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**INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION**  
**2017**

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**Before the Hon'ble National Company Law Tribunal**

**In the matter of**

**RST BANK & ORS.**

**V**

**NEW AGE & ORS.**

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**WRITTEN SUBMISSION ON BEHALF OF THE CONCERNED PARTIES**

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**LIST OF ABBREVIATIONS**

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¶	paragraph
§	section
§§	sections
&	and
AIR	All India Reporter
All.	Allahabad
Anr.	Another
Bom.	Bombay
Cal.	Calcutta
CoC	Committee of Creditors
COMI	Centre of Main Interest
CIRP	Corporate Insolvency Resolution Process
DRTs	Debts Recovery Tribunal
DRATs	Debt Recovery Tribunal & Appellate Tribunal
Ed.	Edition
Etc.	et cetera
EPF	Employees Provident Fund
Hon'ble	Honourable
ILR	Indian Law Reporter
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
IRP	Interim Resolution Professional

IM	Information Memorandum
JV	Joint Venture Agreement
Ltd.	Limited
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
Pg.	Page
Pvt.	Private
Pte.	Private Limited
RHPL	Radha Hospitality Private Limited
RP	Resolution Professional
S.C.	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
THSPL	Ten Hospitality Services Pvt. Ltd.
TPI	Texas Power International
UNCITRAL	United Nations Commission on International Trade Law
v.	versus
vol.	volume
w.e.f.	with effect from

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## STATEMENT OF FACTS

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1. New Age Technology Limited (New Age) is the fourth largest manufacturer of solar panels in the world and the largest in India. It has its Registered Office in New Delhi and corporate office in Mumbai. The shares of New Age are listed on the BSE and the NSE. It raised an amount of Rs. 10 crores in the year 2015 from issuing Masala Bonds with a maturity date of July 2018. The largest maturity amount is owed to PEG Developers Ltd, a London based Infrastructure Company. The FCCBs issued by New Age is listed on the New York Stock Exchange.

2. The company has plants in Karnataka and Gujarat, Jaipur House, given on lease, an apartment in Juhu, a guest house in Hyderabad taken on lease and a parcel of land in Raipur. New Age has over 3000 employees. The company also owns six luxury cars, including a Mercedes Benz, BMW and Audi, for use by its Managing Director, CEO and CFO and other senior executives.

3. New Age entered into a JV Agreement with RHPL to develop a hotel on Raipur land to be operated by Seven Points and the agreement ordains the construction of hotel and commercial tower on the land by RHPL at 50% cost contribution while New Age will pay for the balance (in kind and cash). New Age will receive revenue from commercial tower and RHPL from the hotel, after meeting operational expenses and management fee. Good returns are expected in 2018. The promoters of New Age also acquired THSPL, a Singapore based company, which owns a 5 Star hotel, The Davisson Continental, in Singapore.

4. In the year 2008 and 2011, New Age, the corporate debtor obtained financial assistance from a consortium of banks for setting up Gujrat plant and Karnataka plant respectively and borrowed a total term loan of Rs. 2000 crores from Indo Bank, RST Bank, People's Bank and working capital assistance of Rs. 195 crores from Bank of North India. New Age had many clients and 85% of its production is captive with two major clients- Dan Morris and TPI. Morris conveyed its inability to pay the next tranche of purchase due as it faced stress in North Africa.

5. New Age has been maintaining stability in payment of dues. On December 16, New Age was ordered an attachment of Rs. 55 Lakhs by the Karnataka High Court in favor the Customs Department for which the total amount of penalty was Rs. 95 Lakhs. New Age was left with Rs. 14 Lakh and 32 Lakh in two different accounts. New Age decided to default to the banks. On 4th March 2017, RST Bank filed an application before the NCLT and proposed

Mr. S. Mahesh to be appointed as an IRP. On 5th April 2017, NCLT admitted the application whilst declaring Moratorium and referred the appointment of the IRP to the IBBI for recommendation wherein Mr. Amit Thakur was confirmed as an IRP.

6. Upon appointment and pursuant to the public announcement, IRP received claims from all Banks, operational creditors and statutory authorities including the Customs & Excise Department. 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. 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 and various public depositors filed their claim before the IRP. In order to take possession of the flat of New Age in Mumbai, the IRP wrote to the Director for taking possession, who neither replied nor handed over the possession of the flat. Xi Mao, a Chinese company and the supplier of raw materials to New Age, upon coming to know that New Age is under CIRP refused to supply raw material until past dues to the tune of Rs. 10 crores are cleared.

7. On 22nd April 2017, the IRP constituted the Committee of Creditors (CoC) and RHPL was not included in the CoC. On 29th April 2017, the first meeting of the CoC was scheduled, wherein the IRP, Mr. Thakur, proposed to the CoC to continue as RP. However, the CoC resolved to appoint Mr. Dhivesh Sharma as the RP who was later confirmed by NCLT. Thereafter, he took various decisions such as back dated termination of Hyderabad lease, rejection of claim by Public Depositors. He then receives a letter from Mr. Chew John stating that AFB investments has started CIR proceedings against THSPL in Singapore.

8. Mr. Dhivesh Sharma, the RP thereafter collected information and prepared the Information Memorandum (IM) and invited expression of interest for Resolution Plan. The Blue Plaza, a Thailand based hotel, the promoters and JKL Pvt. Ltd, the fourth largest manufacturer of solar panels in India requested the RP for a copy of the IM. The RP refused to provide IM to JKL Pvt. Ltd on the ground that JKL was not a serious party and provided the copy of IM to both Blue Plaza and the promoters of New Age.

9. RP examined the resolution plans and pointed out defects. New Age had failed to identify the source of funds to pay dissenting creditors. Blue Plaza and New Age had individually proposed a plan of repayment thereby; in the CoC meeting on Sept. 28,2017. The New Age plan was accepted with certain modifications that repayment will be made over 5 years as against 10 years and accordingly the RP filed the plan with the NCLT.

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**STATEMENT OF ISSUES**

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**PARTY 1**

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ARGUMENTS/ISSUES ON BEHALF OF FINANCIAL CREDITORS

**PARTY 2**

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ARGUMENTS/ISSUES ON BEHALF OF CORPORATE DEBTORS

**PARTY 3**

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ARGUMENTS/ISSUES ON BEHALF OF OPERATIONAL CREDITORS

**PARTY 4**

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ARGUMENTS /ISSUES ON BEHALF OF OTHER PARTIES

**PARTY 5**

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ARGUMENTS /ISSUES ON BEHALF OF IRPs/RP

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## SUMMARY OF ARGUMENTS

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### **I. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF FINANCIAL CREDITORS**

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In order to initiate a corporate insolvency resolution process, it is *the sine qua non* for the financial creditor to show that the corporate debtor owes a financial debt within the meaning of § 5(8) of the Code and that he himself is a financial creditor within the meaning of § 5(7). The arguments from the financial creditors include the claims of each financial creditor individually along with the inter-financial creditor's dispute. The arguments are not purely adversarial. The prime concern of financial creditor is to recover debts but not through an adversarial process. The financial creditors resorted to IBC so that the debt may be recovered through a resolution process where the creditors are aware of the fact the corporate debtor is not in a position to pay off their entire sum of interests and installments due on a certain date.

### **II. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF CORPORATE DEBTORS**

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The claims raised by the financial creditors are not maintainable on various grounds. The application of initiation of proceedings was filed by the RST Bank against the corporate debtor before the NCLT. Similarly, few more claims were added by the IRP post public announcement. One of the claims was from Marvel Organics Ltd. for which no documentary evidence was provided to the IRP. Moreover, the financial distress owed its emergence from due payments which were kept on hold by its major debtors. The company expects to get good returns by 2018. The Corporate Debtor also proposed a Resolution Plan during the CoC meeting in order to serve best in the interest of all the creditors amidst the deplorable cash crunch.

### **III. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF OPERATIONAL CREDITORS**

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The Operational Creditors had put forward their claims alongside the financial creditors is that their earlier payment of were due. The concerned operational creditors are GSES, JSEW Ltd., and Xi Mao. All the operational creditors assert the maintainability of their claims in respective capacity.

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**IV. ARGUMENTS/ISSUES ON BEHALF OF OTHER PARTIES**

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There are two other parties in the instant case viz., JKL Pvt. Ltd. and MD acting in his personal capacity. Firstly, JKL Ltd. files an application before the NCLT in order to obtain Information Memorandum from the RP. Regulation 36 provides that any member of the Corporate Insolvency Proceeding or any potential resolution applicant may obtain the Information Memorandum from the RP. However, after bare perusal of § 5(25) of the Code there is no restriction as to who can be a resolution applicant. Also, this process will facilitate proposals from interested stakeholders in commercially viable but insolvent businesses to rescue such entities creating value for all stakeholders in the process. Secondly, the claim of IRP to take possession of the Mumbai flat from MD stands superfluous because of the simple reason that the Mumbai flat has been sold to MD and now is the personal property of MD.

**V. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF INTERIM RESOLUTION PROFESSIONAL/  
RESOLUTION PROFESSIONAL**

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The IRP/ RP made various submissions with regard to the proceedings. It is pertinent to note that an RP cannot act as a counsel for arguing the cause of any party. The act and the submissions of the RP are neutral and are majorly composed of stating the duties complied with and the steps taken to take possession of the corporate debtor's property. In the instant case, the IRP and the RP both have complied with the duties as laid down in §§ 18 and 25 of the Code, respectively. Earlier, Mr. Amit Thakur took possession of the Gujrat Plant despite the agitation and collated all the claims as received post public announcement. The RP made certain amendments and modifications in the Resolution Plan proposed by the Corporate Debtor.

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**ARGUMENTS ADVANCED**

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**I. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF FINANCIAL CREDITORS**

It is hereby submitted that a financial creditor either by himself or jointly with other financial creditors can initiate a corporate insolvency resolution process pursuant to § 7 of the IBC 2016 by filing an application against the corporate debtor before the Adjudicating Authority when a default has occurred.

From a bare perusal of § 7 of the IBC, it is pertinent that the insolvency can be triggered by a "Financial Creditor" individually or jointly against the corporate debtor when a default has occurred. In order to understand the term "Financial Creditor", the requirement of the term "Financial Debt" has to be satisfied which is defined in § 5(8) of IBC. The opening words of the definition clause would indicate that a financial debt is a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the event enumerated in sub-clause (a) to (i). Therefore, the key feature of financial transaction is its consideration for the time value of money.<sup>1</sup>

In other words, the legislature has included such financial transactions in the definition of financial debt which are usually for a sum of money received today to be paid over a period of time in a single series of payments in future or a sum of money invested today to be repaid over a period of time in a single or series of installments to be paid in future. The said requirements have been established further in the same argument.

In the present matter, RST Bank (Financial Creditor) filed an application against New Age (Corporate Debtor) before the NCLT on 17<sup>th</sup> March 2017.<sup>2</sup> However, the Bench whilst recording the objections raised by the Corporate Debtor admitted the application and declared Moratorium on 5<sup>th</sup> April 2017. Pursuant to the public announcement made by Mr. Amit Thakur (IRP), he received claims from other loan lenders as well namely Indo Bank, People's Bank, Bank of North India and Marvel Organics Ltd.<sup>3</sup> The claims were examined in several meetings of CoC. Thereafter, a resolution plan was approved whilst recording objections raised and the application was finally filed by the RP i.e. Mr. Dhivesh Sharma before the NCLT.

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<sup>1</sup> Nikhil Mehta & Sons (HUF) & Ors. Vs. M/s. AMR Industries Ltd., CP. No. (ISB)- 03 PB/2017

<sup>2</sup> *Compromis*, p.5

<sup>3</sup> *Compromis*, p.6

NCLT held that the provisions of § 7 of the Code have come into operation, which prescribes that a financial creditor may file an application for initiating Corporate Insolvency Resolution Process against a Corporate Debtor when a default has occurred. It is required that a Financial Creditor shall furnish the record of the default. When the Adjudicating Authority is satisfied that a default has occurred and the application is complete and the proposed Insolvency Resolution Professional is a qualified person, then by an order under subsection(s) of § 7 can admit a petition.<sup>4</sup>

### ON MAINTAINABILITY

#### ISSUE 1.1] WHETHER OR NOT THE APPLICATION FILED BY THE FINANCIAL CREDITOR IS MAINTAINABLE?

§ 4 of the Code states that Part II will apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the defaults claimed is one lakh rupees. The default claimed in the present matter by the financial creditors are all above one lakh rupees. In the landmark judgment of *M/s Innoventive Industries v. ICICI Bank*<sup>5</sup>, the Apex Court held that under Section 4 of the Code, Part II applies to matters relating to the insolvency and liquidation of corporate debtors, where the minimum amount of default is rupees one lakh. Since the default amount in the said case is much more than 1 lakh, the application stands maintainable.

#### ISSUE 1.2] WHETHER OR NOT THE APPLICANTS ARE THE FINANCIAL CREDITORS?

In order to succeed in initiating a Corporate Insolvency Resolution Process against a Corporate Debtor under § 7<sup>6</sup>, it is *a sine qua non* to establish that the applicant is a Financial Creditor within the meaning of § 5(7) of the Code. Therefore, a financial creditor is a person to whom a financial debt is owed. In the present matter, the applicants can be categorized in the following manner:

- i. RST Bank, People's Bank, and Indo Bank issued term loans to New Age.
- ii. Bank of North India issued working capital assistance to New Age.
- iii. Marvel Organics Ltd. are the financial creditors as per the facts.<sup>7</sup>

*Financial Debt*- A “Financial Debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value for money and includes all credentials enlisted

<sup>4</sup> Indus Financial Ltd. v. Quantum Ltd. C.P. No. 1043 I&BP/NCLT/MB/MAH/2017.

<sup>5</sup> Civil Appeal Nos.8337-8338 of 2017

<sup>6</sup> The Insolvency and Bankruptcy Code, 2016.

<sup>7</sup> *Compromis*, p.7

under § 4(8) from sub-clauses (a) to (i) of the Code. The financial debts as owed by the Corporate Debtor to its creditors have been discussed further distinctively in accordance with the provisions of this Section.

- i. It is hereby submitted that the aforementioned parties, viz. RST Bank, People's Bank and Indo Bank are the financial creditors as the loans given by the banks follows interest, time and charge on the properties of the corporate debtor. "Charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both as the case may be, as security and includes a mortgage.<sup>8</sup>
- ii. Similarly, the Corporate Debtor created the first charge on his plant and machinery and second charge on land and buildings against the working capital issued by the Bank of North India. Therefore, Bank of North India perfectly complies with the requisite essentials under § 5(8) of the Code.

Moreover, the word 'include' has been used instead of 'subject to' which palpably establishes the fact that a financial debt should not necessarily fall in at least one of the credentials enlisted under § 5(8) of the Code. However, in the instant case, subsection (a) of this section would apply wherein money has been borrowed by the Corporate Debtor against the payment of interest.

**ISSUE 1.3] WHETHER OR NOT A 'DEFAULT' INCLUDES A DEFAULT TO NON-APPLICANT  
FINANCIAL CREDITOR?**

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In the present matter, apart from RST Bank, other Financial Creditors are not the direct applicants. However, Explanation to § 7(1) provides that for the purposes of § 7(1), a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.<sup>9</sup> Therefore, the non-applicant Financial Creditors stand equally to file their claims by virtue of Explanation provided by § (1) of the IBC.

In *State Bank of India v Essar Steel Ltd.*<sup>10</sup> the applications filed by SCB and SBI were admitted by the NCLT under § 7 of IBC on similar grounds as discussed further. The claims made by the aforementioned parties in the instant case has been verified by the IRP and

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<sup>8</sup> The Insolvency and Bankruptcy Code, 2016 § 3.

<sup>9</sup> CS (DR.) D.K. JAIN, GUIDE TO INSOLVENCY & BANKRUPTCY CODE 113 (1<sup>st</sup> ed., 2017)

<sup>10</sup> C.P (IB) No.40-7-NCLT-Ahm-2017. *See also*, State Bank of India v Bhushan Steel Limited, C.P. (IB)-201(PB)/2017

thereafter a list was prepared by him containing the names of the creditor.<sup>11</sup> Pursuant to § 18 of the IBC read with Regulation 13<sup>12</sup>, it is the duty of IRP or RP, as the case may be, to verify every claim as on the insolvency commencement date, within seven days.<sup>13</sup> The following are the issues concerned on behalf of Financial Creditors:

### ON MERITS

#### ISSUE 1.4] CLAIMS CONCERNING THE FINANCIAL CREDITORS

In the instant case, New Age, the Corporate Debtor lacked funds to pay off the due installments of the banks and have willfully decided to default to the banks. The claims and their respective Principal Amounts have been illustrated as follows:

Sr. No.	Financial Creditor	Principal Amount	Amount Claimed
1.	RST Bank	Rs. 500 crores	Rs. 650 crores
2.	Indo Bank	Rs. 1000 crores	Rs. 1650 crores
3.	People's Bank	Rs. 500 crores	Rs. 790 crores
4.	Bank of North India	Rs. 195 crores	Rs. 279 crores

*Nature of claims-* In the year 2008 and 2011, New Age, the corporate debtor obtained financial assistance from a consortium of banks for setting up Gujrat plant and Karnataka plant respectively. A total term loan and working capital assistance of Rs. 2000 crores from Indo Bank, RST Bank, People's Bank and Rs. 195 crores from People's Bank was borrowed by Corporate Debtor respectively.<sup>14</sup> The term loan lenders have the first charge on the land and building of New Age and second charge on plant and machinery. Subsequently, the working capital lender has the first charge on plant and machinery and second charge on land and building.<sup>15</sup>

Therefore, the applicants are *ipso facto* the financial creditors to New Age within the meaning of § 5(7) of the Code and therefore, the application is maintainable under § 7.

*Default-* An inclusive definition of default has been provided under § 3(12) of the Code. The NCLAT in *Kirusa Software Private Ltd. v Mobibox Innovations Pvt. Ltd.*<sup>16</sup> held that § 3(12)

<sup>11</sup> *Compromis*, p.8

<sup>12</sup> Insolvency and Bankruptcy Board of India (Insolvency and Resolution Process for Corporate Persons) Regulations, 2016.

<sup>13</sup> *Davinder Ahluwalia & Anr. v M/s Sumit Aviation*, (IB)-229-ND-2017.

<sup>14</sup> *Compromis*. p.3

<sup>15</sup> *Id.*

<sup>16</sup> CP 02/I&BP/NCLT/MAH/2017.

defines “default” to mean “non-payment of the debt” once it has become due and payable and the same is not repaid by the debtor. “Default” occurs on fulfilment of twin conditions:

- i. Debt becoming due and payable; and
- ii. Non-payment thereof.

The definition of default is “inclusive” and not “exhaustive”.<sup>17</sup> The same has to be given wide meaning provided it is relatable to the existence of the amount of the debt, quality of good or services or breach of a representation or warranty.<sup>18</sup> In the present matter, the claims made by the financial creditors against the corporate debtor are the due amount and not paid. Therefore, there exist a “default” on part of the Corporate Debtor.

#### **ISSUE 1.5] ISSUE CONCERNING THE INTER-FINANCIAL CREDITOR DISPUTE**

In the instant case, few challenges have been raised by RST Bank against the claims of other financial creditors which constitute inter-financial creditor dispute. It can be agreed on the jurisprudential aspect that the Code of 2016 is not purely meant to ‘recover debts’ in an adversarial manner and proposes more of a ‘resolution process’ as the Code nowhere uses the terms ‘petitioner(s) and respondent(s)’. The same has been held in *M/s DF Deutsche Forfait AG and Anr. v M/s Uttam Galva Steels Ltd.*<sup>19</sup> by the NCLT Bench. However, an inflated claim or violation of the procedure can never be the genesis of any established legal structure.

Despite the fact that the Code vociferates for more of a Resolution Process, the fact that recovery of debts will always form a vital part of the entire process through amicable means. In fact, Recovery can be considered as an end by virtue of Resolution Process laid down by the Code of 2016. Therefore, the interest/claim of one financial creditor may prevail over the other financial creditor, if the claims are inflated or the procedure has been violated, as the case maybe. The inter-financial dispute has been categorized and discussed as below:

**1.5.1] RST Bank’s challenge against the claims of People’s Bank:** People’s bank’s act of adjusting its term loan claim out of the lease of ‘New Age House’ in Jaipur payable to New Age is invalid. The term loan provided for the first charge on the land and building of New Age and second charge on plant and machinery, in case of default. According to the facts, the term loan was taken for Gujarat and Karnataka plants. Thus, in case of default, People's bank

<sup>17</sup> CS (DR.) D.K. JAIN, GUIDE TO INSOLVENCY & BANKRUPTCY CODE 25 (1<sup>st</sup> ed., 2017).

<sup>18</sup> *Id.*

<sup>19</sup> C.P. No. 45/I&BP/NCLT/MAH/2017.

had the first claim over land and building of such property against which the loan was taken and not Jaipur property.

The NCLT Bench in *K.K.V. Nagaprasad v. LancoInfreatech Ltd.*<sup>20</sup> held that by reading section 3(11) and 3(12) it is clear that default arises out of the non-payment of debt which is due and payable. Where 'due' in question is totally in dispute, it is not at all tenable to invoke the provisions of IBC. The tribunal cannot go into a roving inquiry into the disputed claims of the parties as the object of IBC is to ensure reorganization and insolvency resolution of the corporate persons, individual etc. in a time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship etc.

People's Bank being a *term loan lender* filed an inflated claim due to following reasons:

**i. No prior information provided for such an adjustment:** As per the facts of the case, People's bank aimed at adjusting its term loan dues against the lease rental without giving any prior information to the Corporate Debtor. It was only when the IRP wrote to People's Bank to deposit the lease rental in terms of the lease from April 2015 to February 2017, amounting to Rs. 79,41,026/- with the company that the People's Bank refused and informed the IRP that the Bank has been adjusting the said lease rental towards its dues.

**ii. No demand notice served:** The RBI vide its 'master circular on willful defaulters' dated July 1, 2014 provided that, if the Committee concludes that an event of willful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of willful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.<sup>21</sup>

Further § 13 of SARFAESI Act also establishes the guiding principles for providing due notice to the defaulter before taking any action. The sanctity of *Audi Altrem Partem* vis-a- vis principles of natural justice is maintained by these provisions which have been clearly violated by People's Bank by adjusting its dues without hearing the Corporate Debtor or fulfilling its aforementioned obligations.

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<sup>20</sup> C.P. (IB) No. 9/9/HBD/2017.

<sup>21</sup> Reserve Bank of India, *RBI Master Circular on Willful Defaulters*, GOVT. OF INDIA (September 7, 2017, 11:49AM) <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=9044&Mode=0>.

By virtue of § 13(2) of SARFAESI Act, security interest can be enforced against such a claim once the asset becomes NPA. The legal definition of NPA as provided by RBI in its master circular<sup>22</sup> declared that in cases of term loans, an asset could be termed as NPA if the instalment of principle or interest amount remains overdue for a period of more than 180 days.

In the said case, the period of 180 days had not lapsed; hence People's Bank ought not to adjust their dues out of the lease claim and must surrender the same to IRP to ensure that the company continues as a going concern.

**iii. Loan taken from Consortium of banks:** It is pertinent to note that the financial assistance taken by New Age was not from one single Bank but from a consortium of banks. In a situation of default and initiation of insolvency proceedings, the Corporate Debtor is obliged to repay dues of all the banks in due proportion and its capacity. However, the act of People's bank was a clear violation of terms of equality to be maintained in such a case. The acts of People's Bank provide it an edge over other financial creditors in regard of recovery of its due debts.

**iv. Overriding contracts:** In a plethora of judgments, it has been well established by the Hon'ble Court that two contracts may run parallel to each other, however, provisions of one cannot override the provisions of another.

In the instance case, the People's Bank had clearly overridden two subsequent contracts. People's bank had given a term loan to the CD against the Gujarat and Karnataka land for which first and second charge was created on the respective properties. At the same time, New Age owned a property "New Age House" in Jaipur, which had been given on lease to People's Bank, Jaipur Branch under a registered lease deed dated 06.01.2011.

Lease rental of Rs. 15,06,900/- per month was payable to New Age. By attempting to adjust its term loan dues with the lease rental so deposited to People's Bank; the bank did not comply by the terms of the loan agreement. Despite a clear first and second charge duly created in favour of the consortium, People's bank chose to adjust its dues not from such properties against which charge was established, but from the lease rental deed. It is a clear breach of contract committed by People's Bank.

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<sup>22</sup> Reserve Bank of India, *RBI Master Circular on Willful Defaulters*, GOVT. OF INDIA (September 7, 2017, 10:23AM) <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=9044&Mode=0>.

Thus, all these instances establish that the claim of People's Bank is inflated and does not stand and it must deposit the lease rental as asked for by the IRP.

**1.5.2] RST Bank's challenge against Marvel's claim:** The IRP wrongly admitted Marvel's claim. It cannot be sustained because of following reasons:

Chapter IV Regulation 8(1) of Insolvency Resolution Process of Corporate Person states that a person claiming to be a financial creditor needs to submit documentary proof of such claim in order to be acknowledged for the CIRP. Further, clause (2) provides for various modes of providing proof.

Pursuant to the aforementioned Regulation, the NCLT in *Urban Infrastructure Trustee Ltd. v Neelkanth Township and Construction Pvt. Ltd.*<sup>23</sup> held that three kinds of showings are required to prove a default.

- i. *Firstly*, records available under information utility;
- ii. *Secondly*, the Bench can pass an order against the financial creditor if the other relevant document including the financial debt showing the claim as a debt, a record evidencing the amounts committed by the financial creditor to the corporate debtor under the facility has been drawn by the corporate debtor, if that evidence is not available;
- iii. *Thirdly*, if the financial creditor can show an order of a court or tribunal that has adjudicated upon the non-payment of the debt.

Since these categories have been disjointed using the word 'or', if the financial creditor is able to produce any of these records showing default, then the Bench has invariably to consider that default of the payment has been proved.<sup>24</sup> However, in the instant case, the Financial Creditor i.e. Marvel Organics Ltd. did not provide any such proof as required for under IBC. Also, it never provided for details escalation of the due amount from Rs. 20 crores to Rs. 136 crores.<sup>25</sup> Despite these defaults, the IRP invited and accepted Marvel's claim. The IRP did not perform its duties properly in this regard.

**1.5.3] Non-maintainability of PEG Developers Ltd.'s claim:** In the instant case, PEG Developers Ltd. is a London based Infrastructure Company. The largest maturity of the Masala Bonds is owed to this Company and the maturity date is July 2018.<sup>26</sup> Later, when the public

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<sup>23</sup> C.P. No. 69/I&NP/NCLT/MAH/2017.

<sup>24</sup> CS (DR.) D.K. JAIN, GUIDE TO INSOLVENCY & BANKRUPTCY CODE 194 (1<sup>st</sup> ed., 2017)

<sup>25</sup> *Compromis*, p.7

<sup>26</sup> *Compromis*, p.1

announcement period expired on the 14<sup>th</sup> day of the appointment of Interim Resolution Professional, PEG Developers Ltd. filed their claims to Mr. Dhivesh Sharma, RP on 20<sup>th</sup> July 2017 to the tune of Rs. 15 crores.<sup>27</sup>

It is hereby submitted that the claim made by the PEG Developers Ltd. is not maintainable on the ground that the time period of fourteen days of the Public Announcement has lapsed. Regulation 6(2)(c)<sup>28</sup> states that the last date of submission of proofs of claims shall be fourteen days from the date of appointment of the interim resolution professional. Moreover, the maturity date of the Bond is July 2018 and thus the PEG Developers Ltd. must not prejudice against the default of the Corporate Debtor in this regard.

#### **ISSUE 1.6] ISSUE CONCERNING THE PROPOSAL TO REPLACE IRP**

In the present matter, the IRPs have been replaced twice ever since the commencement of the resolution process. The following are the IRPs/RP appointed/proposed and replaced so far:

- i. Mr. S. Mahesh proposed as IRP by RST Bank.
- ii. Mr. Amit Thakur was recommended by IBBI and replaced Mr. S. Mahesh as an IRP.
- iii. Mr. Dhivesh Sharma was appointed as an RP by CoC.

The Financial Creditor can propose to appoint an interim resolution professional after furnishing the required formalities as laid down in Regulation 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Therefore, pursuant to this provision the RST Bank was right in proposing Mr. S. Mahesh as an interim resolution professional.

**1.6.1] Proposal to replace Mr. Amit Thakur on the ground of appointing a related party as the valuer:** However, Mr. Amit Thakur was the first interim resolution professional who was appointed by IBBI to carry out the functions as mentioned under the IBC.<sup>29</sup> The IRP appointed M/s. KGB Valuers and M/s AKP Valuers, being registered valuers, to determine the liquidation value of New Age.<sup>30</sup>

As per the Regulation 27 of the IBBI Regulations, 2016 the IRP shall within 7 days of his appointment, appoint two registered valuers to determine the liquidation value of the

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<sup>27</sup> *Compromis*, p.11

<sup>28</sup> Insolvency and Bankruptcy Board of India (Insolvency and Resolution Process for Corporate Persons) Regulations, 2016.

<sup>29</sup> *Compromis*, p.5

<sup>30</sup> *Compromis*, p.7

corporate debtor in accordance with the Regulation 35 whereby, certain persons cannot be appointed as registered valuers. Mr. Amit Thakur has complied with his duty of appointing two valuers namely, M/s KGB Valuers and M/s AKP Valuers to determine the liquidation value of New Age. At the time of the commencement of process, it was found that M/s AKP was a related party of New Age and shall not be counted as a valuer. It is therefore established that IRP has not appointed any new valuer and thus, has failed to comply duly with the duties vested in him.

Since, M/s. AKP Valuers were a related party to New Age, they cannot undertake valuation process of New Age as per the provisions of Regulation 27. Hence, it is the duty of the IRP to appoint another valuer for completing the due process as min 2 Valuers are required for determining the liquidation value.

**1.6.2] Proposal to replace Mr. Amit Thakur on the ground of adding claims of Marvel:**

Mr. Amit Thakur, IRP while scrutinizing the claims observed that Marvel Organics Ltd. had filed a claim of Rs. 136 crores but failed to file any documents in support to substantiate its claim.<sup>31</sup> Thereafter, the IRP verified the claims and included Marvel in the list of creditors.<sup>32</sup> It is pertinent to note that an IRP has the duty to verify the claims filed by the creditor adhering to § 18(1)(g) of the Code read with Regulation 8(2) of the IBBI Regulations, 2016. Therefore, this is another ground on which Mr. Amit Thakur was correctly replaced by Mr. Dhivesh Sharma as a Resolution Professional.

The grounds as discussed in adhering to the provisions of the Code<sup>33</sup> in sub-issues 1.4.1 and 1.4.2 are plausible enough to propose the replacement of Mr. Amit Thakur with another IRP/RP.

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<sup>31</sup> *Compromis*, p.7

<sup>32</sup> *Compromis*, p.8

<sup>33</sup> Insolvency and Bankruptcy Code, 2016.

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**ISSUE 1.7] SALE OF MUMBAI'S FLAT TO MD**

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During the first CoC meeting on 29<sup>th</sup> April 2017 People's Bank raised a concern about the sale of Mumbai's flat of New Age to the Managing Director at a much lower price than the market value of the flat.<sup>34</sup> The Bank claimed that the sale proceeds have been siphoned off and it was an undervalued transaction. § 45 of the Code provides for the avoidance of undervalued transaction wherein the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) of § 43 determines that certain transactions were made during the relevant period under § 46 which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Code.

The RP being the custodian of the corporate debtor's assets can, therefore, notify such claim and make an application to the NCLT so as to serve it best in the interest of the corporate debtor. Therefore, it is submitted that such an undervalued transaction may be revoked by the RP and on avoidance of such an undervalued transaction will also serve best to the financial creditors and the entire Corporate Insolvency Resolution Plan.

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<sup>34</sup> *Compromis*, p.9

## II. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF CORPORATE DEBTORS

New Age is the fourth largest manufacturer of solar panels in the world and the largest in India. New Age owns an office in Rajasthan, owns a property named as "New Age House" in Jaipur which has been given to People's Bank on a lease, owns an apartment in Juhu, Mumbai which is occupied by its managing director and has a guest house which was taken on lease for three years.<sup>35</sup>

The company had one Gujrat Plant and two Karnataka Plants for which it took loans from Indo Bank, RST Bank and People's Bank and working capital assistance from the Bank of North India. The company owns the land on which plants are built.<sup>36</sup> The Company has also been involved in Joint Venture with RHPL from which it expects good returns out of it. The Company has been servicing its debts regularly and has excellent relations with the bankers. Its payment to suppliers is also regular.<sup>37</sup>

### ON MAINTAINABILITY

#### ISSUE 2.1] COMPLYING WITH THE PRINCIPLES OF NATURAL JUSTICE

It is hereby submitted that New Age is the Corporate Debtor in the present case. The reasons for the same have been elaborated further adhering to the provisions of the Code of 2016. Most importantly, the principles of natural justice must be duly considered by this Hon'ble Court while considering the claims filed by the Creditors against the Corporate Debtor. The Calcutta High Court upholds the principles of Natural Justice in *Sree Mitaliks Ltd. & Anr. v Union of India*<sup>38</sup>. The Court said that NCLT and NCLAT are required to afford a reasonable opportunity of hearing to the respondent before passing its order. It also held that it would be open to the parties to agitate their respective grievances with regard to any order of NCLT or NCLAT as the case may be in accordance with the law. It is also open to the parties to point out that the NCLT and the NCLAT are bound to follow the principles of natural justice while disposing of proceedings before them. Therefore, anything contrary to it would be in violation of rules of natural justice.<sup>39</sup>

<sup>35</sup> *Compromis*, p.2

<sup>36</sup> *Compromis*, p.3

<sup>37</sup> *Compromis*, p.4

<sup>38</sup> W.P. 7144 (W) of 2017

<sup>39</sup> Punjab National Bank Vs. M/s. James Hotels Ltd., CP(IB) NO. 15/Chd/CHD/2017

There being provisions in the Companies Act, 2013 and the IBC requiring the Tribunal to follow the principle of natural justice, which has been duly held in several orders passed by the Appellate Tribunal, it was held that impugned order passed by NCLT, Mumbai Bench was *ex-facie* illegal and was set aside by the Appellate Tribunal. Thus, Appellant was allowed to function independently through its board of Directors. It was further held that the adjudicating authority should adopt a cautious approach in admitting insolvency applications and ensure adherence to the principles of natural justice.<sup>40</sup>

*Corporate Debtor and Debt-* § 3(8) defines a Corporate Debtor as a corporate person who owes a debt to any person. Moreover, a Corporate Person means a Company as defined in clause (20) of § 2 of the Companies Act, 2013, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.<sup>41</sup> In the present matter, New Age owes a debt to its creditors at various instances and therefore, New Age complies with the definition as provided by the statute.

#### **ISSUE 2.2] NON-MAINTAINABILITY OF APPLICATION FILED BY RST BANK**

It is hereby submitted that the Corporate Debtor had no intention of default the banks. On 4<sup>th</sup> November 2016, New Age paid the balance amount of 10% to RHPL for completing construction works. Thereafter, the Company did not have any cash to service the installment of Rs. 35 lakh due on 31<sup>st</sup> December. Therefore, in order to pay the due installment, the Board of Directors of New Age decided to sell the Mumbai house to its managing director for Rs. 5 crores.<sup>42</sup> However, New Age received an advance of Rs. 55 lakhs. It can be reasonably deciphered from the fact that New Age had clear intentions to pay off the due installments.

It is pertinent to note here that New Age has been incapable of paying off certain installments due to some inevitable reasons. They are as follows: -

- i. Dan Morris Energy Inc. (Morris), a company incorporated in Houston was one of the clients who took large orders from New Age. On 18<sup>th</sup> September 2016 Morris asked New Age to keep the order on hold and conveyed its inability to pay the next tranche of purchase money due on 15<sup>th</sup> October 2016. Therefore, New Age usually gets the payment from Morris on 15<sup>th</sup> October and thereafter the paid off the installment of

<sup>40</sup> Starlog Enterprises Limited Vs. ICICI Bank Limited, Company Appeal (AT) (Insolvency) No. 5 of 2017; Kaliber Associates Pvt. Ltd. Vs. Mrs. Tripat Kaur., Company Appeal (AT) (Insolvency) No. 52 of 2017; Alchemist Asset Reconstruction Company Limited Vs. M/s. Hotel Gaudavan Pvt. Ltd., CP No. (IB)23/PB/2017.

<sup>41</sup> The Insolvency and Bankruptcy Code, 2016 § 3(7).

<sup>42</sup> *Compromis*, p.5

interest payable to term loan lenders which fell due on 31<sup>st</sup> October 2016. However, this did not happen and left New Age incapable to pay its dues.

- ii. Rs. 4, 45, 00,000 were yet to be paid by the Managing Director who bought the Mumbai flat.
- iii. After taking loans and working capital assistance from the banks in 2008 and 2011, the company raised funds by issuing Masala Bonds in 2015<sup>43</sup>; invited public deposits for its working capital assistance in 2012<sup>44</sup>; diversified into hospitality and real estate business in the year 2015 and 2016 and acquired THSPL and entered into a JV Agreement. New Age never expected a cash crunch which arose due to non-payment by its clients and the revenues out of hospitality and real estate business were expected to come in 2018.

Therefore, in view of the aforementioned inevitable reasons, it is hereby submitted that the application filed by the RST Bank is not maintainable.

#### ON MERITS

#### ISSUE 2.3] WHETHER OR NOT THE IRP COMPLIED WITH HIS DUTIES AS LAID DOWN IN THE CODE AND THE REGULATIONS OF IBBI?

It is hereby submitted that Mr. Amit Thakur, IRP has failed to comply with his duties pursuant to § 18 of the Code. The same has been discussed considering his decisions taken in various instances.

**2.3.1] Acceptance of Claim from Marvel Organics Ltd.:** The IRP wrongly admitted Marvel's claim. It cannot sustain because Marvel Organics Ltd. did not provide any documentary evidence in lieu of his claim as required under Regulation 8(1).

Regulation 8(1) of Insolvency Resolution Process of Corporate Person states that a person claiming to be a financial creditor needs to submit documentary proof of such claim in order to be acknowledged for the CIRP. Further, clause (2) provides for various modes of providing proof.

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<sup>43</sup> *Compromis*, p.1

<sup>44</sup> *Compromis*, p.7

Pursuant to the aforementioned Regulation, the NCLT in *Urban Infrastructure Trustee Ltd. v Neelkanth Township and Construction Pvt. Ltd.*<sup>45</sup> held that three kinds of showings are required to prove a default.

- i. *Firstly*, records available under information utility;
- ii. *Secondly*, the Bench can pass an order against the financial creditor if the other relevant document including the financial debt showing the claim as a debt, a record evidencing the amounts committed by the financial creditor to the corporate debtor under the facility has been drawn by the corporate debtor, if that evidence is not available;
- iii. *Thirdly*, if the financial creditor can show an order of a court or tribunal that has adjudicated upon the non-payment of the debt.

Since these categories have been disjointed using the word ‘or’, if the financial creditor is able to produce any of these records showing default, then the Bench has invariably to consider that default of the payment has been proved.<sup>46</sup> However, in the instant case, the Financial Creditor i.e. Marvel Organics Ltd. did not provide any such proof as required for under IBC. Also, it never provided for details escalation of the due amount from Rs. 20 crores to Rs. 136 crores.<sup>47</sup> Despite these defaults, the IRP invited and accepted Marvel’s claim. The IRP did not perform its duties properly in this regard.

**2.3.2] Termination of Lease before termination date:** The Resolution Professional in the exercise of his powers with regard to management of the operations of the Corporate Debtor as a going concern, has the authority to amend or modify the contracts or transactions which were entered into before the commencement of the CIRP, if he deems it fit in order to protect and preserve the value of the property of the Corporate Debtor and maintain continuity of operations of the Corporate Debtor as a going concern.

In the instant case, the IRP has terminated the lease prior to the termination date. It is hereby submitted that an IRP has no authority to terminate the contracts or transactions of the corporate debtor in all his possible capacities. The issue has been further elaborated in sub-issue [2.5]

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<sup>45</sup> C.P. No. 69/I&NP/NCLT/MAH/2017.

<sup>46</sup> CS (DR.) D.K. JAIN, GUIDE TO INSOLVENCY & BANKRUPTCY CODE 194 (1<sup>st</sup> ed., 2017)

<sup>47</sup> *Compromis*, p.7

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**ISSUE 2.4] CONTINUATION OF ESSENTIAL SUPPLIES BY OPERATIONAL CREDITORS**

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New age has an obligation to provide necessary details of insolvency proceedings by virtue of § 8(2)(a) wherein it is necessary for a corporate debtor undergoing insolvency proceedings to provide the operational creditor of an existence of a dispute, within 10 days of issue of notice of occurrence of a default. Therefore, in default of payment to GSES and JSEW, since new age has not been able to pay post 10 days, they can be a party to the proceedings.

However, for the same, the IRP needs to notify them of such proceedings as a part of insolvency resolution process cost defined under § 13(c) of the code and include their claim in the list of claims against the corporate debtor, but at the same time ensure that no such facilities, i.e. electricity supply and raw material be stopped as it would hamper the entity from continuing as a going concern. Further § 20 (1) states that the interim resolution professional shall make every endeavor to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. While the IRP is in the process, the law enshrines a 'calm period' where creditors stay their claims. This gives a better chance for the firm to survive as a going concern.

Further, by virtue of § 14(2) of the code, all essential goods and services would be supplied to the corporate debtor, uninterruptedly. All such goods and services as specified under Regulation 32 of the code shall not stand terminated or suspended during the moratorium.

The insolvency resolution professional shall not exercise any discretion with regard to whether the company should be run as a going concern or not, but rather is mandated by law to seek to run the company as a going concern unless the situation is such that the endeavor on all accounts ought to fail.

Thus, the dues of JSEW and GSES would be addressed in the CoC meeting; however, till then, they have to continue providing New Age with electricity supply and raw material to carry on with its operations.

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**ISSUE 2.5] TERMINATION OF LEASE OF HYDERABAD PROPERTY BY THE IRP**

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In the instant case, New Age filed an Application before the NCLT on account of non-renewable and termination of lease w.e.f. 31<sup>st</sup> March 2017 which was prior to the termination date.<sup>48</sup> the Resolution Professional in the exercise of his powers with regard to management of

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<sup>48</sup> *Compromis*, p.9

the operations of the Corporate Debtor as a going concern, has the authority to protect and preserve the value of the property of the corporate debtor and for the purposes of subsection (1), the interim resolution professional under § 20(2) shall have the authority to enter into contracts on behalf of the corporate debtor or to amend or to modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process.

Subsequently, it has been nowhere mentioned that the IRP has the power to terminate such contracts or transactions. The aforementioned provision comes out with a plausible conclusion which excludes the act of terminating the contract or a transaction in all possible capacities. Therefore, the act of termination of the lease of Hyderabad guest house by the IRP stands superfluous. Moreover, the IRP has a duty to take over the possession of the assets of the corporate debtor but the Hyderabad property was taken on lease and therefore was one of the liabilities of the property. Hence, the IRP cannot take into the possession of the liabilities of the corporate debtor. Therefore, the act of the IRP also stands superfluous and arbitrary.

### III. ARGUMENTS/ISSUES PRESENTED ON BEHALF OF OPERATIONAL CREDITORS

In the present matter, the following are the Operation Creditors concerned about their claims:

- i. GSES- supplied electricity to the Corporate Debtor
- ii. JSEW Ltd.- supplied EVA Films to the Corporate Debtor for manufacturing Solar Panels
- iii. Xi Mao, a Chinese Company- one of the largest supplier of raw material to New Age.

The issues of the Operational Creditors have been discussed keeping in the maintainability and merits of their claims.

#### ON MAINTAINABILITY

##### ISSUE 3.1] WHETHER OR NOT THE PARTIES ARE OPERATIONAL CREDITORS?

The ability of a corporate debtor to insulate itself from claims raised by an operational creditor hinges on a pre- existence of a ‘dispute’ in relation to a debt. As per § 5(20) “Operational Creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred and as per § 5(21) of the IBC states that “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In the matter of *Shiv Narain Sarain v Eminent Infradevelopers Pvt. Ltd.*<sup>49</sup> decided on 5<sup>th</sup> May, 2017 it was held that it is evident from the perusal of the definition of ‘Operational Debt’ that it is a claim in respect of provision of goods and services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Centre and the State Government or the local authority.

The Bench in *Vinod Awasthy v. AMR Infrastructure Ltd.*<sup>50</sup> accentuated that ‘operational debt’ under § 5(21) is confined to only four categories, viz. goods, services, employment and Government dues. On the occurrence of a default, an operational creditor can initiate the process after the expiry of the period of ten days from the date of delivery of notice or invoice

<sup>49</sup> (IB) 673/2017.

<sup>50</sup> (C.P. No (IB)-10(PB)/2017)

demanding payment and he does not receive the payment or notice of dispute from the corporate debtor. As per § 3(12) “default” means non- payment of the debt when a whole or any part or installment of the amount of the debt has become due and payable and is not repaid by the debtor or the corporate debtor as the case may be.

In the instant case, GSES, JSEW Ltd., and Xi Mao are the electricity supplier, EVA Films Suppliers and raw material supplier to the Corporate Debtor respectively. Since these are the ‘goods and services’ supplied by them to the Corporate Debtor, they do fall within the purview of the definition of Operational Creditors under § 5(20).

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### ISSUE 3.2] MAINTAINABILITY OF CLAIMS OF OPERATIONAL CREDITORS

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The issuance of ‘demand notice’ *prima facie* by the Operational Creditors to the Corporate Debtor is *a sine qua non* after probing into § 9 of the Code. The provisions assert on the delivery of demand notice or invoice demanding payment from the corporate debtor; thereby making it an essential element in order to initiate corporate insolvency proceedings<sup>51</sup> against the corporate debtor after the expiry of ten days.

The Tribunal emphasized the importance of sending ‘demand notice’, stating that it is crucial for putting the Corporate Insolvency Process under § 9 of IBC into motion and in case of failure on part of the Operational Creditor, it shall disentitle him from proceeding further.<sup>52</sup> However, in the instant case, the Operational Creditors have issued a demand notice to the Corporate Debtor for the payment of dues<sup>53</sup> and thus, the application of Operational Creditors is maintainable.

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### ON MERITS

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### ISSUE 3.3] CLAIMS RAISED BY GSES

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By virtue of § 8(2) of the code, the Corporate Debtor, i.e., New Age was under a legal obligation to provide GSES with due information regarding its inability to repay its dues which it did not comply with. Further, it is pertinent to note that a notice was served to New Age on 9<sup>th</sup> March of clearance of dues amounting to Rs. 85 Lakh which was due since last 9 months on the Corporate Debtor. A time period of 10 days was duly provided to the Corporate Debtor to repay its debts which it clearly did not pay.

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<sup>51</sup> M/S Rave Scans Pvt. Ltd. Vs. Indian Overseas Bank and Ors., CP. No. (IB)-01(PB)2017

<sup>52</sup> Manish Kumar v. Iyogi Technical Services (P) Ltd., CP No. IB-33 (PB) 2017

<sup>53</sup> *Compromis*, p.6

Despite the fact that electricity being an essential supply to the Corporate Debtor under the ambit of Regulation 32 of the Code, it is noteworthy to point out that as pointed out above, the demand notice was issued against the entity much prior to the initiation of resolution proceedings. Herein, the claim of GSES is sustainable on the ground that the Corporate Debtor had been defaulting against GSES since past 9 months and in such circumstances the claim of Rs. 1.2 crore stands justified.

In *Manish Kumar v. Iyogi Technical Services (P) Ltd.*<sup>54</sup> the Tribunal emphasized the importance of sending "demand notice", stating that it is crucial for putting the Corporate Insolvency Process under § 9 of IBC into motion and in case of failure on part of the Operational Creditor, it shall disentitle him from proceeding further.

However, this was not the case with GSES. They had provided with due notice and complied with all legalities. Thus, he is fully entitled to seek his claim from the Corporate Debtor.

In a landmark judgment, *Col. Vinod Awasthy v. AMR Infrastructure Limited*<sup>55</sup>, the court was of the opinion that, "Operational Creditors are those whose liability from the entity comes from a transaction on operations. Thus, the wholesale vendor of spare parts whose spark plugs are kept in inventory by car mechanics and who gets paid only after the spark plugs are sold is an operational creditor. Similarly, the lessor that the entity rents out space from is an operational creditor to whom the entity owes monthly rent on a three-year lease."

The Court observed that even though not specifically mentioned, interest can be claimed by the Operational Creditors over and above principal amount of failure to pay on time on part of the debtor.

In yet another landmark case of *Mukesh Kumar & Anr v. AMR Infrastructure*<sup>56</sup>, the Hon'ble NCLT held that the Cause of action to an operational creditor to file an application before NCLT would arise if, after 10 days' notice given by him to the operational debtor, the operational creditor does not receive any payment from such a debtor or a corporate debtor or in the alternative he does not receive a notice of dispute.

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<sup>54</sup> C.P. No. IB-33 (PB) 2017

<sup>55</sup> C.P. No (IB)-10(PB)/2017

<sup>56</sup> C.P. No. (IB)-30(PB)/2017.

In the instant case, all due measures had been taken by the operational creditor much before the initiation of insolvency proceedings. This makes the claim of GSES maintainable.

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**ISSUE 3.4] CLAIMS RAISED BY JSEW AND XI MAO**

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The claim raised by JSEW and Xi Mao stands valid as the amount to the tune of Rs. 20 crores and 15 crores is based on the past dues of the Corporate Debtor. The act of halting further supplies up till payment of such dues is completely justifiable as JSEW and Xi Mao are regular suppliers of raw material to New Age and after much deliberation, it was forced to take such a decision on 8<sup>th</sup> March 2017 to cut down on supply to an entity which was not clearing its dues.

Since raw material is not covered under the ambit of ‘essential goods’ as explained under Regulation 32 of the IBBI Regulations on Insolvency Regulation Process for Corporate Persons, there is no further obligation on the suppliers to carry on with the supply before the settlement of such claims.

Operational debt is normally based on an agreement to pay for goods or services, it does not mean that interest cannot be claimed in the times to come, it is a normal practice that trade payables are payments deferred for a fixed time, if the party fails to repay within the fixed time, then interest will be claimed over operational debt as well.<sup>57</sup>

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<sup>57</sup> DF Deutsche Forfait AG and Ors. v. Uttam Galva Steel Ltd. C.P. No. 45/I & BP/NCLT/MAH/2017.

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## IV. ARGUMENTS ON BEHALF OF OTHER PARTIES

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### FROM JKL PVT. LTD.

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#### ISSUE 4.1] WHETHER OR NOT THE APPLICATION FILED BY JKL PVT. LTD. TO OBTAIN IM FROM RP IS MAINTAINABLE?

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It is humbly submitted that the application filed by JKL Pvt. Ltd. is maintainable. The grounds for the same have been discussed keeping in mind that JKL Pvt. Ltd. was right in seeking the copy of Information Memorandum. In order to seek Information Memorandum, the party shall be a potential resolution applicant as demanded by Regulation 36<sup>58</sup>.

*Resolution Applicant-* A Resolution Applicant under § 5(25)<sup>59</sup> defines it to be any person or entity who proposes a resolution plan. The resolution applicant i.e. the person who submits the resolution plan to the resolution professional shall prepare the resolution plan on the basis of information memorandum and submit it to the resolution professional.

**4.1.1] Who can be a Resolution Applicant?** - There are no restrictions as to who can be a resolution applicant, subject to compliance with all applicable laws. This will facilitate proposals from persons interested in commercially viable but insolvent businesses to rescue such entities creating value for all stakeholders in the process.

§ 30 of the Code permits the applicant to submit a resolution plan to the resolution professional prepared on the basis of the information memorandum. However, if an interested party is denied access to such integral information pertaining to the financial standing of the Corporate Debtor, viable proposals for the Corporate Debtor to overcome its stringent times becomes impossible. This hampers the overall functioning of the process as denial of the RP on such frivolous grounds reduces the capability of the entity as a whole from coming up with better opportunities to overcome such distressed times. Therefore, in the instant case, JKL Pvt. Ltd. stands qualified to be a potential resolution applicant.

**4.1.2] Refusal to provide the IM by the RP stands arbitrary-** The RP provided Blue Plaza and promoters of the company with the IM but refused to provide the same to JKL.<sup>60</sup> The

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<sup>58</sup> Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

<sup>59</sup> Insolvency and Bankruptcy Code, 2016.

<sup>60</sup> *Compromis*, p.10

ground of JKL being a non-serious party is a highly vague and absurd stand of the RP. The discriminatory act of the RP for JKL is against the principles of natural justice and equality.

*The rationale of the Code-* Other than the objectives of the Code mentioned in its Preamble, the Tribunal went on to say that IBC is an effective legal framework for its timely resolution of insolvency and bankruptcy which supports the development of credit markets and encourages entrepreneurship. It would also improve ease of doing business and facilitate more investments leading to higher economic growth and development.<sup>61</sup>

It is pertinent to note that JKL was in the same business as New Age. It was the fourth largest manufacturer of solar panels in India.<sup>62</sup> On the outset where the nature of business of both the entities was same, it can be well established that JKL, being a competitor of New Age, was in a much better position to propose a resolution plan than any other interested party as a competitor of the Corporate Debtor is well aware of the nuances of the business and what possible proposals could revive the Corporate Debtor from its doom in the most efficient manner. Thus, the stand taken by RP of JKL being a non-serious party to the proceedings stands arbitrary and diminished from its very inception.

#### FROM 'MD'

#### ISSUE 4.2] CLAIM OF POSSESSION OF MUMBAI FLAT BY MD IN PERSONAL CAPACITY

§ 19 of the Code states that every personnel of the Corporate Debtor, viz. its promoters or any other person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the Corporate Debtor.<sup>63</sup>

Adhering to this section of the Code, the IRP was absolutely right in demanding cooperation from the Managing Director in Corporate Insolvency Proceedings. However, it is pertinent to note that the Mumbai flat of New Age has been sold to the Managing Director by a resolution passed by the Board of Directors.<sup>64</sup> Therefore, it is not to be befuddled with the fact that Mumbai flat is no more in the official capacity of the corporate debtor and is now the

<sup>61</sup> Kamineni Steel & Power India Pvt. Ltd., CP(IB) No. 11/10/HDB/2017 *see also*, M/s. Krishna Kraftex Private Limited v M/s. Krishna Kraftex Private Limited, CP. No. (IB)- 78(ND)2017.

<sup>62</sup> *Compromis*, p.10

<sup>63</sup> Insolvency and Bankruptcy Code, 2016 § 19.

<sup>64</sup> *Compromis*, p.5

personal property of the MD. Therefore, the stand of MD claiming not to give possession of the flat to the IRP was absolutely correct as he was acting in his personal capacity.

### FROM PUBLIC DEPOSITORS

#### ISSUE 4.3] ISSUE ON BEHALF OF PUBLIC DEPOSITORS

The Public depositors filed claim in the capacity of operational creditors due to ambiguity of the code. The IBC, being at its nascent stage provides for no specific clause for filing of claim by the Public Depositors.

§ 5(21) of the code defines operational debt, according to which all claims in respect of provisions of goods and services or debt in respect of repayment of dues; fall under the category of operational debt. § 5(8) of the code defines financial debt as debt which is disbursed against time value of money.

Since, there is uncertainty as to under which head would the claim of public depositors be filed and public depositors, being legit creditors of the Corporate Debtor, had provided funds for meeting working capital needs, their claim must be given due consideration.

In *Hind Motors India Ltd. v. Adjudicating Authority*, NCLT, Chandigarh<sup>65</sup>, vide order dated 10<sup>th</sup> April 2017, the Hon'ble Bench ordered that if 'public depositors' put forward their claim as operational creditors and the RP or the tribunal do not accept the claim on the ground that they are not 'financial creditor' on the ground that they are not 'financial creditor', the same can be adjudicated and appealed against at the concerned forum.

Further, necessary jurisprudence and amendments to the code must be made to bring more clarity and precision, thereby providing room for all sorts of creditors to ascertain their claims and be heard by the Hon'ble Bench against their grievances.

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<sup>65</sup> Company Appeal (AT) (Insolvency) No. 11 of 2017.

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

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**ON DUTIES OF IRP**

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**ISSUE 5.1] THE IRP AND RP COMPLIED WITH ALL THE DUTIES VESTED IN HIM**

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It is humbly submitted that IRP and RP complied with all the duties vested in him by the virtue of § 18 of IBC. An IRP or RP are intermediaries who play a key role in the efficient working of the bankruptcy process. In the resolution process, the insolvency professional verifies the claims of the creditors, collects the information regarding the business, assets, finances of the corporate debtor, constitutes a creditors committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan.

An IRP shall perform all his functions as contemplated under the code, *inter alia*, vide §§ 15, 17, 18, 19, 20 & 21 of IBC. It is further made clear that all the personnel connected with the corporate debtor, its promoters or any other person associated with the Management of Corporate Debtor are under the legal obligation under § 19 of IBC to extend every assistance and cooperation to the IRP, as may be required by him in managing the affairs of the corporate debtor.<sup>66</sup> Mr. Amit Thakur has complied with all the duties vested in him, post his appointment as IRP, as per the provisions mentioned under § 18 (a) – (d).

**5.1.1] Collation of claims by Mr. Amit Thakur:** In the instant case, Mr. Amit Thakur has collated the claims of various parties, collected the information regarding the New Age's assets and took in hand their functioning. To ensure the same he even visited the Gujarat plant to take possession of the same in consonance with the duty mentioned under § 18 (f) of IBC but the performance of the same duty was abrogated by the local political leaders along with the union workers who prevented him from taking the possession of the unit of New Age in Gujarat. Despite all the unfavorable conditions and circumstances Mr. Amit Thakur, IRP, took appropriate steps and appointed XYL security services for preserving the unit of New Age.

**5.1.2] Constitution of CoC:** In compliance with § 18(c) of IBC, the IRP, Mr. Amit Thakur, has constituted the CoC (Committee of Creditors) on 22<sup>nd</sup> April 2017. Furthermore, as per Regulation 17(2) of the code, the IRP convened the first CoC meeting within seven days of the constitution of CoC.

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<sup>66</sup> Davinder Ahluwalia v. M/s Sumit Aviation [IB No. (IB)-229 (ND)/2017

**5.1.3] Taking over the possession of the Mumbai flat by Mr. Amit Thakur:** By the virtue of § 18 and 19 of the IBC, the IRP has the right to take over the possession of the Mumbai flat that has been sold to the MD of the New Age as the same is an asset of corporate debtor and the amount of the flat has yet not been fully paid. Furthermore, the MD is obliged to coordinate and comply with the decisions of IRP and give away the possession of the sold property on the same grounds.

**5.1.4] Checking out the Undervalued Transaction of Mumbai flat:** In accordance with the provisions mentioned under § 43 (1) and § 43 (3)(b) the following sale of Mumbai flat stands and qualifies to be a ‘preferential transaction’ as the same was not made in the ordinary course of business or financial affairs of the corporate debtor or the transferee but was made so to raise the funds of the corporate debtor to enhance the liquidity to pay off debts incurred by them.

The IRP has complied with the above duty by seeking the possession of the Mumbai flat. Moreover, by the virtue of § 45 (2)(b), the IRP has the duty to notify the tribunal regarding any undervalued transaction that has taken place to declare the same transaction as void and reverse. In case there is any violation, the IRP would be at the liberty to make appropriate application to this tribunal with a prayer of passing an appropriate order. The IRP shall be under the duty to protect and preserve the value of the property of ‘corporate debtor’ as a part of its obligation imposed by § 20 of IBC and perform all his functions strictly in accordance with the provisions of IBC.<sup>67</sup> Mr. Amit Thakur has complied with the duty by filing the application before NCLT and informing about the undervalued transaction of the Mumbai flat.

**5.1.5] Attending all the meetings of CoC:** Through the first CoC meeting, Mr. Dhivesh Sharma was appointed as the RP in compliance to the § 22(2). Further, the RP is under the obligation to convene and attend all the CoC meetings as per § 25(f) of the IBC. Furthermore, the RP has also fulfilled and abided by his duties mentioned under the § 25(g) in accordance with §§ 29 and 25(i) whereby the RP should prepare the information memorandum and present all resolution plans at the meetings of CoC respectively.

**5.2.6] Excluding of RHPL from CoC:** RHPL cannot be a party to the transaction as their dues have been met with and they are not any financial creditor of the Corporate Debtor. As per § 21(2) of the Code, CoC should comprise of all financial creditors and RHPL is a JV Company of New Age. New Age had complied with all its obligations towards RHPL as it had paid initial

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<sup>67</sup> Davinder Ahluwalia v. M/s Sumit Aviation C.P. IB No. (IB)-229 (ND)/2017.

90% amount at the time of agreement and rest 10% in the month of October. Therefore, on the fulfillment of all the due payments, there seems to be no reasonable ground for the RP to add RHPL in the CoC.

## ON COMI

### ISSUE 5.2] CENTRE OF MAIN INTEREST LIES IN NEW DELHI AND NOT SINGAPORE

It is hereby submitted that Indian laws on cross border insolvency are at its nascent stage and still striving to be at par with international legal standards. In the event of an international insolvency proceeding involving an Indian company, Indian courts are endeavoring to provide any aid or assistance to a foreign liquidator.<sup>68</sup> Thus, reliance has been made to UNCITRAL Cross Border Insolvency Code.

In the instant case, the center for main interests of the proceedings initiated by Mr. Chew Jon lies in New Delhi. As per Article 16 para 3<sup>69</sup>, any proceeding pending in the debtor's center of main interests is expected to have principal responsibility for managing the insolvency of the debtor. Moreover, the debtor's center of main interests is in the place where they have their registered office or the habitual residence.

UNCITRAL Model Law on Insolvency is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legislation or another process that often apply and to provide certainty w.r.t. the decision to recognize. These core provisions accord recognition to orders issued by the foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceeding.<sup>70</sup>

New Age (corporate debtor) has its registered office in New Delhi and thus, complying with the conditions as mentioned above, the center of the main interests of proceedings shall lie in India. Thus, the proceedings initiated in Singapore should be carried forward in India.

**5.2.1] Centre of Main Interest:** The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. Any foreign proceeding should be recognized as a 'main

<sup>68</sup> Reserve Bank of India, Report of The Advisory Group on Bankruptcy Laws, (May 9, 2001) available at <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/20811.pdf>.

<sup>69</sup> UNCITRAL, Model Law on Cross Border Insolvency

<sup>70</sup> SHAMBHU K. THAKUR, INSOLVENCY AND BANKRUPTCY 88 (1<sup>st</sup> ed., 2017)

proceeding’ or a ‘non- main proceeding’.<sup>71</sup> Article 3(1) of UNCITRAL<sup>72</sup>, enables the ‘main insolvency universal proceedings’ to be opened in the state where the debtor has his center of main interests.

‘Main insolvency proceedings’ have a universal effect on all creditors, wherever located. Thus, any legal foreign proceedings against the corporate debtor or the company should take place post the due consideration to the aspect that center of main interests (COMI) should be in the same place where the COMI is on the commencement date of the foreign proceedings. The concept of COMI must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

In one of the cases, the two parallel main proceedings arose because each court decided that Eurofood's center of main interests (CoMI) was located in its own country. 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. 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.<sup>73</sup>

Thus, the claim by Mr. Chew John to start proceedings against the New Age (corporate debtor) in Singapore is invalid and the application is non- sustainable too, as the subsidiary company or any other establishment<sup>74</sup> from where the debtor has been operating will not sustain and qualify to be the COMI by the virtue of Article 16, para 3 and Article 17 para 2, and the same would primarily lie in New Delhi where the registered office of New Age is established.

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<sup>71</sup> Article 17 paragraph 2, UNCITRAL

<sup>72</sup> UNCITRAL, Model Law on Cross Border Insolvency

<sup>73</sup> *In re Eurofood IFSC Ltd.*, (2004) IESC 45 (Ir.) ; *In Re Stanford International Bank* [2009] EWHC 1441 (Ch).

<sup>74</sup> UNCITRAL, Article 2(f).

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**ON RESOLUTION PLAN**

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**ISSUE 5.3] PROPOSED AMENDMENTS TO THE RESOLUTION PLAN OF NEW AGE  
(CORPORATE DEBTOR)**

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Any plan proposed by a person for insolvency resolution of the corporate debtor as a going concern is called as 'resolution plan' under § 5(26). There is no limit on the number of resolution plan that can be proposed in a CoC meeting or the number of modifications that can be made to one resolution plan. Resolution professional is under the obligation to examine each resolution plan received by him. § 30 of IBC and Regulation 38 of IBBI mentions the necessary contents of the resolution plan.<sup>75</sup> The amendments proposed in the resolution plan submitted by new Age, in consonance with the CIRP Regulation 37 are as follows -

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**PROPOSED RESOLUTION PLAN**

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- i. Sell 20% equity of THSPL Pvt. Ltd., the company which owns the Singapore Hotel, to Blue Plaza.
- ii. Auctioning of the New Age's Mumbai flat and the assets attached to it after being acquired by the MD.
- iii. Sale of one of the plants in Karnataka and its machinery on prior condition of taking it on the lease, to raise funds and liquidity for the Corporate Debtor.
- iv. Payment of 60% Insolvency Resolution Process Cost by New Age in priority to all other debts of the Corporate Debtor.
- v. Payment of all the Financial Creditors of Corporate Debtor by 45% haircut in the amount payable over a period of five years, without interest.
- vi. Payment to Operational Creditors, on an interest-free basis, in a staggered manner over a period of three years, post completion of payments to all the Financial Creditors of Corporate Debtor.
- vii. Payments of statutory dues, in a staggered manner, over a period of three years, on interest-free basis in three equal yearly instalments, post completion of payment of the Financial Creditors and operational creditors of the company;

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<sup>75</sup> Synergies-Dooray Automative Limited case, CA No. 123/2017 In C.P. (IB) No. 01/HBD/2017.

- viii. Since the company expects great returns in the coming years the due payment of maturity amount of FCCB's and Masala bonds will be paid off on the due maturity date.
- ix. Continued usage and operation of the facilities of the Corporate Debtor, in the manner, in which they are being presently utilized as the Resolution Applicant.
- x. The plan envisages a lesser cash outage, as the resolution applicant itself is one of the major secured financial creditors of the Corporate Debtor.
- xi. Continued employment to all the erstwhile workmen of the Corporate Debtor with due and timely payment of salaries.

As per CIRP Regulation 38(2)(a) the plan proposes to revive the viability of the company and is fully operational for 5 years. The company plans to raise funds, in accordance with CIRP Regulation 37(a) and 37(b), by selling 20% equity of THSPL which owns the Singapore hotel, one of the plants in Karnataka whereby, the company would be in a capacity to pay off the immediate payable debts.

Furthermore, the company expects good returns from various ongoing concerns which include the joint venture project started on Raipur land. Through the resolution plan the IRP has proposed that the Mumbai flat which will be acquired by the Managing Director shall be auctioned severely from its assets, to sale of the plant and machinery and the land of the Karnataka plant on the condition of taking it back on lease, so that company would have sufficient funds to keep itself as a going concern and simultaneously take care of its debts.

With the funds raised and returns received from various ongoing projects, the company will pay off the 'financial creditors' and partly pay the CIRP proceeding cost at the first priority. Hence, by virtue of aforementioned assets and means, the sources to raise funds are explicitly mentioned in abidance to CIRP Regulation 38.

Post that, the payments will be done to the unsecured creditors, statutory dues and the FCCB's etc. keeping the other concerns of the company running. The proposal expects swift recovery from the debts that have been incurred with great accomplishments and projects in future.

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**PRAYER**

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*Wherefore*, in the light of the facts and circumstances narrated, issues raised, authorities cited and arguments advanced, the Hon'ble NCLT may graciously be pleased to adjudge and hold:

**I. ON BEHALF OF THE FINANCIAL CREDITORS**

1. *To* declare initiation of proceedings filed by the RST Bank as maintainable.
2. *To* declare claims of People's Bank and Marvel as inflated and not maintainable.
3. *To* replace the IRP.
4. *To* instruct the IRP to appoint another valuer in place of M/s AKP Valuers in compliance with Regulation 27 of the Code.
5. *To* direct the Corporate Debtor to repay the dues owed to the concerned parties.

**II. ON BEHALF OF THE CORPORATE DEBTOR**

1. *To* declare initiation of proceedings filed by the RST Bank as not maintainable.
2. *To* declare IRP's acceptance of Marvel's claim as not maintainable.
3. *That* the act of RP of termination of lease was *ultra vires* his duties.

**III. ON BEHALF OF THE OPERATIONAL CREDITORS**

1. *To* declare inclusion of claims of GSES, JSEW Ltd. and Xi Mao as maintainable.
2. *To* direct IRP to include the aforementioned claims in the list of creditors.
3. *To* direct the Corporate Debtor to repay the dues owed to the concerned parties.

**IV. ON BEHALF OF THE OTHER PARTIES**

1. *To* direct IRP to include claims of Public Depositors in the list of Creditors.
2. *To* direct the RP to provide JKL Ltd. with a copy of the IM.

**V. ON BEHALF OF THE IRP/RP**

1. *To* direct the MD of New Age to handover the possession of Mumbai flat to IRP.
2. *To* declare the COMI of insolvency proceedings to be India and not Singapore.
3. *To* accept the resolution plan as proposed, modified and accepted by the CoC.

*And pass any order that this Hon'ble Court may deem fit in the interest of equity, justice, and good conscience.*

And for this act of kindness, the counsel shall duty bound forever pray.

(Sd/- On Behalf of Concerned Parties)