

TEAM CODE: 108

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION, 2020

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]

WRITTEN SUBMISSIONS ON BEHALF OF JAMES McNULTY, SPL AND HSBC

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LIST OF ABBREVIATIONS

SYMBOLS	MEANING
&	And
\$	Dollar
¶	Paragraph
%	Percent
§	Section
ABBREVIATIONS	EXPANSIONS
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

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ILC	Insolvency Law Committee on Cross Border 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
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.

ISSUES RAISED

ON BEHALF OF MR. JAMES McNULTY

- I. Whether the settlement agreement dated 01.04.2020 is an avoidable transaction?
 - II. Whether Mr. James McNulty has the *locus standi* to challenge the petition against FTSL?
 - 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 can be consolidated?
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ON BEHALF OF SPL

- I. Whether the settlement agreement dated 01.04.2020 is an avoidable transaction?
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ON BEHALF OF HSBC

- I. Whether the pledge agreement signed by Mr. Deepak Dev to the creditors of FGE amounts to guarantee contract?
 - II. Whether the petition filed by HSBC against Mr. Deepak Dev can be admitted by the Hon'ble NCLT?
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ANALYSIS OF ISSUES

ON BEHALF OF MR. JAMES McNULTY

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

1. It is humbly submitted that the settlement agreement between FIL and SPL is not a preferential and fraudulent transaction because, *firstly*, it was done in the ordinary course of business with proper commercial consideration, *secondly*, it was not intended to defraud to creditors and *lastly*, it was done to keep FIL as a going concern.

i) It was done in the ordinary course of business with proper commercial consideration

2. It is submitted that the said transaction was done in the ordinary course of business. The burden of proof to establish an avoidable transaction lies on the person challenging the transaction¹ to show that the transaction was neither *bona fide* nor it was for valuable consideration.² Mere preference is not sufficient to infer that preference is fraudulent.³
3. The transaction was done in the ordinary course of business as FIL used to buy power supply from various power producing companies for its refinery operations in Tamil Nadu.⁴ The Hon'ble Apex Court had construed the meaning of the term ordinary course of business as a regular activity⁵ carried on continuously and systematically with a view to earning an income⁶ and such task should fall in place as a part of the undistinguished common flow of the business.⁷ Further, "*payment made on receipt of goods that are regularly delivered and paid for, may not be preferential even if made within the proximity to the commencement of the insolvency proceedings*".⁸ The transaction between FIL and SPL was done in the ordinary course of business regardless of its proximity to the commencement of CIRP of FIL.

¹ Anuj Jain IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd, 2019 SCC OnLine SC 1775.

² O. L. of Trimline Health & Resort Ltd v. GSFC, 2018 SCC OnLine Guj 2911.

³ O. L. of Piramal Financial Services Ltd v. RBI, [2004] 51 SCL 691.

⁴ Moot Proposition, p. 6.

⁵ Bajaj Allianz General Insurance Co. Ltd. v. State of Madhya Pradesh, 2020 SCC OnLine SC 401.

⁶ Barendra Prasad Ray v. ITO, (1981) 2 SCC 693.

⁷ Downs Distributing Co Pty Ltd v. Associated Blue Star Stores Pty Ltd [1948] HCA 14 (Australia).

⁸ United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law*, p. 144, ¶179, 2005.

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4. It is further submitted that the transaction was a proper commercial transaction with a value consideration.⁹ The PPA stipulated that SPL shall provide the specified units of electricity to FIL and in return FIL shall pay a fixed charge of INR 200 cr per year to SPL.¹⁰ The outstanding dues were paid through the settlement agreement with FGE and FTSL as the confirming parties.¹¹ Hence, for the purpose of the section¹², the said transaction does not fall under the ambit of preferential transaction as the transaction was in consistent with normal commercial practice and was conducted in the professional relationship¹³ of the parties.

ii) It was not intended to defraud the creditors of FIL

5. 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.¹⁴ Thus, the decision was taken in good faith after exercising due diligence as FIL along with its directors 'genuinely believed'¹⁵ that the said transaction was the only viable option to reviving the operations of the largest private refinery in the country.¹⁶
6. It is further submitted that the payment cannot be regarded as fraudulent preference as it was done under the lawful pressure of the settlement agreement.¹⁷ Therefore, to prevent FIL from standstill situation, the dues were paid in good faith to save its own skin from the financial distress, thus exercising due diligence the directors honestly believed that the company's financial position would improve and therefore continued trading,¹⁸ thus in the present case, it cannot be established that there was an intent to defraud the creditors.¹⁹

⁹ Oxford Pharmaceuticals Ltd. Re, (2009) 2 BCLC 485 (Ch D) (UK).

¹⁰ Moot Proposition, p. 6.

¹¹ *Id.*

¹² IBC, 2016, §43, No. 31, Act of Parliament, 2016 (India).

¹³ United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law*, p. 140, ¶166, 2005.

¹⁴ North American Catholic Educational Progaming Foundation v. Gheewalla, 930 A 2d 92, (Del 2007) (USA).

¹⁵ *In re Ralls Builders Ltd.*, (2016) Bus LR 55 (UK).

¹⁶ Moot Proposition, p. 2.

¹⁷ Official Liquidator v. Venkatratnam, (1996) 1 Comp LJ 243 AP.

¹⁸ Aktieselskabert Dansk v. Brothers, [2001] 2 BCLC 324 (UK).

¹⁹ K. Nagendra Prabhu v. Popular Bank Ltd., AIR 1970 Ker 120.

iii) It was done to keep FIL as a going concern

7. It is submitted that a company retains its maximum value when it is a going concern. A business entity is regarded as a going concern, when it can continue its business for the foreseeable future,²⁰ and the management is doing everything possible to keep the operations of CD from ceasing. In the present case, FIL is a largest private refinery that required electrical power to function and operate.²¹ It is the fiduciary duty of director towards the company,²² and towards the creditors to maximize its value.²³ Therefore, the said agreement was entered to prevent the standstill business of FIL and to retain the maximum value as a going concern,²⁴ so as to protect the interests of creditors as well.

ISSUE II. Whether Mr. James McNulty has *Locus Standi* to challenge the petition against FTSL?

8. It is humbly submitted that Mr. James McNulty has *Locus Standi* to challenge petition against FTSL because *in arguendo*, if the petition against FTSL and consequently the interlocutory application of consolidation are admitted, the rights and the interests of the creditors of FGE would be affected.

i) *In arguendo*, rights and the interests of the creditors of FGE would be affected

9. The Hon'ble Apex Court had recognized that in determining '*Locus Standi*' the courts cannot take a narrow view, and has to admit a petition if there is an injury or impact to someone's legal rights and interests.²⁵ In present case, the application to initiate CIRP against FTSL, and subsequent interlocutory application by the RP to consolidate the CIRP of FIL, FTSL and FGE would substantially impact the rights and the interests of the creditors of FGE.

²⁰ 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)

²¹ Ernst Worrel & Christina Galitsky, *Energy efficiency improvement in the petroleum refining industry*, Proceedings ACEEE Summer Study on Energy Efficiency in Industry, (2005) https://www.aceee.org/files/proceedings/2005/data/papers/SS05_Panel04_Paper14.pdf

²² Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

²³ Geyer v Ingersoll Publications Co, 621 A 2d 784 (1992) (USA).

²⁴ Pratik Datta, *Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code 2016*, NIPFP Working paper series, (Dec., 2018).

²⁵ SP Gupta v. President of India, ¶18, AIR 1982 SC 149

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10. It is submitted that the consolidation would force FGE to share its assets with the CoC of FIL and that of FTSL and also the liability of Mr. Deepak Dev would impact the creditors of FGE in their recovery. Therefore, considering the interests and rights of the foreign creditors of FGE, Mr. James McNulty has *locus standi* in the present case to challenge the §10 petition.

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

11. It is humbly submitted that the Section 10 petition against FTSL is not maintainable because, *firstly*, the mandatory requirement of special resolution was not fulfilled, *secondly*, vested rights of shareholders were undermined and *lastly*, *in arguendo* if the petition is admitted, it would be violative of principle of natural justice.

i) Mandatory requirement of special resolution was not fulfilled

12. The statutory requirement for insolvency by a CD under §10 requires that there must be (1) default on an existing debt and (2) the application to AA has to have all documents required to make application along with special resolution.²⁶ Special resolution is given a special status in the company law, and is only passed when a substantial decision has to be taken by the management.²⁷ It is a different from day to day administration of the company, and have adequate procedural safeguards of its own.²⁸ Missing documents and Special resolution from the application makes it liable to be rejected.²⁹ Procedural Law makes the special resolution become an indispensable part of this application.³⁰ In the present case, the shareholders of FTSL have not passed any special resolution authorizing §10 petition against FTSL.³¹
13. It is thus submitted that the requirement of special resolution of the shareholders for initiating CIRP has been held as a mandatory requirement.³² In case of absence of such resolution, it becomes difficult to ascertain whether all the shareholders agreed for such decision. Non-

²⁶ IBC, 2016, §10, No. 31, Act of Parliament, 2016 (India) read with Insolvency Rules, 2019, Rule 7.

²⁷ Companies Act, 2013, §114(2), No. 18, Act of Parliament 2013 (India); Bajaj Auto Ltd v. N.K. Firodia, ¶23, AIR 1971 SC 321.

²⁸ *Id.*

²⁹ Sri Munisuvrata Agri International Pvt. Ltd. v. Bank of Baroda, 2020 SCC OnLine NCLAT 538.

³⁰ *Id.*

³¹ Moot Clarification No. 2.

³² Gaja Trustee Company Pvt. Ltd. v. Haldia Coke & Chemicals Pvt. Ltd. (2018) SCC Online NCLAT 331.

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compliance with this requirement has been held as missing of one of the essential ingredients of §10 petition.³³

ii) Vested rights of shareholders were undermined

14. The primary aim of the code is revival and continuation of CD in a time bound manner and maximize its value.³⁴ However, the Code also strives to balance the rights of all stakeholders.³⁵ Even in the event of default, neither the shareholders are deprived of their rights nor are their shares transferred to creditors.³⁶ In present case, the decision of initiating CIRP against FTSL was a matter of grave concern that would affect the substantial rights of company and its stakeholders. Further, only the shareholders are capable of passing special resolutions,³⁷ and they also have the right to vote on such matters.³⁸ The Code never aimed to make shareholders completely redundant. It only envisioned them to be suspended from powers till the time CIRP process goes on.³⁹ However in the present case, the decision was made without the consensus of shareholders and the board of company and thus, their vested rights were undermined.

iii) In arguendo, the principle of natural justice would be violated on the admission of petition

15. The principle of natural justice⁴⁰ is an integral part of any proceedings of NCLT and NCLAT.⁴¹ The principle of '*audi alteram partem*' forms the back bone of natural justice that mandates the AA to hear all the parties involved in the CIRP before passing any order.⁴² However in the present case, the CoC of FIL unilaterally decided to initiate the CIRP of FTSL, thus disregarding the stakeholders of FTSL.

³³ *In Re. Sri Munisuvrata Agri International Pvt. Ltd.*, 2020 SCC OnLine NCLAT 538.

³⁴ *Swiss Ribbons Pvt. Ltd. v. UOI*, (2019) 4 SCC 17.

³⁵ *Id.*

³⁶ *Export Import Bank of India v. Astonfield Solar (Gujarat) Pvt. Ltd.*, 2018 SCC OnLine NCLAT 977.

³⁷ IBC, 2016, §10(3)(c) No. 31, Act of Parliament, 2016 (India) read with Companies Act, 2013, §114(2), No. 18, Act of Parliament 2013 (India).

³⁸ *Northwest Transportation Compo Limited v. Henry* (1887)12 A.C. 589 (P.C.) (Canada).

³⁹ VINOD KOTHARI, IBC: USHERING IN A NEW ERA, 73 (Meghna Mittal ed. 2019).

⁴⁰ *Maneka Gandhi v UOI*, (1978) 1 SCC 248.

⁴¹ Companies Act, 2013, §424, No. 18, Act of Parliament 2013 (India).

⁴² *Starlog Enterprises Ltd. vs. ICICI Bank Ltd.*, 2017 SCC Online NCLAT 13.

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16. It is further submitted that the action is also in violation of §420(1)⁴³ that states ‘*a reasonable opportunity of being heard*’ to be given to the parties whose rights have been affected before the initiation of CIRP. However in the present case, the shareholders were not given any reasonable opportunity to be heard. Thus *in arguendo* if the petition is admitted, the stakeholders of FTSL would be disregarded and such an action would amount to a clear abrogation of the principle of natural justice. Thus, the said petition is not maintainable.

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

17. It is humbly submitted that the bar of Section 10A would be applicable to the said petition because the petition to initiate of CIRP against FTSL was filed after the stipulated cut-off date in the ordinance.

i) Petition was filed after the stipulated cut-off date

18. The Parliament of India through an ordinance has stopped the admission of petitions against CD under §10A of the Code,⁴⁴ and it applies to any CD whose default occurred after the stipulated cut-off date i.e., 25.03.2020 when the national level lockdown was announced. In the present case, FTSL started to default after the commencement of CIRP of FIL,⁴⁵ which was initiated on 30.06.2020. Therefore, it can be reasonably concluded that the defaults of FTSL occurred after the cut-off date.

19. Further, §10A is an overriding provision that embargo applications under §7, 8 and 10 of the clause.⁴⁶ The Parliament has recognized that due to the pandemic the CD would not be able to find suitable Resolution applicants to rescue themselves through the CIRP process.⁴⁷ Further, there is no provision of classification or exception to CD under the ordinance. Therefore, the said petition is barred by §10A of the Code as it is filed for the default which occurred after the stipulated cut-off date. Hence, the petition is not maintainable.

⁴³ Companies Act, 2013, §420 (1), No. 18, Act of Parliament 2013 (India).

⁴⁴ IBC (Amendment) Ordinance, 2020.

⁴⁵ Moot Proposition, p. 8.

⁴⁶ Ramesh Kymal v. Siemens Gamesa Renewable Power Pvt. Ltd., [2020] 120 taxmann.com 452 (NCLAT).

⁴⁷ *Id.*

ISSUE V. Whether CIRP of FIL, FTSL and FGE can be consolidated?

20. It is humbly submitted that CIRP of FTSL, FGE and FIL cannot be consolidated because, *firstly*, FTSL is a separate legal entity protected by corporate veil, *secondly, in arguendo*, the consolidation would be prejudicial to the creditors of FTSL, *thirdly*, FGE is an independent and a separate legal entity, *fourthly*, UK proceedings should be recognized as the foreign main proceedings, *fifthly, in arguendo*, the consolidation of CIRP would be prejudicial to the interests of European creditors of FGE and *lastly*, the insolvency proceedings against FGE has already commenced in UK, therefore the Indian courts should respect the doctrine of comity.

i) FTSL is a separate legal entity protected by the corporate veil

- 21.** The insolvency law follows the corporate law principle of separate legal entities.⁴⁸ It is submitted that FTSL is a separate legal entity dealing in a diverse business of telecommunication.⁴⁹ It has distinct and identifiable assets and has different group of creditors, which can prevent the consolidation.⁵⁰ A subsidiary company even if it is held and controlled by holding company would still retain its own identity.⁵¹ The inherent reasoning of having separate legal entity is to give its own personality and make it liable for its own debts and liabilities.⁵² Thus, the creditors and other stakeholders are expected to deal with each company in a group as a separate legal entity.⁵³
- 22.** Despite the parent company having persuasive power, the subsidiary acts in its own interests.⁵⁴ Hence, companies are provided with the protection of corporate veil. Mere control and ownership is not a valid ground to lift the corporate veil.⁵⁵ The circumstances of lifting the veil ought to be fair and equitable to all the stakeholders.⁵⁶ Therefore, FTSL should be treated as a separate legal entity and should be protected by the principle of corporate veil.

⁴⁸ IBBI, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY (2019).

⁴⁹ Moot Proposition, p. 2.

⁵⁰ SBI v. Videocon Industries Ltd., 2019 SCC OnLine NCLT 745.

⁵¹ Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

⁵² LIC v. Escorts Ltd., (1986) 1 SCC 264.

⁵³ IBBI, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY (2019).

⁵⁴ *Id.*

⁵⁵ SBI v. Videocon Industries Ltd., 2019 SCC OnLine NCLT 745.

⁵⁶ *Id.*

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ii) In arguendo, it would be prejudicial to creditors of FTSL and would lead to value destruction

23. It is submitted that if FTSL is consolidated with FIL, it would lead to its value destruction.⁵⁷ In present case, the loan accounts of FIL were classified as NPA on 30.09.2019 and have remained an NPA over a period of 14 months. As RBI guidelines, the loan accounts of FIL would be categorized as sub-standard assets,⁵⁸ leading to its credit weakness.. Therefore *in arguendo*, the consolidation of FTSL with FIL would lead to erosion of values of FTSL. This would raise the specter of significant distribution diminution with the creditors of FTSL.⁵⁹
24. The IBC has cramdown provisions, where the decision of majority of CoC has to be accepted by other creditors.⁶⁰ It is further submitted that if CoC of FIL moves ahead with the CIRP of FTSL, it would be at the helm of the decision of majority of CoC of FIL. The consolidation would pose a risk to undermine the value of FTSL, as the assets of the company would be shared with the creditors of the holding company whose sole aim would be recovery of dues as much as possible from the group consolidation. This would be against the aim of the code.⁶¹ It is therefore submitted that the consolidation causes irreparable loss to creditors and thus, the application can be rejected by the AA.⁶²

iii) FGE is an independent and separate legal entity

25. It is submitted that FGE is a separate legal entity⁶³ with separate assets and distinct operating business, entirely situated in Europe. It deals in retail and fashion sector in the European market and had acquired local European brands as an extension to its assets and expansion of its business.⁶⁴ Thereby implying, FGE as an independent entity with substantial assets and income generated out of its business operations.

⁵⁷ Pratik Datta, *Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code 2016*, NIPFP Working paper series, (Dec., 2018).

⁵⁸ RBI Guideline, DBOD No. BP.BC/ 20 /21.04.048 /2001-2002, Prudential Norms on Income Recognition, Asset Classification and Provisioning - Pertaining to Advances.

⁵⁹ *In Re Genesis Health Ventures*, 402 F.3d 416, 423 (3d Cir. 2005) (USA).

⁶⁰ WORKING GROUP ON GROUP INSOLVENCY, *supra* note 53.

⁶¹ *Swiss Ribbons Pvt. Ltd. v. UOI*, (2019) 4 SCC 17.

⁶² *Leo Duct Engineers Ltd. v. Canara Bank*, 2017 SCC OnLine NCLAT 547.

⁶³ *Solomon v. A. Solomon & Co. Ltd.*, 1897 AC 22 (UK).

⁶⁴ Moot Proposition, p. 3.

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26. It is submitted that this Hon'ble Court, in case of *Venugopal Dhoot*⁶⁵, had clubbed various proceedings in respect of several companies of the same group to avoid conflicts and facilitate the resolution process. However, the facts of the instant case are quite different to that of the referred case. In *Venugopal* case, the business activities of companies were inextricably interlinked and intertwined with each other and the creditors of the each company dealt the group as a single economic unit. The AA NCLT, Mumbai, had also observed that “*a blanket view is not possible to declare that the entire Group is fit to be consolidated simply being connected or controlled by common management.*”⁶⁶
27. The Hon'ble Apex Court had observed, “*A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence.*”⁶⁷ Moreover, even the Companies Act, 2013 clearly distinguishes between subsidiary company as separate and distinct from its holding company.

iv) UK proceedings should be recognized as foreign main proceedings

28. The Code enlists the manner and the grounds to initiate the CIRP against the CD. However, no petition was filed against FGE in India to initiate the insolvency process. The only proceeding that was initiated against, it was in UK.⁶⁸ The Indian law regime is silent on recognizing such foreign proceedings. It only recognizes the foreign judgments with the reciprocating territories.⁶⁹ Further, the CPC only regards the territorial competence or jurisdiction over the subject-matter as material by the courts in India.⁷⁰ FGE, on other hand, is incorporated in UK,⁷¹ headquartered in Leeds⁷², thus out of the competent jurisdiction of the AA.
29. It is further submitted that COMI for separate entities should be determined separately⁷³ as Model Law recognizes foreign main proceedings in the COMI of the debtor.⁷⁴ COMI is the

⁶⁵ *Venugopal Dhoot v. State Bank of India*, 2018 SCC OnLine NCLT 29551.

⁶⁶ *SBI v. Videocon Industries Ltd.* 2019 SCC OnLine NCLT 745.

⁶⁷ *Vodafone International Holdings BV v. UOI*, ¶73, (2012) 6 SCC 613.

⁶⁸ Moot Proposition, p. 7.

⁶⁹ Code of Civil Procedure 1908, §13, Act No. 5 (India).

⁷⁰ *R. Vishwanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1.

⁷¹ Moot Proposition, p. 3.

⁷² *Id.*, at p. 7.

⁷³ *Re Lightsquared LP*, (2012) ONSC 2994 (Canada); *Re Eurofood IFSC Ltd.*, [2006] ECR I-3813(UK).

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place where debtor carries out its usual operations as is ascertainable by third parties.⁷⁵ In the present case, UK proceeding must be treated as foreign main proceedings as FGE conducts its regular operations in Leeds, UK thus it is easily ascertainable by the third parties as well as the creditors. Moreover, the principle factor “*readily ascertainable by creditors*”⁷⁶ as well as other additional factors like “*the location in which the debtor’s principal assets or operations are found; the location of the debtor’s primary bank; the jurisdiction whose law would apply to most disputes*”⁷⁷ substantiate the COMI of FGE as UK.

30. In present case, FGE is entirely housed in UK and the place where the debtor holds its assets and pursues its major economic activities are majorly taken into consideration as such factors are easily ascertainable by the third parties.⁷⁸ Hence, the fact that major economic activities⁷⁹ were carried in UK is enough to rebut the presumption laid down in the Model Law⁸⁰. It is therefore submitted that proceeding in UK should be recognized as foreign main proceedings and such proceedings have universal scope and encompass all of a debtor’s assets.⁸¹

v) *In arguendo*, it would be prejudicial to the interests of European creditors

31. It is submitted that FGE raised a finance of \$1.2 billion dollar from the European banks.⁸² This is more than the financial loans of FIL and FTSL combined. *In arguendo*, if the consolidation takes place, the liabilities and assets of FIL, FTSL and FGE would be shared and distributed among all creditors. It is further submitted that FTSL has limited assets to itself and FIL had provided corporate guarantees to the lenders of FTSL. It can reasonably be inferred that FIL would exhaust its assets to its own liabilities and to the lenders of FTSL. The outstanding

⁷⁴ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency*, art.17(2), May 30th, 1997.

⁷⁵ United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law*, p. 4, 2005.

⁷⁶ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation*, ¶145, 2014.

⁷⁷ *Id.*, at ¶147.

⁷⁸ *Interdil Srl v. Fallimento Interdil Srl*, ¶52, [2011] ECR I-9915 (UK).

⁷⁹ *Tucker v. Aero Inventory (UK) Ltd.*, [2009] ONSC 63138 (Australia).

⁸⁰ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency*, art.16(3), May 30th, 1997.

⁸¹ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation*, ¶83, 2014.

⁸² Moot Proposition, p. 3.

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amount would be taken from the assets of FGE, raising the specter of significant distribution diminution.⁸³

32. It is thus contended that the consolidation of CIRP would not attract value maximization for European creditors and therefore, it would be prejudicial to their interests. As FGE has its own substantial assets and diverse business than FIL, therefore it is capable of maintaining itself as a going concern without consolidation with the other group companies.

vi) Doctrine of Comity should be respected by the Indian courts

33. It is submitted that there is no comprehensive framework for dealing with cross-border insolvency in India.⁸⁴ Therefore, applications of doctrine of comity are employed in such cases.⁸⁵ The doctrine of comity connotes recognition that a nation shows to the legislative, executive or judicial acts of another nation.⁸⁶ The Hon'ble Apex Court had held that the principles of comity of nation demand the Indian Courts to respect the order of English Courts.⁸⁷ In present case, the proceedings against FGE were already commenced in the English court *vide* an order dated 15.05.2020.⁸⁸
34. It is also submitted that the ILC report has recognized that “*the mechanism for the enforcement of foreign judgments under CPC is not broad enough to include all insolvency orders such as orders regarding reorganization processes, administrative and interim orders, etc.*”⁸⁹ Therefore, considering the absence of mechanism the Indian courts should respect the foreign proceedings in UK as per the doctrine of comity.

⁸³ *In re* Genesis Health Ventures, 402 F.3d 416, 423 (3d Cir. 2005) (USA).

⁸⁴ MINISTRY OF FINANCE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, p. 5 (2015).

⁸⁵ UNCITRAL Guide to Enactment and Interpretation, *Supra* note 81 at ¶7.

⁸⁶ *Animal Science Products v. Hebei Welcome Pharmaceuticals Co.*, 585 U.S., 138 S. Ct. 1865 (2018) (USA).

⁸⁷ *Alcon Electronics Pvt. Ltd. v. Ceslem S.A. of FOS, France*, 2016 SCC OnLine SC 1444.

⁸⁸ Moot Proposition, p. 7.

⁸⁹ MINISTRY OF FINANCE, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, p. 13 (2015).

ON BEHALF OF SPL

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

35. It is humbly submitted that the settlement agreement entered between SPL and FIL is not a preferential and fraudulent transaction because, *firstly*, it was a proper commercial transaction, *secondly*, it was entered in the ordinary course of business, *thirdly*, it was done in good faith and *lastly, in arguendo*, the order of AA would be prejudicial to the interest of SPL.

i) It was a proper commercial transaction

36. It is submitted that SPL and FIL had entered into a PPA for the supply of specified units of electricity. Pursuant to the agreement, FIL and SPL entered into a settlement agreement which stipulated that FIL would pay the fixed charge of INR 200 cr per year as the valuable consideration to SPL,⁹⁰ thus, the settlement agreement is said to fulfill the essential elements of proper commercial transaction.

ii) It was entered in the ordinary course of business

37. FIL is currently holding the position of largest private refinery,⁹¹ and its operations depend on the power supplies from various power producing companies.⁹² Electricity supply is an essential service that is needed by an oil and gas refinery to function and falls into place as par to the undistinguished common flow business done.⁹³ In present case, SPL had provided power supplies through the national power transmission.⁹⁴ Thus, the parties entered into a routine contract for the supply of utilities in the ordinary course of business.⁹⁵

iii) It was done in good faith

38. It is submitted that neither Mr. Deboshish Sahasa nor SPL had the sufficient information regarding the CIRP of FIL.⁹⁶ The Hon'ble NCLT had initiated the CIRP of FIL via order dated

⁹⁰ Moot Proposition, p. 6.

⁹¹ *Id.* at 2.

⁹² Moot Proposition, p.6.

⁹³ Downs Distributing Co. v. Associated Blue Star Stores, (1948) 76 CLR 463 (Australia).

⁹⁴ Moot Proposition, p. 6.

⁹⁵ United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law*, p. 140 ¶165, 2005.

⁹⁶ IBC, 2016, §44 (Explanation II), No. 31, Act of Parliament, 2016 (India).

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30.06.2020,⁹⁷ and the said transaction took place on 01.04.2020. Therefore, Mr. Deboshish Sahasa or SPL cannot be deemed to have sufficient information as the public announcement was not made during the said period.

39. It is further submitted that Mr. Deboshish Sahasa is a good acquaintance to Mr. Deepak Dev.⁹⁸ The said relation does not come under the meaning of ‘related party’ as stated by the Code.⁹⁹ Therefore, the said transaction was a *bona fide* transaction done in good faith.¹⁰⁰

iii) In arguendo, the order of AA would be prejudicial to SPL

40. It is submitted that the settlement agreement entered by the parties was done in good faith and in the ordinary course of business. Therefore *in arguendo*, if the AA adjudicates it as a preferential and fraudulent transaction, it would be prejudicial to the interest of SPL.¹⁰¹ It would thus defeat the purpose of the Code, which is beneficial¹⁰² and creditor-friendly¹⁰³ legislation.

ON BEHALF OF HSBC

ISSUE I. Whether the pledge agreement signed by Mr. Deepak Dev to the creditors of FGE amounts to guarantee contract?

41. It is humbly submitted that the pledge agreement signed by Mr. Deepak Dev to the creditors of FGE amounts to guarantee contract because it fulfills the elements of a guarantee contract and it also states the extent of liability of Mr. Deepak Dev to the creditors of FGE.

i) The elements of guarantee contract are fulfilled

42. A contract is a guarantee contract when the requirements of §126¹⁰⁴ are be fulfilled and there must be a promissory nature to the contract, where the surety promises to discharge the liability

⁹⁷ Moot Proposition, p. 8.

⁹⁸ *Id.*, at p. 6.

⁹⁹ IBC, 2016, §5, No. 31, Act of Parliament, 2016 (India).

¹⁰⁰ IBC, 2016, §44 (Explanation I), No. 31, Act of Parliament, 2016 (India).

¹⁰¹ IBC, 2016, §44, No. 31, Act of Parliament, 2016 (India).

¹⁰² Swiss Ribbons Pvt. Ltd. v. UOI, (2019) 4 SCC 17.

¹⁰³ Innoventive Industries v. ICICI Bank, (2018) 1 SCC 407.

¹⁰⁴ Indian Contract Act, 1872, §126, No. 09 (India).

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of the borrower,¹⁰⁵ in case of default.¹⁰⁶ Further, the extent of liability of surety must be defined and fixed,¹⁰⁷ thereby implying the intention of parties on creating legal obligations against each other.

43. It is submitted that Mr. Deepak Dev signed a pledge agreement clearly including a comprehensive list of debts and stating the *'liability to pay to the lenders on all debts and liabilities incurred by FGE'*,¹⁰⁸ and had also attached the assets of his partnership interest held in Quest LLP towards the lenders of the FGE.¹⁰⁹ Moreover, the contract was also clear on the part of obligation of Mr. Deepak Dev towards the creditors of FGE *'in any manner whatsoever'*. Thus, the pledge agreement is qualified as a guarantee contract and Mr. Deepak Dev is personally liable for the debts of FGE.

ISSUE II. Whether petition filed by HSBC against Mr. Deepak Dev can be admitted by the Hon'ble NCLT?

44. It is humbly submitted that petition filed by HSBC against Mr. Deepak Dev should be admitted by the Hon'ble NCLT because, *firstly*, HSBC has the *locus standi* and NCLT has the competent jurisdiction and *secondly*, Mr. Deepak Dev has co-extensive liability with that of FGE towards HSBC and other European creditors.

i) Competent Jurisdiction of Hon'ble NCLT and *locus standi* of HSBC

45. It is submitted that foreign creditors are recognized and allowed to file insolvency petition in India and the Code does not discriminate any foreign persons.¹¹⁰ It is further submitted that Hon'ble NCLT has the competent jurisdiction by the provisions empowering it.¹¹¹ Moreover, the adjudication by the same AA would provide procedural coordination as there are same

¹⁰⁵ Ramchandra B. Loyalka v. Shapurji N. Bhowndree, 1940 SCC OnLine Bom 21.

¹⁰⁶ Kleinwort Benson Ltd v. Malaysia Mining Corporation, [1989] 1 All ER 785 (UK).

¹⁰⁷ State of Maharashtra v. Dr. M. N Kaul, AIR 1967 SC 1634.

¹⁰⁸ Moot Proposition, p. 7.

¹⁰⁹ *Id.* at 3.

¹¹⁰ Shilpi Cables v. Macquarie Bank, 2018 SCC OnLine NCLAT 383.

¹¹¹ IBC, 2016, § 60, No. 31, Act of Parliament, 2016 (India).

claims and defaults in question. Thus, this would avoid multiplicity of proceeding and avoid conflicting decisions of two different AA.¹¹²

ii) Co-extensive liability of Mr. Deepak Dev

46. It is submitted that the liability of Mr. Deepak Dev is co-extensive with that of FGE towards HSBC and other European creditors.¹¹³ It implies that both the principal debtor and the surety are liable at the same time to the creditors¹¹⁴ and both proceedings can be initiated simultaneously.¹¹⁵ Moreover, the Hon'ble Apex Court had held that the creditor is not bound to exhaust his remedy against principal debtor before suing the surety and a suit may be maintained against the surety though the principal has not been sued.¹¹⁶
47. It is further submitted that the Code is a creditor-friendly law¹¹⁷ and it cannot bar the creditor as then the object of guarantee would be defeated.¹¹⁸ In the present case, the contract of guarantee is an independent contract between HSBC and Mr. Deepak Dev. Thus, Mr. Deepak Dev has to be honor and fulfill the contractual obligations which the parties entered into.¹¹⁹ In the case of *Indian Bank*¹²⁰, Hon'ble NCLT had observed that two same claims against an insolvent borrower and guarantor are not prohibited under Rule against Double proof or under the Contract Act or under the Insolvency laws. Therefore, the Hon'ble NCLT should admit the petition filed by HSBC in the light of the principle of double-dip¹²¹.

¹¹² Sicom Investments & Finance Ltd. v. Rajesh Kumar Drolia, 2017 SCC OnLine Bom 9725.

¹¹³ Indian Contract Act, 1872, §128, No. 09 (India).

¹¹⁴ Jagannath Ganeshram Agarwal v. Shivnarayan Bhagirath, 1939 SCC OnLine Bom 65.

¹¹⁵ Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, 2019 SCC OnLine SC 1478.

¹¹⁶ Bank of Bihar Ltd. v. Damodar Prasad, AIR 1969 SC 297.

¹¹⁷ Innoventive Industries v. ICICI Bank, (2018) 1 SCC 407.

¹¹⁸ Industrial Investment Bank of India Ltd. v. Biswanath Jhunjhunwala, (2009) 9 SCC 478.

¹¹⁹ Mukesh Hans v. Smt. Uma Bhasin, 2010 SCC OnLine Del 2776.

¹²⁰ Indian Bank v. Jeppiar Cements Pvt. Ltd, IBA/685/2019.

¹²¹ *In Re Kaupthing Singer and Friedlander Ltd.*, [2011] UKSC 48 (UK).

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 UK INSOLVENCY ADMINISTRATOR, MR. JAMES McNULTY

1. Hold that the settlement agreement dated 01.04.2020 is not an avoidable transaction.
2. Hold the *locus standi* of Mr. James McNulty
3. Dismiss the Section 10 petition filed against FTSL as it is not maintainable.
4. Declare that the bar of Section 10A is applicable.
5. Hold that the CIRP of FIL, FTSL and FGE should not be consolidated

ON BEHALF OF SPL

1. Hold that the settlement agreement dated 01.04.2020 is not an avoidable transaction.

ON BEHALF OF HSBC

1. Hold that the pledge agreement signed by Mr. Deepak Dev to the creditors of FGE amounts to guarantee contract.
2. Admit the petition filed by HSBC against Mr. Deepak Dev.

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. James McNulty, SPL and HSBC