

**TEAM CODE: 108**

**INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION, 2020**

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**IN THE MATTER OF**

**FORTUNA INDUSTRIES LIMITED, CORPORATE DEBTOR**

**[CP(IB)/PB/7/253/2020 and CP(IB)/PB/10/93/2020 with CP(IB)/PB/95/21/2020]**

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**WRITTEN SUBMISSIONS ON BEHALF OF RAVI SHANKAR AND DEEPAK DEV**

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**LIST OF ABBREVIATIONS**

<b>SYMBOLS</b>	<b>MEANING</b>
&	And
\$	Dollar
¶	Paragraph
%	Percent
§	Section
<b>ABBREVIATIONS</b>	<b>EXPANSIONS</b>
AA	Adjudicating Authority
AIR	All India Reporter
BLRC	Bankruptcy Law Reforms Committee, 2015.
CD	Corporate Debtor
CIRP	Corporate Insolvency Resolution Process
Co.	Company
CoC	Committee of Creditors
Code	Insolvency and Bankruptcy Code of 2016
COMI	Centre of Main Interest
CPC	Code of Civil Procedure, 1908
Cr	Crore
DRT	Debt Recovery Tribunal
Ed.	Edition
FGE	Fortuna Global Enterprises PLC
FIL	Fortuna Industries Limited
FTSL	Fortuna Tele Services Limited
Hon'ble	Honorable
ILC	Insolvency Law Committee on Cross Border

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	Insolvency, 2018.
INR	Indian Rupee
Insolvency Rules 2019	Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019.
IRP	Interim Resolution Professional
LLP	Limited Liability Partnership
Ltd.	Limited
Model Law	UNCITRAL Model Law on Cross Border Insolvency, 1997.
MoU	Memorandum of Understanding
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
No.	Number
p.	Page
PPA	Power Purchase Agreement
Pvt.	Private
RP	Resolution Professional
SBI	State Bank of India
SC	Supreme Court
SCC	Supreme Court Cases
UK	United Kingdom
UNCITRAL	United Nations Committee on International Trade Law
UOI	Union of India
WG	Working Group on Group Insolvency (2019)

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## STATEMENT OF FACTS

### **Background**

**FIL** – It was founded in 1981 by Mr. Atul Dev that deals in diverse businesses from trading in coal to a large complex refinery complex in Tamil Nadu. After Atul's demise, his son, grandson and granddaughter namely, Mr. Deepak, Mr. Rishabh and Ms. Ridhima respectively, run FIL's business with formidable reputation. It is now the largest private oil and gas refinery in country. A consortium of 12 lenders had financed FIL with INR 43,034 cr for its operations.

**FTSL** – It is the wholly-owned subsidiary company of FIL founded in 2008 that is into telecom business. In its initial years, it provided free virtual telecom services from 2014 to 2016 and managed to become the second largest telecom company in India in terms of its 4G user base by the year 2018. In this process of expansion, it had raised finance of INR 32,000 cr from a consortium of 11 lenders. In return and due to limited assets of FTSL, lenders were provided corporate guarantees by FIL and personal guarantee by Mr. Deepak.

**FGE** - It was incorporated in UK in 2011, headquartered in Leeds, which helped the Fortuna group enter European market in retail and fashion businesses. Between 2011 and 2019, FGE expanded exponentially by acquiring various local brands in Europe. In this process, it raised finance of \$1.2 billion from European banks led by HSBC. As one of the securities, lenders were provided with a pledge over the entire partnership interest of Mr. Deepak in Quest Holding LLP.

### **Holding Structure of Fortuna Group**

The entire operations of Fortuna group are controlled by the Promoter family from their corporate offices in New Delhi. A core group of senior managers would assist the family in controlling the group. In terms of the family arrangement, all family members are the board members of FIL, moreover, Mr. Rishabh and Ms. Ridhima are also directors in FTSL and FGE respectively, among other directors in each companies.

In terms of holding, Atul Dev Trust holds 55% shares in FIL and Ms. Ayesha is the trustee of the said trust. The beneficiaries of the trust are Quest Holdings LLP that has Mr. Deepak, Mr. Rishabh and Ms. Ridhima as partners with their respective partnership shares as 51%, 24.5% and 24.5%. In FGE, Quest Holdings LLP is the 99.99% shareholder.

**Externalities faced by Fortuna Group**

In 2018, the breakthrough of electric vehicles resulted in massive decrease in demand for oil and gas which led to enormous loss of business for FIL. FGE faced an externality when the imports from China were banned by EU and acquisition of local brands was not bearing the expected outcome. With advent of 5G and insufficient capital, FTSL also started defaulting in payments.

In 2018, continuing externalities led FIL to provide financial assistance of aggregate INR 500 cr to FTSL and FGE. In due course, on 30.09.2019 the loan accounts of FIL were classified as NPA due to externalities and defaults. However, FIL managed to repay the outstanding dues to SPL on basis of the settlement agreement on 01.04.2020, for the supply of specified units of electricity.

**Applications and Objections pertaining to Insolvency Resolution Proceedings**

Against FGE and Mr. Deepak - Post the defaults in repayment, European lenders of FGE led by HSBC initiated CIRP under applicable UK law and English Court appointed Mr. James as the IA and they also initiated insolvency resolution process against Mr. Deepak under IBC. Objections by Mr. Deepak – He is contesting the petition filed by HSBC against him both on grounds of lack of jurisdiction of Hon’ble NCLT and also on merits.

Against FIL - Lenders of FIL led by SBI initiated CIRP under section 7 of IBC before the NCLT, Principal Bench and upon its admission, Mr. Ravi was appointed as IRP, who was subsequently confirmed as RP by CoC of FIL. RP also filed an application to annul the settlement agreement between SPL and FIL on grounds of it being preferential and fraudulent transaction. Mr. James and SPL are contesting the alleged preferential and fraudulent transaction.

Against FTSL - Post commencement of CIRP against FIL, CoC of FIL resolved RP to take the lead of FTSL. After notifying the board of FTSL and on authority of CoC of FIL, RP initiated CIRP under section 10 of IBC in shareholder’s derivative capacity and also filed a separate interlocutory application for consolidation of insolvency proceedings of FIL, FTSL and FGE for value maximisation. Objections by Mr. James – He is also challenging the maintainability of section 10 petition against FTSL and contesting the consolidation of CIRP of FIL, FTSL and FGE.

The AA has listed all aforementioned petitions for arguments and consideration on 08.01.2021.

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**ISSUES RAISED**

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**ON BEHALF OF MR. RAVI SHANKAR**

- I.** Whether the settlement agreement dated 01.04.2020 is an avoidable transaction?
  - II.** Whether the letter signed by Mr. Deepak Dev to the creditors of FTSL amounts to guarantee contract?
  - III.** Whether Section 10 petition against FTSL is maintainable?
  - IV.** Whether the bar of Section 10A is applicable?
  - V.** Whether the CIRP of FIL, FTSL and FGE should be consolidated?
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**ON BEHALF OF MR. DEEPAK DEV**

- I.** Whether the petition filed by HSBC against Mr. Deepak Dev can be admitted by the Hon'ble NCLT?
  - II.** Whether the settlement agreement dated 01.04.2020 is an avoidable transaction?
  - III.** Whether the letter signed by Mr. Deepak Dev to the creditors of FTSL amounts to guarantee contract?
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## ANALYSIS OF ISSUES

ON BEHALF OF MR. RAVI SHANKAR

### ISSUE I. Whether the settlement agreement dated 01.04.2020 is an avoidable transaction?

1. It is humbly submitted that the settlement agreement dated 01.04.2020 between FIL and SPL is preferential and fraudulent in nature because, *firstly*, it constitutes preferential transaction benefitting an operational creditor over financial and secured creditors and *secondly*, it was done in the twilight period and defrauded the creditors.

#### i) It constitutes preferential transaction benefitting an operational creditor

2. The term ‘preference’ is not defined under the Code, however, it generally connotes “*favoring of one person over another*”.<sup>1</sup> The Code defines preferential transactions as the transactions intentionally or unintentionally<sup>2</sup> benefitting creditors of an antecedent financial debt or operational debt that has effect of putting them into a beneficial position than they would have been in *pari passu* distribution of assets under §53.<sup>3</sup> Moreover, it also ensures that “*the defaulters should not go scot free, if the funds have been syphoned away*”.<sup>4</sup> In the present case, FIL preferred SPL, an operational creditor,<sup>5</sup> over its financial and secured creditor, thus constituting preferential transaction.
3. Reliance must be placed on the *Swiss Ribbons*<sup>6</sup> case, where the Hon’ble Apex Court had established an intelligible differentia equating financial creditors to secured creditors and the operational creditors to unsecured creditors respectively. However, pursuant to this transaction, SPL became a secured creditor from an unsecured creditor with a more beneficial position in accordance with §53 of the Code.

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<sup>1</sup> *Preference*, BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

<sup>2</sup> Anuj Jain IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd, 2019 SCC OnLine SC 1775.

<sup>3</sup> IBC, 2016, §43, No. 31, Act of Parliament, 2016 (India).

<sup>4</sup> SBI Global Factors Ltd. v. Sanaa Syntex Private Ltd., 2018 SCC OnLine NCLT 14762.

<sup>5</sup> Moot Proposition, p.6.

<sup>6</sup> Swiss Ribbons Pvt. Ltd. v. UOI, (2019) 4 SCC 17.

4. In present case, FIL was in a precarious financial condition yet it gave an undue advantage to SPL in terms of the PPA.<sup>7</sup> Moreover, the transaction was not made in the ordinary course of business as the insolvency commenced against FIL on 30.06.2020. This is within the relevant time of one year even for unrelated party transaction and in the zone of insolvency. Thus, fulfilling the ingredients of §43 of the Code.<sup>8</sup>

ii) The said transaction was done in the twilight period and defrauded the creditors

5. It is submitted that the said transaction was made in bad faith to defraud the creditors. In present case, the loan accounts of FIL were classified as NPA as per the RBI guidelines due to various externalities and defaults.<sup>9</sup> Thus implying that the FIL and its directors had the knowledge<sup>10</sup> of the fact that it would not be able to pay its other debts and it was also on the brink of insolvency, therefore such payment amounts to fraudulent preference as it was made to one creditor leaving FIL in a position with fewer funds and thereby turning ‘blind-eye’<sup>11</sup> towards its secured creditors.
6. It is further submitted that Mr. Deboshish Sahasa is a good acquaintance to Mr. Deepak Dev and that Mr. Deboshish Sahasa, acting on behalf of SPL, had the sufficient information<sup>12</sup> about the initiation of CIRP against FIL. The assets of FIL were classified as NPA and that a Joint Lenders Forum was constituted to restructure the loans of FIL. Moreover, the debts of company are a public knowledge.<sup>13</sup> It is submitted that the said transaction has stripped off funds and was done in bad faith. There was no due diligence on the part of the directors and it aggravated the financial distress of FIL. Thus, it is of fraudulent nature as the management failed to consider the best interests of its creditors along with company in the twilight period.<sup>14</sup>
7. It is further submitted that it is one of the duties of the RP to avoid such transactions which were made by the management of CD to protect the interests of the creditors and to manage the

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<sup>7</sup> WADHWA LAW CHAMBERS, CONCISE COMMENTARY ON THE IBC, 2016, 324 (Raghav Wadhwa ed., 1<sup>st</sup> Ed. 2020).

<sup>8</sup> Anuj Jain IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd, p.75, ¶20, 2019 SCC OnLine SC 1775.

<sup>9</sup> Moot Proposition, p. 7.

<sup>10</sup> IBC, 2016, §66(2), No. 31, Act of Parliament, 2016 (India).

<sup>11</sup> Manifest Shipping Co. Ltd. v. UniPolaris Co. Ltd., [2003] 1 AC 469 (UK).

<sup>12</sup> IBC, 2016, §44, No. 31, Act of Parliament, 2016 (India).

<sup>13</sup> Companies (Acceptance of Deposits) Rule, 2014, rule 16(A).

<sup>14</sup> Winkworth v Edward Baron Developments Co Ltd, (1987) 1 All ER 114 (UK); Brady v Brady, (1989) 3 BCC 535 (CA) (UK); *In Re Horsley and Weight Ltd*, (1982) 3 All ER 1045, p. 1055 (UK).

operations of the CD as a going concern, for which funds are essential to enable the company to meet its day-to-day monetary needs.

**ISSUE II. Whether the letter signed by Mr. Deepak Dev to creditors of FTSL amounts to guarantee contract?**

8. It is humbly submitted that the letter signed by Mr. Deepak Dev to the creditors of FTSL qualifies as the contract of guarantee because the intention and the requirements of guarantee contract are fulfilled.

i) The intention and requirements of the guarantee contract are established

9. A letter of comfort will be recognized as guarantee contract, if it has some promissory character to it.<sup>15</sup> To determine this, the intent of the parties and substance of the letter is to be analyzed.<sup>16</sup> Further, there shall be a presumption on creating a legal obligation and same has to be rebutted by the one who is challenging the letter.<sup>17</sup> If the letter of comfort complies with the requirements of §126 of the Indian Contract Act, then it may be classified as a guarantee.<sup>18</sup> This means there must be a debtor, a creditor and a surety who agrees to pay in case of default by the debtor. In the present case, there is intent to create a legal obligation as the creditors of FTSL had asked for corporate guarantees as well as personal guarantee from Deepak Dev, since FTSL had only a limited number of assets.
10. In pursuance to it, Mr. Deepak Dev signed a letter specifically guaranteeing that FTSL would meet with all repayment obligations.<sup>19</sup> Considering the wordings of the letter, it becomes clear that Deepak Dev intends to be the surety to the creditors of FTSL. The wording of the letter with regards to ‘guarantee’ is clear leaving out any vagueness.<sup>20</sup> Thus, the letter by Mr. Deepak Dev to the creditors of FTSL qualifies as a contract of guarantee.

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<sup>15</sup> Lompart S.A. (BBL) v. Australian National Industries, (1989) 21 NSW LR 502 (Australia).

<sup>16</sup> Lucent Technologies v. ICICI Bank, ¶33, 2009 SCC OnLine Del 3213.

<sup>17</sup> Lompart S.A. (BBL) v. Australian National Industries, (1989) 21 NSW LR 502 (Australia).

<sup>18</sup> Yes Bank v. Zee Entertainment, LD-VC-IA NO. 01 OF 2020 IN LD-VC- SUIT NO. 120 of 2020.

<sup>19</sup> Moot Proposition, p. 3.

<sup>20</sup> Commonwealth Bank of Australia v. TLI Management Pty Limited (1990) V.R. 510 (Australia).

**ISSUE III. Whether Section 10 petition against FTSL is maintainable?**

11. It is humbly submitted that the section 10 petition against FTSL is maintainable because, *firstly*, CoC has all the requisite powers to take the management decisions during CIRP, *secondly*, the requirements of petition under section 10 are fulfilled and *lastly*, it is not barred by the section 11.

i) CoC has all the requisite powers to take management decisions during CIRP

12. The Code has adopted the principal of “creditor-in-possession”.<sup>21</sup> As soon as the CIRP of a CD commences the control of CD is taken away from the management of the company.<sup>22</sup> It first shifts to interim resolution professional<sup>23</sup> and ultimately lands with the CoC<sup>24</sup> representing the financial creditors of the CD. When CoC is formed and a RP is appointed, many decisions require the approval of CoC<sup>25</sup>, as RP only has an administrative role.<sup>26</sup>
13. The CoC reserves the right to take decisions regarding the management of a subsidiary.<sup>27</sup> The suspended management during the CIRP has limited role and limited rights.<sup>28</sup> They have to extend co-operation to the RP<sup>29</sup> and general duties in case of directors.<sup>30</sup> They are expected to assist the CoC and act in best interest of creditors<sup>31</sup> in matters pertaining to company debts and subsequent resolution. During CIRP, the CoC through RP would come in the shoes of the management by the virtue of operation of law.<sup>32</sup> Thus, they are fully empowered by the law to take any kind of decisions that the management of CD would take. In the present case, the CoC has taken such decision to initiate §10 petition by passing the resolution, that in normal circumstances the management of CD would have passed.

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<sup>21</sup> VINOD KOTHARI, IBC: USHERING IN A NEW ERA, 73 (Meghna Mittal ed. 2019).

<sup>22</sup> *Innoventive Industries v. ICICI Bank*, ¶11, (2018) 1 SCC 407.

<sup>23</sup> IBC, 2016, §17, No. 31, Act of Parliament, 2016 (India).

<sup>24</sup> IBBI Discussion paper 1, ¶3, Corporate Insolvency Resolution Process (Nov. 3<sup>rd</sup>, 2019)

<sup>25</sup> IBC, 2016, §28, No. 31, Act of Parliament, 2016 (India).

<sup>26</sup> *Swiss Ribbons Pvt. Ltd. v. UOI*, ¶¶88-91, (2019) 4 SCC 17.

<sup>27</sup> IBC, 2016, §28(j), No. 31, Act of Parliament, 2016 (India).

<sup>28</sup> *Vijay Kumar Jain v. Standard Chartered Bank*, ¶14, 2019 SCC OnLine SC 103.

<sup>29</sup> IBC, 2016, §19, No. 31, Act of Parliament, 2016 (India).

<sup>30</sup> *In Re HLC Environmental Projects Ltd.*, [2013] EWHC 2876 (Ch) (UK).

<sup>31</sup> *BTI LLC v. Sequana SA* [2019] EWCA Civ 112 (UK).

<sup>32</sup> IBBI, Circular number IP/002/2018 (Jan. 3<sup>rd</sup>, 2018).



14. The said decision taken by the CoC was done through their commercial wisdom, which cannot be questioned.<sup>33</sup> CIRP is a market driven process and the success of this process is contingent upon the commercial decision and competence of the RP and CoC.<sup>34</sup> A CoC is deemed to be correct forum in determining the possibilities and path to take for a stressed CD.<sup>35</sup> The Code never envisioned to equip AA with the powers to question or to reverse the decisions taken by the CoC in its commercial wisdom.<sup>36</sup> This principle of the Code shall be interpreted harmoniously with the intent of Code and therefore shall also extend to decisions taken by the CoC in the management capacity. FTSL started facing distress leading to defaults and irregular payments, after the holding company went under CIRP.<sup>37</sup> The CoC being in the management's shoes, chose to apply its commercial wisdom to start the CIRP of the distressed subsidiary and also to consolidate it with the holding company to maximize the value and save the subsidiary from its inevitable downfall and liquidation.

ii) Requirements of Section 10 petition are fulfilled

15. It is submitted that every petition filed by a corporate applicant under §10 for CIRP must fulfill certain requirements. These are (1) there must be a default on the debts owed and (2) the other statutory requirements in terms of documents<sup>38</sup> and special resolution<sup>39</sup>. However, the requirement of the special resolution while procedural can be relaxed by AA to prevent abuse<sup>40</sup> and in the interest of justice.<sup>41</sup> In case of substantial shareholding, the defense of lack of shareholders consent cannot be taken and requirement of special resolution can be relaxed.<sup>42</sup> In present case, FIL holds 99.99% in FTSL and if the process of CIRP under §10 is initiated by the management of majority shareholder, it is presumed to be done in good faith.<sup>43</sup>

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<sup>33</sup> Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, ¶39, 2019 SCC OnLine SC 1478.

<sup>34</sup> Chitra Sharma v. UOI, (2018) 18 SCC 611.

<sup>35</sup> MINISTRY OF FINANCE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (2015).

<sup>36</sup> K Shashidhar v. Indian Overseas Bank, 2019 SCC Online SC 257.

<sup>37</sup> Moot proposition, p. 8.

<sup>38</sup> IBC, 2016, §10, r/w The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, rule 7.

<sup>39</sup> IBC, 2016, §10(3), No. 31, Act of Parliament, 2016 (India).

<sup>40</sup> NN Enterprises v. Relcon Infra Projects Ltd., 2020 SCC OnLine NCLT 6.

<sup>41</sup> NCLT Rules, 2016, rule 11.

<sup>42</sup> Amit Gupta v. Yogesh Gupta, 2019 SCC OnLine NCLAT 914.

<sup>43</sup> *Id.*

16. The RP is an agent of AA rather than company. His duty is to protect and preserve the assets of the company than to conduct business.<sup>44</sup> The main object of the Code is to preserve the CD and maximize the value of its assets for resolution and keep it running as a going concern.<sup>45</sup> The basic understanding of going concern is when a company is able to survive and continue operation for the foreseeable future. This assumption is seriously challenged when there are various external threats and uncertainties.<sup>46</sup> It is further submitted that the RP after studying the forensic audits of FTSL<sup>47</sup> concluded that it would not be able to sustain itself for long as it lacks massive funds to move forward with the 5G technology,<sup>48</sup> and hence it should be bought under CIRP.

iii) Bar of section 11 does not apply

17. Certain persons are barred from initiating CIRP under the Code.<sup>49</sup> One category includes the CD who are going under CIRP themselves.<sup>50</sup> However, this does not include the CD from initiating CIRP against other CD who owes money.<sup>51</sup> The inter-corporate deposit by FIL to FTSL to stay relevant in the 5G race amounts to a loan as the money was extended for usage by subsidiary in its principal business activities.<sup>52</sup> The same money was outstanding and was payable to FIL by FTSL.<sup>53</sup> Such claims may have not matured, but a claim can be independent of actual default.<sup>54</sup> This makes FTSL a debtor to FIL and thus, the bar of Section 11 cannot be applied to FIL for initiating CIRP under §10.

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<sup>44</sup> MINISTRY OF FINANCE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE (2015).

<sup>45</sup> Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, 2019 SCC OnLine SC 1478.

<sup>46</sup> International Standard on Auditing 570, Going Concern, [https://www.ifac.org/system/files/publications/files/ISA-570-\(Revised\).pdf](https://www.ifac.org/system/files/publications/files/ISA-570-(Revised).pdf)

<sup>47</sup> Moot proposition, p. 9.

<sup>48</sup> *Id.*, at p. 5.

<sup>49</sup> IBC, 2016, §11, No. 31, Act of Parliament, 2016 (India).

<sup>50</sup> IBC, 2016, §11(a), No. 31, Act of Parliament, 2016 (India).

<sup>51</sup> IBC, 2016, §11(explanation. II), No. 31, Act of Parliament, 2016 (India).

<sup>52</sup> Companies Act, 2013, §185(3), No. 18, Act of Parliament 2013 (India).

<sup>53</sup> Moot Proposition, p. 6.

<sup>54</sup> Axis Bank v. Edu Smart Pvt. Ltd., 2017 SCC OnLine NCLT 1811.

**ISSUE IV. Whether the bar of Section 10A is applicable?**

18. It is humbly submitted that the bar of section 10A should not be applied in the interest of justice and the powers bestowed on the AA.

i) AA has the requisite powers to relax the bar in the interest of justice

19. The said provision was introduced to prevent initiation of CIRP against CD who defaulted on debts after 25.03.2020.<sup>55</sup> The legislative intent of the ordinance was to prevent the CD from going under CIRP due to the covid-19 pandemic. In present case, the FIL group as a whole was struggling before the pandemic. It defaulted on its loan in 2019,<sup>56</sup> and the loan accounts were declared as NPA by the lenders as per the RBI guidelines. It is thus submitted that the inter-linkage of FIL and FTSL were so intrinsic that FTSL had started to default post the commencement of CIRP of FIL. This indicates that the deteriorating conditions of FTSL have no relevance with the ongoing pandemic.
20. The AA reserves the power to pass any orders in the interest of justice and to prevent abuse of legislation.<sup>57</sup> In present case, FTSL is a struggling CD in financial distress and it should not be allowed to escape its legal obligations to creditors. The business affected by the pandemic should benefit from the said ordinance and not FTSL as it has been struggling prior to the stipulated period. It is thus submitted that reasonable classification and the principle of equality<sup>58</sup> should be observed by the AA and the bar of §10A should not be applied.

**ISSUE V. Whether the CIRP of FIL, FTSL and FGE should be consolidated?**

21. It is humbly submitted that the CIRP of FIL, FTSL and FGE should be consolidated because *firstly*, intrinsic inter-linkage of FTSL with FIL, *secondly*, corporate veil of FTSL should be lifted as the required conditions are fulfilled, *thirdly*, FIL and FGE are inextricably linked with each other, *fourthly*, Indian proceedings should be recognized as foreign main proceedings, *fifthly*, the consolidation of CIRP of FTSL, FGE and FIL would lead to value maximization and thus the interests of creditors would be protected and *lastly*, a coordinated and cooperative approach between English and Indian courts would benefit all.

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<sup>55</sup> IBC (Amendment) Ordinance, 2020.

<sup>56</sup> Moot Proposition, p. 7.

<sup>57</sup> NCLT Rules, 2016, rule 11; NN Enterprises v. Relcon Infra Projects Ltd., 2020 SCC OnLine NCLT 6.

<sup>58</sup> State of W.B v. Anwar Ali Sarkar, AIR 1952 SC 75; INDIA CONST., art. 14.

i) Intrinsic inter-linkage of FTSL with FIL

22. In present case, FTSL is intrinsically inter-linked with FIL in terms of financial as well as operational linkages. FIL had provided financial assistance to FTSL for its project expansion<sup>59</sup> and also inter-corporate deposits in the times of externalities.<sup>60</sup> Moreover, considering the limited assets of FTSL,<sup>61</sup> Mr. Deepak Dev had to provide personal guarantees to the creditors of FTSL as the limited assets make the survival of the subsidiary on its own, virtually impossible.<sup>62</sup>
23. In terms of operational linkages, the policies and targets of FTSL were issued by a core senior management group led by the Promoter family from Delhi.<sup>63</sup> Thus, the factual matrix satisfies the criteria of common management<sup>64</sup> and the element of ‘excessive control’ when the holding company determines and controls the policies and plans of a subsidiary.<sup>65</sup> It is also recognized that if there is a distress in the group companies after one has gone under insolvency, then the group shall undergo insolvency as a whole.<sup>66</sup> In present case, FTSL started defaulting on its repayments, post commencement of CIRP of FIL.<sup>67</sup> Therefore, considering the aforementioned factors, the grounds for piercing the corporate veil to access the subsidiaries in the CIRP have been satisfied,<sup>68</sup> and thus corporate veil of FTSL should be lifted and it should undergo CIRP under §10.

ii) Corporate Veil of FTSL should be lifted

24. It is submitted that the concept of ‘separate legal entity’ is not absolute and can be disregarded under certain circumstances.<sup>69</sup> While the Code is silent on where this veil should be

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<sup>59</sup> Moot Proposition, p. 2.

<sup>60</sup> *Id.*, at p. 6.

<sup>61</sup> Moot Proposition, p. 2.

<sup>62</sup> Edelweiss Reconstruction Company v. Sachet Infrastructure Pvt. Ltd., 2019 SCC OnLine NCLAT 592.

<sup>63</sup> Moot Proposition, p. 3.

<sup>64</sup> IBBI, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY (2019).

<sup>65</sup> *Krivo Indus. Supply Co. v. National Distillers and Chem. Corp.*, 483 F.2d 1098 (USA).

<sup>66</sup> United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency*, ¶215, 2012.

<sup>67</sup> Moot Proposition, p. 8.

<sup>68</sup> *SBI v. Videocon Industries Ltd.*, 2019 SCC OnLine NCLT 745.

<sup>69</sup> *LIC v. Escorts Ltd.*, (1986) 1 SCC 264; *ArcelorMittal Pvt. Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1.

disregarded, the AA has the power to lift the veil and bring group or related companies like subsidiaries under the CIRP of the holding company.<sup>70</sup> The burden to challenge this also lies on the party who objects to such lifting.<sup>71</sup> The various conditions for lifting of corporate veil of the subsidiaries includes, inter alia excessive control<sup>72</sup> and interdependence, common control, limited assets of the subsidiary, inter-corporate deposits and intermingling guarantees, co-mingling management structures.<sup>73</sup>

iii) Inter-linkage of FGE with FIL

25. It is submitted that there is operational as well as financial linkages of FGE with FIL that cannot be disentangled. The entire Fortuna group was controlled by a core group of Senior Managers led by the Promoter family that would further assist the senior management of its group companies in setting targets, goals and also provided assistance in implementing short- and long-term plans.<sup>74</sup> Moreover, FIL is controlled<sup>75</sup> and primarily held<sup>76</sup> by Mr. Deepak Dev and his family members through a holding structure. Likewise, Mr. Deepak and his family members through Quest LLP hold 99.99% shareholding in FGE.<sup>77</sup> Thus implying, there is common ownership<sup>78</sup> as well as common control<sup>79</sup> over the group companies.
26. It is further submitted that FIL had also provided financial assistance to FGE in 2018 when it was facing distress due to various externalities.<sup>80</sup> The Model Law defines an enterprise group as “two or more enterprises that are interconnected by control or significant ownership”<sup>81</sup>, with control being “the capacity to determine, directly or indirectly, the operating and

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<sup>70</sup> SBI v. Videocon Industries Ltd., 2019 SCC OnLine NCLT 745.

<sup>71</sup> *Id.*, at ¶88.

<sup>72</sup> William J. Brands, *Domination of a Subsidiary by a Parent*, 32 IND. L.REV. 421, 441 (1999).

<sup>73</sup> IBBI, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY (2019).

<sup>74</sup> Moot Proposition, p. 3.

<sup>75</sup> *Id.*, at p. 4.

<sup>76</sup> Moot Proposition, p. 1.

<sup>77</sup> *Id.*, at p. 3.

<sup>78</sup> SBI v. Videocon Industries Ltd., 2019 SCC OnLine NCLT 745.

<sup>79</sup> *Id.*

<sup>80</sup> Moot Proposition, p. 6.

<sup>81</sup> UNICIRTAL Legislative Guide Part three, *supra* note 64 at Glossary ¶4.

*financial policies of an enterprise*".<sup>82</sup> Therefore, FGE was inextricably connected and linked up together with FIL. The WG in its report stated that it would be overall beneficial for stakeholders to utilize the inter-linkages and synergies between group companies to keep the companies running as a going concern and achieve a more value maximizing deal.<sup>83</sup>

iv) Indian proceedings should be recognized as the foreign main proceedings

27. It is submitted that FGE is entirely controlled and operated by core group in New Delhi.<sup>84</sup> The place from where the affairs are managed and operationally controlled reflects the most suitably the heart and core of the company, its center and the meeting point.<sup>85</sup> It is the place of central administration where the senior management takes the decisions which are essential for the operations of the company.<sup>86</sup> The main principle of the Model Law also confirms the COMI as central administration of the debtor.<sup>87</sup>
28. The COMI 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.<sup>88</sup> Reliance can also be placed on the case of *Ci4net.com*<sup>89</sup>, where 'incorporation' was one of the factors in determining the COMI, however, not the decisive factor. In present case, India can be construed as a place of central administration of FGE, fulfilling the command and control test and thus, Indian proceedings should be recognized as the foreign main proceedings.

v) Value Maximization and protection of creditors' interests

29. The group companies have started defaulting on their payments due to various externalities that it becomes the duty of the RP to keep the companies running as the going concern.<sup>90</sup> The preamble of the Code states the objective of maximization of value of assets and balancing of

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<sup>82</sup> *Supra* note 81.

<sup>83</sup> IBBI, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY13 (2019).

<sup>84</sup> Moot Proposition, p. 3.

<sup>85</sup> *In re Sphinx Ltd.*, 371 BR 10 (SDNY 2007) (Australia).

<sup>86</sup> *Young v. Anglo American South African Ltd. & Ors.*, [2014] EWCA Civ 1130 (UK).

<sup>87</sup> United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, ¶145, 2014.

<sup>88</sup> European Council Regulation No. 1346/2000 of 29<sup>th</sup> May 2000, ¶14.

<sup>89</sup> *In re Ci4net.com Inc.*, (2005) BCC 277 (Ch D) (UK).

<sup>90</sup> IBC, 2016, §20, No. 31, Act of Parliament, 2016 (India).

the interests of all stakeholders.<sup>91</sup> It is thus a beneficial legislation which puts CD back on its feet, not being a mere recovery legislation for creditors.<sup>92</sup>

30. The WG report highlighted the advantages of consolidation as “*promotion of information symmetry, reduction in costs of insolvency proceedings, increasing certainty for stakeholders and saving judicial time and also enabling the resolution or liquidation of intrinsically linked assets together, thereby maximizing synergies and not forcing a value destruction separation*”.<sup>93</sup> In case of *Venugopal*<sup>94</sup>, this Hon’ble court ordered all matters pertaining to CIRP of companies of the same group to be dealt with same bench of AA for the purpose of avoiding conflicting orders and facilitating the hearing and the process. Thus, the consolidation would increase the efficiency of process, maximize the value of assets and protect the interests of all stakeholders including creditors.

vi) Coordinated and Cooperative Approach

31. The ILC report stated that cooperation is the only realistic way to prevent dissipation of assets, maximize the value of assets and to find the best solutions for the reorganization of the enterprise.<sup>95</sup> The lack of cooperation from a single party can derail the entire proceedings and cost resolution of the debtor altogether.<sup>96</sup>
32. In consonance with the provisions and requirements of the Code pertaining to cross-border insolvency,<sup>97</sup> it is submitted that India has international agreements with UK. In 2007, India acceded to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters<sup>98</sup> and the Hague Convention on Taking of Evidence Abroad in Civil and Criminal Matters<sup>99</sup>. In addition, India has also signed MoU with

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<sup>91</sup> IBC, 2016, PmbL., No. 31, Act of Parliament, 2016 (India).

<sup>92</sup> *Swiss Ribbons Pvt. Ltd. v. UOI*, p. 39, (2019) 4 SCC 17.

<sup>93</sup> IBBI, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY 20 (2019).

<sup>94</sup> *Venugopal N. Dhoot v. SBI*, 2018 SCC OnLine NCLT 29551.

<sup>95</sup> MINISTRY OF CORPORATE AFFAIRS, REPORT OF THE INSOLVENCY LAW COMMITTEE 42 (2020).

<sup>96</sup> *Sudhaker Shukla & Kokila Jayaram, A Case to Cross the Border Beyond the UNCITRAL*, IBBI NARRATIVE, IBBI, 2020 at p.318.

<sup>97</sup> IBC, 2016, §§ 234-235, No. 31, Act of Parliament, 2016 (India).

<sup>98</sup> The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15<sup>th</sup>, 1965.

<sup>99</sup> The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Nov. 8<sup>th</sup>, 1970.

UK, concerning in the sphere of Law and Justice and establishing a joint consultative committee.<sup>100</sup> Thus, these would serve as the international cooperation agreements between the two states.<sup>101</sup>

33. Reliance must be placed on *Jet Airways*<sup>102</sup> case, where a ‘Cross-Border protocol’ was agreed upon through co-operation and it is further submitted that Hon’ble NCLAT had also held that a scheme under section 230<sup>103</sup> can be filed during insolvency or liquidation proceedings.<sup>104</sup> Thus, such measures along with the various forms of cooperation<sup>105</sup> would foster communication, cooperation and facilitate coordination of the proceedings for the benefit of all the stakeholders.<sup>106</sup>

**ON BEHALF OF MR. DEEPAK DEV**

**ISSUE I. Whether the petition filed by HSBC against Mr. Deepak Dev can be admitted by the Hon’ble NCLT?**

34. It is humbly submitted that the petition filed by HSBC against Mr. Deepak Dev should not entertained and admitted by this Hon’ble Court because, *firstly*, the AA with the competent jurisdiction is DRT and *secondly*, *in arguendo* it would be prejudicial to Mr. Deepak Dev.

i) The AA with the competent jurisdiction is DRT

35. It is submitted that the Part III of the Code had already been notified in entirety with effect from 01.02.2020.<sup>107</sup> The petition to initiate the insolvency process against Mr. Deepak Dev was filed after the said date.<sup>108</sup> Moreover, Hon’ble NCLT has the jurisdiction only when the CIRP

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<sup>100</sup> MoU on Co-operation between both Countries in the Sphere of Law & Justice, Ind- UK, Jul. 10, 2018, <https://www.mea.gov.in/commercial-menu.htm>

<sup>101</sup> *UNCITRAL Guide to Enactment and Interpretation*, *supra* note 84 at ¶215.

<sup>102</sup> *Jet Airways v. State Bank of India*, 2019 SCC OnLine NCLAT 385.

<sup>103</sup> Companies Act 2013, §230, No. 18, Act of Parliament, 2013 (India).

<sup>104</sup> *SC Sekaran v. Amit Gupta*, 2019 SCC OnLine NCLAT 517.

<sup>105</sup> United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency*, art. 27, May 30<sup>th</sup>, 1997.

<sup>106</sup> The World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes*, 2016.

<sup>107</sup> Moot Proposition, p.11.

<sup>108</sup> *Id.*, at p. 7.



of CD has been initiated and is pending before it,<sup>109</sup> which in this case it is not. Thus implying DRT would be the AA with the competent jurisdiction over the matters relating to insolvency resolution for individuals.<sup>110</sup> Moreover, the petition by HSBC was filed under §95 of the Code as per the Insolvency Rules 2019<sup>111</sup>, the said provision read together with rule<sup>112</sup> state that DRT would be the AA.<sup>113</sup>

ii) *In arguendo*, it would be prejudicial to Mr. Deepak Dev

36. It is submitted that at this juncture it is not possible to ascertain the liabilities of Mr. Deepak Dev as the debts owed by the CD is not final till the resolution plan is approved and thus, the liability of the surety would also be unclear.<sup>114</sup> It is further submitted that the Code aims to promote entrepreneurship and balance the interests of all the stakeholders<sup>115</sup>, however *in arguendo*, if the said petition is allowed, it would be prejudicial to Mr. Deepak Dev as he would be assessed in multiple proceedings, once in CIRP of companies and other in individual insolvency.
37. The BLRC report stated that collective process is one of the driving principles of the Code.<sup>116</sup> However, this proceeding would violate the rule against double proof<sup>117</sup> as HSBC and other European creditors would benefit twice and recover more in terms of loan given to CD. Simultaneously, it would also affect the creditors of FTSL because once the assets of Mr. Deepak Dev are stripped off by HSBC, there shall be diminution in the value of assets of Mr. Deepak Dev and creditors of FGE would not be able to recover from him. It is thus submitted that the admission of petition would defeat the principle of hotchpot rule of insolvency<sup>118</sup> and it shall be prejudicial to Mr. Deepak Dev because once he is stripped off his assets in the said manner, he would not be able to recover by way of subrogation.

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<sup>109</sup> IBC, 2016, §60, No. 31, Act of Parliament, 2016 (India).

<sup>110</sup> IBC, 2016, §79(1), No. 31, Act of Parliament, 2016 (India).

<sup>111</sup> Insolvency Rules 2019, rule 7(2).

<sup>112</sup> *Id.*, rule 3(a).

<sup>113</sup> IBC, 2016, §179, No. 31, Act of Parliament, 2016 (India).

<sup>114</sup> Sanjeev Shriya v. SBI, 2017 SCC OnLine All 2717.

<sup>115</sup> IBC, 2016, PmbL., No. 31, Act of Parliament, 2016 (India).

<sup>116</sup> MINISTRY OF FINANCE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE<sup>29</sup> (2015).

<sup>117</sup> *In re Kaupthing Singer and Friedlander Limited*, [2011] UKSC 48 (UK).

<sup>118</sup> *UNCITRAL Model Law*, *supra* note 102.

**ISSUE II. Whether the settlement agreement dated 01.04.2020 is an avoidable transaction?**

38. It is humbly submitted that the settlement agreement between SPL and FIL is not an avoidable transaction because *firstly*, it was made in the ordinary course of business in professional capacity of the parties and *secondly*, it was done in good faith to save itself from the financial distress.

i) It was made in the ordinary course of business and in professional capacity of the parties

39. It is submitted that the business of FIL has been running for 40 years now with a formidable reputation.<sup>119</sup> It is placed in the list of top conglomerates and is currently holding the position of largest private refinery in the country.<sup>120</sup> For its refinery operations, FIL buys power supply from various power producing companies,<sup>121</sup> and one such company was SPL. On 20.09.2018, FIL had entered into a PPA with SPL whereby SPL would supply specified units of electricity to FIL for its operations and in consideration FIL would pay INR 200 cr per year to SPL. In pursuance to the PPA and outstanding dues, SPL and FIL entered into a settlement and assignment agreement on 01.04.2020.<sup>122</sup> Therefore, the transaction was made in a professional capacity of the parties and in the ordinary course of business as it was a regular activity<sup>123</sup> carried on continuously and systematically with a view to earning an income.<sup>124</sup>

ii) It was done in good faith to save its own skin

40. It is submitted that the settlement agreement between FIL and SPL was an attempt to save FIL from financial distress. When FIL was in bad financial shape, the board should promote the interest of the company to overcome the financial distress.<sup>125</sup> Thus, the decision was taken in good faith after exercising due diligence as the directors ‘genuinely believed’<sup>126</sup> that the said transaction was the only viable option to reviving the operations<sup>127</sup> of the largest private

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<sup>119</sup> Moot Proposition, p. 1.

<sup>120</sup> *Id.* at 2.

<sup>121</sup> Moot Proposition, p. 6.

<sup>122</sup> *Id.*

<sup>123</sup> *Bajaj Allianz General Insurance Co. Ltd. v. State of Madhya Pradesh*, 2020 SCC OnLine SC 401.

<sup>124</sup> *Barendra Prasad Ray v. ITO*, (1981) 2 SCC 693.

<sup>125</sup> *North American Catholic Educational Programming Foundation v. Gheewalla*, 930 A 2d 92, (Del 2007) (USA).

<sup>126</sup> *In re Ralls Builders Ltd.*, (2016) Bus LR 55 (UK).

<sup>127</sup> *Aktieselskabert Dansk v. Brothers*, [2001] 2 BCLC 324 (UK).

refinery in the country.<sup>128</sup> Therefore, to prevent FIL from standstill situation and to make it as a going concern, power supply was required. Thus, it was done in good faith to save its own skin from the financial distress.

**ISSUE III. Whether the letter signed by Mr. Deepak Dev to the creditors of FTSL amounts to guarantee contract?**

41. It is humbly submitted that the letter signed in favor of FTSL by Mr. Deepak Dev is a letter of comfort and not a guarantee contract because it is a mere acknowledgement of debt and that no liability of guarantor was fixed.

i) It is mere acknowledgement of debt and no liability of surety was fixed

42. The Hon'ble Apex Court has held that a guarantee contract is in existence only when the liability of the surety is defined.<sup>129</sup> In present case, letter signed by Mr. Deepak Dev to FTSL creditors is a letter of comfort as it is signed for the comfort of the lenders<sup>130</sup> and merely states that '*FTSL would be able to meet its repayment obligations*' and most importantly, it does not specify the extent of liability of Mr. Deepak Dev as a surety. Therefore, the requirements of guarantee contract are not fulfilled.<sup>131</sup>
43. It is further submitted that Mr. Deepak Dev merely issued a letter of comfort as a standard business practice to the creditors that acknowledged an existence of debt and made a statement that the FTSL would be able to meet its repayment obligations, thus such statements qualify as letter of comfort.<sup>132</sup> Moreover, the letter is silent on the promissory nature<sup>133</sup> and mere use of the word 'guarantee' would not raise the obligation of guarantee contract.<sup>134</sup> Therefore in present case, neither the element of promissory nature not the extent of liability of surety was fulfilled and defined. Thus, the obligation of Mr. Deepak Dev as a personal guarantor to the creditors of FTSL does not arise.

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<sup>128</sup> Moot Proposition, p. 2.

<sup>129</sup> State of Maharashtra v. Dr. M. N Kaul, AIR 1967 SC 1634.

<sup>130</sup> Moot Proposition, p. 3.

<sup>131</sup> Indian Contract Act, 1872, §126, No. 09 (India).

<sup>132</sup> United Breweries Ltd. v. Karnataka State Industrial Investment Development Corp., (2012) 113 AIC 358.

<sup>133</sup> Lucent Technologies v. ICICI Bank, 2009 SCC OnLine Del 3213.

<sup>134</sup> United Breweries Ltd. v. Karnataka State Industrial Investment Development Corp., (2012) 113 AIC 358.

**PRAYER**

Wherefore, in the lights of the issues raised, cases referred, arguments advanced and authorities cited, it is most humbly prayed and implored before the Hon'ble NCLT, Principal Bench that it may be graciously pleased to:

**ON BEHALF OF RESOLUTION PROFESSIONAL, MR. RAVI SHANKAR**

1. Hold that the settlement agreement dated 01.04.2020 is an avoidable transaction.
2. Hold that the letter signed by Mr. Deepak Dev to the creditors of FTSL amounts to guarantee contract.
3. Hold that the Section 10 petition against FTSL is maintainable.
4. Declare that the bar of Section 10A is not applicable.
5. Hold that the CIRP of FIL, FTSL and FGE should be consolidated.

**ON BEHALF OF MR. DEEPAK DEV**

1. Dismiss the petition filed by HSBC against Mr. Deepak Dev.
2. Hold that the settlement agreement dated 01.04.2020 is not an avoidable transaction.
3. Hold that the letter signed by Mr. Deepak Dev to the creditors of FTSL does not amount to guarantee contract.

And any other relief that this Hon'ble Tribunal may be pleased to grant.

All of which is respectfully submitted.

Sd/-

Respective Counsels on behalf of Mr. Ravi Shankar and Mr. Deepak Dev