

[Team Code -17]

**INSOLVENCY AND BANKRUPTCY MOOT COURT  
COMPETITION, 2018**

**IN THE MATTER OF  
ARVIND CEMENT LIMITED, CORPORATE DEBTOR**

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

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**TABLE OF CONTENTS**

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I.	Table of Contents.....	2
II.	List of Abbreviations.....	5
III.	Index of Authorities.....	7
IV.	Statement of Facts.....	10.
V.	Issues Raised.....	12
VI.	Summary of Arguments.....	14
VII.	Arguments Advanced.....	16
	<b><u>ON BEHALF OF CORPORATE DEBTOR</u></b> .....	<b>16</b>

1. CIRP APPLICATION BEFORE NCLT BY THE PEOPLE’S BANK IS NOT MAINTAINABLE

2. THE PAYMENT OF INR 20 LAKH TO TTCL WAS LAWFUL.

3. THE PERSONAL GUARANTEE AGAINST PROMOTER OF ACL IS NOT MAINTAINABLE DUE TO JURISDICTION OF NCLT.

4. THE MORTGAGE OF 100 ACRES OF LAND BY ACL WOULD NOT CONSTITUTE AS ASSET STRIPPING.

**ON BEHALF OF OPERATIONAL CREDITORS**.....**19**

1. GKCL IS A FINANCIAL CREDITOR FOR THE CIRP

**ON BEHALF OF RESOLUTION PROFESSIONAL/INTERIM RESOLUTION PROFESSIONAL**.....**20**

SUBMISSIONS ON BEHALF OF RESOLUTION PROFESSIONAL OF **ARVIND CEMENT LIMITED** ..... **20**

1 GKCL IS AN OPERATIONAL CREDITOR FOR THE CIRP

2 INTERIM FINANCE PROVIDED TO TTCL WAS LAWFUL.

3 TRANSACTION OF CERTAIN NATURE CAN BE AVOIDED AS EXCESS  
PAYMENT OF INR 20 CRORE HAS ALREADY BEEN MADE TO APL

4 THE RESOLUTION PLAN SUBMITTED BY JMCL IS NOT ACCEPTABLE.

5 ACL CAN TERMINATE THE POWER PURCHASE AGREEMENT WITH APL.

SUBMISSIONS ON BEHALF OF THE RESOLUTION PROFESSIONAL OF **ARVIND  
POWER LIMITED**.....25

1 ACL IS IN DEFAULT OF THE POWER PURCHASE AGREEMENT AND CANNOT  
AVOID TRANSACTIONS.

2 ACL SHOULD RELEASE THE MORTGAGE OF 100 ACRES OF LAND OWNED BY  
APL AND THE SAME SHOULD BE CONSTITUTED AS ASSET STRIPPING

3 ACL CANNOT TERMINATE THE POWER PURCHASE AGREEMENT WITH APL;  
THE SAME SHOULD HAVE CONSIDERATION IN THE RESOLUTION PLAN  
FORMULATED.

**ON BEHALF OF FINANCIAL CREDITORS**.....29

1.CIRP APPLICATION IS MAINTAINABLE

2. THE PAYMENT OF INR 20 LAKH TO TTCL BY THE CORPORATE DEBTOR IS  
UNLAWFUL.

3. THE INTERIM FINANCE PROVIDED BY THE RESOLUTION PROFESSIONAL OF  
ARVIND CEMENT LIMITED IS UNLAWFUL

4. PERSONAL GUARANTEE AGAINST THE PROMOTER OF ACL (ARVIND  
KUMAR) IS MAINTAINABLE.

**ON BEHALF OF OTHER PARTIES**.....33

SUBMISSIONS ON BEHALF OF **RESOLUTION APPLICANT**.....33

1.THE RESOLUTION PLAN SUBMITTED BY JMCL SHOULD BE ACCEPTED BY  
RP OF ACL.

2. SUBMISSIONS ON BEHALF OF **FOREIGN REPRESENTATIVE**.....34

2.1 APPLICATION FOR RECOGNITION OF FOREIGN PROCEEDING

VII Prayer.....37

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**LIST OF ABBREVIATIONS**


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<b>%</b>	Percentage
<b>\$</b>	US Dollar
<b>&amp;</b>	and
<b>§</b>	Section
<b>§§</b>	Sections
<b>¶</b>	paragraph
<b>ACL</b>	Arvind Cement Limited
<b>AIR</b>	All India Reporter
<b>ALSL</b>	Aqua Logistics and Shipping Limited
<b>An.</b>	Another
<b>APL</b>	Arvind Power Limited
<b>Boom.</b>	Bombay
<b>Cal.</b>	Calcutta
<b>CIRP</b>	Corporate Insolvency Resolution Process
<b>CoC</b>	Committee of Creditors
<b>Code</b>	Insolvency and Bankruptcy Code
<b>GKCL</b>	GK Constructions Limited
<b>GKL</b>	GK Limited
<b>Hon'ble</b>	Honourable
<b>I&amp;B Code</b>	Insolvency and Bankruptcy Code
<b>IB Code</b>	Insolvency and Bankruptcy Code
<b>IBBI</b>	Insolvency and Bankruptcy Board of India
<b>ICL</b>	Imperium Carriers Limited
<b>INR</b>	Indian Rupee
<b>IRP</b>	Interim Resolution Professional

WRITTEN SUBMISSION ON BEHALF OF THE CONCERNED PARTIES

<b>Ltd.</b>	Limited
<b>MTPA</b>	million tonnes per annum
<b>PPA</b>	Power Purchasing Agreements
<b>RP</b>	Resolution Professional
<b>SPV</b>	Special Purpose Vehicle
<b>TTCL</b>	T&T Constructions Limited
<b>USA</b>	United States of America

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## STATEMENT OF FACTS

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ACL was established in 1993 and had emerged as a key leader in the Indian Cement Industry. It entered into a Loan Agreement dated 12.12.1994 with a consortium of banks led by People's Bank for loan amounting to INR 2000 crores for setting up and implementation of its projects and operation. It created hypothecation and mortgage on its properties to secure the loan from time to time. It also obtained working capital facility of INR 200 crores from RST Bank on which Mr. Arvind Kumar, promoter of ACL gave a personal guarantee.

ACL entered into an agreement dated 05.07.2010 with GKCL for construction of 85 storage facilities for INR 500 crores to be paid by ACL within a period of 10 years with interest. On construction, the ownership vested with ACL who was also under an obligation to engage GKL, a Group Company of GKCL as its dealer for at least 30% of ACL's sales every year till payment.

In 2002, ACL acquired 100 acres land in Rajasthan and transferred it to APL, a Special Purpose Vehicle (SPV) formed by ACL in 2003. Both parties entered into a PPA under which ACL had to mandatorily purchase at least 80% of entire power generated by APL and in case of non-consumption, it had to provide for sale to third parties by providing for necessary transmission facility within 5 years or compensate for the unsold units. APL entered into two credit facility agreements dated 04.05.2003 and 15.10.2003 with People's Bank for INR 20 crores and with Indo Bank for INR 25 crores respectively for which ACL gave a corporate guarantee. The agreement contained a stipulation that required APL to obtain the approval of lenders for creating any interest on its unencumbered assets.

In 2007, ACL set up a fully-owned subsidiary-ALSL with its registered office in USA. ALSL set up around 85 container vessels financed by a consortium of banks led by Citi Fin with total loans amounting to 1.5 billion USD. During 2015-16, ALSL provided loans of USD 100 million to ACL. However, due to high loan obligations it started defaulting on its loan obligations and is thus, undergoing Insolvency proceedings in the US Bankruptcy Court.

In March 2017, ACL faced issues in the supply of raw materials due to change in the policies of the Malaysian Government. To deal with this, ACL decided to set-up a domestic plant for easier access to raw materials in Karnataka and engaged TTCL to build the same. It obtained an extended credit facility of INR 500 crores from People's Bank by way of mortgage of the

100 acre land in the name of APL. The Managing Director of ACL informed Indo Bank of the same, however, did not receive any acknowledgment from them. The finance obtained was used for various purposes including essential maintenance work at APL.

Since March 2017, ACL had not been able to consume the entire electricity generated by APL and payments had become irregular. The cancelling of mining licenses subsequent to the mining scandal in Karnataka in February 2018 served another blow on ACL who ended up in severe financial stress. Consequently, even APL started facing problems and was unable to service its debts. People's Bank initiated CIRP against APL.

#### Insolvency Proceedings

In March 2018, ACL defaulted on its instalment to People's Bank who then filed an application for initiation of CIRP against ACL on behalf of the lenders. The application was admitted and IRP was accordingly appointed on 30.03.2018. GKCL submitted its claim as a Financial Creditor which was rejected by RP and accepted only as an Operational Creditor. It later filed an application to NCLT contesting the said decision of the RP.

The RP prepared a list of claims and raised interim finance of INR 5 crores for various purposes including payment to TTCL for resuming constructing work at the Karnataka plant after obtaining approval of the CoC. However, RST Bank challenged this decision in the NCLT and proceeded to invoke personal guarantee against the promoter of ACL.

The interim trustee of ALSL applies as a foreign representative to NCLT for recognition of the foreign proceedings and sought cooperation in relation to the loaned amount to ACL. RP of ACL filed an application for avoidance of transactions with regard to payment of excess amount of INR 20 crores to APL which was opposed by APL. APL later filed an application in NCLT for release of the mortgage over the land of APL and for opposing the approval of Resolution Plan in relation to the PPA.

The RP invited Resolution Plans and the Committee of Creditors approved the Resolution Plan of RCL without considering the revised Resolution Plan submitted by JMCL due to delay in their submission. Aggrieved by this, JMCL filed an application to NCLT for approval of its Plan.

The RP submitted RCL's plan to NCLT for its approval. NCLT has listed all applications for hearing on 16.11.2018.

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## ISSUES RAISED

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### *Issues Raised on behalf of Corporate Debtor*

1. Whether the CIRP application before NCLT by the people's bank is not maintainable?
2. Whether the payment of INR 20 lakh to TTCL was lawful?
3. Whether the personal guarantee against promoter of ACL is not maintainable due to jurisdiction of NCLT?
4. Whether the mortgage of 100 acres of land by ACL would not constitute as asset stripping?

### *Issues Raised on behalf of Operational Creditor*

1. Whether GKCL is a financial creditor for the CIRP?

### *Issues Raised on behalf of Resolution Professional*

#### **1. Submissions on behalf of Resolution Professional of Arvind Cement Limited**

- 1.1 Whether GKCL is an operational creditor for the CIRP?
- 1.2 Whether Interim Finance provided to TTCL was lawful?
- 1.3 Whether the transaction of certain nature can be avoided as excess payment of INR 20 crore has already been made to APL?
- 1.4 Whether the resolution plan submitted by JMCL is not acceptable?
- 1.5 Whether ACL can terminate the PPA with APL, would it affect the Resolution Plan?

#### **2. Submissions on behalf of the Resolution Professional of Arvind Power Limited**

- 2.1 Whether ACL is in default of payment to APL and claims of APL as an operational creditor shall be admitted under the pretext of the Power Purchase agreement?
- 2.2 Whether ACL should release the mortgage of 100 acres of land owned by APL and the same should be constituted as asset stripping?

2.3 Whether ACL can terminate the PPA with APL, would it affect the Resolution Plan for non-consideration of the long-term PPA?

**Issues Raised on behalf of Financial Creditors**

1. Whether the CIRP application is maintainable?
2. Whether the payment of INR 20 lakhs to TTCL by the corporate debtor is unlawful?
3. Whether the interim finance provided by the Resolution Professional of Arvind Cement Limited is unlawful?
4. Whether personal guarantee against the promoter of ACL (Arvind Kumar) is maintainable?

**Issues Raised on behalf of Other Parties**

**1. Submissions on behalf of Resolution Applicant**

1.1 Whether the Resolution Plan submitted by JMCL should be accepted by RP of ACL?

**2. Submissions on behalf of Foreign Representative**

2.1 Whether there is an application for recognition of foreign proceeding?

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## **SUMMARY OF ARGUMENTS**

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### **ARGUMENTS ON BEHALF OF CORPORATE DEBTORS**

The CIRP application before the NCLT by People's bank is not maintainable as it violates the principles of Natural Justice and the I&B Code does not exclude the above-mentioned principle. Payment of 20 lakhs transferred to TTCL was lawful according to preferential transactions under Section 43 of the I&B Code. The payment to TTCL would be beneficial after the Karnataka plant became operational. The personal guarantee against Mr. Arvind Kumar is not maintainable as it is not the correct forum for invoking personal guarantee of the promoter. The mortgage of land of APL (earlier belonging to ACL) was not arbitrary or without consideration and hence, it was not an undervalued transaction under Section 45 of the Code.

### **ARGUMENTS ON BEHALF OF OPERATIONAL CREDITORS**

Financial Creditor is determined by the nature of agreement entered into between the parties. Where a party enters into an agreement for disbursement of debt against consideration for time value of money, it is a financial agreement. The agreement between GKCL and ACL is not an ordinary supplier agreement; however, it is one that provides for payment of interest and a commitment for hiring GKCL as a dealer for 30% of its sales. The law itself provides for an inclusive definition of financial debt and this case falls squarely under the definition provided in the IB Code

### **ARGUMENTS ON BEHALF OF RESOLUTION PROFESSIONAL/INTERIM**

#### **RESOLUTION PROFESSIONAL**

Argument on Behalf of RP of ACL:- The Interim Finance provided to TTCL was lawful and covered under the Section 18 (1) (d) and Section 20 (1) of the I&B Code. The interim finance provided is not building new assets but, is protecting and preserving the value of the property of the corporate debtor as a going concern. Considering that the payment made to APL was made during the F.Y. 2016-17 and since the insolvency process commenced within the required time, the transaction of certain nature can be avoided as excess payment of INR 20 crore has already been made to APL. The Resolution Plan submitted by JMCL is not acceptable as the entire purpose of the speed of insolvency would be defeated. It would also lead to a violation of the provisions of Section 29 (A) read with Section 25(2) (h) of the I&B Code. APL sought determination of claims rejected by the RP of ACL; such redetermination is not envisaged under Section 30 and Section 31 of the IB Code. ACL can terminate the PPA with APL.

Argument on Behalf of RP of APL:- Since APL is an Operational Creditor, it has the right to claim operation debt from the RP of ACL. Reversal of transactions would imply violation of contractual obligation arising out of the PPA, the provisions which are binding on both the parties. ACL should release mortgage on the land for successful resolution of insolvency of APL considering that APL was undergoing financial stress when ACL mortgaged the land for its own benefit. ACL cannot terminate the PPA with APL as the IB Code does not enable termination of valid contracts by a resolution plan nor does any provision in Section 30 and Section 31 of the IB Code read with Section 37 and Section 38 of the CIRP Regulations.

### **ARGUMENTS ON BEHALF OF FINANCIAL CREDITORS**

The CIRP is maintainable since the default amount in the said case exceeds one lakh rupees. The payment of INR 20 lakhs to TTCL was unlawful as it was made in order to defraud the creditors and the same has been proven through Section 49 of the IB Code and it constituted as a undervalue transaction under Section 45(2)(b).

The interim finance provided by the RP of ACL for Karnataka Unit is contrary to Section 20 of the Code and hence it is unlawful.

In regard to the promoter of ACL, Mr. Arvind Kumar, guarantee contracts cannot be suspended by an order of Moratorium under Section 14 of the I&B Code. Hence the personal guarantee filed against him by RST bank is maintainable.

### **ARGUMENTS ON BEHALF OF OTHER PARTIES**

JMCL's delayed submission of resolution plan is no ground for rejection for a resolution plan rather, the rejection of the plan should be on a substantive ground. The provisions of Regulation 39 of the CIRP have substantial information to prove that JMCL's revised bid should have been taken into consideration as it was in the best interest of the company.

On behalf of Kelvin Murray, foreign representative of Citi Fin, as it is due to the constraints of time, there should be recognition of the foreign proceeding for the 100 million USD which is unpaid. Kelvin Murray, is the foreign representative appointed by the US Court to make sure Citi Fin gets all its debts back as a part of his duty as Citi Fin is going through involuntary bankruptcy.

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## **ARGUMENTS ADVANCED**

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### **ARGUMENTS PRESENTED ON BEHALF OF CORPORATE DEBTOR/**

#### **PROMOTERS OF CORPORATE DEBTOR**

#### **1. The CIRP application before NCLT by the people's bank is not maintainable**

The Counsel humbly submits before the Hon'ble Tribunal that the said application for Corporate Insolvency Resolution Process (CIRP) should be dismissed at the first instance itself. The submissions in this regard are fourfold:

##### 1.1. Violation of the principle of Natural Justice

1.1.1 Audi alteram partem<sup>1</sup> or audiatur et altera pars is the most basic principle of natural justice which means "the right to a fair hearing or listen to the other side."<sup>2</sup>

It is therefore, to be brought before the attention of Hon'ble Tribunal that no notice was given prior to the submission of the said petition to Arvind Cement Limited regarding its default.

According to the principles of natural justice<sup>3</sup> in situations like these, notice prior is bound to be produced before the application is admitted<sup>4</sup>. The rationale being that the proceedings before NCLT are adversarial in nature and such proceedings have drastic consequences, hence person cannot be condemned unheard.<sup>5</sup>

1.1.2 Providing such notice to Corporate Debtor can give him the opportunity to bring its face of the facts to the observation of the Tribunal as to whether any such default as contended by the creditor has actually occurred or such application deserves to be dismissed on account of invalidity,<sup>6</sup> deprivation of which they can put the rights of corporate debtor to defend themselves before the initiation of corporate insolvency

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<sup>1</sup>Nawabkhan Abbaskhan v. State of Gujrat, AIR 1974 SC 1471 (India).

<sup>2</sup>Sham Sahib M. Multtani v. State of Karnataka, AIR 2001 SC 921 (India).

<sup>3</sup>Canara Bank v. Debasis Das, AIR 2003 SC 2041 (India).

<sup>4</sup>S.L. Kapoor v. Jagmohan, AIR 1981 SC 136 (India).

<sup>5</sup>Sree Metaliks Limited & Anr. v. Union of India, Writ Petition 7144 (W) of 2017 (India).

<sup>6</sup>Sahara India (Firm), Lucknow v. CIT, AIR 2008 SC (Supp) 308 (India).



resolution process in grave peril. Therefore, this is a clear abrogation of the principles of natural justice as no notice was given to Arvind Cement Limited.

1.2. Further, it is important to note that, where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken as compliance with the principles of natural justice.<sup>7</sup> Hence, even though the provision of notice is unexpressed in Sec. 7 of 'Insolvency and Bankruptcy Code, 2016,' but where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a Particular manner, natural justice will have to be observed unless statutory provision specifically or by necessary implication excludes the application of any rules of natural justice<sup>8</sup>before admitting application.

## **2. Payment of INR 20 lakhs transferred to TTCL was lawful**

The payment made to TTCL by ACL of INR 20lakhs was not contrary to law.

2.1 As per Section 43 of the Code, the following requisites have to be present for a transaction to be adjudged as avoidable –It has to be a preferential transaction within the meaning of section 43(2) of the Code.<sup>9</sup>There is a transfer of property or an interest for the benefit of a creditor for or on account of an antecedent financial debt or other liabilities owed by the corporate debtor.<sup>10</sup>Such transfer has the effect of positioning creditor in a beneficial position than it would have been in the event of distribution of assets.<sup>11</sup>

2.2 The payment of INR 20 lakhs was made to TTCL in order to benefit the creditors as Karnataka Unit would have been essentially a producer of money which would help the Corporate Debtor to repay the debt.<sup>12</sup> As benefit to a creditor was an intention of the debtor it essentially falls under the preview of Section 43(2) which preserves rights of the corporate debtor to preferential transactions.

## **3. The personal guarantee against promoter of ACL is not maintainable due to jurisdiction of NCLT**

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<sup>7</sup> Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818(India)..

<sup>8</sup> Safdar Khan v. State of Assam, 2017 1 GLT 365(India).

<sup>9</sup> Section 43(2) Insolvency and Bankruptcy Code, 2016

<sup>10</sup> Section 43(2)(a) Insolvency and Bankruptcy Code, 2016

<sup>11</sup>Section 53 Insolvency and Bankruptcy Code, 2016

<sup>12</sup> Moot Proposition Pg.6 ¶ 1.

3.1 It is humbly submitted that the application filed by RST Bank for invoking personal guarantee of the promoter should be dismissed. NCLT may be used as a forum for initiating insolvency proceedings against the guarantors; however, it is not the correct forum for invoking personal guarantee of the promoter. The correct forum shall be Debt Recovery Tribunal under the SARFAESI Act, 2002. It is further contested that such application should be filed after the claims of the banks are ascertain.

3.2 The NCLT is already ceased with the process of insolvency resolution against the company under IBC 2016 and moreover, the bank has also put their appearance in the said proceedings regarding its claim. At no point in time the bank has disassociated itself from the proceeding before the NCLT and it is actively participating in the proceeding<sup>13</sup>.

#### **4. The mortgage of 100 acres of land by ACL would not constitute as asset stripping**

4.1.Operations of APL completely dependent on ACL's smooth functioning. The existence of APL was totally dependent on ACL in such manner that ACL's insolvency consequently leads to insolvency of APL. The entire power consumption of APL is done by ACL. For successful revival and resolution of insolvency of APL, it is pertinent to ensure that ACL is revived as a running unit.

4.2.No intention to defraud creditors of APL. ACL in good faith and fiduciary care made payments to APL for running its business concern. All Throughout ACL tried to revive APL and pumped in money in order to continue its operations despite it itself being in financial stress. Permission from the banks under the agreement was obtained- People's Bank itself lent further amount to ACL and Indo Bank was informed by email without any objection received from them.<sup>14</sup> Thus, there is nothing on record to suggest that the ACL has suppressed any fact or has not come with the clean hands.<sup>15</sup>

4.3.ACL paid consideration for the mortgage of land of APL. ACL played a big part in finalizing credit facilities for ACL and acted as a corporate guarantor for the loans sanctioned to APL. Thus, the mortgage of land of APL (earlier belonging to ACL)

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<sup>13</sup> Sanjeev Shriya vs. State Bank of India, 2018(2) ALJ 769 (India),

<sup>14</sup> Moot Proposition Pg 5 ¶ 3

<sup>15</sup> Neeta Chemicals (I) Pvt. Ltd. vs. State Bank of India Company Appeal (AT) (Insolvency) No. 174 of 2017 (India)

was not arbitrary or without consideration and hence, it was not an undervalued transaction under Section 45 of the Code.

## **ARGUMENTS PRESENTED ON BEHALF OF OPERATIONAL CREDITOR**

### **1. GKCL is a Financial creditor for the CIRP**

GKCL satisfies the definition of Financial Creditor under Section 5(7) and meets

Criteria of Financial Debt under Section 5(8) of the I&B Code.

- 1.1. The debt owed to Corporate Debtor was disbursed against the consideration for ‘time value of money’. The expression ‘Time Value’ has been defined to mean “the price associated with the length of time that an investor must wait until an investment matures or the related income is earned”.<sup>16</sup> The fact that GKCL was to be paid consideration of INR 500 crores with interest over a period of 10 years even after construction was completed indicates that it was a financial debt transaction against consideration of time value of money. When an amount paid satisfies the condition of consideration against time value of money, it is said to have the commercial effect of borrowing.<sup>17</sup>
- 1.2. It is not necessary for an “amount” to be disbursed against the consideration for time value of money. To show that there is a debt due which was disbursed against the “consideration for the time value of money”, it is not necessary to show that an amount has been disbursed to the ‘Corporate Debtor’.<sup>18</sup> A person can show that the disbursement has been made through any instrument including a contract. In the case of Daljit Singh vs. SMD Infra Ventures,<sup>19</sup> a Receipt cum Acceptance Letter was presumed to have a commercial effect of borrowing.
- 1.3. Inclusive definition of Financial Debt under the Code: The current definition of ‘financial debt’ under section 5(8) of the Code uses the word “includes”, thus the kinds

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<sup>16</sup> Bryan A. Garner,,3 ed. Black’s Law Dictionary.

<sup>17</sup> Nikhil Mehta & Sons vs. AMR Infrastructure Ltd. (NCLAT) [2017] 141 CLA281( India)

<sup>18</sup> B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited (NCLAT) [2018]142CLA321(India) (Supra *B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited*)

<sup>19</sup> Daljit Singh vs. SMD Infra Ventures[2018]208CompCase551.( India)

of financial debts illustrated are not exhaustive.<sup>20</sup> Thus, it implies that the agreement between GKCL and ACL need not necessarily fall under the sub-heads of Section 5(8).

1.4. Agreement between GKCL and ACL had an 'assured returns scheme' clause. The Agreement provided for not only payment of 'interest' over the pending consideration amount but also appointment of GKL, a group company of GKCL for 30% of their sales in any given year till the entire consideration amount is paid. Thus, GKCL was a financial creditor and had chosen 'Committed Returns/Assured Returns' plan under the said Agreement.<sup>21</sup>

**ARGUMENTS PRESENTED ON BEHALF OF RESOLUTION PROFESSIONAL/  
INTERIM RESOLUTION PROFESSIONAL  
SUBMISSIONS ON BEHALF OF RP OF ACL**

**1. GKCL is an Operational Creditor to ACL**

It is hereby submitted that GKCL falls under the category of Operational Creditor under Section 5(20) of the Code:-

1.1. The agreement between GKCL and ACL is an operational and not a financial agreement. Financial creditors are those whose relationship with the entity is a pure financial contract while Operational contracts typically involve an exchange of goods and services for cash.<sup>22</sup> The Code differentiates between financial creditors and operational creditors on logical grounds.<sup>23</sup> The agreement entered into between ACL and GKCL was based on the operations carried on by ACL whereby GKCL was hired to provide the service of construction of storage vessels.<sup>24</sup> The terms of the agreement do not provide for creation of any type of security over the assets of the Corporate Debtor. Further, definition of financial debt requires a pre-requisite of disbursement of debt. No 'amount' has been disbursed from GKCL to ACL to qualify under the definition of

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<sup>20</sup> (Supra *B.V.S. Lakshmi vs. Geometrix Laser Solutions Private Limited*)

<sup>21</sup> Anil Mahindroo and Ors. vs. Earth Iconic Infrastructure (P) Ltd. (NCLT-Delhi )CP No. (IB) -16-(PB) /2017.( India)

<sup>22</sup> The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design November 2015

<sup>23</sup> BLRC March 2018

<sup>24</sup> Moot Proposition Pg 3 ¶ 4

Financial Debt under Section 5(8) of the Code. Thus, the agreement was operational in nature.

1.2. Without ad idem, it cannot be assumed that the contract was financial when it was never intended to be so by the parties.

Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence.<sup>25</sup> The parties ACL and GKCL never intended entering into a financial agreement.

## **2. Interim Finance provided to TTCL was lawful.**

The interim finance provided by RP of ACL for INR 5CR to TTCL is not contrary to the provisions of law.

2.1 It is humbly submitted by the counsel for RP of ACL (Pooja Prakash) that the interim finance provided for three purposes I) minimal operation of Rajasthan Unit ii) construction work at Karnataka Unit and iii) payment of salaries for workmen. All the three purposes are lawful and covered under the Section 18 (1) (d) and Section 20 (1) of the Code.

*Section 18 (1) (d); - Duties of interim resolution professional: The interim resolution professional shall perform the following duties, namely-(d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional has been appointed by the committee of creditors.<sup>26</sup>*

*Section 20 (1) ; -Management of operation of corporate debtor as going concern (1)  
The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.*

2.2 In furtherance to the allegations raised by RST bank over the interim finance provided for the construction work at Karnataka Unit, is in conclusion building new asset has been stricked out by the RP of ACL on the grounds

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<sup>25</sup> Powertech World Wide Limited Vs. Delvin International General Trading LLC, (2012) 1 CompLJ62(SC)(India).

<sup>26</sup> Insolvency and Bankruptcy Code 2016, § 18

- 2.2.1 ACL has already imported the machinery and plant equipments.<sup>27</sup> ii) ACL has brought 80 acre of land. The following are termed 'fixed assets'.
- 2.2.2 The RP of ACL has exercised her power under Section 18 (1) (d) and Section 20 of the Code and has utilised the interim finance on fixed assets to procure the final product. The return in the form of final product not building of a new asset but, it is a profit of the same.
- 2.2.3 There have been no modifications or improvement on the fixed assets mentioned but, they are utilised in order to procure the final product.
- 2.2.4 Frequently, it is difficult to determine whether subsequent expenditure related to fixed asset represents improvements that ought to be added to the gross book value or repairs that ought to be charged to the profit and loss statement. Only expenditure that increases the future benefits from the existing asset beyond its previously assessed standard of performance is included in the gross book value, e.g., an increase in capacity.<sup>28</sup>

Hence, as the fixed assets are not facing modification their utility products are added to the profit and loss statement and deem it out of the scope of 'asset'.<sup>29</sup>

Hence, the interim finance provided by RP of ACL is not building new assets but, is protecting and preserving the value of the property of the corporate debtor as a going concern.

### **3. The transaction of certain nature can be avoided as excess payment of INR 20 crore has already been made to APL.**

It is submitted that the application filed by the Resolution Professional of ACL before the Adjudicating Authority for avoidance of certain transactions is maintainable. As per the audited financial statement of APL for 2016-17, the sole source of revenue for APL have been the payments made by ACL. APL had received INR 100 Crores from ACL. The RP of ACL seeks for avoidance of the above transactions to the extent of INR 20 crores.<sup>30</sup>

3.1 As per Section 43 of the Code, the following requisites have to be present for a transaction to be adjudged as avoidable – It has to be a preferential transaction within

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<sup>27</sup> Moot proposition page 5, ¶ Para 2.

<sup>28</sup> Accounting for Fixed Asset, Indian Accounting Standards, 1985

<sup>29</sup> Indian Companies Act 2013, Schedule 3

<sup>30</sup> Moot proposition page 6 ¶ 2 read with page 9 ¶ 3

the meaning of section 43(2) of the Code.<sup>31</sup> There is a transfer of property or an interest for the benefit of a creditor for or on account of an antecedent financial debt or other liabilities owed by the corporate debtor.<sup>32</sup> Such transfer has the effect of putting creditor in a beneficial position than it would have been in the event of distribution of assets.<sup>33</sup>

3.2 The transactions under consideration must have been undertaken by the corporate debtor at a relevant time.<sup>34</sup> The transaction under consideration has been made for the benefit of APL. APL is an operational creditor as per the definition under Section 5(20) read with Section 5(21). APL was constituted with the sole objective of running the Captive Power Plant. ACL has been not only its capital contributor but also its sole customer. The payment to APL was made by ACL on account of antecedent financial debts owed to banks and other secured creditors.

3.3 The Transaction also puts APL in a beneficial position. In the event of distribution of assets made in accordance of section 53, APL would not have been in a beneficial position as APL would have been paid post making payments in favour of insolvency resolution process cost, workmen's dues, secured creditors, wages and other unpaid workmen's dues, unsecured creditors and governments dues.

3.4 Under section 43(4) (b), a preference is deemed to be given at a relevant time if a preference is given to a person other than related party during the period of one year preceding the insolvency commencement date. The payment made to APL was made during the F.Y. 2016-17. The insolvency process commenced within the required time.

#### **4.The resolution plan submitted by JMCL is not acceptable...**

The RP of ACL submits that the revised application of JMCL is not acceptable.

4.1 It is submitted by the counsel of RP of ACL that the object of the Code is to enable efficient and speedy consideration of serious and eligible application. The failure to adhere to strict timelines of 180 days or 270 days amounts to a severe prejudice to the Corporate Debtor, the lenders and other stakeholders.

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<sup>31</sup> Insolvency and Bankruptcy Code 2016 § 43(2).

<sup>32</sup> Insolvency and Bankruptcy Code 2016 § 43(2)(a)

<sup>33</sup> Insolvency and Bankruptcy Code 2016 § 53

<sup>34</sup> Insolvency and Bankruptcy Code 2016 § 43(2). Section 43(1) read with section 43(4)

4.2 It is clear from the fact that the first bid submitted by JMCL indicates that JMCL was well aware of the last date of submission being 15.10. 2018.<sup>35</sup> for the resolution plan. The tender terms have to be strictly construed and submission of bids beyond deadline would not only derail the entire process but would also result into injustice to other bidders.<sup>36</sup>

4.3 Speed is the essence of IBC<sup>37</sup> it must be noted that in this instance if RP of ACL opens and accepts the application of JMCL, it will create an array of applicants wanting to submit their plans for ACL as the establishment of ACL is of a superior quality with regards to its plant and machinery.<sup>38</sup> The entire purpose of the speed of insolvency will be defeated.

4.4 It has further been advanced that the provisions of Section 29 (A) read with Section 25(2) (h) of the Code would be held as a violation of the statutory process contemplated by the aforesaid provisions if the application filed by JMCL is given consideration.

4.5 Under the Indian Constitution, the RP of ACL also submits that Article 14 which deals with the equality principle has undergone review in the Hon'ble High Court of Jammu and Kashmir, multiple times and it has been established that with regards to tender conditions that the tenders which are not in line with the conditions set by the petitioner have no value and response.<sup>39</sup> In other words, a person who comes after the deadline has no locus standi to challenge tender conditions. A level playing ground should be established under Article 14 and whoever tries to misbalance this level playing ground must not be heard.<sup>40</sup>

## **5. ACL can terminate the Power Purchase Agreement with APL.**

5.1 The counsel on behalf of RP of ACL humbly submits that The Specific Relief Act, 1963 amounts to effectively seeking performance of the contract, in the present case PPA which cannot be accepted.

5.2 The Adjudicating Authority has to act in accordance with the requirements of Section 31(1) of the IB Code and considered a resolution plan submitted for its approval. APL

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<sup>35</sup>Moot Proposition page 10 ¶ 4.

<sup>36</sup> W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and Others, (2001) 2 SCC 451 (India)

<sup>37</sup> M/S. Innoventive Industries Ltd vs ICICI Bank ( 2017) CIVIL APPEAL NOS. 8337-8338 OF 2017 (India) ( Supra *M/S. Innoventive Industries Ltd vs ICICI Bank*)

<sup>38</sup> Moot proposition page 10 ¶ 2

<sup>39</sup> M/s Nayak Infrastructure Pvt. Ltd vs State of J&K and ors (2012) OWP No. 1170 OF 2012..(India)

<sup>40</sup> Reliance Energy limited and anr v Maharashtra State Road Development Co. Ltd and Ors (2007) 8 SCC 1(India)



has sought determination of the claims rejected by RP of ACL. Such a redetermination is not envisaged under Section 30 and Section 31 of the IB Code.

5.3 Section 10 of The Specific Relief Acts, 1963, establishes that commercial contract by nature are determinable even if there is no specific provision in the contract authorizing/enabling to terminate it. It can be terminated without any reason for the same by serving a reasonable notice and the contract which are determinable cannot be specifically enforced as provided by Section 14 (1) of The Specific Reliefs Act, 1963<sup>41</sup>

### **SUBMISSIONS ON BEHALF OF RP OF APL**

#### **1. The application filed by the RP of ACL before the Adjudicating Authority for avoidance of certain transactions is not maintainable.**

It is submitted that the application filed by the Resolution Professional of ACL before the Adjudicating Authority for avoidance of certain transactions is not maintainable.

##### 1.1 APL is an Operational Creditor

The term “Operational creditor” has been defined in Section 5(20) as, “A person to whom an operational debt is owed”. Further, according to the Code, operational debt has been defined <sup>42</sup>in the IB Code to mean “a claim in respect of the provision of goods or services” APL was constituted in the year 2003 to run the Captive Power Plant. ACL purchases nearly 80% of the power and also the fly ash generated thereby. Thus, owing to the nature of services of ACL and APL, APL is indeed an operational creditor. ACL thus, is in default to APL and hence, APL has a right to claim over the money.

##### 1.2 Payment to APL cannot be termed as preferential transaction

Section 43(3) states that a transfer made in the ordinary course of business of the corporate debtor shall not amount to preferential transaction. Manufacturing of cement requires power and fly ash in abundance. The purchase of power and fly ash from APL thus, is ordinary, day-to-day transaction for ACL. And hence, cannot be termed as preference. It cannot be sought to be reversed by way of declaring it avoidable transaction.

##### 1.3 Violation of contractual obligation

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<sup>41</sup>Indian Oil Corporation Limited v. Amritsar Gas Service and Ors (1991) 1 SCC 533(India).

<sup>42</sup> Insolvency and Bankruptcy Code 2016§ 5(21).

In 2006, ACL entered into a long-term Power Purchase Agreement (PPA) with APL. The provisions of the PPA state that ACL shall mandatorily purchase at least 80% of the entire power generated by APL. The Agreement also provided that ACL shall make minimum payments to the APL to meet expenses, taxes and debt-service obligations to the lenders. Reversal of transactions would imply violation of contractual obligation arising out of the PPA, the provisions which are binding on both the parties.

**2. ACL should release the mortgage of 100 acres of land owned by APL and the same should be constituted as asset stripping.**

APL is a wholly-owned SPV of ACL formed in 2003 for power generation. It was completely dependent on ACL for its operations as per the PPA between them. However, the mortgage of its 100 acres land constituted asset stripping as:-

**2.1 It was done in complete disregard of the interests of creditors and stakeholders of APL.**

In 2003, APL entered into credit facility agreements with People's Bank and Indo Bank. One of the clauses provided for approval of the banks before creating any encumbrance on the assets of the company. However, ACL in contravention of the credit facility agreements of its SPV, APL mortgaged its land for securing a loan of INR 500 crore as no approval was obtained from the banks regarding the mortgage of the land.

**2.2 APL was undergoing financial stress when ACL mortgaged the land for its own benefit**

Non-payment of dues with reduced consumption of power by ACL pushed APL towards bankruptcy. Since May 2017, it was unable to pay its workers and banks lost confidence in its ability to service debts. Despite this, ACL mortgaged APL's land in September 2017. The land could have been used to be sold off to pay the creditors of APL. The sub section (1) of Section 66 of the Code provides that if during the CIRP, it is found that any business of the Corporate Debtor has been carried on with the intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose, the Tribunal may on application of the Resolution Professional pass an order directing any persons who were knowingly parties to carry on the business in such manner shall be liable to make such contribution to the assets of the Corporate Debtor as it may deem fit.

**2.3 Preferential Transaction under Section 43**

Section 43(1) of the Code provides that a corporate debtor shall be deemed to have given preference if there is any interest created over property of the corporate debtor for the benefit of a creditor and has the effect of putting such creditor in the beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53 of the Code.

In the instant case, the Directors of APL after negotiations with ACL have created an interest over the immovable properties as security in favour of the lenders of ACL, its holding company, for the benefit of ACL and its creditors and have put the Creditors of the APL in disadvantageous position than they would have been in the event of distribution of assets of Corporate Debtor being made in accordance with section 53 of the Code.<sup>43</sup>

Thus, the Tribunal has the power to declare such transaction to be fraudulent and preferential and direct ACL to release mortgage on the land for successful resolution of insolvency of APL.

**3. ACL cannot terminate the Power Purchase Agreement with APL, the same should have been in consideration in the resolution plan formulated.**

3.1 The RP of APL claims that he is bestowed with the duty to preserve and protect the assets of APL (Section 20(1) read with section 25(1) and 23(2) of the IBC)

3.2 The objection raised is that the resolution plan submitted by RCL seeks to terminate the PPA between APL and ACL unlawfully. It adversely affects the rights of the APL under the PPA entered in 2006.

APL being an operational creditor submitted its claims for INR 95 crore to RP of ACL which were rejected by the RP of AC<sup>44</sup>. This amount was owed by the corporate debtor to APL under the PPA.

3.3 It has been submitted that the right to property cannot be taken away by any act of Parliament. Under the Article 300A of Indian Constitution<sup>45</sup>, valid contracts are under the preview of property. A right created in favour of a party cannot be taken away.

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<sup>43</sup> IDBI Bank Limited vs. Jaypee Infratech Limited (2017) CP No. (IB) 77/ALD/2017. (9 August, 2017) (India).

<sup>44</sup> Moot proposition Pg 9 ¶ 2

<sup>45</sup> ICICI Bank Limited v. SIDCO Leathers Ltd 2006 (10) SCC 452 (India).

3.4 The IB Code does not enable termination of valid contracts by a resolution plan. Nor does any provision in Section 30 and Section 31 of the IB Code read with Section 37 and Section 38 of the CIRP Regulations.

3.5 Under the PPA it is stated that :-

*“In 2006, ACL entered into a long-term Power Purchase Agreements (PPAs) with APL. The PPA provides that ACL shall mandatorily purchase at least 80% of the entire power generated by APL. The PPA stipulated that in the event that ACL is not able to consume the entire output generated by the APL, APL may sell the balance power to a third party and ACL shall be liable to compensate for the unsold units. It further stipulated that ACL shall provide APL with the necessary transmission facility to transfer power to the grid within a period of 5 years from the scheduled date of commencement of operations of the power plant. “<sup>46</sup>*

3.6 ACL is obligated to perform the contract under the preview of Section 20 (2) of the Specific Relief Act ,1963

*“20. Discretion as to decreeing specific performance.—*

*(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—*

*(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*

*(b) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, where as its non-performance would involve no such hardship on the plaintiff.”*

Hence, ACL cannot terminate the Power Purchase Agreement with APL.

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<sup>46</sup> Moot Proposition Pg 2 ¶ 9.

**ARGUMENTS PRESENTED ON BEHALF OF FINANCIAL CREDITORS**

**1. The CIRP application is maintainable.**

- 1 Section 4 of the Code states that Part II will apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the defaults claimed is one lakh rupees. The default claimed in the present matter by the financial creditors is all above one lakh rupees. In the landmark judgment of M/s Innoventive Industries v. ICICI Bank<sup>47</sup> the Apex Court held that under Section 4 of the Code, Part II applies to matters relating to the insolvency and liquidation of corporate debtors, where the minimum amount of default is rupees one lakh. Since the default amount in the said case is much more than 1 lakh, the application stands maintainable.

**2. The payment of INR 20 lakh to TTCL by the corporate debtor is unlawful.**

2.1 It has been submitted by the counsel RST Bank that the payment of INR 20 lakh which was made to TTCL by ACL was contrary to the provisions under IBC.

2.2 The transaction between TTCL and ACL was of INR 20 lakh. ACL had INR 20 lakhs left in one of its bank accounts, this money could have been for making interest payment to the banks, but it chose to default to banks and instead paid the money to TTCL<sup>48</sup>. This would constitute as a undervalue transaction under Section 45(2)(b).

*“(2) A transaction shall be considered undervalued where the corporate debtor—*

*(a) makes a gift to a person; or*

*(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.”*

2.3 Further, this transaction would be in the relevant time period under the Section 46(1) of the IB Code.

*“(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—*

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<sup>47</sup>( Supra M/S. Innoventive Industries Ltd vs ICICI Bank)

<sup>48</sup> Moot Proposition Pg. 6 ¶. 1

*(i) such transaction was made with any person within the period of one year preceding the insolvency commencement date”*

2.4 In furtherance, the transaction of INR 20 lakhs was made in order to defraud the creditors and the same has been proven through Section 49 of the IB Code. As, ACL the payment of such kind would keep the money beyond the reach of the financial creditors, also this would adversely affect the interests of people in relation to the claim as mentioned in the Code Section 49 of the IB Code reads as:-

*“Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—*

*(a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or*

*(b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order—*

*(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and*

*(ii) protecting the interests of persons who are victims of such transactions”*

### **3. The interim finance provided by the Resolution Professional of Arvind Cement Limited is unlawful.**

3.1 The interim finance granted by RP of ACL for construction work at Karnataka is contrary to law. It is being humbly contested by the counsel of RST Bank, financial creditor, which the payment of INR 5 crore made through the interim finance for three major purposes, Minimal operation at Rajasthan Unit, payment of salaries and construction of work at Karnataka Unit. The interim finance provided for Karnataka Unit is contrary to Section 20 of the Code. Section 20 titled

*“Management of operation of corporate debtor as a going concern “.*

Going concern is defined as, *“A business currently successful with indications in the foreseeable future of continuing to do well.”*<sup>49</sup>

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<sup>49</sup> The Law Dictionary. (2018). *What is GOING CONCERN? definition of GOING CONCERN (Black's Law Dictionary)*. [online] Available at: <https://thelawdictionary.org/going-concern/> [Accessed 5 Sep. 2018].

- 3.2 As, it is established that the ACL has brought imported machinery and equipments and purchased land measuring 80 acres for Karnataka Unit.<sup>50</sup> The same would constitute as fixed asset. Further, TTCL has begun work at Karnataka site, due to the uncertainty over payments for its service; it has done only minimal off site work so far.<sup>51</sup>
- 3.3 There are no operation procedures initiated at Karnataka Unit. In furtherance, to the same it has to be noted that that interim finance was granted for “construction work”<sup>52</sup> at Karnataka Unit.
- 3.4 In order for an asset to be recognized in the financial statements, it must the following definition laid down in the IASB Framework: “*Asset is a resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity.*”<sup>53</sup>”
- 3.5 Frequently, it is difficult to determine whether subsequent expenditure related to fixed asset represents improvements that ought to be added to the gross book value or repairs that ought to be charged to the profit and loss statement. Only expenditure that increases the future benefits from the existing asset beyond its previously assessed standard of performance is included in the gross book value, e.g., an increase in capacity.<sup>54</sup>
- 3.6 It has been noted that due to non- operationalization of Karnataka Unit, it had no capacity and no productivity, but developments and improvements through construction work utilised through interim finance would ultimately lead to increase in the capacity providing marginal productivity i.e. to say that this performance would fall in the gross value book and hence, be noted as building a new asset.

#### **4. Personal guarantee against the promoter of ACL (Arvind Kumar) is maintainable**

- 4.1 In 2005, RST Bank lent ACL INR 200 crores by way of a working capital facility agreement wherein the promoter of ACL, Mr. Arvind Kumar gave a personal guarantee to secure the loan.<sup>55</sup>RST Bank has filed an application before this Hon’ble bench for action against the promoter. It is contested by the Bank that:- Guarantee

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<sup>50</sup> Moot Proposition page 5 ¶ 2

<sup>51</sup> Moot Proposition page 5 ¶ 2

<sup>52</sup> Moot Proposition page 5 ¶ 2

<sup>53</sup> International Accounting Standards Board (IASB) Framework

<sup>54</sup> Accounting for Fixed Asset, Indian Accounting Standards,1985

<sup>55</sup> Moot Proposition Page 3 ¶ 2

Contracts cannot be suspended by an order of Moratorium under Section 14 of the I&B Code.

4.2 The recent amendment to I&B Code<sup>56</sup> supplemented by a plethora of judgments have given a clear picture on the question of invoking guarantee during CIRP. The courts have held that moratorium has no application on the properties beyond the ownership of the Corporate Debtor.<sup>57</sup>The BLRC Report of March 2018 gives an insight on the intention of the amendment to Section 14 which inter alia was to prevent the promoters from filing frivolous applications to merely guard their assets during the stay imposed under Moratorium. It further held that “*Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor*”<sup>58</sup>. Thus, bank has a right to proceed against the assets of the personal guarantor.

4.3 Bank has a right to invoke guarantee against the promoter in NCLT Section 128 of the Indian Contract Act propounds:- “*The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract*”. Thus, RST Bank has a right to invoke such guarantee against the promoter. The Bank can invoke guarantee against both ACL and its promoter as rights under Guarantee Contracts are co-extensive<sup>59</sup>, joint and several.<sup>60</sup>This right to proceed against the surety is a major element of guarantee contracts and thus, such contractual right cannot be preceded by an order of moratorium.<sup>61</sup>It is further provided that RST Bank has a right to go against the promoter in NCLT itself at the same time as also held in State Bank of India vs. D. S. Rajendra Kumar<sup>62</sup>.

4.4 There is no legal bar for the DRT not to continue with the proceeding against the guarantors of the principal debtor and the deed of guarantee makes it clear that the proceeding can very well continue in the DRT against the petitioners/guarantors. The

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<sup>56</sup> Insolvency and Bankruptcy (Amendment) Act 2018 § 14(3) w.e.f. 06/06/2018.

<sup>57</sup> Schweitzer Systemtek India Private Limited vs. Phoenix ARC Private Limited (NCLAT): Company Appeal (AT) (Insolvency) No. 129 of 2017(India), Alpha and Omega Diagnostics (India) Limited vs. Asset Reconstruction Company of India Ltd. (NCLAT) : Company Appeal (AT) (Insol.) No. 116 of 2017 (India)

<sup>58</sup> State bank of India vs. V. Ramakrishnan, Civil Appeal No(s). 3595/2018 SC. (India)

<sup>59</sup> Rural Electrification Corporation Limited vs. Ferro Alloys Corporation Limited (- NCLT - Kolkata) (2017). CP (IB) No. 251/KB/2017( India)

<sup>60</sup> Bank of Bihar v. Damodar Prasad,(1969) AIR 1969 SC 297(India) , Industrial Investment Bank of India Ltd. vs. Biswanath Jhunjunwala (2009) 9 SCC 478 (India).

<sup>61</sup> Bankruptcy Law Reforms Committee (BLRC) Report, Mar. 2018.

<sup>62</sup> State Bank of India Vs. D. S. Rajendra Kumar CA (AT) Nos. 87 to 91-2018.( India)



IBC 2016 pertains to insolvency resolution, whereas the Act of 1993 pertains to recovery of dues, and as such there is no overlapping between them<sup>63</sup>.

## **ARGUMENTS PRESENTED ON BEHALF OF OTHER PARTIES**

### **SUBMISSIONS ON BEHALF OF RESOLUTION APPLICANT**

#### **1. JMCL's Resolution Plan should be accepted by the RP of ACL**

The revised Resolution Plan submitted by JMCL should be accepted by RP of ACL.

1.1 The counsel humbly submits that it has been established; JMCL submitted the revised resolution plan after the date stipulated by the RP of ACL as the deadline for submission of resolution plan, that is, 15.10.2018.<sup>64</sup> While last date for conclusion of this insolvency is 25.12.2018.<sup>65</sup> The revised plan of JMCL was brought before the approval of Resolution plan provided by RCL.

1.2 The resolution applicant JMCL firmly believes that its resolution plan is better than the existing resolution plan formulated by RCL, it offers 10% haircut for financial creditors and with a closing date for implementation of the plan, sooner than that offered by RCL.<sup>66</sup>

1.3 The central element of corporate insolvency resolution process is the resolution plan and or restructuring or reorganization of the corporate debtor.<sup>67</sup> The idea of restructuring proceedings is to establish a successful resolution plan. There has been no explicit mention or consideration in the plan that states that some delay in submitting the requisite resolution plan defeats the very objectives of the "insolvency resolution" especially if otherwise the plan aims to maximize the possible eventual return to the creditors and provide better expertise for the turn around, as in the present case. The essence of time does not affect the ultimate goal of "insolvency resolution"

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<sup>63</sup> Sanjeev Shriya and Ors. vs. State Bank of India and Ors WRIT - C No. - 30285 of 2017 ( India)

<sup>64</sup> Moot proposition page 10, ¶ 3

<sup>65</sup> Moot proposition page 10 ¶ 2

<sup>66</sup> Moot proposition page 10, ¶ 3

<sup>67</sup> Long title, Insolvency and Bankruptcy Code, 2016

1.4 It has been submitted that the Code ensures maximization of the value of assets of the corporate debtor and in the process to do so the better resolution plan should be imparted.

1.5 Further, it is submitted that JMCL had submitted its revised bid on 19/10/2018<sup>68</sup> which is more than 30 days before the conclusion of the CIRP. It must also be noted that delay of submission of resolution is no ground for rejection for a resolution plan rather, the rejection of the plan should be on a substantive ground.<sup>69</sup> Further, it is a decision of the CoC to decide which resolution plan is a better one to achieve the objective of the Code.<sup>70</sup>

1.6 A perusal of section 12 of the Code would present that the time limit for completion of CIRP is 180 days from the date of admission of the application which is expandable up to 270 days if the CoC by a vote of 75% of voting share passes a resolution to that effect. The provisions of Regulation 39 of the CIRP Regulations dictate that a resolution applicant shall endeavour to submit a resolution plan 30 days before the expiry of the maximum period permitted under section 12 of the completion of the Corporate Insolvency Regulation Process.

## **SUBMISSIONS ON BEHALF OF FOREIGN REPRESENTATIVE**

### **2. Application for recognition of foreign proceeding**

2.1 . It is humbly submitted before the Hon'ble Tribunal that the application submitted by Kelvin Murray on behalf of Citi Fin is maintainable considering the fact that India is signatory to UNCITRAL Model Law on Cross-Border Insolvency and has also ratified the same. One of that most significant objective of which is –

*“Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor.”<sup>71</sup>*

2.1.1 In the case at hand, It is been established that Citi Fin and the consortium of banks in USA had financed 80 container vessels amounting to 1.5 billion USD<sup>72</sup>. Further, in 2015-2016, ALSL loaned USD 100 million to ACL. ALSL

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<sup>68</sup> Moot clarification

<sup>69</sup> Punjab National bank vs Bhushan Power & Steel Limited [ C.P (IB) 202(PB) 2017] Para 76 (c)

<sup>70</sup> Id. para 76 (d)

<sup>71</sup> Seawolf Tankers Inc., Heidmar Inc. v. Pan Ocean Co. Limited, [2015] EWHC 1500 (Ch).

<sup>72</sup> Moot Proposition Pg.8 ¶ 4

is a fully-owned subsidiary of ACL<sup>73</sup>. ALSL was incorporated in USA. Its registered office is in USA. It has offices and assets located in Singapore, UAE, Cyprus, and Visakhapatnam. The Board of Directors usually meets and manages the company from Visakhapatnam.<sup>74</sup> A major part of business turnover accrues from non-USA located offices/centers<sup>75</sup>.

2.1.2 When ALSL defaulted in making payment of debt to Citi Fin and the consortium, and when they were made aware of the loan of 100 million USD between ALSL and ACL, Citi Fin and consortium was not left with any option but to have its proceeding recognized under Art. 15, Para. 1 of UNCITRAL Model Law on Cross-Border Insolvency which makes Citi Fin competent to file application in NCLT by fulfilling the requirements of Art. 15<sup>76</sup>, as it lays down that—

*“Foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.”<sup>77</sup>*

2.1.3 The following proceeding will be recognized as a Foreign main proceeding as laid down in Art. 2, Para. 5 of UNCITRAL Model Law on Cross-Border Insolvency which lays down that – “Foreign main proceeding” means

*“Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;”*

The definition of “centre of interest” is the ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties<sup>78</sup>

In the case at hand, ALSL, the corporate debtor has its centre of interest in India as the meeting of Directors takes place and company is being managed from Visakhapatnam in the form of an establishment. This strictly falls under the preview

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<sup>73</sup> Moot Proposition Pg.3 ¶ 2

<sup>74</sup> Moot Clarification ¶ .6

<sup>75</sup> Moot Clarification ¶ 22

<sup>76</sup> Nordic Trustee ASA and Another v. OGX Petróleo e Gás SA and Another, [2016] EWHC 25 (Ch).

<sup>77</sup> Ivan Cherkasov, William Browder, Paul Wrench v. Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (In Liquidation), [2017] EWHC 756 (Ch).

<sup>78</sup> EC Regulation on Insolvency Proceedings 2000 article recital 13,para 14.

of an establishment as lay down in Art 2, Para 5 <sup>79</sup>of UNCITRAL Model Law on Cross-Border Insolvency and hence, is under the scope of main proceeding. As ALSL has loaned 100 million USD to ACL, which it has done from the 1.5 billion USD, it's the duty of Kelvin Murray, foreign representative appointed by the US Court to make sure Citi Fin gets all its debts back as a part of his duty <sup>80</sup> as Citi Fin is going through involuntary bankruptcy.

2.1.4 Hence, considering the huge amount of finance involved, the application is requested to be accepted as ALSL has not submitted any claims as a financial creditor in front of the RP of ACL. The process of insolvency in India is time bound<sup>81</sup>. It must be noted that, as ALSL has not brought any action for the loan of 100 million USD which is unpaid, the constraints on time, recognition of foreign proceeding should be granted.

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<sup>79</sup> American Energy Group Limited v. Hycarbex Asia Pte Limited (In Liquidation), [2014] EWHC 1091.

<sup>80</sup> US Bankruptcy Code Chapter 11 Code § 704 - Duties of trustee (a) (1).

The Official Receiver vs S.A. Somasundaram Chettiar 34 Ind Cas 602, (1916) 30 MLJ 415 (India)

<sup>81</sup> Insolvency and Bankruptcy Code 2016, § 53.

## **PRAYER**

**WHEREFORE, IN THE LIGHT OF FACTS STATED, ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE RESPECTIVE PARTIES RESPECTFULLY SUBMITS BEFORE THIS HON'BLE TRIBUNAL TO ADJUDGE AND DECLARE:**

### **CORPORATE DEBTOR**

1. CIRP application before NCLT by the people's bank is not maintainable.
2. The payment of INR 20 lakh to TTCL was lawful.
3. The personal guarantee against promoter of ACL is not maintainable due to jurisdiction of NCLT.
4. The mortgage of 100 acres of land by ACL would not constitute as asset stripping.

### **OPERATIONAL CREDITORS**

1. GKCL is a financial creditor for the CIRP.

### **RESOLUTION PROFESSIONAL/INTERIM RESOLUTION PROFESSIONAL**

#### **Submitted by RP of ACL**

1. GKCL is an operational creditor for the CIRP.
2. Interim Finance provided to TTCL was lawful.
3. Transaction of certain nature can be avoided as excess payment of INR 20 crore has already been made to APL.
4. The resolution plan submitted by JMCL is not acceptable.

#### **Submitted by RP of APL**

1. ACL is in default of payment to APL and claims of APL as an operational creditor shall be admitted under the pretext of the Power Purchase Agreement.
2. ACL should release the mortgage of 100 acres of land owned by APL and the same should be constituted as asset stripping.
3. The resolution plan should include the Power Purchase Agreement as claims submitted by APL as an operational creditor.

**FINANCIAL CREDITORS**

1. **CIRP application is maintainable.**
2. **The payment of INR 20 lakh to TTCL by the corporate debtor is unlawful.**
3. **The interim finance provided by the Resolution Professional of Arvind Cement Limited is unlawful.**
4. **Personal guarantee against the promoter of ACL (Arvind Kumar) is maintainable.**

**OTHER PARTIES**

1. **The Resolution Plan submitted by JMCL should be accepted by RP of ACL.**
2. **Acceptance of Application for recognition of foreign proceeding.**