant as the owner of the goods sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability¹⁴⁷.

59. Conclusion can be drawn from the compromise that parties didn't intend to enter into reciprocal transactions i.e. to settle the debt of the loan provided or have a mutual account between them.

(b) Absence of Independent Obligation

60. To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations¹⁴⁸. The obligation to repay the loan amount arises immediately on receipt of the loan¹⁴⁹. The duty to pay rent arises as soon it gets due. Therefore, there is absence of mutual transactions also absence in the intent of the parties.

C. BEST INTEREST OF THE COMPANY & INTENT OF THE CODE

¹⁴³ ¶16, Supra note 38.

¹⁴⁴ Mysore Tools Limited (in Liquidation) v. Dominion Hardwares Stores, 2003 SCC OnLineKar 845.

¹⁴⁵ Bharath Skins Corporation v. Taneja Skins Company Pvt. Ltd., 2011 SCC OnLine Del 5523.

¹⁴⁶ Hindustan Forest Company v. Lal Chand and others, AIR 1959 SC 1349, Polar Industries Ltd. v. rihant Communications & Marketing Company, 2012 SCC OnLine Del 263.

¹⁴⁷ Tea Financing Syndicate Ltd. v. ChandrakamalBezbaruah, (1930) ILR 58 Cal 649of Supra 56.

¹⁴⁸ Article 1 of Limitation Act, 1963; KesharichandJaisukhalal v. Shillong Banking Corpn. Ltd., AIR 1965 SC 1711.

¹⁴⁹ Pennwalt India Ltd. v. Registrar of Companies, 1986 SCC OnLineBom 46.

61. If the business is going to be paralyzed, then the Court, for the benefit and interest of the Company, may save the transaction¹⁵⁰. It is for enabling the Company to continue as a going concern¹⁵¹ and to protect the interest of the shareholders and creditors that such a power is conferred and must be exercised.¹⁵²

62. The intention of the Legislature is important as reflected in the statute. IBC provides to restructure the debt before the company is forced to wind up¹⁵³. Setting off the debt would obstruct the restructuring process which is also the essence of the code¹⁵⁴. It will bring a Going Concern Company closer to winding up¹⁵⁵.

ON BEHALF OF FINANCIAL CREDITOR/CREDITORS COMMITTEE

ISSUE 14: AMIT THAKUR CANNOT BE APPOINTED AS INTERIM RP

63. The Financial Creditor recommended Mr. S. Mahesh as IRP¹⁵⁶ under section 7 but the Tribunal without going into the provisions of section 16(2) of the code appointed Mr. Amit Thakur as IRP. The term 'shall' in its ordinary significance is mandatory and the Court shall ordinarily give that interpretation to that term¹⁵⁷. If Insolvency Resolution Process has been triggered by the debtor or financial creditor, the interim RP appointed will be the IP proposed in the application¹⁵⁸. Hence, Mr. Amit Thakur cannot be appointed as IRP.

ISSUE 15: PEOPLE'S BANK CAN ADJUST THE CLAIMS OF NEW AGE

64. Petitioner humbly contends that New Age ltd. owes Rs. 790 Crores of outstanding amount as on 31.12.2016. The company, New Age ltd. borrowed the loan in year 2008 and 2011¹⁵⁹. In 2011 one of New Age's property is with People's Bank on lease. The lease rental of the property is Rs. 15,06,900/- per month.¹⁶⁰

¹⁵⁰LaxmanYeshwantPrabhudesai v. NRC Ltd. 2011 (Supp.) Bom. CR 243-248, 251 ¶19-23.

¹⁵¹Cl. 20 Supra note 2.

¹⁵²M/s. Bhairav Industries v. The Official Liquidator M/s. Shree Ghanshyam P. Ltd. 2015 SCC OnLineBom 7630.

¹⁵³Shishir Mehta, Kumar Saurabh Singh, Rajeev Vidhani & AhanaSinha, The Insolvency and Bankruptcy Code, 2016 — New Road and New Challenges, (2016) PL (CL) July 76.

¹⁵⁴¶12, Supra note 115.

¹⁵⁵¶33, Supra note 115.

¹⁵⁶Fact sheet 5.

¹⁵⁷Khub Chand v. State of Rajasthan, (1967) 1 SCR 120 : AIR 1967 SC 1074.

¹⁵⁸ The report of the Bankruptcy Law Reforms Committee: Rationale and Design 83 (Vol. I, November 2015).

¹⁵⁹ Fact Sheet 3.

¹⁶⁰Fact Sheet 2.

A. PEOPLE'S BANK HAS THE RIGHT TO 'SET OFF' THE DEBT

65. The petitioner contends that People's bank has the right to set off the debt from the rent as the banker has such a lien and that the bank was entitled to a banker's lien on all the moneys of the depositor lying in his hands for the time being, and that, therefore, the banker would have the right to transfer funds from one account to another account of the depositor.¹⁶¹ The two debts could have been set one against the other after the bankruptcy just as effectually as before, and whether the debts were both paid or were set off against each other before the bankruptcy or after would be perfectly immaterial¹⁶². When a firm defaults on its debt, control of the company should shift to the creditors.¹⁶³

66. The bank has general lien over the securities which come to its hands. It may be in the form of money, negotiable instrument or any form of security or it may be goods.¹⁶⁴ The right to set off can be invoked where there have been dealings between an insolvent customer and banker.¹⁶⁵ Bank is entitled to exercise general lien against fixed deposit (or negotiable instrument) amount to an extent to which the customer is liable¹⁶⁶. The bank has the authority to affect the sale by using its powers as pledge when there is a default in payment.¹⁶⁷ Bank can enforce its right by adjusting the amount due from FD pledged by the guarantor in terms of security.¹⁶⁸

B. RIGHT TO SETTLE MUTUAL DEALINGS

67. When the banker holds a depositor's money in one account and the depositor owes the bank on another account, the banker has a charge, by virtue of his lien, on all money of the depositor in his hands and is at liberty to transfer the money to whatever account he chooses, with a view to set off or liquidate the debts¹⁶⁹. In order that an account shall be deemed to be a mutual account, it is not necessary that each party should keep accounts in writing. It is enough if the dealing amounted to mutual debits and credits on both sides¹⁷⁰.

¹⁶¹Merantile Bank Ltd. v. Roachal Das, AIR 1926 Sind 225. ML Tanna, Banking law and Practice in India, Pg. 1004.

¹⁶² In re Washington Diamond Mining Company [1893] 3 Ch. 95 at p. 111, Smt. Jayanthi Bai and others v. Popular Bank Ltd., AIR 1966 Ker 296.

¹⁶³Innoventive Industries Ltd. v. ICICI Bank Ltd. [2017] 84 taxmann.com 320 (SC).

¹⁶⁴Thankappan V.K. & Anr v. Uthiliyoda Muthukoya Uthiliyoda Muthukoya, 2011 SCC OnLine Ker 3989.

¹⁶⁵In re T.N. Bank Subsidiary Co., AIR 1940 Mad 226.

¹⁶⁶City Union Bank Ltd. v. C. Thangarajan, [2003] 46 SCL 237 (MAD.).

¹⁶⁷Syndicate Bank v. Sundari Sagars Ltd., (2003) 3 BC 10 (DRAT- Chen).

¹⁶⁸Punjab National Bank v. Surendra Prasad Sinha, 1993 Supp (1) SCC 499.

¹⁶⁹Devendra Kumar Lal Chand Ji v. Gulab Singh Nekhe Singh, (1946) 16 Com Cas 89.

¹⁷⁰Laikshmayya v. Jagannatham and others (199-202), Volume X, Madras Series, Indian Law Reports.

68. It was held that Indian Contract Act is not exhaustive; where the law is silent the principle of English Law will be applicable.¹⁷¹ Section 323(1) of Insolvency Act, 1986 of UK legislation provides that where there have been mutual dealings between the parties it can be set off against each other.¹⁷² The debtor who is under an obligation to pay money to the company but who themselves are creditors of the company may set off one debt against the other and the balance remaining due should be paid to or by the company as the case may be.¹⁷³

69. Where there is a mutual credit debt, or other mutual dealings, the sums are to be set off and the balance of account and no more shall be claimed or paid on either side respectively.¹⁷⁴ IBC is enacted to safeguard the interest of the creditors; it is in no way in contradiction to the provisions of the SARFESI Act. Under the Act creditor can demand for recovery of his debt¹⁷⁵.

ISSUE 16: THE RESOLUTION PLAN SUBMITTED BY NEW AGE SHOULD NOT BE ACCEPTED

70. It is humbly submitted that the resolution plan of New Age submitted by RP to NCLT should not be approved. The plan submitted is nothing but unprofessional behavior and influenced decision on the part of RP and creditors in support of the plan for undue preference¹⁷⁶. The resolution plan is not in conformity with any of the regulation¹⁷⁷ or the code itself. In this resolution plan the insolvency resolution process costs were provided but the part that insolvency resolution process costs will be paid in priority to any other creditor & specific sources for the payment is not present in the resolution plan¹⁷⁸.

71. The liquidation value due to operational creditors is not specifically provided and payment is planned to be made after 3 years instead of 30 days after approval of resolution plan by Adjudicating Authority is in clear contravention with the regulation¹⁷⁹. The liquidation value, due to dissenting financial creditors, preferential payment and the source of payment is not available in the plan which will set the path for the Corporate Debtor¹⁸⁰.

¹⁷¹Harilal Chimanlal v. Pehladrail and Co. AIR 1929 Bom 260, Raja DhruvDev Chand v. Raja Harmohinder Singh and Another, AIR 1968 SC 1024.

¹⁷² Stein v. Blake [1996] A.C. 243, CHITTI ON CONTRACT, (32ND EDN., VOL. 1, 2015).

¹⁷³EX PARTE HANSON, HALSBURY 285 (HAILSHAM EDITION).

¹⁷⁴Official Liquidator, High Court of Karnataka v. Smt. V. Lakshmikutty, AIR 1981 SC 1483.

¹⁷⁵ Indus Finance Limited Vs. Quantum Limited, C.P. No. 1043 I & BP /NCLT/ B/[AH/2017.

¹⁷⁶ Entry 9 Schedule 1, *Supra note 9*.

¹⁷⁷ *Supra note 9*.

¹⁷⁸ Regulation 38(1)(a), *Supra note 9*.

¹⁷⁹ Regulation 38(1)(b), *Supra note 9*.

¹⁸⁰ Regulation 38(1)(c), *Supra note 9*.

72. The resolution plan submitted also lacks (a) the term of the plan and its implementation schedule; (b) the management and control of the business of the corporate debtor during its term; and (c) adequate means for supervising its implementation.¹⁸¹

73. Therefore it is humbly submitted that such an unplanned and irregular resolution plan should not be accepted as it is in contravention¹⁸² with the basic fundamentals of the contents of the plan provided under the regulations¹⁸³ and it is nothing but ignorance of the statutory requirements for pressure building on the Corporate Debtor.

ISSUES ON BEHALF OF OTHER PARTIES

ISSUE 17: THE INSOLVENCY PROCEEDINGS INITIATED IN SINGAPORE SHOULD BE RECOGNIZED IN INDIA

74. Counsel humbly contends that, the present application is filed before the learned Tribunal for the recognition of the insolvency proceedings, which is going against the subsidiary company (THSPL)¹⁸⁴. The periphery of this issue can be determined *viz. firstly*, Control of holding company over subsidiary, *secondly*, lifting of corporate veil and *thirdly*, Jurisdiction of the Court to recognize foreign proceeding.

A. CONTROL OF THE HOLDING COMPANY OVER THE SUBSIDIARY COMPANY.

75. Counsel humbly contends that, the applicant is the office holder of the THSPL which is a subsidiary company¹⁸⁵ of the New Age, for which is the ultimate holding company¹⁸⁶, the holding company exercise control over the composition of the Board of Directors of the subsidiary company, and also have a controlling interest of over 50% of the equity shares and voting rights of the subsidiary company.¹⁸⁷ Whereas a holding company with maximum shares can easily control and influence the management of subsidiary¹⁸⁸. Control of the company vests with shareholders¹⁸⁹.

¹⁸¹ Regulation 38(2), Supra note 9.

¹⁸² Section 30 (2) (e)

¹⁸³ Regulation 39, Supra note 9.

¹⁸⁴ Fact Sheet pg. 11.

¹⁸⁵ §5, ch.50, The Singapore Companies Act, §2 (87) of the CA.

¹⁸⁶ Section 5A, The Singapore Companies Act.

¹⁸⁷ Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407.

¹⁸⁸ Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 ¶245.

¹⁸⁹ IRC v. J. Bibby & Sons Ltd. [(1945) 1 All ER 667.

76. Arguendo: It is humbly pleaded that the, holding company not only acquire subsidiary for its profit maximization but also control it. It is duty of the holding company to keep regular check upon the business of the subsidiary company. Certain and powers and obligation have been conferred to holding company.

B. LIFTING OF THE CORPORATE VEIL.

77. Counsel humbly pleads that, the learned Tribunal may pierce the veil¹⁹⁰, when the notion of legal entity is to defeat public convenience¹⁹¹ and take advantage of company's separate legal personality¹⁹² or it is a sham. There are certain parameters defined for the purpose of determining whether the business of subsidiary company is the business of parent company¹⁹³. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case¹⁹⁴.

(i) Were the profit treated as profit of parent company.

78. It is mandated by the government to prepare the consolidated balance sheet of parent company and subsidiary company¹⁹⁵

(ii) Where the person conducting business appointed by the Parent company.

79. Holding company holds majority of shares and can which gave it a preponderating influence in the control, election of directors,¹⁹⁶ etc.

(iii) Effectual and constant control of Parent Company

80. It is well accepted notion of the corporate governance that, ownership of shares may, result in the assumption of an interest which has the character of a controlling interest in the management of the company. A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares¹⁹⁷.

81. The holding company controls and manages and integrates the subsidiary as a whole as though they are merely departments of one large undertaking owned by the holding company.

¹⁹⁰LIC of India v. Escorts Ltd. AIR 1986 SC 1370., State of UP v. Renusagar Power Company AIR 1988 SC 1737.

¹⁹¹US v. Milwaukee Refrigerator Transit Co(1905) 142 Fed 247.

¹⁹²Prest v. Petrodel Resources Ltd., (2013) 2 AC 415 ¶35.

¹⁹³ Smith, Stone and Knight Limited v Birmingham., [1939] 4 All ER 116 (KB).

¹⁹⁴Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407.

¹⁹⁵Rule 3 (iv), Circular No. 2/2011 file No. 51/12/2007-CL-III.

¹⁹⁶Kodak Ltd. v. Clark [(1976) 1 SCC 248].

¹⁹⁷Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

Subsidiary companies have become an integral part of corporate structure¹⁹⁸. The Parent Company is involved in giving principal guidance to group companies by providing general policy guidelines subsidiaries whereas controlling interest is an incident of holding majority shares. Control of a company vests in the voting powers of its shareholders. Holding a controlling interest¹⁹⁹.

82. Arguendo: counsel humbly concludes from the above submission that, the Parent company exercise regular control over the business and other transaction of the subsidiary company any decision taken by the subsidiary is in accordance and consent of the parent company. In reference to insolvency proceedings, the entire burden cannot be shifted to the subsidiary company, when decision making power is vested with the holding company²⁰⁰.

C. JURISDICTION OF THE COURT TO RECOGNIZE SINGAPORE PROCEEDING

83. Counsel humbly contends that, as per article 15(1) of the Model law²⁰¹, a foreign representative²⁰² is directly entitled to apply²⁰³ to the court, for recognition of the foreign proceeding²⁰⁴, in which the foreign representative²⁰⁵ has been appointed. Present application has been filed for the recognition of the proceeding²⁰⁶ either foreign main proceedings or foreign non main proceedings.²⁰⁷ It is pertinent to mention that to be recognized as a "foreign main proceeding, "proceeding must be "pending in the country where the debtor has the center of its main interests²⁰⁸ and for non-main foreign proceedings learned Tribunal are vested with the power²⁰⁹ to determine proceeding²¹⁰. Where 80% of the share was held by holding the corporate veil was lifted.²¹¹

¹⁹⁸*Supra 14*

¹⁹⁹*Supra 14*

²⁰⁰State of Rajasthan & Others v. Gotan Lime Stone Khanij Udyog Pvt. Ltd. & anr., (2016) 4 SCC 469.

²⁰¹The UNCITRAL Model Laws on Cross-border Insolvency, 1997 provides that legislative framework, addressing issues of access to foreign courts and recognition of foreign insolvency proceedings, and authorizing cross-border cooperation and communication between courts, and insolvency representatives.

²⁰² Article 2 (d), UNCITRAL Model Laws on Cross-border Insolvency, 1997.

²⁰³ Article 9, UNCITRAL Model Laws on Cross-border Insolvency, 1997.

²⁰⁴Article 2(a), UNCITRAL Model Law on Cross-border Insolvency, 1997.

²⁰⁵ Ibid. Article 2 (d) of the Model Law : Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

²⁰⁶ UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE 5.

²⁰⁷*Fairfield Sentry Ltd (In re)*, 714 F.3d at 132

²⁰⁸In re SPhinX, Ltd., 351 B.R. at 118 Miguel Lomeli vs. Kenneth Krys (16.04.2013 - 2nd Circuit) MANU/FESC/0156/2013

²⁰⁹ Article 17 of the Model Law on Cross-border Insolvency.

²¹⁰IN RE ABC LEARNING CENTRES LTD. (27.08.2013 - 3rd Circuit) : MANU/FETC/0167/2013.

²¹¹Mafatlal Industrial Ltd., In re [2000] 3 SCL 69 (GUJ).

84. Arguendo: it is humbly submitted that, the foreign representative is the judicial manager²¹² appointed in the Singapore, it is vested with power and duties²¹³. It is duty of the foreign representative to conduct affairs in his best capacity²¹⁴

a. Determining the status as foreign main proceeding

85. A foreign main proceeding is "a foreign proceeding" pending in the country where the debtor has the COMI,²¹⁵ it should be debtor's registered office, habitual residence or principle place of business and easily ascertained by third party²¹⁶ and the location of the majority of the debtor's creditors who would be affected by the case²¹⁷

b. Determine the status as non-foreign main proceeding.

86. Any place of operations where the debtor carries out a non-transitory economic activity.²¹⁸ Bar is relatively high to prove the establishment as compared to COMI²¹⁹. Recognition of foreign non main proceeding cannot be granted if there is no establishment²²⁰.

87. Arguendo: it is submitted before the Hon'ble Tribunal that, it may graciously be pleased to determine the nature of foreign proceeding. So that the interest of the creditors of Singapore can be protected.

c. Concurrent proceedings.

88. Counsel humbly contends that the basic intent of the Model law contributes significantly to the establishment of a harmonized legal framework for addressing cross-border insolvency and facilitating coordination²²¹ when proceedings are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27 of the Model Law.

ISSUE 18: THE APPLICATION FILED BY JKL PVT. LTD. BEFORE NCLT SHOULD BE ADMITTED

²¹² Section 227B, Ch. 50 Companies Act, No. 42 of 1967.

²¹³ Section 227P, Ch. 50 Companies Act, No. 42 of 1967.

²¹⁴ In Re Innua Canada Ltd 2009 WL 1025090., In Re: IN THE MATTER OF STANFORD INTERNATIONAL BANK LIMITED (03.07.2009 - UKCH) : MANU/UKCH/0246/2009.

²¹⁵ Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ).

²¹⁶ In re Tri-Continental Exch. Ltd., 349 B.R., Betcorp Ltd (In re) (in liquidation) 400 B.R. 266.

²¹⁷ Millennium Global Emerging Credit Master Fund Limited et al First instance: 458 B.R. 63.

²¹⁸ British American Ins. Co. Ltd (In re) 425 B.R. 884.

²¹⁹ IN MATTER OF RAN (27.05.2010 - 5th Circuit) : MANU/FEFT/2205/2010.

²²⁰ In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 131.

²²¹ UNCITRAL Model Law on Cross-Border Insolvency, 1997.

89. Counsel humbly submit that, the applicant JKL Pvt. Ltd. (“**JKL**”) has right to have access to the Information Memorandum (“**IM**”). Present application is filed to seek direction against the Respondent, i.e., RP (“**RP**”) to provide copy of the IM to JKL. Periphery of the issue can be decided *viz. firstly* by determining the jurisdiction of the tribunal to admit the present application and *secondly* by acknowledging the duties of the respondent

A. JURISDICTION OF TRIBUNAL TO ADMIT THE APPLICATION.

90. Counsel humbly contends that, Present application has been filed by the JKL before the National Company Law Tribunal (“**NCLT**”) i.e. the Adjudicating Authority as per Section 5(1) of the Insolvency and Bankruptcy Code, 2016 (“**IBC**), under the ambit of section 60(5)(c)²²² of (IBC) also R/w rules 14²²³& 34²²⁴ of National Company Law Tribunal Rules, 2016, (“**NCLT Rules**) by *inter alia* seeking directions to the Respondent i.e., RP (“**RP**”) for providing copy of Information Memorandum²²⁵(“**IM**”).It is pertinent to mention that NCLT is the quasi-judicial authority, endowed with such inherent powers²²⁶as are necessary to discharge its Power effectively to do justice²²⁷, between the parties.²²⁸ Hence the present application has the valid ground to get admitted.

B. DUTIES OF THE RP

91. Counsel humbly contends before the Hon’ble Tribunal that, it is a duty of the RP to prepare²²⁹, in accordance with section 29(1)²³⁰ of the IBC and to invite prospective lenders, investors, and any other potential resolution applicant²³¹to put forward the resolution plans²³² for Expression of Interest pertaining to resolution plan²³³ and share the IM with all the Resolution Applicants as per Section 5(25) of IBC.

²²²Any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

²²³ The Tribunal may on sufficient cause being shown, exempt the parties from compliance with any requirement of these rules and may give such directions in matters of practice and procedure, as it may consider just and expedient on the application moved in this behalf to render substantial justice.

²²⁴ In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

²²⁵ Cl. 5(10) Supra note 2.

²²⁶Rule 11, NCLT Rules, F.No.1/30/NCLAT/CL-V/2013].

²²⁷Sarla Performance v. UOI (2008) 226 ELT 45 (Bom HC DB).

²²⁸Grindlay's Bank Ltd. v. Central Govt. Industrial Tribunal, AIR 1981 SC 606.

²²⁹Cl. 25(g), Supra note 2.

²³⁰The RP shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

²³¹Regulation 35(4), Supra note 9.

²³² Cl. 25(h), Supra note 2.

²³³ Cl. 5(26) Supra note 2.

92. Arguendo: In the present matter copy of the IM is provided to other two resolution applicants (the Blue Plaza & The New Age Technology Ltd) except for the JKL. RP arbitrary denied the copy of IM to the JKL without stating any prudent reason in exercise of its dominant position. There was an explicit violation of its *vires* by the respondent. It is right of the resolution applicant to have access to IM, as it is necessary for making a resolution plan; this gives rise to the question of Priority as per the law in relation to the insolvency resolution. Hon'ble tribunal may graciously be pleased to admit the present application because in the present matter there was arbitrary discrimination done towards the applicant.

ISSUE 19: THE IRP CANNOT CLAIM CONTROL OVER THE MUMBAI FLAT

93. The counsel on behalf of the Director of New Age humbly contends that the IRP cannot claim the property from the director. *Firstly*, there is a valid sale *Secondly*, there was no related party transaction.

A. THERE IS A VALID SALE

94. In order to constitute a valid sale, three essentials are required to be satisfied, namely, (i) an agreement to transfer title; (ii) supported by consideration and (iii) an actual transfer of title in the goods.²³⁴

95. The counsel humbly contends that there is an agreement to transfer the title of the Mumbai Flat was entered into.²³⁵ Part payment of the consideration was made.²³⁶ If there is only part payment of the sale consideration, and the remaining amount not paid, the sale would not be constituted invalid.²³⁷ The ownership is transferred as the flat was sold for the part payment of 55lakh.²³⁸

96. Section 188(3) provides that any agreement entered in a related party transaction is voidable at the option of the board and not void *ab-initio*.²³⁹

B. THERE IS NO RELATED PARTY TRANSACTION

²³⁴ BSNL & Anr. v. UOI, (2006) 3 SCC 1.

²³⁵ Fact Sheet pg. 5.

²³⁶ *Id.*

²³⁷ MULLA, THE TRANSFER OF PROPERTY ACT 363 (10TH EDN, 2006).

²³⁸ §54, Supra note 6.

²³⁹ Deccan Chronicle Holding Ltd. & Ors. V. Registrar of Companies, Hyderabad, 2017 SCC OnLine NCLAT 117.

97. The Counsel humbly contends that there was no insinuation regarding the variant price in Related Party Transaction²⁴⁰ arrangement between the Board of Directors and the Managing Director. Companies Act provides that a sale of any property cannot be made to its director unless the same has been approved by the board in the resolution.²⁴¹ The umbrella outlook of the whole transaction, *inter alia* includes the benefit of the company and the interest of its creditors. It is vehemently denied that the abovementioned arrangement was done in *mala fide* manner or in breach of any fiduciary duty²⁴² vested to director²⁴³.

(a) Duties of directors

98. The New Age is suffering from inevitable financial crisis to pay its debt. For the going concern of the company, it is directors' duty to take active steps to thwart the process²⁴⁴. It is fundamental duty of the director to serve company in a best possible way²⁴⁵ and seeing its best interest²⁴⁶. Such type of undervalue transaction or significantly less than the value of consideration carried in good faith to continue companies business no liability will arise in such cases²⁴⁷. The transaction should be *bona fide* and should not likely to jeopardize and cause loss²⁴⁸ or prejudice to interest of creditor²⁴⁹. At present, the company is in stage of insolvency and to protect the going concern and in the best interest of the business; BOD gave their assent to this transaction as a *dernier ressort*. It is duty of the director to act in good faith and in the best interest of the company²⁵⁰

(b) Intent of the Code²⁵¹

99. Counsel humbly contends that the basic premise and range of the act is maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the

²⁴⁰ §188, Companies Act, No. 18 of 2013.

²⁴¹ §188(1), *Supra note* 240.

²⁴² A director holds a fiduciary position in the company and 2013 Act now prescribes duties of a director. Clause III(12) of Schedule IV also refers to acting within the authority and assist in protecting the legitimate interests of the company, shareholders and employees.

²⁴³ *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200.

²⁴⁴ *Shepherds Investments Limited, Shepherds (Financial) Limited v Andrew Walters, Mike Simmons, Mark Hindle, Alan Morgan-Moodie, Assured Fund Limited, Policy Selection Limited*, [2006] EWHC 836 (Ch).

²⁴⁵ *Robb v Green* [1895] 2 QB 315.

²⁴⁶ *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ. 1244.

²⁴⁷ (7th September 2017, 10:11AM) <https://www.slaughterandmay.com/media/251437/an-introduction-to-english-insolvency-law.pdf>

²⁴⁸ *Bowthorpe Holdings Limited, Yasaiwa Securities Limited v R. J. Hills and Others*, [2002] EWHC 2331 (Ch).

²⁴⁹ *Kinsela v Russell Kinsela* (1986) 4 NSWLR 722.

²⁵⁰ §166(2), *Supra note* 240.

²⁵¹ The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design. November 2015.

interests of all the stakeholders. The liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. Delays may cause depreciation and value destruction to the asset.

100. In the present case, New Age became insolvent because of inevitable business failure which resulted into financial failure. In consequence, the company was unable to pay off its debt to its creditors. In order to meet up their losses partially and to pay its debt, resolution was passed to sell the Mumbai Flat to the MD.²⁵² So that they can pay the debts from the consideration received in the transaction and protect the interest of the business.²⁵³

101. Thus the application before the Tribunal should not be accepted as the ownership right over the Mumbai flat is with the Managing director and thus doesn't form part of the balance sheet of the Company and thus the IRP cannot take control or custody over the flat.

ISSUE 20: THE CLAIMS SUBMITTED BY PEOPLE'S BANK AND MARVEL ORGANICS LTD CANNOT BE ACCEPTED BEING INFLATED

102. It is humbly submitted before the Learned Tribunal that the claims submitted by Marvel²⁵⁴ and People's Bank cannot be accepted. *Firstly*, the claims are inflated and *mala fide*. *Secondly*, IRP was wrong in accepting the claims.

A. THE CLAIMS FILED BY MARVEL AND PEOPLE BANK ARE INFLATED

103. Claim means a 'demand for something as due' or 'to seek or ask for on the ground of right'.²⁵⁵ 'Claim' means a right to payment.²⁵⁶ The code defines debt in an exhaustive manner as a liability or obligation in respect of a claim which is due.²⁵⁷ 'Due' refers to an amount which the creditor has a right to recover.²⁵⁸

104. When an application u/s 7 of IB Code is made, the corporate debtor is given an opportunity to contest the claims, i.e., to substantiate the claim by documents or otherwise that there doesn't

²⁵² Fact Sheet pg. 4.

²⁵³ See note. 10

²⁵⁴ Marvel Organics Ltd, (Marvel).

²⁵⁵ Hameedia Hardware Stores v. B. Mohan Lal Sowcar, (1988) 2 SCC 513 ¶13.

²⁵⁶ Cl. 2(6), Supra note 2.

²⁵⁷ Cl. 2(11), Supra note 2.

²⁵⁸ State of Kerala v. V.R. Kalliyankutty, (1999) 3 SCC 657 ¶8.

exist a default as claimed.²⁵⁹ In order to prove the existing operational²⁶⁰ or financial debt²⁶¹, subsequent list of documents must be shown in support of the claim. Showing an incorrect claim shows the *mala fide* intention of the claimant.²⁶²

105. Marvel as a creditor must support its claim by providing the necessary documents. Marvel was able to provide documents with regard to claims amounting to Rs.20Crore while he submitted a claim amounting to Rs.136Crore.²⁶³ Marvel failed to provide any document as to why there was a sizable increase in its claim and thus it is to be considered inflated. Furthermore, People's Bank has the right to set off the amount of Rs.79,41,026/-.²⁶⁴ Therefore there is a genuine reduction in the amount claimed by the People's Bank which the IRP failed to record.

B. IRP WAS WRONG IN ACCEPTING THE CLAIMS

106. The IRP is duty bound to verify all the claims that are submitted to him by the creditors.²⁶⁵ The IRP in order to substantiate whole or part of any claim submitted by the creditor may call for evidences and clarifications.²⁶⁶ Where the IRP comes across additional information with regards to such admitted claims, he shall revise the amounts claimed.²⁶⁷ Where there are no documents or details to substantiate or check the veracity of the claims, the claims cannot be accepted.²⁶⁸

107. IRP was thus wrong in accepting the entire amount claimed by Marvel and People's Bank where the actual amount having veracity was supposed to be accepted. Moreover, Marvel was only able to show 20Crore as the amount outstanding from New Age for the supply of transformers²⁶⁹ which is an operational debt and the remaining amount was not substantiated. This makes him an operational creditor²⁷⁰ to the extent of 20Crore and thus cannot be made a member to the CoC.²⁷¹

²⁵⁹SreeMetaliks Ltd. &Anr. v. UOI &Anr., W.P. 7144 (W) of 2017 (Cal) pg 12.

²⁶⁰ Rule 7, *Supra* note 9.

²⁶¹ Rule 8, *Supra* note 9.

²⁶²Starlog Enterprises Ltd. v. ICICI Bank Ltd., [2017] 82 taxmann.com 189 ¶21.

²⁶³ Fact Sheet pg 7.

²⁶⁴ PNB v. Surendra Prasad Sinha, 1993 Supp (1) SCC 499.

²⁶⁵ Rule 13, *Supra* note 9.

²⁶⁶ Rule 10, *Supra* note 9.

²⁶⁷ Rule 14, *Supra* note 9.

²⁶⁸ Creative Solutions v. AMR Infrastructure Ltd., C.A No. (I.B.) 34/PB/2017 ¶6.

²⁶⁹ Fact Sheet, pg 7.

²⁷⁰ Macquarie Bank Ltd. v. Uttam Galva Metallics Ltd., [2017] 142 SCL 483 (NCLT-Chd) ¶37.

²⁷¹ §21(2), *Supra* note 2.

ISSUE 21: THE CLAIMS OF THE PUBLIC DEPOSITORS CANNOT BE REJECTED BY THE IRP

108. It is humbly submitted before the Learned Tribunal that the claims submitted by the public depositors cannot be rejected. *Firstly*, the public depositors are creditors. *Secondly*, the claims of the creditors are to be admitted by the IRP.

A. PUBLIC DEPOSITORS ARE CREDITORS

109. The definition of ‘deposits’ is inclusive²⁷² as it covers all receipt of the company except those which has been excluded.²⁷³ ‘Deposit’ means any deposit of money with the company and further includes money borrowed by the company²⁷⁴ from the public²⁷⁵ against the payment of interest.²⁷⁶

110. Public deposits with companies primarily establish the relationship of a debtor and creditor.²⁷⁷ Deposits are debts repayable²⁷⁸ as they become payable on the date of maturity.²⁷⁹ The deposits so accepted by the company shall be repaid with interest.²⁸⁰ Acceptance of deposits by the company is in the nature of civil contract and non-payment of a deposit is in the nature of civil liability.²⁸¹ Deposits are nonetheless secured²⁸² or unsecured debts.²⁸³ The essence of deposit is that there must be a liability to return it to the depositor.²⁸⁴

111. ‘Creditor’ includes secured and unsecured creditors.²⁸⁵ Therefore the counsel contends that the public depositors are creditors in the eye of the company as the amount deposited by the company remains payable to the public.²⁸⁶

²⁷² RBI v. Peerless General Finance and Investment Co. Ltd., (1996) 1 SCC 642 ¶25.

²⁷³ Rule 2, Companies (acceptance of deposit) rules, No. GSR 256(E)[F. No. 1/8/2013-CL-V].

²⁷⁴ Gopal K. Maheshwari v. Hawk Multimedia (P.) Ltd., [2005] 60 SCL 382 (CLB – CHENNAI); Commissioner of Income Tax v. Gandhi Metal Mills (P.) Ltd., [1993] 200 ITR 252 (RAJ.).

²⁷⁵ §2(31) *Supra* note 240.

²⁷⁶ §73(3), *Supra* note 240.

²⁷⁷ 1 CR DUTTA, THE COMPANY LAW 1244 (6THEDN. 2008)

²⁷⁸ Abdul Hamitv.Rahamat Bi, AIR 1965 Mad 427.

²⁷⁹ §58A(2)(c), *Supra* note 240.

²⁸⁰ §73, *Supra* note 240.

²⁸¹3 RAMAIYA A, GUIDE TO THE COMPANIES ACT, PROVIDING GUIDANCE ON THE COMPANIES ACT, 2013 (18th ed. 2015).

²⁸²1 RAMAIYA A, GUIDE TO THE COMPANIES ACT, PROVIDING GUIDANCE ON THE COMPANIES ACT, 2013 1539 (18th ed. 2015).

²⁸³ 1 CR DUTTA, THE COMPANY LAW 1243 (6THEDN. 2008)

²⁸⁴ CIT v. Bazpur Coop. Sugar Factory Ltd., (1988) 3 SCC 553.

²⁸⁵ Cl. 10, *supra* note 2.

²⁸⁶ Fact Sheet 7.

B. THE CLAIMS OF THE CREDITORS ARE TO BE ACCEPTED BY THE IRP.

112. Debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt or an operational debt.²⁸⁷

113. A financial debt is a debt along with interest which is disbursed against consideration for the time value of money.²⁸⁸ Financial debt includes money borrowed by the company against the payment of interest.²⁸⁹ Therefore public depositors are financial creditors²⁹⁰ as the money borrowed by New Age against an interest²⁹¹ amounts to a financial debt.

114. The IB Code confers upon the IRP, the responsibility to receive and collate all the claims submitted to the IRP by the creditors²⁹² and form a Committee of Creditor pursuant to the collation of claims.²⁹³ Therefore, the claims of the public depositors bring financial in nature are to be received and collated by the IRP and cannot be rejected on the ground for not being operational debt.

²⁸⁷ §3(11) *Supra* note 2.

²⁸⁸ Nikhil Meheta & Sons v. AMR Infrastructure Ltd., CA (AT) (Insol.) No. 07/2017 ¶17.

²⁸⁹ Cl. 3(11)(a) *supra* note 2.

²⁹⁰ Cl. 3(10), *supra* note 2.

²⁹¹ Fact Sheet 7.

²⁹² Cl. 18, *Supra* note 2.

²⁹³ Cl. 21, *Supra* note 2.

PRAYER

In light of the arguments presented an authorities presented, it is most humbly prayed before the Learned Tribunal that:

On behalf of Corporate Debtor

- 1) The act of Resolution Professional is declared *ultra vires* regarding the termination of lease.
- 2) The lease of guesthouse at Hyderabad shall stand renewed with People's Bank with the same terms and conditions.
- 3) The resolution plan submitted by Resolution Professional to NCLT be admitted for restructuring of the company.

On behalf of Operational Creditor

- 1) GSES and JSEW be declared as entitled to the pending dues for the supplies already provided to the company.
- 2) In alternate, GSES and JSEW shall not be penalized for termination of the contract in case the contractual liability is not fulfilled by the company.

On behalf of Resolution Professional/ Interim Resolution Professional

- 1) The Resolution Professional was within his legal rights for not renewing the lease of the guesthouse at Hyderabad
- 2) The GSES and JSEW acted illegally and violated the contract by discontinuing the supply of essential material to company.
- 3) India shall be acknowledged as the Centre of Main Interest in the present insolvency proceedings.
- 4) The insolvency proceedings initiated in Singapore shall not be recognized in the present insolvency proceedings.

- 5) The application submitted by JKL is not maintainable and liable to be dismissed on the ground of alternate remedy.
- 6) RHPL is confirmed as a subsidiary of the Company and not a financial creditor of the Company and hence shall not be included in the CoC.
- 7) The director of Company shall transfer the possession of Mumbai flat to the IRP.
- 8) The claims filed by Marvel and People's bank against the Company are admitted.
- 9) The claims proposed by the Public depositors are illicit and liable to be discharged.
- 10) The Company bears the overhead costs and damages.
- 11) The People's Bank shall be prevented from setting off the payment of rent from the lease against the installment of loan due from the company.

On behalf of Financial Creditor/Committee of Creditor

- 1) The appointment of Amit Thakur as Interim Resolution Professional stands cancelled.
- 2) People's Bank can adjust the claims of New Age.
- 3) The Resolution Plan submitted by the Company is legal and liable to be dismissed.

From the side of Miscellaneous Parties

- 1) The Insolvency proceedings initiated in Singapore should be recognized in India either as foreign main proceeding or as foreign non-main proceedings.
- 2) The application filed by JKL before NCLT is justifiable and reasonable and legally admissible.
- 3) The precise responsibility of the Mumbai Flat with the IRP is outside the legal paradigm and liable to be dismissed.
- 4) The claims submitted by People's Bank and Marvel are inflated liable to exculpated.
- 5) The claims of the public depositors are legit and warranted and cannot be ousted by the IRP.

The Learned Tribunal may be pleased to pass any other order as it deems fit in the interest of Justice, Equity and Good Conscience. For this act of Kindness, the Applicant shall duty bound forever pray.

Place: New Delhi, Delhi

Sd/-

Dated:

(Counsels)