

TEAM CODE: 8

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION

2018

IN THE MATTER OF

ARVIND CEMENT LIMITED

...CORPORATE DEBTOR

&

ARVIND POWER LIMITED

...CORPORATE DEBTOR

WRITTEN SUBMISSIONS ON BEHALF OF ALL THE CONCERNED PARTIES

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-LIST OF ABBREVIATIONS-

LIST OF ABBREVIATIONS

Abbreviations	Full Forms
AIR	All India Reporter
BLRC	Bankruptcy Law Reforms Committee
SC	Supreme Court of India
SCC	Supreme Court Cases
Co	Company
CoC	Committee of Creditors
IBBI	Insolvency and Bankruptcy Board of India
IBC	The Insolvency and Bankruptcy Code, 2016
IRP	Interim Resolution Professional
RP	Resolution Professional
Edn	Edition
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
UNCITRAL	United Nations Convention on International Trade Law
ACL	Arvind Cement Limited
APL	Arvind Power Limited
PPA	Power Purchase Agreement
Inc	Incorporated

-LIST OF ABBREVIATIONS-

LLP	Limited Liability Partnership
Ltd	Limited
TTCL	T&T Constructions Limited
ALSL	Aqua Logistics and Shipping Limited
RCL	Rambo Cement Limited
s	Section
SPV	Special Purpose Vehicle
GKCL	G.K Constructions Limited
GCL	G.K Limited
No	Number
CIRP	Corporate Insolvency Regulation Process
JMCL	JM Cements Limited
CIRP Regulations	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016
Ors	Others
Pvt	Private
Reg	Regulation
US	United States
ICL	Imperium Carriers Limited
AA	Adjudicating Authority
INR	Indian National Rupees
COMI	Centre of Main Interest

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Salomon v Salomon & Co Ltd, (1896) UKHL 1, (1897) AC 22 5

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The Trustee in Bankruptcy of Gordon Robin Claridge v Claridge & Claridge, (2011) EWHC 2047 (Ch) 9

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United Nations, UNCITRAL Legislative Guide on Insolvency (2004)	14
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United Nations, <i>UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective</i> (2012)	19

BOOKS & JOURNALS

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DG Baird & TH Jackson, ‘Corporate Reorganisation and the Treatment of Diverse Ownership Interests: A Comment of Adequate Protection of Secured Creditors in Bankruptcy’ (1984) 51 <i>University of Chicago Law Review</i> 97	13
Irit Mevorach, ‘The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency’ (2008) 57(2) <i>The International and Comparative Law Quarterly</i> 427	5
L Perkins, ‘A Defence of Pure Universalism in Cross-Border Corporate Insolvencies’ (2000) 32 <i>New York University Journal of International Law & Policy</i> 787	20
McCormack, <i>Corporate Rescue Law: Anglo-American Perspective</i> (Edward Elgar Publishing 2008)	13
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STATEMENT OF FACTS

BACKGROUND

- Arvind Cement Limited (ACL) is the flagship company of Arvind Group of Industries. ACL's biggest dealer is GK Limited with a share of 35% of ACL's sales. GK's group company, GKCL has built 85 storage facilities for ACL whose ownership rights vested in ACL immediately upon completion of construction. GKCL were to be paid its consideration in instalments over a period of 10 years. Until the complete consideration amount was paid to GK Constructions, ACL shall engage GK as their dealer for at least 30% of their sales in any given year.
- Arvind Power Limited (APL) was constituted to run the Captive Power Plant in Rajasthan. The PPA provided that ACL shall mandatorily purchase at least 80% of the entire power. ACL shall also be liable to compensate for the unsold units. ACL shall make minimum payments to the APL to meet the expenses, taxes and debt-service obligations to the lenders. Aqua Logistics and Shipping Limited (ALSL) is a fully owned subsidiary of ACL. ALSL had financed over 80 container vessels from a consortium of three banks/ financial institutions. Citi Fin was the leading lender of the consortium.
- A consortium led by People's Bank granted ACL loans amounting to INR 2,000 crores. ACL also obtained working capital facility of 200 crores from RST Bank, which is not a part of the consortium. In 2007 due to some internal problems in Malaysia, the import of limestone became unviable which resulted in a drop of quality in cement, which adversely affected ACL. It decided to set up a plant in Karnataka with easier access to domestically mined limestone. ACL approached its existing consortium to expand its credit facilities. APL decided to create securities by way of mortgage of 100 acres of land. APL had obtained financial assistance from People's Bank (20 crores) and Indo Bank (25 crores).
- ACL engaged TTCL for the construction of the plant. However, ACL's plan of setting up the plant took a hit due to cancellation of mining licenses. It was left with INR 20 lakhs left in its bank accounts. ACL could have used this money for making interest payment to the banks, but it chose to default to banks and instead paid the money to TTCL.

-STATEMENT OF FACTS-

CIRP OF ACL

- People's Bank filed an application before the Adjudicating Authority for initiating CIRP against ACL. The IRP made a public announcement and invited claims from creditors of ACL. GKCL submitted its claim as a Financial Creditor, which was rejected. The RP proposed raising an interim finance for INR 5 crores, to which the consortium agreed. RST Bank has contested this decision. RST Bank also proceeded to invoke the personal guarantee against Mr. Arvind Kumar. The RP of ACL filed an application for avoidance of certain transactions that led to payment of excess amount of INR 20 crores to APL. Meanwhile, RP of ACL made an invitation for resolution plan. The revised plan of JMCL was not accepted and it has filed an application before the AA.

CIRP OF APL

- People's Bank filed an application for initiation of corporate insolvency resolution process against APL. The IRP took note of the PPA provisions and wrote to ACL's RP demanding full and complete payment of dues from ACL. The RP of APL found that the mortgage created by APL over its land for securing the extended credit facility of ACL is an avoidable transaction under the law. The RP and CoC of APL fostered apprehensions that the resolution plan approved for ACL may not take into consideration the interests of APL, specifically the PPA entered into by APL and ACL. RP of APL filed an application for impleadment in the suit filed by RP of ACL for approval of resolution plan.

CIRP OF ALSL

- ALSL provided loans of USD 100 million to ACL. Due to the high amount of loans and reducing margins, ALSL started falling behind in servicing its loan obligations to the consortium. Citi Fin filed an involuntary bankruptcy petition. Mr. Kevin Murray was appointed as the interim trustee by the bankruptcy court. Mr. Kevin applied as a foreign representative to the Adjudicating Authority for recognition. He sought cooperation in relation to the amount of USD 100 million loaned by ALSL to ACL

-The Adjudicating Authority listed applications arising in all the aforementioned matters for hearing on 16th November 2018-

ISSUES RAISED

ON BEHALF OF CORPORATE DEBTOR AND ITS PROMOTERS

Arvind Cement Limited

- ◆ The payment of 20 lakhs to TTCL is not a fraudulent transaction.

Arvind Power Limited

- ◆ APL's mortgage for the benefit of ACL is not an avoidable transaction under law.

ON BEHALF OF THE RESOLUTION PROFESSIONALS

ACL's Resolution Professional

- ◆ GKCL is an operational creditor.
- ◆ The interim finance, to the extent of payment to TTCL, follows the provisions of law.
- ◆ APL should not be allowed impleadment in the suit for approval of resolution plan.
- ◆ The tribunal should not grant cooperation with respect to the 100 million USD loan.
- ◆ ACL was a party to extortionate credit transactions with APL.
- ◆ The excess payments made under PPA cannot be set off against APL's claim.
- ◆ The resolution plan of JMCL cannot be accepted.
- ◆ US proceedings should not be recognised as foreign main proceedings.

APL's Resolution Professional

- ◆ APL's mortgage for the benefit of ACL is an avoidable transaction under law.
- ◆ APL's claim as an operational creditor is valid.
- ◆ Any excess payments made to APL under PPA should be set off against the dues.
- ◆ APL should be allowed impleadment in the suit for the approval of APL's resolution plan to prevent premature termination of PPA.

-ISSUES RAISED-

ON BEHALF OF ACL'S FINANCIAL CREDITOR (RST BANK)

- ◆ The interim finance, to the extent of payment to TTCL, is contrary to provisions of law.
- ◆ The payment of 20 lakhs to TTCL is a fraudulent transaction.
- ◆ RST Bank is entitled to enforce the personal guarantee against Mr. Arvind Kumar.

ON BEHALF OF ACL'S OPERATIONAL CREDITOR (GKCL)

- ◆ GKCL is a financial secured creditor.

ON BEHALF OF THE RESOLUTION APPLICANTS

Rambo Cement Limited (RCL)

- ◆ JMCL's Resolution Plan should not be accepted.
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JM Cements Limited (JMCL)

- ◆ ACL's RP should accept the resolution plan of JMCL.

ON BEHALF OF MR. KEVIN MURRAY (US BANKRUPTCY TRUSTEE)

- ◆ The US proceedings should be recognized as foreign main proceedings.
- ◆ The Tribunal should grant cooperation with respect to the 100 million USD loan.

ANALYSIS OF ISSUES

ON BEHALF OF THE CORPORATE DEBTOR AND ITS PROMOTERS

ARVIND CEMENT LIMITED

ISSUE I. THE PAYMENT OF 20 LAKHS TO TTCL IS NOT A FRAUDULENT TRANSACTION.

¶1. It is the duty of the RP to determine and notify fraudulent transactions to the AA.¹ Hence, the applicant (RST Bank) has no legal right to question the economic wisdom of the directors of ACL. Those decisions were taken at the relevant time keeping in mind the facts and circumstances in good faith after exercising due diligence and in the best interests of the company. ACL has been servicing its debts regularly and has excellent relations with the bankers, which displays its responsible conduct towards its creditors. It had no intent to defraud the creditors and exercised due diligence in paying 20 lakhs to TTCL as ACL '*genuinely believed*'² that their prospects for a complete revival were contingent on quickly setting up and operationalizing a manufacturing plant in Karnataka.

ARVIND POWER LIMITED

ISSUE I. APL'S MORTGAGE FOR THE BENEFIT OF ACL IS NOT AN AVOIDABLE TRANSACTION UNDER LAW.

¶2. It is submitted that the burden of proof to establish an avoidable transaction is on the person challenging the transaction. The mortgage in favour of ACL's lenders was an attempt to save ACL from financial stress, which in turn was in APL's best interests as the two companies had inextricably intertwined interests. The transaction was in good faith and a reciprocal arrangement in response to ACL's guarantee for APL's loans.

i. THE MORTGAGE WAS IN APL'S BEST INTEREST.

¶3. While evaluating avoidable transactions, the Courts must consider the 'company's situation' and the test should not be what a company could have done but whether the company was reasonable in entering into the transaction³ and what were the needs of the

¹ The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016, reg 35A. [hereinafter '**CIRP regulations**']

² *In re Ralls Builders Ltd*, (2016) Bus LR 55.

³ *Lewis v Cook*, (2000) NSWSC 191, ¶ 46.

-ANALYSIS OF ISSUES-

company then⁴. In the present case, APL was financially distressed as a direct result of ACL's bad condition and payment failures under the PPA. As a result, providing security for a loan that could revive ACL was the only viable solution. When the company is in bad financial shape, the board should promote the interest of the company⁵ and the reasonable prospect criteria is the best to determine it.⁶ Further, the burden of proof in case of avoidable transactions lies on the person claiming it.⁷

ii. THE MORTGAGE WAS IN GOOD FAITH AND IN THE ORDINARY COURSE OF BUSINESS.

¶4. In the present case, the mortgage might have been executed for the benefit of ACL because of its guarantee for APL in an antecedent financial debt; however, there is nothing to suggest that it would place ACL in a better position than it would have been in case of distribution of assets under section 53. Further, ACL had already helped APL in a number of ways like providing corporate guarantee for its credit facility agreement and therefore, the mortgage was not without consideration but a reciprocal arrangement.

¶5. The transaction was in good faith, with a hope that the successful set up of Karnataka plant would help ACL overcome its bad financial shape; only then could it support APL in the end through and beyond the PPA. Although APL informed its lender (Indo Bank) of the mortgage through an email in good faith, the lender did not respond.

ON BEHALF OF THE RESOLUTION PROFESSIONALS
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MS. POOJA PRAKASH (ACL'S RESOLUTION PROFESSIONAL)

ISSUE I. THAT GKCL IS AN OPERATIONAL CREDITOR.

¶6. It is submitted that the debt under the agreement dated 05.07.2010 does not satisfy the essential conditions for a financial debt. Instead, the debt under the agreement is for provision of dealership services to ACL and therefore, an operational debt.

i. THE TRANSACTION IS A SALE-PURCHASE AGREEMENT.

¶7. In the present case, the agreement between GKCL and ACL was a simple sale-purchase agreement. It fulfils all the conditions of a valid sale: parties capable of entering into a

⁴ *Demondrille Nominees Pty Ltd v Shirlaw*, (1997) 25 ACSR 535.

⁵ *North American Catholic Educational Programming Foundation v Gheewalla*, 930 A 2d 92, pg 99 (Del 2007).

⁶ *In re Produce Marketing Consortium Ltd (No 2)*, (1989) BCLC 520; *In re Purpoint Ltd*, (1991) BCLC 491; *BNY Corporate Trustee Services Ltd v Eurosail*, (2013) 1 WLR 1408; *In re Onslow Ditching*, (2012) BCC 407.

⁷ *Phillips v Brewin Dolphin Bell Lawrie*, (2001) 1 All ER 673.

contract, immovable properties which are the subject of the agreement, and consideration.⁸ Where the contract is primarily for sale of an immovable property, the claim on breach of contract falls under contractual liability for the unpaid consideration and is not a 'financial debt'.⁹

ii. THERE IS NO DISBURSAL OF DEBT OR BORROWING OF MONEY.

¶8. A financial debt under the Code is a debt, which is 'disbursed' against consideration for time value of money.¹⁰ In the present case, there is no dispute as to existence of a debt but the debt requires disbursement, i.e., it should be in the form of a loan or borrowing of money.¹¹ In the present case, there is no 'borrowing/disbursement of money' or 'raising of an amount' and instead, the agreement is simply a sale of storage facilities.

iii. THE SUBSTANCE OF TRANSACTION IS PROVISION OF DEALERSHIP SERVICES.

¶9. While classifying the debt, it is essential to consider the substance and nature of the transaction.¹² In *AMR Infrastructures Case*¹³, the AA laid down the elements of operational debt: debt arising out of provisions of goods or services or out of employment. In the present case, the agreement is for the sale of storage facilities and contemplates provision of dealership services by GKL until ACL repays the entire consideration amount. Further, even the repayment so far has been through set-off from the profits made by GKL as a dealer of ACL. Therefore, the debt is in relation to provision of dealership services and as such qualifies as an operation debt.

ISSUE II. THE INTERIM FINANCE, TO THE EXTENT OF PAYMENT TO TTCL, FOLLOWS THE PROVISIONS OF LAW.

¶10. The RP is duty bound to maintain the enterprise as a going concern. The RP has sincerely complied with the procedure under the Code to raise the interim finance.¹⁴ The

⁸ The Transfer of Property Act 1882, s 54; *Misabul Enterprises v Vijaya Srivastava*, AIR 2003 Del 15; *Ram Jiwan Rai v Deoki Nandan Rai*, AIR 2005 Pat 23; *CIT v Motor and General Stores*, AIR 1967 SC 200.

⁹ *Pawan Dubey v JBK Developers*, CP (Insolvency) 385/2017 (NCLT, 16 February 2018).

¹⁰ *Nikhil Mehta v AMR Infrastructure*, CA (Insolvency) 07/2017 (NCLAT, 21 July 2017).

¹¹ *BV Lakshmi v Geometrix Laser Solutions*, CA (Insolvency) 38/2017 (NCLAT, 27 December 2017).

¹² *Nikhil Mehta v AMR Infrastructure*, CA (Insolvency) 07/2017 (NCLAT, 21 July 2017).

¹³ *Vinod Awasthy v AMR Infrastructures*, CP (Insolvency) 10/2017 (NCLT, 22 February 2017); *Sajive Kanwar v AMR Infrastructure*, CP (Insolvency) 6/2017 (NCLT, 16 February 2017).

¹⁴ The Insolvency and Bankruptcy Code 2016, s 28(1)(a); Moot Proposition, pg 8.

-ANALYSIS OF ISSUES-

majority in the CoC has also approved the interim finance as it was necessary to avoid value erosion of the assets of ACL.

i. THE INTERIM FINANCE IS NECESSARY TO KEEP ACL AS A GOING CONCERN.

¶11. The work for the site at Karnataka had already begun and purchase orders and Letters of Credit had been issued for import of equipment. The enterprise is normally viewed as a going concern when the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.¹⁵ The plant in Rajasthan was not functioning at full capacity owing to the reduced supply of substandard raw material, which adversely affected ACL. The quickest route for the revival of ACL was to operationalize the Karnataka plant.¹⁶ Considering the importance of the plant at Karnataka in the view of maintaining ACL as a going concern, the interim finance should be declared in accordance with the provisions of law.

ISSUE III. THAT THE US PROCEEDINGS SHOULD NOT BE RECOGNISED AS FOREIGN MAIN PROCEEDINGS.

¶12. It is humbly submitted that an entity's COMI is determined based on multiple factors like principle place of business, business as ascertainable by third parties and place of actual control under the Model Law and that ALSL's COMI is therefore, in India.

i. THE COMI OF ALSL LIES IN INDIA.

¶13. It is humbly submitted that 'incorporation' as jurisdictional basis for insolvency loses its significance because it might not represent any real connection to the debtor. In the case of *Ci4net.com*¹⁷, incorporation was only one of many factors in determining the COMI and it was not regarded as the decisive factor. In *Eurofood IFSC Ltd*¹⁸, the European Court of Justice determined that "*the presumption of COMI as to registered office can be rebutted if objective factors ascertainable by third parties enable it to be established.*"

¹⁵ Accounting Standards 1, standard 10(a).

¹⁶ Moot Proposition, pg 5.

¹⁷ *In re Ci4Net.com Inc*, (2005) BCC 277 (Ch D).

¹⁸ *In re Eurofood IFSC Ltd*, (2006) All ER 1078 (EC).

- ¶14. The place from which the affairs are managed and operationally controlled reflects most suitably the heart and core of the company, its center, and meeting point.¹⁹ In the present case, a major part of business turnover accrues from non-USA located offices/centres. It implies that the third parties did not view the US office to be the principal place of business but it might be a case of a 'letterbox' company²⁰; therefore, 'headquarters criterion' will enable identification of the place of command and control.²¹ Further, in case it is a fully owned subsidiary, it may be possible when applying the presumption of Article 3(1) to replace the registered office of the subsidiary with the registered office of the parent company.²²
- ¶15. Therefore, even though the registered office of ALSL is in USA, its COMI lies in India because the Board of Directors usually meet and manage the company from Visakhapatnam, its interest with parents are very intricately intertwined.²³

ISSUE IV. THE TRIBUNAL SHOULD NOT GRANT COOPERATION WITH RESPECT TO THE 100 MILLION USD LOAN.

- ¶16. The legal relationship between ACL and ALSL is that they are two distinct persons. The holding company does not own assets of the subsidiary and, in law, the management of the business of the subsidiary vests in its separate Board of Directors.²⁴ Therefore, ALSL's creditors cannot move against ACL for the repayment of their loans.
- ¶17. The creditors of ALSL do not have any right to seek cooperation with respect to the 100 million USD loan because it is only 'claimed' to have been paid out of the loan granted by the consortium. Further, ALSL's creditors do not fall under the categories specified under Article 1 to seek cooperation under Article 25 of the Model Law.

¹⁹ *In re SPhinX Ltd*, 371 BR 10 (SDNY 2007).

²⁰ *In re Bear Stearns High-Grade Structured Credit Strategies*, 389 BR 325, pg 335 (SDNY 2008).

²¹ Irit Mevorach, 'The 'Home Country' of a Multinational Enterprise Group Facing Insolvency' (2008) 57(2) *The International and Comparative Law Quarterly* 427.

²² Bob Wessels et al, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford University Press 2009).

²³ Clarification 6.

²⁴ Companies Act 2013, s 9, 2(87); *Vodafone International v Union of India*, (2012) 6 SCC 613; *Salomon v Salomon & Co Ltd*, (1896) UKHL 1, (1897) AC 22; *Andar Transport v Brambles Ltd*, (2004) 206 ALR 387.

ISSUE V. ACL WAS A PARTY TO EXTORTIONATE CREDIT TRANSACTIONS WITH APL.

¶18. Extortionate transactions involve the receipt of financial or operational debt due to exorbitant payments for the credit or under an unconscionable transaction under the law during the relevant period of two years preceding the insolvency commencement date.²⁵

¶19. During 2014-15, a payment of 95 crores was made by ACL with both the cement and the power plant functioning at full capacity. Even though ACL had started facing a decline in the production and sales of cement in 2016-17, the audited information reflect the payment under PPA as 100 crores. The inflated payment of 20 crores was also found to be within the relevant period of two years in the forensic audit performed by the RP of ACL. In the absence of any additional contractual obligations, the payment was in clear excess of what was envisaged by the PPA and is therefore liable to be set aside.

ISSUE VI. THE EXCESS PAYMENTS MADE UNDER PPA CANNOT BE SET OFF AGAINST APL'S CLAIM.

¶20. When a party becomes insolvent, the contest of the creditor is no longer with the insolvent, but with other unsecured creditors. The avoidance of excess payments contributes money to the liquidation asset. CIRP involves distribution of assets as per the priority of debts under the Code. Any instance of set-off would contemplate partial satisfaction of a single debt, thereby contributing an unfair share to a creditor bypassing the priority of claims and in effect, provide an unpublished security by such set-off.²⁶ Thus, set-off falls outside the scope of modification of claims attributed to the RP.

ISSUE VII. THE RESOLUTION PLAN OF JMCL CANNOT BE ACCEPTED.

¶21. The RP invites resolution plans, and specifies the time frame for acceptance.²⁷ JMCL did not comply with the timeline set for the submission of plan. With timely resolution being one of the basic elements for bringing in this legislation²⁸, the timelines cannot be considered as procedural,²⁹ and are to be strictly followed.

²⁵ The Insolvency and Bankruptcy Code 2016, s 50; CIRP Regulations, reg 5.

²⁶ *Stein v Blake*, (1996) AC 243, pg 251.

²⁷ CIRP Regulations, reg 39(1); Moot Proposition, pg 10.

²⁸ *Innoventive Industries Ltd v ICICI Bank*, (2018) 1 SCC 407, pg 425.

²⁹ *Gupta Energy Pvt Ltd*, CP (Insolvency) 43/2017 (NCLT, 20 February 2018).

i. JMCL SUBMITTED ITS PLAN AFTER THE LAST DATE FOR SUBMISSION.

¶22. The RP had specified the last date for submission along with the Evaluation Matrix, which had the prior approval of the CoC.³⁰ The plans were evaluated strictly based on the Evaluation Matrix. Accordingly, the plan of RCL was submitted to the CoC for their approval. The entire process was carried out in a fair and just manner. JMCL submitted its plan in violation of the timeline after the negotiations had started with RCL.

ii. THE RESOLUTION PLAN OF RCL HAS ALREADY BEEN APPROVED BY THE COC.

¶23. The CoC has accepted the Resolution Plan of RCL, and the business wisdom concerning the Resolution Plan is entirely of the CoC to decide what suits their interest.³¹ Any interference is not justified unless the plan contravenes the essential requirements.³² Prior pronouncements in this regard have involved resolution processes, which began before the amendment³³ in the Regulations.³⁴ The Adjudication Authority should rule in accordance with the amended regulations and the objectives of the code and disallow the Resolution Plan of JMCL.

ISSUE VIII. APL SHOULD NOT BE ALLOWED IMPLEADMENT IN THE SUIT FOR APPROVAL OF RESOLUTION PLAN.

¶24. The commercial wisdom of the CoC is generally accepted and any interference with it is considered an exception.³⁵ The NCLT has to play only a supervisory role and cannot deal with the merits of a resolution plan unless it is found contrary to the express provisions of law.³⁶ Furthermore, the percentage of claim amount payable to a creditor can be decided by the Committee of Creditors under the Resolution Plan and in absence of any discrimination not permitted by law, it is not open to the AA to modify the Plan.³⁷

³⁰ Clarification 17.

³¹ *Gupta Energy Pvt Ltd*, CP (Insolvency) 43/2017 (NCLT, 20 February 2018).

³² The Insolvency and Bankruptcy Code 2016, s 31(2).

³³ IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations 2017.

³⁴ *Bank of Baroda v Binani Cements Ltd*, CP (Insolvency) 201/2018 (NCLT, 2 May 2018); *Punjab National Bank v Bhushan Power & Steel*, CP (Insolvency) 202/2017 (NCLT, 23 April 2018).

³⁵ *Gupta Energy Pvt Ltd*, CP (Insolvency) 43/2017 (NCLT, 20 February 2018).

³⁶ *Tarini Steel Company v Trinity Auto Components*, CA (Insolvency) 75/2018 (NCLAT, 9 March 2018).

³⁷ *Symphony Ltd v Chhaparia Industries*, CA (Insolvency) 327/2017 & 328/2017 (NCLAT, 2 February 2018).

- ¶25. Moreover, the resolution plan may, in the larger interest of restructuring, waive off debts and breaches or reduce the amount payable to others.³⁸ The Code only remedies breach of contract if there is a right to payment through a ‘claim’,³⁹ and no remedies of injunction or specific performance can be sought. The impleadment application amounts to demanding specific performance of its PPA with ACL. Such contracts are determinable and can be terminated at the instance of one party, even in the absence of a specific provision authorizing it. Thus, determinable contracts cannot be specifically enforced.⁴⁰
- ¶26. The CoC shall duly consider the treatment of the PPA under the Plan during the approval of the Resolution Plan and no other consideration for pre-existing contracts is required.⁴¹ The Resolution plan, once approved by the AA, shall be binding on the corporate debtor on all stakeholders involved under section 30. Thus, APL has no locus to present the current impleadment application as it goes beyond the scheme of the Code.

MR. MAHESH SINGH (APL’S RESOLUTION PROFESSIONAL)

ISSUE I. APL’S MORTGAGE FOR THE BENEFIT OF ACL IS AN AVOIDABLE TRANSACTION UNDER LAW.

¶27. It is submitted that the mortgage created by APL in favour of ACL’s lender is both a preferential and an undervalued transaction that defrauds the creditors of APL. Such a transaction can never be in the ordinary course of business and constitutes asset stripping.

i. THE TRANSACTION WAS A PREFERENTIAL TRANSACTION.

¶28. A corporate debtor shall be deemed to have given a preference under section 43(2), if there is a transfer of an interest on property of the corporate debtor for the benefit of a guarantor because of an antecedent financial debt owed by the corporate debtor and such transfer places the guarantor in a beneficial position.

¶29. ACL qualifies as a guarantor for an antecedent financial debt as it provided a corporate guarantee for the APL’s financial debt under the credit facility agreement dated 04.05.2003 and 15.10.2003. Interest here means a right, title, interest or claim to property

³⁸ CIRP Regulations, reg 37.

³⁹ The Insolvency and Bankruptcy Code 2016, s 3(6).

⁴⁰ The Specific Relief Act 1963, s 14(1)(c).

⁴¹ The Insolvency and Bankruptcy Code 2016, s 30; CIRP Regulations, reg 37.

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including a mortgage.⁴² APL created a mortgage over its property as a security for ACL's extension of credit facilities in September 2017. This satisfies all the ingredients of a preferential transaction executed with a related party⁴³ within relevant time of 2 years.

ii. THE TRANSACTION WAS UNDERVALUED AND INTENDED TO DEFRAUD APL'S CREDITORS.

¶30. An undervalued transaction is the one where the value of consideration received by the corporate debtor in return is significantly less than what should have actually been.⁴⁴ Section 45 also applies to a security to a company in bad financial shape.⁴⁵ Even the detriment suffered by donor is a consideration.⁴⁶ APL did not receive anything in return of the mortgage (which qualifies as a consideration⁴⁷) created in favour of ACL's lenders.

¶31. APL's credit facility agreement dated 4.5.2003 and 15.10.2003 stipulated that it should not create any security interest over its unencumbered assets without the approval of lenders. However, APL only informed Indo Bank after creating the interest: through an email sent by the managing director of ACL who was not even the authorized person.

¶32. In the twilight period, the responsibility of the company's management shifts to protect the best interests of the creditors along with the company.⁴⁸ APL undertook the mortgage while it was under financial stress and had already defaulted in paying the workers on its rolls. If the promoters had used the mortgage to secure a loan, they could have restored APL to a healthy financial position. Therefore, APL's management was only pushing an asset out of the liquidation estate to the harm of creditors.

iii. THE TRANSACTION WAS NOT IN THE ORDINARY COURSE OF BUSINESS.

¶33. The insolvency process commenced in May 2018 within the relevant time⁴⁹ of 1 year even for unrelated parties i.e. the lenders of APL. Further, a transaction creating security

⁴² The Insolvency and Bankruptcy Code 2016, s 3(31).

⁴³ The Insolvency and Bankruptcy Code 2016, s 5(24).

⁴⁴ The Insolvency and Bankruptcy Code 2016, s 45; *The Trustee in Bankruptcy of Gordon Robin Claridge v Claridge & Claridge*, (2011) EWHC 2047 (Ch); *Phillips v Brewin Dolphin Bell Lawrie*, (2001) 1 All ER 673; *Mann Aviation Group (Engineering) v Longmint Aviation Limited (Fairoaks)*, (2011) EWHC 2238 (Ch).

⁴⁵ Vinod Kothari, *Law relating to Insolvency & Bankruptcy Code 2016* (Taxmann 2016), pg 422.

⁴⁶ *Agricultural Mortgage Corporation PLC v Woodward*, (1994) BCC 688 CA.

⁴⁷ *IDBI Bank v Jaypee Infratech*, CA (Insolvency) 26/2018 (NCLAT, 17 May 2018).

⁴⁸ *Winkworth v Edward Baron Developments Co Ltd*, (1987) 1 All ER 114; *Brady v Brady*, (1989) 3 BCC 535 (CA), (1988) 2 All ER 617 (HL); *Re Horsley and Weight Ltd*, (1982) 3 All ER 1045, pg 1055.

⁴⁹ The Insolvency and Bankruptcy Code 2016, s 46.

interest in favor of lenders of a related party without any consideration cannot be in the ordinary course of business.⁵⁰ Therefore, the AA should discharge APL's mortgage.⁵¹

ISSUE II. APL'S CLAIM AS AN OPERATIONAL CREDITOR IS VALID.

¶34. Debt is defined under the Code as a 'claim', which includes right to remedy for breach of contract if such breach gives rise to a right to payment, whether or not such right is matured or disputed.⁵² In *AMR Infrastructures Case*⁵³, the AA laid down the elements of operational debt: debt arising out of provisions of goods or services or out of employment. In the present case, the payments made to APL were in relation to provision of services, i.e., supply of electricity and fly ash. Further, the transaction was structured as an operational debt, such that payments were made periodically after the services had been provided and utilized by ACL.⁵⁴

¶35. In the absence of a power grid connection to sell electricity to third parties and irregular payments under the terms of PPA, ACL relied solely on the interim finance to fulfill its partial obligations under the PPA. Therefore, ACL is still obligated to make payments for the power provided under the PPA, which qualifies as an operational debt.

i. APPLICATION FOR AVOIDANCE CANNOT INTERFERE WITH CLAIMS OF DEBT.

¶36. An application regarding the avoidance of certain transactions for the restoration of the position held by the Corporate Debtor or the setting aside of the debts cannot affect the CIRP.⁵⁵ Extortionate transactions are based on the receipt of a financial or operational debt; if the RP of ACL does not recognize debt accrued to APL as an operational debt, an application to set it aside cannot be carried forward.⁵⁶ The RP of ACL may claim the avoidance of specific transactions in the financial year 2016-17; however, ACL is still required to fulfill its obligations under the financial year 2017-18.

⁵⁰ *IDBI Bank v Jaypee Infratech, CA (Insolvency) 26/2018 (NCLAT, 17 May 2018).*

⁵¹ The Insolvency and Bankruptcy Code 2016, s 44(c), 48(1)(b).

⁵² The Insolvency and Bankruptcy Code 2016, s 3(6).

⁵³ *Vinod Awasthy v AMR Infrastructures, CP (Insolvency) 10/2017 (NCLT, 22 February 2017); Sajive Kanwar v AMR Infrastructure, CP (Insolvency) 6/2017 (NCLT, 16 February 2017).*

⁵⁴ *Vinod Awasthy v AMR Infrastructures, CP (Insolvency) 10/2017 (NCLT, 22 February 2017), pg 5.*

⁵⁵ The Insolvency and Bankruptcy Code 2016, s 26, 51.

⁵⁶ The Insolvency and Bankruptcy Code 2016, s 50.

ISSUE III. ANY EXCESS PAYMENTS TO APL SHOULD BE SET OFF AGAINST THE DUES.

¶37. The RP can collate, ask for substantiation, verify the claims or modify and revise them upon contingencies or additional information submitted by the creditors.⁵⁷ Claims submitted by operational creditors are also provided with an additional disclosure of mutual debt or obligations owed in Form-B.⁵⁸

¶38. The counter claims raised by ACL cannot nullify the default by the debtor. It can only qualify as a set off or counter claim.⁵⁹ The insolvency law should protect a general right of set-off existing under law that arose prior to the commencement of insolvency proceedings.⁶⁰ US⁶¹ provides for set-off and similar provisions are also exist in UK⁶².

ISSUE IV. APL SHOULD BE ALLOWED IMPLEADMENT IN THE SUIT FOR THE APPROVAL OF APL'S RESOLUTION PLAN TO PREVENT PREMATURE TERMINATION OF PPA.

¶39. The NCLT is vested with the jurisdiction regarding any claims by or against the corporate debtor and on any question of priorities, law or facts, arising in relation to the CIRP.⁶³ Its supervisory role is important in maintaining the sanctity of the CIRP.⁶⁴

i. THE INTERESTS OF APL ARE NOT REPRESENTED IN THE RESOLUTION PLAN.

¶40. ACL's RP has rejected the claims made by APL with regard to the default in payments. Without representation in the insolvency resolution process of ACL, there is no alternative to prevent the violation of PPA obligations. Thus, APL has the locus to present this impleadment application in light of the refusal of its claims.

¶41. The Code provides for repayment of the debts of operational creditors such that the payment shall not be less than the amount to be paid to the operational creditors in the event of liquidation.⁶⁵ While implementing it, if the applicant discovers a liability to a

⁵⁷ CIRP Regulations, reg 7, 10, 13, 14.

⁵⁸ CIRP Regulations, reg 9.

⁵⁹ *VR Polyfab v Sadhbhav Enterprise*, CP (Insolvency) 115/2017 (NCLT, 19 September 2017).

⁶⁰ *Citizens Bank of Maryland v Strumpf*, 516 US 16, 18 (1995).

⁶¹ US Bankruptcy Code 1978, s 553(a).

⁶² Insolvency Act 1986, s 323 (UK).

⁶³ The Insolvency and Bankruptcy Code 2016, s 60(5)(b), 60(5)(c).

⁶⁴ *State Bank of India v Bhushan Steel Limited*, CP (Insolvency) 201/2017 (NCLT, 26 July 2017).

⁶⁵ The Insolvency and Bankruptcy Code 2016, s 53.

claimant, which has not been factored into the plan, the resolution plan will be frustrated.⁶⁶ In no circumstances, neither the Code nor the Regulations 38 and 39 envisage the abrogation of valid contractual rights by the resolution plan without due process of law.⁶⁷ If the resolution plan fails to satisfy the claim of an operational creditor, the resolution plan violates Section 30(2)(b) and therefore, cannot be allowed by the AA.

ii. PREMATURE TERMINATION IS AGAINST THE INTEREST OF BOTH ACL AND APL.

¶42. The PPA is a reciprocal agreement between ACL and APL that protects the market position of APL while ensuring supply of electricity and fly ash to ACL. APL only produces electricity for ACL and as a result, termination of PPA would render its existence futile unless it is connected to the grid. Further, ACL in any case, needs supply of power as an essential service even after resolution to continue its operations and prevention of premature termination of PPA would serve the interest of both the parties.

iii. EQUITABLE REMEDY IS THE SOLUTION WHEN LEGAL REMEDY IS NOT ADEQUATE.

¶43. Balancing the interests of all stakeholders is one of the objectives of the Code.⁶⁸ Where legal remedies do not serve the purpose, equitable remedies can be employed as adequate. Furthermore, in cases where an equitable remedy like injunction or specific performance would not affect any other creditor, compelling performance by the debtor is an adequate remedy instead of allowing the debtor to deal with a party he is not obligated to deal with, in the form of a negative agreement.⁶⁹ Therefore, the NCLT should provide an injunction against premature termination of PPA.

ON BEHALF OF ACL'S FINANCIAL CREDITOR (RST BANK)

ISSUE I. THE INTERIM FINANCE, TO THE EXTENT OF PAYMENT TO TTCL, IS CONTRARY TO PROVISIONS OF LAW.

¶44. The RP is duty bound to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor,⁷⁰ and manage the

⁶⁶ *State Bank of India v Electrosteel Steels Ltd*, CA (Insolvency) 284/2018 (NCLT, 4 July 2018).

⁶⁷ *State Bank of India v Bhushan Steel Limited*, CP (Insolvency) 201/2017 (NCLT, 26 July 2017).

⁶⁸ *Chitra Sharma v Union of India*, Writ Petition (Civil) 744/2017 (SC).

⁶⁹ *Great Lakes v Scranton Coal Co*, 239 Fed 603 (CCA 7th Cir 1917); *Zimmerman v Gerzog*, 13 App Div 210, 43 NY Supp 339 (2d Dept 1897); *Petrolia Mfg co v Jenkins*, 29 App Div 403, 51 NY Supp 1028 (1st Dept 1898).

⁷⁰ The Insolvency and Bankruptcy Code 2016, s 25(1).

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operations of the corporate debtor as a going concern,⁷¹ for which funds are required to enable it to meet the essential day-to-day monetary needs of the company.⁷² The enterprise is normally viewed as a going concern when there is neither an intention nor the necessity of liquidation or of curtailing materially the scale of the operations.⁷³

i. THE PAYMENT TO TTCL IS NOT NECESSARY TO MAINTAIN ACL AS A GOING CONCERN.

¶45. The interim finance must be raised and used very cautiously,⁷⁴ as the secured creditors are relegated to a position subordinate to the interim finance raised by the RP.⁷⁵ The rationale of corporate rescue is to sustain the going-concern value of the assets of the ailing company, in that the value of a company's business operations is likely to be far greater than the scrap value of its assets.⁷⁶ The going concern value is measured by estimating the income stream that the assets would generate if they were kept together.⁷⁷ In the present case, the construction at the site has not begun as only minimal off-site work has been done, the procurement of machines is at a preliminary stage and the mining licences have been cancelled by the apex court, which implies that ACL has no surety of beginning its operations in Karnataka within a specified period.

¶46. No extra finances are required to keep it as a going concern as there can be no value erosion of land because the life of a land is unlimited⁷⁸ and payments made for the purposes of beginning construction amount to creation of assets. The RP has already appointed ABC security services for protecting and preserving the plant in Karnataka.

ISSUE II. THE PAYMENT OF 20 LAKHS TO TTCL IS A FRAUDULENT TRANSACTION.

¶47. ACL has engaged in a fraudulent transaction by paying 20 lakhs to TTCL instead of making the interest payment to the banks. The intent to defraud is clear from the fact that

⁷¹ The Insolvency and Bankruptcy Code 2016, s 20(1).

⁷² Sumant Batra, *Corporate Insolvency* (Eastern Book Company 2018), pg 240.

⁷³ Accounting Standards 1, standard 10(a).

⁷⁴ Vinod Kothari, *Law relating to Insolvency & Bankruptcy Code 2016* (Taxmann 2016), pg 220.

⁷⁵ The Insolvency and Bankruptcy Code 2016, s 53(1)(a), 5(13).

⁷⁶ McCormack, *Corporate Rescue Law: Anglo-American Perspective* (Edward Elgar Publishing 2008), pg 3.

⁷⁷ DG Baird & TH Jackson, 'Corporate Reorganisation and the Treatment of Diverse Ownership Interests: A Comment of Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 *University of Chicago Law Review* 97, pg 109.

⁷⁸ Indian Accounting Standards 16, standard 58.

it continued to incur debts when there was no reasonable prospect of the creditors ever receiving payment of those debts,⁷⁹ considering its financial condition.⁸⁰

i. THERE WAS NO REASONABLE PROSPECT OF AVOIDING INSOLVENCY AND THE DIRECTORS DID NOT EXERCISE DUE DILIGENCE TO MINIMIZE THE POTENTIAL LOSS.

¶48. During the twilight period, the primary duty of the director is in reference to the best interests of the creditors.⁸¹ It is the duty of the directors and partners to exercise due diligence in minimizing the potential loss to the creditors of ACL.⁸² The company knew that there were no prospects of avoiding the commencement of the CIRP as their hopes of revival were solely pinned on operationalizing the plant in Karnataka, which was dealt a severe blow by the apex court through cancellation of all the mining licenses. Moreover, the RP has failed her duty to form an opinion, determine and notify the AA about this fraudulent transaction and hence the creditor had to approach the AA.⁸³

ISSUE III. RST BANK IS ENTITLED TO ENFORCE THE PERSONAL GUARANTEE.

¶49. It is submitted that a creditor is entitled to enforce the personal guarantee against promoters of the corporate debtor as the moratorium under section 14 of the Code only bars proceedings against the properties and assets of the corporate debtor.

i. THE MORATORIUM DOES NOT APPLY TO THE PROPERTIES OF GUARANTORS.

¶50. The Code provides for a moratorium or stay of the proceedings against the corporate debtor and its assets. In *Alpha and Omega Diagnostics*⁸⁴, the NCLAT allowed the enforcement of security interest on the personal properties of the promoters given as security to the banks. In *Schweitzer Systemtek*⁸⁵, NCLAT clarified that the use of the word ‘its’ in sections 14(1)(b) and 14(1)(c) means that they have no extension to the properties of third parties like surety and only protect the assets of the corporate debtor.

⁷⁹ *In re William C Leitch Brothers Ltd*, (1932) 2 Ch 71; Vinod Kothari, *Law relating to Insolvency & Bankruptcy Code 2016* (Taxmann 2016), pg 533.

⁸⁰ United Nations, UNCITRAL Legislative Guide on Insolvency (2004), ¶ 172.

⁸¹ Sumant Batra, *Corporate Insolvency* (Eastern Book Company 2018), pg 184.

⁸² The Insolvency and Bankruptcy Code 2016, s 66(2)(b).

⁸³ The Insolvency and Bankruptcy Code 2016, s 60(5)(a).

⁸⁴ *Alpha and Omega Diagnostics v ARC of India*, CA (Insolvency) 116/2017 (NCLAT, 31 July 2017).

⁸⁵ *Schweitzer Systemtek India v Phoenix ARC*, CA (Insolvency) 129/2017 (NCLAT, 9 August 2017).

¶51. However, the Allahabad High Court in *Sanjeev Shriya*⁸⁶, holding that the rights of creditors are not crystallised until the approval of a resolution plan, had barred the enforcement of a personal guarantee. Even the NCLAT had later taken an opposite stance in *V Ramakrishnan*⁸⁷ but the Amendment Ordinance⁸⁸ dated 6 June 2018 settled the debate by substituting section 14(3) of the Code, which now states that the moratorium under section 14(1) does not protect sureties of the corporate debtor.⁸⁹

ii. THE JUNE 2018 AMENDMENT IS RETROSPECTIVELY APPLICABLE.

¶52. The Supreme Court in *V Ramakrishnan appeal*⁹⁰ categorically held that the amendment is a clarification and therefore, applicable retrospectively and creditors can initiate debt recovery against personal guarantors under suitable provisions if they fail to comply with the guarantee contract. The Court observed that the object of the Code was not to allow guarantors, who were mostly directors of the company, to escape from an independent and co-extensive liability to pay off the entire outstanding debt.

iii. THE EXTENSION OF MORATORIUM WOULD DEFEAT THE PURPOSE OF GUARANTEE.

¶53. The liability of a guarantor is co-extensive⁹¹ with the debtor wherein the creditor has a simultaneous remedy against the debtor and surety and there is no requirement of exhausting the remedy against one before proceeding against the other.⁹² The enforcement of a guarantee does not affect the debt because it merely shifts the right of the creditor to seek payment from the surety.⁹³ If a creditor is asked to postpone the enforcement of guarantee, the very purpose of it will be defeated and such curtailing of rights against the surety will render the security futile.⁹⁴

⁸⁶ *Sanjeev Shriya v State Bank of India*, Writ Petition (Civil) 30285/2017 (Allahabad HC).

⁸⁷ *State Bank of India v V Ramakrishnan*, CA (Insolvency) No 213/2017 (NCLAT, 28 February 2018).

⁸⁸ Insolvency and Bankruptcy Code (Amendment) Ordinance 2018.

⁸⁹ The Insolvency and Bankruptcy Code 2016, s 14(3)(b).

⁹⁰ *State Bank of India v V Ramakrishnan*, Civil Appeal 3595/2018 & 4553/2018 (SC).

⁹¹ Indian Contracts Act 1872, s 128.

⁹² Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2018), pg 34.

⁹³ Indian Contracts Act 1872, s 140.

⁹⁴ *Industrial Investment Bank of India Ltd v Biswanath Jhunjunwala*, (2009) 9 SCC 478.

ON BEHALF OF ACL'S OPERATIONAL CREDITOR (GKCL)

ISSUE I. THAT GKCL IS A FINANCIAL SECURED CREDITOR.

¶54. It is submitted that the debt under the agreement dated 05.07.2010 satisfies all the essential conditions for a financial debt. GKCL is also a secured creditor because it has a statutory charge over the property to the extent of the unpaid amount.

i. THE DEBT UNDER THE AGREEMENT IS A FINANCIAL DEBT.

¶55. A financial creditor is the person to whom a corporate debtor owes a financial debt. Financial debt is a debt along with interest, if any, disbursed with regard to the time value of money and includes any of the situation in clauses (a) to (i) of section 5(8).

a. The former part of financial debt's definition is the essential test.

¶56. The NCLAT in *Anil Mahindroo*⁹⁵ had held the financial debt to mean “*debt disbursed considering time value of money and may include any of the situation under (a) to (i)*” and therefore, the essential ingredients of a financial debt are only two: a debt and its disbursement against time value of money. In the present case, the debt arises by virtue of the right to payment out of the agreement. In fact, ACL's RP has accepted GKCL's claim as an operational creditor and only the nature of the debt is disputed.

b. The disbursement of debt is against consideration for time value of money.

¶57. For a debt to qualify as financial debt under section 5(8), it must have been disbursed against consideration for time value of money.⁹⁶ “*Time value of money is the price associated with the length of time that an investor must wait until an investment matures.*”⁹⁷ The debt here is to be repaid with interest at ordinary market rates over 10 years. Therefore, the agreement has consideration for time value of money.

c. The transaction is an agreement having the commercial effect of borrowing.

¶58. Section 5(8)(f) states that an amount raised under any transaction having the commercial effect of borrowing is a financial debt. In the present case, the agreement between GKCL and ACL was a simple sale purchase agreement. It fulfils all the

⁹⁵ *Anil Mahindroo v Earth Iconic Infrastructure, CA (Insolvency) 74/2017 (NCLAT, 2 August 2017).*

⁹⁶ *ACPC Enterprises v Affinity Beauty Salon Pvt Ltd, CP (Insolvency) 352/2017 (NCLT, 10 November 2017); Anil Mahindroo v Earth Iconic Infrastructure, CA (Insolvency) 74/2017 (NCLAT, 2 August 2017).*

⁹⁷ *Nikhil Mehta v AMR Infrastructure, CA (Insolvency) 07/2017 (NCLAT, 21 July 2017).*

conditions of a valid sale: parties capable of entering into a contract, immovable properties which are the subject of the agreement, and price or consideration.⁹⁸

¶59. While classifying the debt, it is essential to consider the substance and nature of the transaction.⁹⁹ An entity may structure a transaction in such a way that it finances the purchase of an asset, which would help it in qualifying as a financial debt; as in *Asea Brown*¹⁰⁰ wherein the Supreme Court held a lease to be a financial lease.

¶60. A financial debt does not necessarily need disbursement of money.¹⁰¹ In the present case, ACL has indirectly financed the purchase of storage facilities through the agreement. The ownership was transferred instantly while the consideration is repaid in instalments with interest, which gives it the commercial effect of borrowing. Further, GKCL designed the storage facilities to be utilised also for purposes other than cement storage to protect its interest in case GKCL had to resort to its statutory charge on a contract breach.

ii. GKCL IS A SECURED CREDITOR.

¶61. The seller of an immovable property has a statutory charge over the property if the ownership of the property transfers to the buyer before the payment of entire consideration amount promised to the seller as per the agreement.¹⁰² Therefore, GKCL also qualifies as a secured creditor since it has a security interest (which includes charge)¹⁰³ in the storage facilities to the extent of the unpaid amount until the repayment.

ON BEHALF OF THE RESOLUTION APPLICANTS

RCL

ISSUE I. JMCL'S RESOLUTION PLAN SHOULD NOT BE ACCEPTED.

¶62. The object of maximization of assets cannot be accepted as a principle in isolation unless it is sought to be achieved within the inbuilt parameters set out in the Code. A

⁹⁸ The Transfer of Property Act 1882, s 54; *Misabul Enterprises v Vijaya Srivastava*, AIR 2003 Del 15; *Ram Jiwan Rai v Deoki Nandan Rai*, AIR 2005 Pat 23; *CIT v Motor and General Stores*, AIR 1967 SC 200.

⁹⁹ *Nikhil Mehta v AMR Infrastructure*, CA (Insolvency) 07/2017 (NCLAT, 21 July 2017).

¹⁰⁰ *Asea Brown Boveri Ltd v Industrial Finance Corporation of India*, (2004) 12 SCC 570.

¹⁰¹ *BV Lakshmi v Geometrix Laser Solutions*, CA (Insolvency) 38/2017 (NCLAT, 27 December 2017), ¶ 29.

¹⁰² The Transfer of Property Act 1882, s 55(4)(b).

¹⁰³ The Insolvency and Bankruptcy Code 2016, s 3(31).

person who has taken part in a process is prevented from challenging the same.¹⁰⁴ Speed is the essence of the process¹⁰⁵ and delaying tactics should not be allowed.¹⁰⁶

JMCL

ISSUE I. ACL'S RP SHOULD ACCEPT THE RESOLUTION PLAN OF JMCL.

¶63. The RP acted unfairly and arbitrarily against the interests of JMCL as she did not present its plan before the CoC in spite of it being a competent bidder.

i. THE RP FAILED HER DUTY TO PRESENT ALL THE RESOLUTION PLANS BEFORE COC.

¶64. The RP is bound to present all the eligible plans¹⁰⁷ in the interests of the stakeholders to the CoC for its consideration.¹⁰⁸ Moreover, the RP is not restricted from accepting a revision of an offer already placed. The NCLT in *Bank of Baroda*¹⁰⁹ accepted a revised plan 45 days prior to the completion of the CIRP. In the present case, the revised plan has been submitted well before the end of the CIRP, and the approval of the Resolution Plan of RCL. There are enough days for the RP and CoC to consider the better revised offer.

ii. THE TIMELINE IS DIRECTORY AND NOT MANDATORY.

¶65. The rejection should be on substantive grounds and further, regulation 39 uses the word 'endeavour', which leaves a room for a day or two.¹¹⁰ When a statutory functionary has to perform a duty within the time prescribed, the same would only be directory.¹¹¹

<p>ON BEHALF OF MR. KEVIN MURRAY (US BANKRUPTCY TRUSTEE)</p>

ISSUE I. US PROCEEDINGS SHOULD BE RECOGNIZED AS FOREIGN MAIN PROCEEDINGS.

¶66. It is submitted that an involuntary bankruptcy petition was filed against ALSL under Chapter 11 of the US Bankruptcy Code pursuant to which Mr. Kevin Murray was

¹⁰⁴ *Ashok Kumar v State of Bihar*, (2017) 14 SCC 517.

¹⁰⁵ *Gupta Energy Pvt Ltd*, CP (Insolvency) No 43/2017 (NCLT, 20 February 2018).

¹⁰⁶ Ministry of Finance, *Report of the Bankruptcy Law Reforms Committee* (2015), pg 29.

¹⁰⁷ The Insolvency and Bankruptcy Code 2016, s 30(3).

¹⁰⁸ The Insolvency and Bankruptcy Code 2016, s 25(2)(i), 30(3); CIRP Regulations, reg 39(2); *Bank of Baroda v Binani Cements Ltd*, CP (Insolvency) 201/2018 (NCLT, 2 May 2018), pg 55.

¹⁰⁹ *Bank of Baroda v Binani Cements Ltd*, CP (Insolvency) 201/2018 (NCLT, 2 May 2018), ¶ 66.

¹¹⁰ *Punjab National Bank v Bhushan Power & Steel*, CP (Insolvency) 202/2017 (NCLT, 23 April 2018).

¹¹¹ *Surendra Trading Company v Juggilal Kamlatpat Jute Mills*, Civil Appeal 8400/2017 (SC).

appointed as the interim trustee. He seeks recognition of the proceedings under Article 15 of the UNCITRAL Model Law for cooperation with respect to the 100 million USD loan given by ALSL to ACL. Appointment of a trustee indicates an exceptionally strong need for preventing loss to the estate, which could arise if the debtor stayed in possession.¹¹²

i. THE CHAPTER 11 PROCEEDINGS ARE FOREIGN PROCEEDINGS UNDER MODEL LAW.

¶67. A foreign representative may directly apply to the AA in India for recognition of his proceedings.¹¹³ A ‘foreign proceeding’ is a collective proceeding relating to insolvency in which the assets and affairs of the debtor are subject to reorganization under the supervision of the foreign court.¹¹⁴ Even an interim trustee is entitled to apply for recognition as foreign representative.¹¹⁵ The proceedings also qualify as collective proceedings meant for reorganization under supervision by a foreign Court.¹¹⁶

ii. THE COMI OF ALSL IS IN USA.

¶68. The US proceeding must be treated as foreign main proceeding pursuant to Art 2(b) since the COMI is the place where the debtor carries out its usual operational as is ascertainable by third parties.¹¹⁷ “*In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.*”¹¹⁸ If a company's place of incorporation determines its home country, it results in a clear rule that would avoid protracted disputes about the debtor's principle place of business and will enhance predictability ex ante.¹¹⁹

¶69. The burden of proof to establish ‘evidence to the contrary’ lies with the person who intends to rebut the presumption, not on the person supporting it.¹²⁰ Additional factors

¹¹² *In re Levin*, (2011) WL 1469004, ¶ 2 (Bankruptcy SD Fla).

¹¹³ UNCITRAL Model Law on Cross-Border Insolvency 1997, art 15.

¹¹⁴ *Hur v Samsun Logix Corporation*, (2009) FCA 372.

¹¹⁵ United Nations, *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective* (2012), ¶ 35.

¹¹⁶ *In re Gold & Honey Ltd*, 410 BR 357, 370 (Bankruptcy EDNY 2009); *In re Stanford International Bank Ltd*, (2009) EWHC 1441 (Ch), ¶ 73-84; *In re Betcorp Ltd*, 400 BR 266, pg 284 (Bankruptcy D Nev 2009).

¹¹⁷ *In re Daisytek-ISA Ltd*, (2003) All ER 312 (D).

¹¹⁸ UNCITRAL Model Law on Cross-Border Insolvency 1997, art 16(3).

¹¹⁹ L Perkins, ‘A Defence of Pure Universalism in Cross-Border Corporate Insolvencies’ (2000) 32 New York University Journal of International Law & Policy 787, pg 815.

¹²⁰ *In re Bear Stearns High-Grade Structured Credit Strategies*, 389 BR 325 (SDNY 2008).

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like “*the location where financing was organized; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation*” help in substantiating the fact that ALSL’s COMI lies in the US.¹²¹

¶70. Further, *Eurofood*¹²² held that, “*Where a company carries on its business in the territory of its registered office, the mere fact that its economic choices can be controlled by a parent in another territory cannot rebut the presumption*”. Therefore, a debtor’s COMI is independent of its parent under the Model Law.

ISSUE II. THE TRIBUNAL SHOULD GRANT COOPERATION WITH RESPECT TO THE 100 MILLION USD LOAN.

¶71. ALSL should be granted cooperation under Article 25 of the Model Law with respect to the 100 million USD loaned out to ACL in 2015-16 and be allowed to protect its interests because it satisfies the requirements of Article 1 as it is ACL’s creditor.

¶72. Further, the Hon’ble Tribunal should grant the relief mentioned under Article 20 and 21, subsequent to the recognition of foreign main proceedings against ALSL and allow ALSL to intervene in the insolvency resolution process of ACL as it is a party in it.¹²³

¹²¹ United Nations, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014), pg 71.

¹²² *In re Eurofood IFSC Ltd*, (2006) All ER 1078 (EC).

¹²³ UNCITRAL Model Law on Cross-Border Insolvency 1997, art 24.