

TEAM CODE: 13

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION

2018

IN THE MATTER OF

ARVIND CEMENT LIMITED, CORPORATE DEBTOR

ON BEHALF OF

CORPORATE DEBTOR / PROMOTER OF CORPORATE DEBTOR

OPERATIONAL CREDITORS

INTERIM RESOLUTION PROFESSIONAL / RESOLUTION PROFESSIONAL

FINANCIAL CREDITORS / COMMITTEE OF CREDITORS

OTHER PARTIES

WRITTEN SUBMISSIONS ON BEHALF OF ALL CONCERNED PARTIES

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LIST OF ABBREVIATIONS

Abbreviation	Full Form
§	Section
¶	Paragraph
2015 Bill	Notes to the Insolvency and Bankruptcy Bill.2015
ACL	Arvind Cement Limited
AIR	All India reporter
All ER	All England Reporter
ALSL	Aqua Logistics and Shipping Limited
APL	Arvind Power Limited
BLRC	Bankruptcy Law Reforms Committee
BoD	Board of Directors
COMI	Centre of main interests
CIRP	Corporate Insolvency Resolution Process
CIRP Regulations	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2018
CLR	Company Law Reporter
CoC	Committee of Creditors
ComLJ	Company Law Journal
GKCL	GK Construction Limited
IM	Information Memorandum
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
IRP	Interim Resolution Profession
JMCL	JM Cements Limited
Model Law	UNCITRAL Model Law on Cross Border Insolvency

NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
NCLT Rules	National Company Law Appellate Tribunal Rules,
PPA	Power-Purchase Agreement
RCL	Rambo Cement Limited
RP	Resolution Professional
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Recorder
SPV	Special Purpose Vehicle
TTCL	T&T Construction Limited
UNCITRAL	United Nations Convention on International Trade Law
USA	United States of America

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STATEMENT OF FACTS

Background

Arvind Cement Limited (“ACL”) is a listed company and key leader in the Indian Cement Industry with the highest manufacturing capacity. The company has its registered office in Hyderabad, and two corporate offices in New Delhi and Mumbai. The corporate office in Mumbai is a ten-storey building owned by Mr. Arvind Kumar.

The company entered into a Power-Purchase Agreement (“PPA”) with Arvind Power Limited (“APL”), a Special Purpose Vehicle on 05.07.2010 which was constituted to captive power plant and a 100 acres’ land worth INR 10 crores was transferred to APL. The terms laid down that ACL had to mandatorily purchase 80% of the power generated and had to provide transmission facility to transfer power to grid within five years. Aqua Logistics and Shipping Limited (“ALSL”) was established as a fully owned subsidiary of ACL and had its registered office in United States of America (“USA”) while the Board of Directors (“BoD”) sat in Vizag.

In March 2017, ACL faced issues with supply of raw material as the import of bulk limestone became unviable due to change in regulations of Malaysian government leading benchmarked export price. The alternatives available domestically varied significantly in quality and this led to reduced output and non-functioning of plant at full-capacity. To get back on track ACL decided to establish a new manufacturing plant in Karnataka but the court order of issuing fresh mining licenses due to increased corruption decelerated the process and subsequently the payment of instalment of interests to be made to People’s bank was defaulted.

Insolvency Proceedings

Owing to the default in payment of the due loan instalment, People’s Bank, being the lead banker of the consortium, on behalf of the lender banks, filed a Corporate Insolvency Resolution Process (“CIRP”) against ACL before the NCLT which was duly accepted. Thereafter, an Interim Resolution Professional (“IRP”), Ms. Pooja Prakash was appointed to manage the affairs of the Corporate Debtor and after appointing *ABC Security Services* to preserve the manufacturing plant in Rajasthan, made a public announcement to invite claims. The claims were filed by various creditors wherein GK Constructions Limited (“GKCL”) filed claim as a financial creditor which

was rejected by the IRP wherein after claims as operational creditor were filed while awaiting a decision on final position of GKCL.

The Committee of Creditors (“CoC”) in the first meeting decided to have the IRP continue as the Resolution Professional (“RP”). Interim finance was raised with the majority approval of the CoC various necessities including for T&T Constructions Limited (“TTCL”) but the same was however contested by RST Bank and in addition to the previous transaction of INR 20 lacs made in favour of TTCL. RST Bank also invoked the personal guarantee against Mr. Arvind Kumar and filed an application for the same which was in turn contested.

While the insolvency resolution process was going on, Mr. Kevin Murray, the appointed interim trustee of ALSL – ACL’s wholly-owned subsidiary in USA– applied as foreign representative to the Adjudicating Authority in India for recognition of the foreign proceedings. Subsequently CIRP was filed against APL by People’s bank and Mr. Mahesh Kumar was appointed as IRP.

The RP of ACL hereinafter filed an application to treat the payment of excess 20 crore made to APL in 2016-17 as being avoidable whereas The RP of APL filed an application to release mortgage created over the 100 acres’ land to extend credit facility to ACL.

The RP of ACL made invitation for resolution plan and also published the Evaluation Matrix and Information Memorandum and other relevant information. The CoC in the 7th meeting filed for extension of CIRP to another 90 days which was accepted.

Rambo Cement Limited (“RCL”) and JM Cements Limited (“JMCL”) submitted one plan each by 15.10.2018 wherein RCL’s plan scored the highest and the negotiations were in place when on 19.10.2018 JMCL submitted a revised plan. The RP and CoC of ACL rejected the same as it was made four days after the submission deadline. JMCL filed application challenging the same.

The RP of APL filed an application for impleadment in the suit filed by RP of ACL for approval of resolution plan seeking protection from premature termination of its PPA with ACL. In the meanwhile, CoC approved the resolution plan submitted by RCL and the same was submitted before the Adjudicating Authority for approval.

- The matter has now been listed for 16th and 17th November, 2018-

ISSUES RAISED**ISSUES ON BEHALF OF CORPORATE DEBTOR****ARVIND CEMENT LIMITED**

1. Whether the insolvency petition should be dismissed?
2. Whether the actions of IRP are valid?
3. Whether the application for release of mortgage over land valid?

MR. ARVIND KUMAR / PROMOTER OF ACL

1. Whether personal guarantee for debt owed by ACL can be enforced against Mr. Arvind Kumar?

ISSUES ON BEHALF OF OPERATIONAL CREDITORS**GK CEMENT LIMITED**

1. Whether GKCL is a financial creditor?

ISSUES ON BEHALF OF RESOLUTION PROFESSIONAL / IRP**RESOLUTION PROFESSIONAL OF ACL – MS. POOJA PRAKASH**

1. Whether the actions taken by the IRP are valid?
2. Whether the transaction entered into with TTCL is an avoidable transaction or not?
3. Whether the payment of 100 crores to APL for liability of 80 crores an undervalued transaction?
4. Whether the foreign proceedings against ALSL should be recognized?
5. Whether APL should be impleaded in the suit for approval of ACL's resolution plan?

RESOLUTION PROFESSIONAL OF APL– MR. MAHESH KUMAR

1. Whether the payment of 100 crores to apl for liability of 80 crores an undervalued transaction?
2. Whether the application for release of mortgage over land valid?
3. Whether APL should be impleaded in the suit for approval of ACL's resolution plan?

ISSUES ON BEHALF OF FINANCIAL CREDITOR(S)**PEOPLE'S BANK**

1. Whether the CIRP application filed by People's Bank against ACL is maintainable?

RST BANK

1. Whether the transaction entered into with TTCL is an avoidable transaction or not?
2. Whether the personal guarantee for the debt owed by ACL can be enforced against Mr. Arvind Kumar?

ISSUES ON BEHALF OF OTHER PARTIES**RESOLUTION APPLICANT- JMCL**

1. Whether the RP was justified in rejecting JMCL's revised resolution plan?

MR. KEVIN MURRAY

1. Whether the foreign proceedings against ALSL should be recognized?

SUMMARY OF ARGUMENTS

1. ON BEHALF OF CORPORATE DEBTOR/ PROMOTER OF CORPORATE DEBTOR

ACL: The proceedings under NCLT being adversarial in nature, both the sides should be given an opportunity to be heard. The non-serving of notice and admission of insolvency resolution application is against principles of natural justice and should be rejected. The actions of RP were detrimental to the debtor as appointment of third-party to manage assets may affect its functions adversely and providing interim finance to TTCL would result into unnecessary liability. The mortgage of land in favour of ACL by APL to extend credit facility is a good business decision and cannot be challenged without cogent evidence.

PROMOTER OF ACL: Personal Guarantee to RST Bank against Mr. Arvind Kumar must not be enforced as it will result in inequality between the financial creditors, cause duplicity of remedy and defeat the purpose of the moratorium under IBC.

2. ON BEHALF OPERATIONAL CREDITORS

OPERATIONAL CREDITORS: GKCL is a financial creditor not an operational creditor because it is owed a financial debt by ACL i.e. the consideration for the storage facilities and the debt is disbursed against time value of money i.e. consideration is to be paid back with interest over 10 years.

3. ON BEHALF OF INTERIM RESOLUTION PROFESSIONAL / RESOLUTION PROFESSIONAL

RP OF ACL - POOJA PRAKASH: The actions of RP to appoint ABC Security Services to preserve the manufacturing plant and to raise interim finance to extend credit facility were necessary to preserve and protect the debtor. Construction service provided by GKCL being a service makes him an operational creditor. Also, the rejection of JMCL's revised plan was valid as IBC being a time bound code, acceptance of late submissions would defeat its intent of the IBC. The approval of RCL's plan by CoC cannot be challenged before the Adjudicating Authority. It is further proved that the transaction of INR 20 lacs made to TTCL was not an avoidable transaction as it did not satisfy the scheme under IBC relating to such transactions. The transaction of extra 20 crores made to APL being disproportionate to power supplied makes it an undervalued

as well as a fraudulent transaction. ALSL's proceedings should not be recognized in ACLs insolvency proceedings. ALSL and ACL are two separate companies and their proceedings are not related. Also, Citibank Consortium is not privy to any contract with ACL and hence has no stand. The application filed for impleadment of APL in the suit filed by RP of ACL for approval of the resolution plans should not be allowed as APL is an operational creditor and it should avail its remedies under the ordinary course of law instead of hindering and delaying ACL's proceedings.

RP OF APL – MAHESH KUMAR: The payment of extra 20 crores is not an avoidable transaction as it was made on ad-hoc basis to keep power plant running and was a set-off in lieu of defaulted payments. The application for release of mortgage over land was valid as it was falling under the exception laid down in §186(11)(a) of Companies Act, 2013 and fell under the avoidable transaction scheme provided under IBC. APL should be impleaded on following grounds: PPA with ACL being APL's sole source of income and APL being an SPV as well as subsidiary of ACL as well as a necessary and proper party.

4. ON BEHALF OF FINANCIAL CREDITOR/ COMMITTEE OF CREDITORS

PEOPLE'S BANK: The satisfaction of tri-fold requirements of occurrence of default, completeness of application and absence of disciplinary proceedings against the proposed resolution professional makes the insolvency application valid.

RST BANK: The transaction of INR 20 lacs made to TTCL being undervalued is an avoidable transaction as it was disproportionate and disadvantageous. Also, the personal guarantee against the promoter of the corporate debtor should be enforced otherwise the very object of the guarantee will be defeated.

5. ON BEHALF OF OTHER PARTIES

JMCL: The code being creditor friendly and the revised plan if accepted will be falling well within the time line and is a better offer therefore should be accepted.

KEVIN MURRAY: ALSL's proceeding should be recognised as the foreign non main proceeding and ACL's RP must coordinate with the interim trustee because ACL is liable for ALSL's debts to the Citibank Consortium.

ARGUMENTS ADVANCED

**I. ARGUMENTS ON BEHALF OF CORPORATE DEBTOR AND PROMOTER
OF CORPORATE DEBTOR**

ISSUES ON BEHALF OF ARVIND CEMENT LIMITED

I. WHETHER THE INSOLVENCY PETITION SHOULD BE DISMISSED?

1. The proceedings before NCLT are adversarial in nature and both sides are entitled to a reasonable opportunity of hearing.¹ The application u/s 7 IBC to initiate CIRP along with notice by applicant to debtor regarding the application filed² and by Adjudicating Authority recording date of hearing of said application is to be served; failing which acceptance of application under §7 of the IBC will be deemed as violation of rules of natural justice.³ In the instant case no such notice has been served to the corporate debtor and hence the CIRP is invalid as it is against the law laid down in the above case and the principles of natural justice.
2. Without prejudice to the above, it is admitted that in the absence of mention of notice given to corporate debtor, the same has been construed in its favour.

II. WHETHER THE ACTIONS OF IRP ARE VALID?

3. The purpose of appointing Interim Resolution Professional (“IRP”) is to run the undertaking of the Corporate Debtor as a going concern.⁴ The IRP is required to act strictly in accordance with provisions of IBC and in line with highest standards of ethics.⁵

A. Appointment of ABC Security Services is bad in law

4. In the instant matter, the steps taken by the IRP for appointment of ABC Security Services⁶ have the potential to prejudice the functioning of the Corporate Debtor as a going-concern.

¹ Sree Metaliks Ltd. v Union of India W.P. 7144(W) of 2017.

² Rule 4(3), Insolvency and Bankruptcy (Application to Adjudicating Authority for insolvency Resolution Process for Individuals and Firms) Rules, 2016.

³ Rajneet Karnal v. Bell Finvest (India) Ltd. [2018] 146 SCL 711.

⁴ BLRC Report at ¶ 5.3.1(3).

⁵ Hero Steels Ltd. v. Rolex Cycles Pvt. Ltd, CP No. (IB)-37/Chd/Pb/2017 (20.07.2017, NCLT– Chandigarh).

⁶ MOOT PROPOSITION, p. 6, ¶ 2.

This is because appointment of a third-party to manage the assets/unit of the Corporate Debtor may have a detrimental bearing over its functioning⁷ and thus should be held as invalid.

B. Raising of Interim Finance was unnecessary and contrary to provisions of law and created additional unnecessary liability

5. The term “going concern” refers to an existing solvent business, which is being conducted in the usual and ordinary way for which it was organized. When applied to a corporation, it means that it continues to transact its ordinary business⁸.
6. It should be noted further that going concern value is the value which inheres in a plant where its business is established, *as distinguished from one which has yet to establish its business.*⁹
7. It is thus concluded that since interim finance to TTCL to continue its construction of plant at Karnataka is a business that is yet to be constructed and though it is for a particular object it is yet not existing and thus not a going-concern and will not be covered under §20 of IBC.

III. WHETHER THE APPLICATION FOR RELEASE OF MORTGAGE OVER LAND VALID?

8. The business judgement rule is a principle which assumes that the directors of a company will act in its best interest unless proven otherwise. It should be noted that the mortgage made by APL over its land to gain credit facility for ACL satisfies the business judgement rule as the management of APL acted in good faith on an informed basis so as to not waste the assets of the corporation and hence proves to be a good business decision.¹⁰
9. It is further to be noted that the NCLAT in ***IDBI v. Jaypee Infratech*** observed that:
*“Management in good faith, according to the facts and circumstances then prevailing or which could be reasonably anticipated and according to their wisdom took a decision and such decisions cannot be questioned by the applicant without proving by cogent evidence that the decision was fraudulent.”*¹¹

⁷ BLRC Report at ¶ 6.4.5.

⁸ State ex rel. Sorensen v. Lincoln Hail Ins. Co., 133 Neb. 496, 276 N.W. 169, 174.

⁹ East Bay Water Co. v. McLaughlin, D.C.Cal., 24 F.Supp. 222, 226.

¹⁰ Grobow v. Perot, 539 A.2d 180 (Del. 1988).

¹¹ IDBI Bank Limited v. Jaypee Infratech Limited, CA No. 26/2018 in Company Petition No. (1B)77/ALD/2017.

10. In the instant case one of the directors of APL and ACL being same¹² and the two entities being cross-knitted, the mortgage is deemed to be made in good faith.
11. It is further submitted that e-mail being an instantaneous mode of communication follows the receipt rule and therefore is deemed to have been received the addressee when it has entered his server provided that there has been an implied or expressed consent to receive such communication in such form at that address.¹³ The present communication through email satisfies the above requirements and hence it cannot be said that it was made to the detriment of Indo Bank.

ISSUE ON BEHALF OF PROMOTER OF ACL

IV. WHETHER PERSONAL GUARANTEE FOR DEBT OWED BY ACL CAN BE ENFORCED AGAINST MR. ARVIND KUMAR OR NOT?

12. § 14 of the IBC defines Personal guarantor as an individual who is the surety in a contract of guarantee to a corporate debtor. In *Sanjeev Shriya v. State Bank of India*¹⁴ Sections 60(1), 60(2) and Section 31 were interpreted to include personal guarantors in the moratorium of the corporate debtor and it was held that two parallel proceedings of personal guarantee and CIRP cannot go on. Similarly, it is contended that while corporate debtor is under moratorium with the CIRP going on, personal guarantee proceedings should not be started.
13. §140 and 145 of the Indian Contract Act lay down that, a debtor has an implied promise to indemnify the surety i.e. the surety upon payment of the guarantee steps into the shoes of the creditor. Applying the same in the instant case, if the personal guarantee is enforced, the promoter would claim from the corporate debtor's assets thus putting stress on them and hamper the CIRP. The purpose of moratorium is to ensure the suspension of debt collection actions by the creditors and prevent initiation of any other legal proceedings against the debtor thus stream lining all insolvency proceeding under one umbrella. It is contended that enforcement of personal guarantee will defeat these fundamental objectives of the moratorium.

¹² Moot Clarifications Answer to Question 18.

¹³ CISG Advisory Council Opinion no 1, Electronic Communications under CISG (15 August 2003).

¹⁴ *Sanjeev Shriya v. State Bank of India* [2018] (2) ALJ 769.

14. It is also contended that enforcing the personal guarantee would lead to duplicity of remedy and disparity between financial creditors, with RST Bank gaining credit from both the personal guarantee and as a financial creditor. It is also submitted that by allowing enforcement of personal guarantee, unlimited liability of the promoter will be established and if liability was unlimited, fewer risky projects would be undertaken¹⁵ thus discouraging future entrepreneurs from exploring new avenues.

II. ARGUMENTS ON BEHALF OF OPERATIONAL CREDITOR

ISSUE ON BEHALF OF GKCL

I. WHETHER GKCL IS A FINANCIAL CREDITOR?

15. §5 (7) of the IBC defines financial creditor as a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred is a financial creditor. §5(8) defines financial debt as the debt along with interest, if any, is disbursed against the consideration for time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i).
16. Clause (e) of §5(8) of IBC states, “(e) *receivables sold or discounted other than any receivables sold on nonrecourse basis*” Receivables” means that which is due and owing a person or company¹⁶ The construction of storage facilities is a service¹⁷ rendered by GKCL, which has been delivered but has not yet been paid for yet¹⁸ and is a receivable under §5(8).
17. ‘Time Value’ is defined as “the price associated with the length of time that an investor must wait until an investment matures or the related income is earned”¹⁹ and a convenient way of disbursing time value of money is by calculating interest.²⁰ Under the agreement, GKCL was

¹⁵ *BLRC Report* at ¶ 3.2.3.

¹⁶ Black's Law Dictionary (6th ed.).

¹⁷ Clause (o) of § 2, Consumer Protection Act, 1986, See also § 65 clause (30a), Finance Act (No. 2) of 2004, Tulip Park Co-operative Housing Society Ltd. v. Sai Overseas Import Export, AIR 1999 SC 3665.

¹⁸ Moot Clarifications Answer to Question 14.

¹⁹ *Nikhil Mehta v. AMR Infrastructure Limited C.A. (IB) No. 543/KB/2017* arising out of C.P.(IB)/170/KB/2017.

²⁰ *Indian Council of Enviro-Legal Action v. UOI and Ors.*, 2011 (8) SCC 161; *T.N. Generation and Distbn. Corp. Ltd. v. PPN Power Gen. Co. Pvt. Ltd.*, [2014] 6 ALL MR 476.

being paid the consideration along with interest over a period of 8 years. Hence it is contended that the essentials of a financial creditor are met by GKCL.

III. ARGUMENTS ON BEHALF OF RESOLUTION PROFESSIONAL

ISSUES ON BEHALF OF RESOLUTION PROFESSIONAL OF ACL— MS. POOJA PRAKASH

I. WHETHER THE ACTIONS TAKEN BY THE IRP ARE VALID?

18. The Report of the BLRC has laid down specific mandates for the selection, appointment and functioning of IPs²¹ which ensures credibility and cannot be questioned without concrete evidence.

A. *Appointment of ABC Security Service is valid*

19. § 20(1) of IBC provides that an IRP is to take all necessary steps to *protect* and *preserve* the assets of the Corporate Debtor. Further, §20(2)(e) read with §25(c) and §28 enables the IRP to take all such actions as “are *necessary* to run the Corporate Debtor as a going concern”.²² Therefore, the action taken by the IRP of appointing ABC Security Service to preserve the manufacturing unit and plant of the Corporate Debtor is valid and must be respected.

B. *Raising of Interim Finance is valid*

20. The present business if provided with this interim finance would be able to get back on track with construction of the plant in Karnataka to continue its business for a foreseeable future²³ and discharge its liabilities. It can thus be said to fall under the definition of going concern and principle of business continuity.²⁴

21. The IBC under §5(13)(c) vests in the IRP the power to incur costs in running the business as a going concern and raising of interim finance is her statutory duty subject to approval of CoC.²⁵ The court can only intervene when there is ambiguity in law but not when the mandate is clear

²¹ MOOT PROPOSITION, p. 2, ¶ 3.

²² *BLRC Report* at ¶ 5.3.1(3).

²³ *Cox Enterprises Inc., v. Herbert M. Davidson, Jr., et al.*, 510 F.3d 1350.

²⁴ *Going Concern*, International Standard on Auditing (UK) 570. pp. 547–561.

²⁵ § 25(c) r/w §28 IBC.

Quoties in *verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*²⁶ which is interpreted as “When there is no ambiguity in the language of an instrument, no interpretation is to be made contrary to the words.” In the instant case raising of interim finance was to maintain ACL’s assets as a going concern and the same was approved duly by majority CoC.²⁷

C. GKCL is an operational creditor

22. An operational creditor is one to whom an operational debt²⁸ is owed, and whose liability comes from transaction on operations.²⁹ *Col. Vinod Awasthy v. AMR Infrastructure Limited*³⁰ observed that framers intended to have operational debt confined only to four categories as specified in §5(21) of the IBC like goods, services, employment and Government dues.
23. The construction of the 85 storage facilities by GKCL for ACL is a kind of service³¹ and the title of ownership of storage facilities vested in ACL when the construction was complete thus showing the essence being mere completion of the construction.
24. In light of the above arguments it is humbly submitted that the purchase money not yet paid would be an operational debt and that the decision of the RP be upheld.

D. Rejection of JMCL’s Revised Resolution Plan is valid

25. IBC has prescribed time limits for every step involved under the CIRP³² which emphasizes that time is the essence of the insolvency process and the revised plan being submitted beyond submission deadline should be not accepted.³³
26. The CoC accepted the plan of RCL and same was submitted to the adjudicating authority. The BLRC, with regards to the role of NCLT, has said that, “once a consensus has been reached,

²⁶ Dr. K. Subbaiah v. C.N. Krishnamacharlu S/o. Narasimha Charlu and Ors., 2011 (2) ALT 516.

²⁷ MOOT PROPOSITION, p. 8, ¶ 21.

²⁸ Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd. AIR 2018 SC 498.

²⁹ *BLRC Final Report* at ¶ 5.2.1 .

³⁰ *Col. Vinod Awasthy v. AMR Infrastructure Ltd.* (C.P. No. (IB)10(PB)/2017), See also Para 6,7 *Sajive Kanwar v AMR Infrastructure C.P. No. (ISB)-03(PB)/2017.*

³¹ Clause (o) of § 2, Consumer Protection Act, 1986, See also § 65 clause (30a), Finance Act (No. 2) of 2004

³² Regulation 40 A, IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2018.

³³ *J.K. Jute Mills Co. Ltd. v. Surendra Trading Co., C. P. No. 19/Ald/2017 (09.03.2017, NCLT – Allahabad).*

the Adjudicator should accept the agreement without any modification, and give the stamp of approval which will give effect to the agreement.”³⁴

27. The adjudicating authority has no jurisdiction to interfere with rejection of Resolution Plan by CoC.³⁵ The ultimate decision on the viability of the plan is of the CoC and upon its approval no further enquiry is required, and the Plan would be binding on all the remaining creditors.³⁶
28. The present submission of revised plan can also be seen to be an anti-competitive tactic as JMCL and RCL being market rivals, JMCL did not want RCL to get hold of ACL which had the highest manufacturing capacity in India with superior technological know-how.
29. Therefore, it is humbly submitted that RP was valid in not accepting the revised plan of JMCL.

II. WHETHER THE TRANSACTION ENTERED INTO WITH TTCL IS AN AVOIDABLE TRANSACTION OR NOT?

30. The basic principles of law state that the burden of proving a transaction to be an undervalue lies on the party claiming it to be and mere speculation in this regard does not discharge the burden of proof³⁷ which shall be substantiated by the following arguments-

A. Not an undervalued or fraudulent transaction

31. The transaction of INR 20 lacs is neither disproportionate nor disadvantageous and was made in good faith for the purpose of carrying on the business³⁸ as ACL’s management believed it to be the quickest route of revival of ACL.³⁹ This payment was in the usual course of business⁴⁰ to continue construction of its cement plant⁴¹ and is therefore not an undervalued transaction and thus not a fraudulent one as being undervalued transaction is a pre-condition to it u/s 45.

³⁴ *BLRC Report* at ¶ 6.4.2.

³⁵ *Vivek Vijay Gupta v. Steel Konnect (india) (P.) Ltd.* [2018] 146 SCSL 0016.

³⁶ *BLRC Report* at p. 13 (Executive Summary).

³⁷ *Philips and Anr. v. Brewin Dolphin Bell Lawrie and Anr.* [2001] 1 WLR 143.

³⁸ *Colin Thomas Burke v. John Morrison* [2011] EWHC 804 (Ch).

³⁹ MOOT PROPOSITION, p. 6, ¶ 15.

⁴⁰ *Medigroup Inc. v. Phillip Schildknecht and Neil P. Gavin*, [1969] 463 F.2d 525 (7th Cir.).

⁴¹ MOOT PROPOSITION, P. 7, ¶ 21.

B. Not an extortionate or preferential transaction

32. The transaction was not extortionate as for one, credit has to be obtained at abnormally high rates and on unfair terms⁴² whereas in the instant case the credit was not obtained but given for continuation of services. The transaction was made in cash and not through transfer of property hence it is not a preferential transaction either u/s 43.
33. Thus, the transaction of INR 20 lacs made by ACL was not an avoidable transaction.

III. WHETHER THE PAYMENT OF 100 CRORES TO APL FOR LIABILITY OF 80 CRORES AN UNDERVALUED TRANSACTION?

34. It is contented that the excess transaction of INR 20 crores done by ACL to APL is an undervalued transaction under §45 of the code. The exception of ordinary course of business also would not be applicable as ordinary course of business expressly excludes set-offs of preexisting debt.⁴³
35. The transaction also falls under §49 of the code as it involves fraud on creditors as the transaction was deliberately keeping away the amount from the creditors. The fact that it was made within the suspense period, i.e., the time of early signals of financial trouble when the management may enter into transactions with related parties to strip the corporate of its value.⁴⁴
36. It is thus humbly submitted that the transaction of extra INR 20 crores is avoidable.

IV. WHETHER THE FOREIGN PROCEEDINGS AGAINST ALSL SHOULD BE RECOGNIZED?

37. Mr. Kevin Murray, the interim trustee in the US Bankruptcy proceedings against ALSL has applied to the adjudicating authority for recognition of the foreign insolvency proceeding. However, the same should not be recognized because (A) the insolvency against ACL is unrelated to insolvency against ALSL and (B) Citibank Consortium is not privy to the contract.

⁴² § 50 IBC.

⁴³ Franklin v. First National Bank of Morrill, [1993] 848 P. 2d 775, 781 (Wy.); See also Orix Credit Alliance v. Sov. Bank [1993] 4 F. 3 d 1262.

⁴⁴ VINOD KOTHARI, LAW RELATING TO INSOLVENCY AND BANKRUPTCY CODE 2016, See also Notes on clauses of IBC, p.125.

A. Insolvency against ACL is unrelated to insolvency against ALSL

38. The doctrine of separate legal entity of a company⁴⁵ is not affected merely because there is a proximate relationship between two or more companies. A company is a separate legal entity distinct from its members⁴⁶ and separate legal existence of the companies has to be respected.⁴⁷
39. In *Vodafone Intl. Holdings v. UOI*⁴⁸ the Apex Court observed “*A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence.*” Companies Act, 2013 clearly differentiates a subsidiary company as separate and distinct from its holding company.
40. Mere ownership, parental control, management etc. of a subsidiary is not sufficient to pierce the status of their relationship and hold the parent company liable.⁴⁹ The UNCITRAL Legislative Guide on Insolvency Law states that when the structure of a group is diverse, involving unrelated businesses and assets, the insolvency of one or more group members may not affect other members and the insolvent members can be administered separately.⁵⁰
41. Mr. Murray is the interim trustee for ALSL, an overseas subsidiary with registered office in the USA while ACL is its Indian Parent Company. Thus, being two separate debtors, foreign insolvency proceedings against ALSL have no bearing on the insolvency proceedings against ACL in India and the same need not be recognized.

B. Citibank Consortium is not privy to the contract

42. The Doctrine of Privity of Contract means that a contract cannot confer rights or impose those obligations arising under it, on any person except the parties to it⁵¹ i.e. a stranger to contract

⁴⁵ Test Claimants in the FII Group Litigation v. HM Revenue and Customs, [2014] EWHC 4302 (Ch).

⁴⁶ Salomon v. Salomon & Company Ltd., [1897] AC 2

⁴⁷ Krishi Foundry Employees' Union v. Krishi Engines, (2003) 5 Comp L.J. 94 (AP); *See also* Covert et al. v. Minister of Finance of Nova Scotia, [1980] SCC 229 (Canada).

⁴⁸ Vodafone Intl. Holdings v. UOI, (2012) 6 SCC 613, ¶ 73.

⁴⁹ *Id.* At ¶ 60. *See also* United States v. Bestfoods, 524 US 51 (1998).

⁵⁰ UN, UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency (2012), at p. 20, ¶ 4.

⁵¹ Harnam Singh v. Purbi Devi, AIR 2000 HP 108; Narayani Devi v. Tagore Corporation Ltd. AIR 1973 Cal 401.

cannot sue⁵² unless the contract was made for the benefit of such stranger (third party).⁵³ Thus, it is settled law that a person not party to a contract cannot enforce the terms of the contract.⁵⁴

43. The remedy is to have either a tripartite contract between the debtor, the creditor and the third party so that the privity of contract is established to provide creditor's rights to the third party or to ensure that the original contract is assignable to third party.⁵⁵

44. There are two different loan contracts; first, the loan of value 1.5 billion USD granted by Citibank Consortium to ALSL used to finance 80 container vessels, second, the loan of 100 million USD granted by ALSL to its parent company ACL.⁵⁶ Since Citibank Consortium is a third party, it is submitted that this foreign proceeding by a third party should not be recognized due to lack of privity of contract.

V. WHETHER APL SHOULD BE IMPEADED IN THE SUIT FOR APPROVAL OF ACL'S RESOLUTION PLAN?

45. The application filed for impleadment of APL in the suit filed by RP of ACL for approval of the resolution plans should not be allowed. APL is an operational creditor and should avail its remedies under the ordinary course of law instead of delaying ACL's proceedings.

A. APL being only a SPV, should be remote from bankruptcy proceedings of ACL

46. A SPV is formed for a specific purpose, its powers are limited to what might be required to attain that purpose and its life is destined to end when the purpose is attained.⁵⁷ In *IVRCL Limited v. Alkor Petroo Limited and Ors* the Gujarat High Court held “.....*Alkor is a Special Purpose Vehicle and a subsidiary of the IVRCL for its foray in oil and gas business....*” implying that an SPV⁵⁸ is not necessarily a subsidiary unless expressly so stated.

⁵² Avtar Singh, Contract and Specific Relief, Eastern Book Company, 11th Edition, p. 109.

⁵³ Pandurang v. Vishwanath, AIR 1939 Nag 20; Khired Behari Dutt v. Man Gobinda, AIR 1934 Cal 682.

⁵⁴ MC Chacko v. State Bank of Travancore, 1970 AIR 500.

⁵⁵ The New Bank of India Ltd. v. UOI & Ors. (1977) ILR 2 Delhi 672.

⁵⁶ MOOT PROPOSITION, p. 8, ¶ 24.

⁵⁷ Special Purpose Vehicle, Vinod Kothari Consultants (August 20, 2018, 16.35pm) <http://vinodkothari.com/spv/>.

⁵⁸ *IVRCL Limited v. Alkor Petroo Ltd. and Ors*, First Appeal No. 547 of 2016, Civil Application No. 2815 of 2016.

47. APL's special purpose is running the captive power plant governed by the PPA signed with ACL.⁵⁹ The PPA also allows for sale of electricity to third party making APL independent enough to be able to sell its product to other parties if it wished to do so.
48. An Ideal SPV must be bankruptcy remote i.e. the bankruptcy of Originator should not affect the interests of holders of instruments issued by SPV.⁶⁰ Thus APL being a SPV pursuant to these RBI guidelines, APL should be kept away from bankruptcy proceedings of ACL.

B. Remedy for Breach of Contract should be sought by APL

49. It is submitted that APL and ACL being separate entities with a well-defined contract (PPA) between them, entitles APL to claim reliefs to breach of contract under Chapter VI of the ICA if the PPA is modified or terminated in a manner that is detrimental to APL and use the relief granted by the court to satisfy its creditors without harming other creditors of ACL.
50. Therefore, impleadment of APL will cause unnecessary delay in the approval of the RP.⁶¹

ISSUES ON BEHALF OF RESOLUTION PROFESSIONAL OF APL – MR. MAHESH KUMAR

I. WHETHER THE PAYMENT OF 100 CRORES TO APL FOR LIABILITY OF 80 CRORES AN UNDERVALUED TRANSACTION?

51. The functions of APL were totally dependent on ACL as APL's plant was not connected to the grid making it impossible for APL to sell electricity to third parties. The payments made by ACL to APL were irregular⁶², making the ad-hoc payment of extra INR 20 crores which was made to deal with the particular issue⁶³ of keeping the power plant running to continue uninterrupted infrastructural facility of power supply for the cement manufacturing unit.
52. The ad-hoc payment was made for a particular reason in good faith and under ordinary course of business as though it is not in general course of business but is required to carry it out.⁶⁴

⁵⁹ MOOT PROPOSITION, p. 2, ¶ 4.

⁶⁰ Chapter 7 – Special Purpose Vehicle, Reserve Bank of India Reports, (August 24, 2018, 19.14) <https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?ID=164>.

⁶¹ J.K. Jute Mills Co. Ltd. v. Surendra Trading Co., C. P. No. 19/Ald/2017 (09.03.2017, NCLT – Allahabad).

⁶² MOOT PROPOSITION, p. 6, ¶ 16.

⁶³ U.S. v. Fernandez, 388 F. 3d 1199 2004.

⁶⁴ Medigroup Inc. v. Phillip Schildknecht and Neil P. Gavin, [1969] 463 F.2d 525 (7th Cir.).

53. CPC provides that parties have the power to set-off the claims⁶⁵ and as in the instant case ACL has defaulted under PPA to pay APL, the Adjudicating Authority should also allow setting-off of the due amount against the disputed 20 crores extra payment.

II. WHETHER THE APPLICATION FOR RELEASE OF MORTGAGE OVER LAND WAS VALID?

54. That the charge created by APL to secure a credit of INR 500 Crore from People's Bank is an avoidable transaction and therefore, the land must be released. The avoidable transactions are dealt u/s 43,45,49 and 50 of IBC.

A. Whether the relief of "ordinary course of business" available?

55. The Code carve out exceptions for transactions entered into ordinary course of business from being challenged as avoidable transactions like §43(3)(a) excludes "a transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee".

56. In *IDBI Bank Ltd. v. Jaypee Infratech Ltd.*⁶⁶ it was held that the transaction of creating a security interest by way of mortgage in favour of lenders of a third party cannot be treated as transfer in the ordinary course of business of the corporate debtor as it is does not transpire to be a matter of daily custom in business.⁶⁷ The exclusion clause cannot be interpreted such that the ordinary course of business also includes transferee's ordinary business.

B. Whether the transaction was an undervalued transaction

57. The alleged transaction has been made without receipt of any consideration by APL. Therefore, the transaction is covered under § 45(1) of the Code to be treated as undervalued.⁶⁸ This aims to prevent siphoning away of corporate assets by the management of corporate debtor.⁶⁹

C. Whether the transaction was to defraud creditors

58. The value of the land mortgaged by APL was of INR 100 crores created without any counter guarantee from a related party. The mortgage of land is in nature of asset stripping and entered

⁶⁵ Code of Civil Procedure, Order 8 Rule 6 (1908).

⁶⁶ *IDBI Bank Limited v. Jaypee Infratech Limited*, CA No. 26/2018 in Company Petition No. (1B)77/ALD/2017.

⁶⁷ *In Re Eagle-Picher Industries v. Eagle-Picher Industries* [2006] 447 F. 3d 461.

⁶⁸ *Pandurang v. Vishwanath*, AIR 1939 Nag 20.

⁶⁹ Notes on clauses of IBC, p.124.

into with the intent to defraud the Creditors of the Corporate Debtor.⁷⁰ The mortgage deliberately puts the assets of the Indo Bank beyond the reach as the mortgage was made without even waiting for the reply to the email sent to from Indo Bank attracting §49.

D. That the instant transaction cannot be protected as an inter-corporate loan

59. §186 of The Companies Act, 2013 would not apply to the present case as it falls under the exception laid down in §186(11) (a) which provides that “A company framed with the purpose of financing industrial enterprises or providing infrastructure facilities”.

60. Oxford dictionary defines ‘*infrastructure*’ as:⁷¹ “*basic physical and organizational structures and facilities (e.g. buildings, roads, power supplies) needed for the operation of a society or enterprise. In the instant case APL provides ACL with the infrastructural facility of power supply and hence falls under s.186(11) Companies Act 2013.*”

61. Thus, it is humbly submitted that the application for release of mortgage of land is valid.

III. WHETHER APL SHOULD BE IMPLEADED IN THE SUIT FOR APPROVAL OF ACL’S RESOLUTION PLAN?

62. The application filed for impleadment of APL in the suit filed by RP of ACL for approval of the RPs should be allowed because (i)PPA with ACL is APL’s sole source of income; (ii)APL is an SPV and subsidiary of ACL; and (iii) APL is a necessary and proper party.

A. PPA with ACL is APL’s sole source of income

63. Through the IBC (Amendment) Ordinance, 2018⁷² homebuyers who were previously operational creditors were elevated to financial creditors. It was done in recognition of the fact that a homebuyer’s life’s savings were being wiped out and hence he should have say in the resolution plan pursuant to the principles of natural justice.⁷³

64. ACL and APL entered into a PPA wherein ACL would mandatorily purchase 80% of power generated by APL, compensate APL for unsold units and connect APL to the grid within five

⁷⁰ IDBI Bank Ltd. v. Jaypee Infratech Ltd, CA No. 26/2018 in Company Petition No. (1B)77/ALD/2017.

⁷¹ Infrastructure, English Oxford Living Dictionaries, (August 29, 2018, 15.45)
<https://en.oxforddictionaries.com/definition/infrastructure>

⁷² IBC, Second Amendment Bill, 2018, Bill no. 127 of 2018.

⁷³ Chitra Sharma & Ors. V. UOI and Ors. [2018] 9 SCALE 490.

years of the commencement of operations. However, APL was not connected to the grid by its parent company ACL, in turn violating the PPA terms, yet APL never protested against these violations by its parent. APL has traded electricity only with ACL since the commencement of its operations making ACL's payments' APL's sole income source for its entire lifetime.

65. Inferring from the intention behind the ordinance and the decision in *Chitra Sharma* it is humbly contended that APL is an operational creditor whose life's income is dependent on ACL's RP and hence APL should be impleaded in the suit for the approval of the RP.

B. APL is an SPV as well as subsidiary of ACL

66. The name SPV is given to an entity which is formed for a single, well-defined and narrow purpose⁷⁴ whereas subsidiary is a smaller company than the parent company which is controlled and owned by the parent company.⁷⁵ By its very nature, a SPV must be distanced from the sponsor both in terms of management and ownership, because if the SPV were to be owned or controlled by the sponsor, there is no difference between a subsidiary and an SPV.⁷⁶

67. APL has been set up as a SPV to run the Captive Power Plant.⁷⁷ ACL and APL have a common MD⁷⁸, all its capital is transferred from ACL and being dependent on ACL for its power production, its functioning is also determined by the needs of ACL almost integrating APL into ACL as its own unit whereas ideally an SPV should have an independent existence, otherwise a court may use the principle of piercing the corporate veil to bring the SPV and its assets into the parent's bankruptcy proceedings.⁷⁹

68. Therefore, it is humbly submitted that APL is a subsidiary masquerading as an SPV and is thus accessible for insolvency proceedings against ACL and hence, APL must be impleaded into the suit to allow proper consideration of its concerns before approval of the resolution plan.

⁷⁴ What is a Special Purpose Vehicle?, Financial Express (23rd August, 2018, 14.28) <https://www.financialexpress.com/archive/what-is-a-special-purpose-vehicle/129610/>

⁷⁵ Black's Law Dictionary, 2nd Edition.

⁷⁶ VINOD KOTHARI, LAW RELATING TO INSOLVENCY AND BANKRUPTCY CODE 2016

⁷⁷ MOOT PROPOSITION, p. 2, ¶ 4.

⁷⁸ Moot Clarifications Answer to Question 18.

⁷⁹ Chapter 7 – Special Purpose Vehicle, Reserve Bank of India Reports, (August 24, 2018, 19.14) <https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?ID=164.>

C. APL is a necessary and proper party

69. The CPC empowers the court to add parties to a suit if it finds that the party's presence is necessary for effective disposal of the suit.⁸⁰ There are two tests to determine whether a party is a necessary party to a proceeding or not:

- (i) There must be a right to some relief such party in respect of the matter involved; and
- (ii) It should not be possible to pass an effective decree in absence of such a party.⁸¹

70. The court can allow impleadment when decision of a case has effect on rights and liabilities of party.⁸² APL and ACL are closely- knit entities, extremely dependent on each other with a common MD⁸³ which enables the two supposedly separate entities to be controlled singly. Also the PPA is APL's only source of income. It follows that APL is a necessary and proper party since it satisfies the tests of the doctrine⁸⁴ and similar to the power granted by the CPC to the court to add parties to a suit if it finds that the party's presence is necessary for effective disposal of the suit⁸⁵ the Adjudicating Authority should also implead APL to the suit.

IV. ARGUMENTS ON BEHALF OF FINANCIAL CREDITORS

ISSUES ON BEHALF OF PEOPLE'S BANK

I. WHETHER THE CORPORATE INSOLVENCY RESOLUTION PROCESS APPLICATION FILED BY PEOPLE'S BANK AGAINST ARVIND CEMENT LTD. IS MAINTAINABLE?

71. It is humbly submitted that the IBC being a complete code confers specific statutory rights on the creditor to initiate CIRP against the debtor under §7.⁸⁶ In *M/s. Innoventive Industries*

⁸⁰ Code of Civil Procedure, Order 1 Rule 10 sub-rule 2 (1908).

⁸¹ *Kasturi v. Iyyamperumal* (2005) 6 SCC 733 at p. 738.

⁸² *Poonam v. State of U.P. & Ors.*, 2016 (7) ADJ 530.

⁸³ Moot Clarifications Answer to Question 18.

⁸⁴ *Kasturi v. Iyyamperumal* (2005) 6 SCC 733 at pt. 738.

⁸⁵ Code of Civil Procedure, Order 1 Rule 10 sub-rule 2 (1908).

⁸⁶ *Essar Steel India Ltd. & Ors. v. Reserve Bank of India & Ors.*, 2018 208 COMPCAS 101 (Guj.).

*Ltd.*⁸⁷ pursuant to §7(5) observed that the tri-fold requirements of occurrence of default, completeness of application and absence of disciplinary proceedings against the proposed IRP must be satisfied along with the minimum default of INR 1 lakh laid down under §4⁸⁸ beyond which the adjudicating authority is not required to look into any other factor.⁸⁹

72. The facts of the instant case squarely fit the requirements laid down by the apex court and the statutory provision of minimum default amount, hence the adjudicating authority was correct in admitting the application filed by People's bank.

ISSUES ON BEHALF OF RST BANK

I. WHETHER THE PERSONAL GUARANTEE FOR THE DEBT OWED BY ACL CAN BE ENFORCED AGAINST MR. ARVIND KUMAR?

73. An arrangement in which a person becomes liable for the debts of another party, in case the other party fails to clear their dues on time is a personal guarantee.⁹⁰ The amended §14(3) (b) states that the provisions of sub-section (1) shall not apply to a surety in a contract of guarantee to a corporate debtor.⁹¹ This clarificatory amendment is retrospective⁹² and the moratorium has no application on the properties beyond the ownership of the Corporate Debtor.⁹³ §128 creates a co-extensive liability between the surety and the debtor so in case a proceeding is initiated against the principal debtor guarantors conduct will be governed by it.⁹⁴ It empowers the creditor to proceed against the principal-debtor and the guarantor.⁹⁵

⁸⁷ M/S. Innoventive Industries Ltd v. ICICI Bank, [2017] 142 SCL 11 (NCLAT) at ¶82.

⁸⁸ Vidul Sharma v. Technopak Advisors Pvt. Ltd. Company Appeal (AT) (Insol.) No. 131 of 2017;.

⁸⁹ ICICI Bank v. ABG Shipyard Ltd., CP No.(IB)53/7/NCLT/AHM/2017(01.08.2017-NCLT–Ahmedabad).

⁹⁰ Black's Law Dictionary, 2nd Edition.

⁹¹ IBC, (Second Amendment) Act, No, 26 of 2018.

⁹² State Bank of India v. Ramakrishnan and Ors. Civil Appeal No. 3595 Of 2018, [2018] 9 SCALE 597.

⁹³ M/s. Schweitzer Systemtek India Private Limited.v. Pheonix ARC Private Limited, Company Appeal (AT) (Insolvency) No. 129 of 2017.

⁹⁴ NAMRATA DUBEY, THE NEW CONUNDRUM: GUARANTOR IN INSOLVENCY REGIME, (3rd September, 2018, 22.47) <http://www.ibbi.gov.in/2ndPrizeNamrataDubeyILNUAhmedabad.pdf>

⁹⁵ Subankhan v. Lalkhan AIR 1947 Nag. 643.

74. In *State Bank of India v. Ramakrishnan and Ors.*⁹⁶ held that, “§14 refers only to debts due by corporate debtors, The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why §14 is not applied to them.” The term “its” u/s 14(1)(c) of the Code refers only to the property of the corporate debtor undergoing a CIRP.⁹⁷

75. Mr. Arvind Kumar had provided personal guarantee to obtain loan from RST which RST bank is now seeking to enforce by filing an application. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety⁹⁸ and the security will become useless if his rights against the surety can be so easily cut down.⁹⁹

II. WHETHER THE TRANSACTION ENTERED INTO WITH TTCL IS AN AVOIDABLE TRANSACTION OR NOT?

76. The Code under §45(1) vests in the IRP the authority to file an application with the adjudicating authority to declare undervalued transactions made within relevant period of one year¹⁰⁰, as void and reverse the effect of such transaction.

77. The following has to be proved for a transaction to be termed as ‘*undervalued*’:

- (a) The corporate debtor should either make a gift or enter into a transaction with a person;¹⁰¹
- (b) The exchange made in transaction should be disproportionate¹⁰² and disadvantageous to the corporate debtor;
- (c) There is no need of a pre-existing transaction; and
- (d) The transaction should not have taken place in ordinary course of business¹⁰³

⁹⁶ State Bank of India v. Ramakrishnan and Ors. Civil Appeal No. 3595 Of 2018, [2018] 9 SCALE 597.

⁹⁷ Alpha & Omega Diagnostics (India) Ltd. Vs. Asset Reconstruction Company of India Ltd. & Ors, Company Appeal (AT) (Insol.) No. 116 of 2017.

⁹⁸ Lacchman Joharimal v. Bapu Khandu and Tukaram Khandoji, 1869) 6 Bombay High Court Reports 241.

⁹⁹ Industrial Investment Bank of India Ltd. vs. Biswanath Jhunjhunwala,, SC, CIVIL APPEAL NO. 4613 OF 2000.

¹⁰⁰ §46 IBC.

¹⁰¹ §45(2) IBC.

¹⁰² In re MC Bacon Ltd. 1990 BCLC 324,340.

¹⁰³ VINOD KOTHARI & SIKHA BANSAL TAXMANN’S LAW RELATING TO INSOLVENCY AND BANKRUPTCY CODE, 2016.

78. It is submitted that transaction of 20 lacs was made in favour of TTCL to allay its fear of uncertainty of future payment which indicates that the present payment included the fee for future service along with the fee for minimal off-site work done¹⁰⁴.
79. This transaction was made by defaulting to the banks and did not transpire as being a matter of daily custom in the business¹⁰⁵ of cement manufacturing. It is humbly submitted that the transaction was undervalued and this Hon'ble Tribunal should reverse the transaction of 20 lacs made to TTCL by exercising power under §48 of IBC.

ARGUMENTS ON BEHALF OF OTHER PARTIES

ISSUES ON BEHALF OF RESOLUTION APPLICANT JMCL

I. WHETHER THE RP WAS JUSTIFIED IN REJECTING JMCL'S REVISED RESOLUTION PLAN?

80. IBC is a creditor friendly code¹⁰⁶ and endeavors should be made to keep it true to its spirit. The resolution applicants should have been given minimum of thirty days to submit the resolution plan¹⁰⁷ till 15.10.2018. The IRP with the approval of CoC is allowed to extend the timeline of submission of resolution plan.¹⁰⁸ The timeline prescribed by CIRP Regulations, 2018 expressly provide that after receipt of plans, the CoC approved Resolution Plan has to be submitted to Adjudicating Authority at least fifteen days before the maximum period for completion of CIRP under §12¹⁰⁹ which is of 270 days (10.12.18) and the Adjudicating Authority has to approve the same within 15 days¹¹⁰ (25.12.18). In the instant case JMCL submitted the plan on 19.10.18 and the completion date of CIRP was 25.12.18. Thus, it can be seen that if the revised plan of JMCL is accepted then also the process can be finished in time.

¹⁰⁴ MOOT PROPOSITION, p. 5, ¶ 15.

¹⁰⁵ In Re Eagle-Picher Industries v. Eagle-Picher Industries [2006] 447 F. 3d 461.

¹⁰⁶ *BLRC Report*.

¹⁰⁷ Regulation 36 B(3) of CIRP Regulations 2018.

¹⁰⁸ *Id.* at 36B(60).

¹⁰⁹ Regulation 39(4), CIRP Regulations, 2018.

¹¹⁰ § 31 IBC, See also Regulation 40A CIRP Regulations, 2018.

81. The facts of *Bank of Baroda and Ors. v. Vijaykumar V. Iyer*¹¹¹ apply squarely to the present case and it was observed that the CoC directed consideration of the revised offer along with the resolution plan of Ultra Tech and directed to reconsider the resolution plan of RPPL, if the resolution applicant is willing to raise the offer so as to allow both resolution applicants in the bidding process and decide on whichever is the best plan for revival of the corporate debtor.
82. In the case of *Bhushan Power & Steel*¹¹², the court while accepting the late submission of Liberty house's resolution plan made the following observation:

"...the ultimate objective of the Code is inter alia to ensure maximisation of the value of assets of the corporate debtor and in order to do so, it is imperative that all credible resolution applicants must be permitted to participate in the process."

Considering the fact that the haircut offered by JMCL's revised plan is 10% as compared to RCL's 40% and the closing date for the implementation of the plan is sooner than that offered by RCL; and the entire CIRP would be completed well within the maximum time of 270 days with a better offer, thus, serving the larger purpose. It can be concluded that delay, if any, ought and should not be an obstacle in achieving the ultimate goal of 'insolvency resolution' and that the rejection of the Resolution Plan of JMCL is invalid.

ISSUE ON BEHALF OF MR. KEVIN MURRAY

I. WHETHER THE FOREIGN PROCEEDINGS AGAINST ALSL SHOULD BE RECOGNIZED?

A. UNCITRAL Model Law on Cross Border Insolvency should be applied

83. Article 15(1) of the UNCITRAL Model Law on cross-border insolvency provides that, "A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed."¹¹³ ALSL's proceeding is a foreign proceeding¹¹⁴

¹¹¹ Bank of Baroda and Ors. v. Vijaykumar V. Iyer, C.P. (IB) No.359/KB/2017.

¹¹² PNB v. BPSL C.A. No. 152(PB)/2018 in C.P. IB-202(PB)/2017; See also V.S. DATEY, TAXMANN'S GUIDE TO INSOLVENCY AND BANKRUPTCY CODE, 4th ed., May 2018.

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

¹¹⁴ Article 2, UNCITRAL Model Law on Cross-Border Insolvency.

with Mr Murray as its foreign representative,¹¹⁵ the application being complete and having been filed before the appropriate forum i.e. the Adjudicating Authority¹¹⁶ it thus fulfills all the requirements for recognition under Article 17.¹¹⁷

84. Article 16(3) states that, "In the absence of proff 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." In the instant case, while the registered office of ALSL is in USA, the Board of Directors usually meet and manage the company from Vishakhapatnam, India.¹¹⁸

85. It is submitted that since, India has adopted the UNCITRAL Model Law on Cross-Border Insolvency, 1997, its provisions must be applied by the Adjudicating Authority and ALSL's US Bankruptcy Proceeding should be recognized in ACL's Indian Insolvency Proceedings.

B. ACL is liable for the debts of ALSL

86. In **Hackbridge-Hewittic and Easun Ltd.**¹¹⁹ the court observed: "*The orthodox approach that a company is a legal entity in itself and whether it is a subsidiary of another, is of no meaning or consequence for fixing the responsibility of the activities of one upon another... does not suffice to dispose of the possibility that its behaviour might be imputed to the parent company.*"

87. ALSL loaned 100 million USD to ACL while ALSL itself had received 1.5 billion USD from the Citibank Consortium¹²⁰ which thus has to claim its loaned money from ACL as well. The instant case presents a situation where the parent company can be made liable towards the debts of its subsidiary notwithstanding that the two companies have separate legal entities and the same should be done.

¹¹⁵ Article 2d, UNCITRAL Model Law on Cross-Border Insolvency.

¹¹⁶ Art 4, UNCITRAL Model Law on Cross-Border Insolvency.

¹¹⁷ Art 17, UNCITRAL Model Law on Cross-Border Insolvency.

¹¹⁸ Moot Clarifications Answer to Question 6.

¹¹⁹ Hackbridge-Hewittic & Easun v. G.E.C. Distribution Transformers, [1992] 74 Comp Cas 543 (Mad).

¹²⁰ MOOT PROPOSITION, p. 8, ¶ 24.

PRAYER

WHEREFORE, IN THE LIGHT OF THE ISSUES RAISED, ARGUMENTS ADVANCED, REASONS GIVEN
AND AUTHORITIES CITED, THIS HON'BLE TRIBUNAL MAY BE PLEASED TO:

1. ON BEHALF OF CORPORATE DEBTOR

ACL:

- *Dismiss* the present insolvency resolution petition;
- *Hold* that the appointment of security services is invalid;
- *Hold* that the raising of interim finance is an unnecessary additional liability;
- *Hold* that the application for release of mortgage over 100 acres land is invalid;

PROMOTER OF ACL - MR. ARVIND KUMAR:

- *Hold* that the personal guarantee against Mr. Arvind Kumar cannot be invoked;

2. ON BEHALF OF OPERATIONAL CREDITORS

- *Hold* that GKCL is a financial creditor;

3. ON BEHALF OF RESOLUTION PROFESSIONAL / IRP

RESOLUTION PROFESSIONAL (ACL)– MS. POOJA PRAKASH:

- *Hold* that the appointment of security services is valid;
- *Hold* that the interim finance raised is valid;
- *Hold* that GKCL is an operational creditor;
- *Hold* that the decision of rejecting JMCL's revised plan is valid;
- *Hold* that amount of INR 20 lacs paid to TTCL is not avoidable;
- *Hold* that amount of INR 20 crores paid in excess to APL as avoidable;
- *Hold* that foreign insolvency proceedings should not be recognised;
- *Hold* that APL be not impleaded in the insolvency proceedings;

INTERIM RESOLUTION PROFESSIONAL (APL) – MR. MAHESH KUMAR:

- *Hold* that the payment of 20 crores be set-off against previous defaults in payment of ACL;
- *Hold* that the application of release of mortgage over 100 acres land is valid;

- *Hold* that APL should be impleaded in the proceedings;

4. ON BEHALF OF FINANCIAL CREDITORS / CREDITORS COMMITTEE

PEOPLE'S BANK:

- *Hold* that the Insolvency Proceeding against ACL is maintainable;

RST BANK:

- *Hold* that the Personal Guarantee for the debt owed by ACL can be enforced against Mr. Arvind Kumar;
- *Hold* that the transactions of INR 20 lacs made to TTCL is avoidable;

5. ON BEHALF OF OTHER PARTIES

MR. KEVIN MURRAY:

- *Recognise* the Insolvency proceedings in relation to ALSL in USA as a Foreign Non-main proceeding under the UNCITRAL Model Law on Cross Border Insolvency;

JMCL PVT. LTD.:

- *Direct* the RP to accept revised resolution plan of JMCL;
- *Stay* the decision of Adjudicating Authority on RCL's CoC Approved plan;

AND ANY OTHER RELIEF THAT THIS HON'BLE TRIBUNAL MAY BE PLEASED TO GRANT.

- ALL OF WHICH IS RESPECTFULLY SUBMITTED –

SD/-

RESPECTIVE COUNSELS ON BEHALF OF ALL CONCERNED PARTIES