TEAM CODE: 123

INSOLVENCY AND BANKRUPTCY MOOT COURT COMPETITION

2017

IN THE MATTER OF

NEW AGE TECHNOLOGY LIMITED, CORPORATE DEBTOR

ON BEHALF OF

CORPORATE DEBTOR / PROMOTERS OF CORPORATE DEBTOR

OPERATIONAL CREDITORS

INTERIM RESOLUTION PROFESSIONAL / RESOLUTION PROFESSIONAL

FINANCIAL CREDITORS / CREDITORS COMMITTEE

OTHER PARTIES

WRITTEN SUBMISSIONS ON BEHALF OF ALL CONCERNED PARTIES

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TABLE OF ABBREVIATIONS

Abbreviation	Full form
§	Section
¶	Paragraph
2015 Bill	Notes to the Insolvency and Bankruptcy Bill, 2015
AIR	All India Reporter
All ER	All England Reporter
BLRC	Bankruptcy Law Reforms Committee
COMI	Centre of main interests
CIRP Regulations	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
CLR	Company Law Reporter
CoC	Committee of Creditors
Com LJ	Company Law Journal
IM	Information Memorandum
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
IRP	Interim Resolution Profession
JKL	JKL Pvt. Ltd.
Model Law	UNCITRAL Model Law on Cross Border Insolvency
New Age	New Age Technology Limited
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
NCLT Rules	National Company Law Tribunal Rules, 2016
RP	Resolution Professional
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
UNCITRAL	United Nations Convention on International Trade Law

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STATEMENT OF FACTS

Background

New Age Technology Ltd. ("**New Age**") is a listed company and the largest manufacturer of solar panels in India. The company has its registered office in Delhi, a corporate office in Mumbai, sales offices in Rajasthan and Hyderabad and a guest house in Hyderabad. New Age also owns a property "New Age House" in Jaipur, which has been given on lease to People's Bank, Jaipur Branch. Lease rental of Rs. 15,06,900/- per month is payable to New Age. The company owns an apartment in Juhu, Mumbai, which is occupied by the managing director of the company.

The company entered into a JV with Radha Hospitality Private Limited ("**RHPL**") to set up real estate and hotel business on a 50:50 share. The promoters also acquired Ten Hospitality Services Pvt. Ltd. ("**THSPL**"), a Singapore based company, which owns a 5 Star hotel in Singapore.

In 2016, two major clients of the company cancelled their respective orders with New Age which resulted in serious financial troubles for the company. After the cancellation of the client orders, the Karnataka High Court ordered for attachment of New Age's bank account which resulted in further reduction in cash available of the company. This triggered the default on the part of the company of the instalments due to the Banks.

Insolvency Proceedings

Owing to the default in payment of the due loan instalment, RST Bank, on behalf of the lender banks, filed an Insolvency Petition against New Age before the NCLT. Pursuant to this, various objections with regards to the maintainability of the present petition which were rejected by the NCLT. Thereafter, an Interim Resolution Professional ("**IRP**"), Mr. Amit Thakur was appointed to manage the affairs of the Corporate Debtor, which, according to New Age, resulted in serious mismanagement of the affairs of the company.

The IRP, after making public announcement, prepared a list of claims of all the creditors. The Public Depositors of New Age claimed to be financial creditors, but their claims were rejected by the IRP. The Committee of Creditors was formed and Mr. Dhivesh Sharma was appointed as the Resolution Professional ("**RP**"). RHPL sought to be included in the Committee claiming participation and voting rights.

While the insolvency resolution process was going on, the RP received a communication from Mr. Chew John, the office bearer of THSPL - New Age's subsidiary in Singapore – that the insolvency process against New Age should be stayed till the pendency of insolvent proceedings against THSPL.

After receiving the claims, two Resolution Plans were submitted out of which the Plan submitted by New Age was approved with modifications. The said Plan was, thereafter, filed with the NCLT.

- The matter has now been listed for 28th and 29th October, 2017 -

ISSUES RAISED

I. Issues on behalf of Corporate Debtor

NEW AGE TECHNOLOGY LIMITED

1. Whether the present insolvency petition should be dismissed?
2. Whether the actions of the IRP are valid?
3. Whether the sale of the Mumbai flat of is liable to be set aside?

RHPL / PROMOTERS OF NEW AGE

1. Whether RHPL should be included in the Committee of Creditors?

II. Issues on behalf of Operational Creditors

1. Whether the operational creditors should be allowed to participate in the meetings of the Committee of Creditors?

III. Issues on behalf of Resolution Professional / IRP

INTERIM RESOLUTION PROFESSIONAL – MR. AMIT THAKUR

1. Whether the actions taken by the IRP are valid?
2. Whether the appointment of Resolution Professional / replacement of Interim Resolution Professional is valid?
3. Whether public depositors are creditors under IBC?
4. Whether RHPL should be included in the Committee of Creditors?

RESOLUTION PROFESSIONAL – MR. DHIVESH SHARMA

1. Whether the appointment of Resolution Professional/replacement of Interim Resolution Professional was valid?
2. Whether the RP has the power to terminate the lease or not?
3. Whether the foreign insolvency proceedings ought to be recognized and whether the present proceedings ought to be stayed?
4. Whether the sale of the Mumbai flat is valid?
5. Whether the RP's refusal to supply Information Memorandum to JKL Pvt. Ltd. is valid?
6. Whether the approved resolution plan is valid?

IV. Issues on behalf of Financial Creditors/Creditors Committee

RST BANK

1. Whether the insolvency petition should be dismissed?
2. Whether the appointment of Interim Resolution Professional is valid?
3. Whether the claims filed by Marvel Organics should be admitted?

COMMITTEE OF CREDITORS

1. Whether the operational creditors should be allowed to attend the meetings of the Committee of Creditors?
2. Whether the appointment of the registered valuer is valid?

DISSENTING CREDITORS

1. Whether the Resolution Plan is valid?

V. Issues on behalf of Other Parties

PUBLIC DEPOSITORS OF NEW AGE

1. Whether public depositors are creditors under IBC?

MR. CHEW JOHN

1. Whether the Singapore insolvency proceedings against THSPL should be recognized and should the present proceedings be stayed?

JKL PVT. LTD.

1. Whether the decision of RP in refusing to supply the Information Memorandum to JKL Pvt. Ltd. is valid?

SUMMARY OF ARGUMENTS

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

NEW AGE: The IRP, in the instant matter, has committed various errors in discharging his duties including appointment of XYL Securities, error in computing the lease rental amount, adding the unsubstantiated claims of Marvel Organics to the list of claims, etc. Due to all these actions the business of the Corporate Debtor has suffered adversely. Further, the act of termination of lease by the RP - Divesh Sharma - was unlawful as the same was essential in running the sales office of the Debtor. Furthermore, the sale of the Mumbai flat to the Director of New Age is valid and cannot be set aside as the same has been backed by the requisite procedures and was carried out to effect payment of bank instalments.

PROMOTERS OF NEW AGE / RHPL: RHPL should be permitted to participate in the Committee of Creditors as its rights will be affected by any decision that may be taken by the Committee and will have the result of novation of contract for which consent of RHPL is required. A liberal interpretation must be given to the provisions of IBC and RHPL should be allowed to participate in the Committee of Creditors.

2. ON BEHALF OF OPERATIONAL CREDITORS

OPERATIONAL CREDITORS: Operational creditors should be entitled to raise their concerns in the meeting of the Committee of Creditors as the concerns of other creditors, apart from financial creditors, relating to the prospective Plan should also be taken into account. Moreover, the IBC does not strictly prohibit raising concerns, and therefore, the same should be permitted.

3. ON BEHALF OF INTERIM RESOLUTION PROFESSIONAL / RESOLUTION PROFESSIONAL

INTERIM RESOLUTION PROFESSIONAL - AMIT THAKUR: The IRP took appropriate measures by appointing XYL Securities in taking over the possession of the property of the Corporate Debtor. Further, the adjustment of the lease rental amount in relation to the People's Bank is correct and the inclusion of the claims of the Marvel Organics in the entire proceedings is valid. Furthermore, the appointment of the Registered Valuer has been made as per the provisions of the IBC and the same needs to be upheld.

RESOLUTION PROFESSIONAL - DHIVESH SHARMA: The appointment of the RP is valid as the decision making authority is the Committee of Creditors and in case of replacement of RP, the NCLT relies on the judgement of the Committee. Further, the actions of the RP, in terminating the lease on the Hyderabad Guest House and refusing to supply the Information Memorandum are valid.

4. ON BEHALF OF FINANCIAL CREDITORS / CREDITORS' COMMITTEE

RST BANK: The insolvency petition in relation to the New Age is maintainable since there has been a default on the part of New Age amounting to more than Rs. 1 lakh. Furthermore, the claim of the Marvel Organics is inflated and the same needs to be struck-off.

COMMITTEE OF CREDITORS: The composition of Committee of Creditors is strict as can be inferred from the observations of the BLRC Report. Only the financial creditors comprise of the Committee and therefore, any inclusion of third party will go against section 21 of the IBC and the intent of the Parliament.

DISSENTING CREDITORS: The Resolution Plan as passed by the Committee of Creditors is in violation of the Regulations issued under the IBC and therefore should not be approved by the NCLT.

5. ON BEHALF OF OTHER PARTIES

MR. CHEW JOHN: In light of UNCITRAL Model Law the insolvency proceedings in respect of New Age in India ought to be stayed in the light of the ongoing Insolvency Proceedings against THSPL since the proceedings in respect of New Age in India have a direct bearing on the THSPL proceedings.

PUBLIC DEPOSITORS: The Public Depositors must be treated as creditors within the scheme of the IBC and therefore they should be allowed to present their claims before the IRP.

JKL PVT. LTD.: Considering the importance that the Information Memorandum has in the revival of the Corporate Debtor, it has been provided in the IBC that the same shall be made available to all the potential applicants by the RP and therefore the same should be made available to the JKL.

ARGUMENTS ADVANCED

I.

ARGUMENTS ON BEHALF OF THE CORPORATE DEBTOR AND PROMOTERS OF CORPORATE DEBTOR

ISSUES ON BEHALF OF NEW AGE TECHNOLOGY LIMITED

1. WHETHER THE PRESENT INSOLVENCY PETITION SHOULD BE DISMISSED?

[¶ 01] It is contended by the Corporate Debtor that the present corporate insolvency petition, filed by RST Bank,[1] upon default of one installment is not maintainable. This is because the claims filed by the financial creditor(s) are inflated.

[¶ 02] It is a settled law, as evident from the judgments of the National Company Law Tribunal ("**NCLT**"), that where the amount of claims is disputed on the ground that the amount claimed by the creditor is not genuine, the NCLT cannot go into the merits of the dispute and should dismiss the insolvency petition. Reliance is placed on the case of *M/s. One Coat Plaster,*[2] wherein the Principal Bench of Delhi made the following observations:

> *"... However, in relation to the balance amount claimed by the petitioners as due from the Company, we are unable to agree in view of lack of materials submitted before us by the Petitioners and also taking into consideration the fact that the debt sought to be fastened on the company has been vehemently disputed ..."*

Even where the claim is alleged to be doubtful and questionable in the facts of the case, the petition must be rejected.[3]

[¶ 03] It is contended, most respectfully, that the claims submitted by the banks against the Corporate Debtor are inflated. This is evident from the fact that the installments had been regularly paid by the Corporate Debtor till 31st October, 2016.[4] Now, the amount outstanding on 31st December, 2016 against Indo Bank is stated to be Rs. 1650 crores, whereas the principal amount was only Rs. 1000 crores.[5] It is submitted that it is not possible, under any

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[1] MOOT PROPOSITION, p. 5, ¶ 3.

[2] In Re: One Coat Plaster and Ors., [2017] 138 CLA 104 (01.03.2017, NCLT - Principal Bench).

[3] M/s. VDS Plastics Pvt. Ltd. v. M/s. Pal Mohan Electronics Pvt. Ltd., CP No. (IB)-37(ND)/2017 (21.04.2017, NCLT - New Delhi).

[4] MOOT PROPOSITION, p. 5, ¶ 1.

[5] MOOT PROPOSITION, p. 3, ¶ 2.

stretch of imagination, to have such an exorbitant amount of Rs. 650 crores due only in two months, as the last installment had already been paid by the Debtor. It is, therefore, contended that such claim is inflated and ought not to be entertained as the Petitioner has not come with clean hands while filing the claim.

[¶ 04] To support this contention, reference is made to the order of NCLT, Principal Bench in the matter of *Unigreen Global Pvt. Ltd.,*[6] wherein the Bench, while imposing costs on the applicant company, had said that:

> *"… as the petitioners have not come with clean hands before this Tribunal in bringing out the necessary facts, we are constrained to dismiss this petition. With a view to discourage the parties form abusing the process of IBC, 2016 and this Tribunal, we deem it as a fit case to impose costs…"*

Similarly, in another case,[7] the NCLT dismissed the petition on the ground of non-disclosure of essential facts to paint a full picture of the matter.

[¶ 05] Therefore, it is the humble contention of the Corporate Debtor that since the claims filed by the banks are inflated, this Hon'ble forum, in order to discourage any abuse of the process of IBC, must dismiss the present petition.

2. WHETHER THE ACTIONS OF THE IRP ARE VALID?

[¶ 06] It is submitted by the Corporate Debtor that the actions of the appointed Interim Resolution Profession ("**IRP**") are against the provisions of IBC and are gravely detrimental to the interests of the Corporate Debtor.

[¶ 07] According to the Bankruptcy Law Reforms Committee ("**BLRC**") report, one of the most essential features for assessing the viability of the Corporate Debtor is the 'calm period' for insolvency resolution where the debtor can negotiate in the assessment of viability without fear of debt recovery enforcement by the creditors.[8] This period has been termed as the 'moratorium' period under § 14 of IBC. The BLRC noted that:

> *"In the case of insolvency resolution, a failure of the process may result from two main sources: collusion between the parties involved and poor quality of execution of the process itself. Hence, it is important that the professionals responsible for*

[6] In Re: Unigreen Global Private Limited, [2017] 139 CLA 101 (08.05.2017, NCLT - Principal Bench) at ¶¶ 17-19.

[7] In Re: Creative Solutions and Ors., CP No. (I.B.) 34/PB/2017 (12.04.2017, NCLT - Principal Bench).

[8] *The report of the Bankruptcy Law Reforms Committee*, Ministry of Finance, Government of India (November 2015) at ¶ 3.4.2. ["**BLRC Report**"]

implementing the insolvency resolution process adhere to certain minimum standards so as to prevent failures of the process and enhance credibility of the system as a whole." [9]

[¶ 08] It should be noted that the purpose of appointing IRP is to run the undertaking of the Corporate Debtor as a going concern.[10] This obligation which is cast upon the IRP must be adhered to by him in all respects, which is the intent of IBC. The IRP is required to act strictly in accordance with provisions of IBC and in line with highest standards of ethics.[11]

A. *Appointment of XYL Security Services is bad in law*

[¶ 09] In the instant matter, the steps taken by the IRP for appointment of XYL Security Services[12] have the potential to prejudice the functioning of the Corporate Debtor as a going-concern. This is because appointment of a third-party to manage the assets/unit of the Corporate Debtor may have a detrimental bearing over its functioning.[13]

[¶ 10] It is submitted that the appropriate step, known to law, in case of absence of any co-operation on the part of Corporate Debtor is by submission of an application to NCLT.[14] Since this was not done in the present case, the appointment of XYL Security Services is not valid and should be set aside.

B. *Adjustment of lease rental amount is not correct*

[¶ 11] It is submitted that the Corporate Debtor had leased out its property 'New Age House' in favor of People's Bank,[15] one of the financial creditors in the instant matter.[16] According to the terms of the said lease, a monthly rental of Rs. 15,06,900 per month was payable to the Corporate Debtor from 6th January 2011.[17] However, the outstanding dues claimed by the IRP, on behalf of the Corporate Debtor, is limited to Rs. 79,41,026 only,[18]

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[9] *BLRC Report* at ¶ 4.4.1.

[10] *BLRC Report* at ¶ 5.3.1(3).

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

[12] MOOT PROPOSITION, p. 6, ¶ 2.

[13] *BLRC Report* at ¶ 6.4.5.

[14] R.S. Polychem v. M/s. Ekdantam Infra Pvt. Ltd., CP No. (IB)-42(ND)/2017 (13.04.2017, NCLT– New Delhi).

[15] MOOT PROPOSITION, p. 2, ¶ 1.

[16] MOOT PROPOSITION, p. 3, ¶ 2.

[17] MOOT PROPOSITION, p. 2, ¶ 1.

which is not the true amount due from People's Bank to the Corporate Debtor. It is submitted that the actual amount due is Rs. 3,31,51,800. The IRP had misrepresented the outstanding dues, and therefore has not been able to discharge its duties in accordance with the IBC.

3. WHETHER THE SALE OF THE MUMBAI FLAT OF IS LIABLE TO BE SET ASIDE?

[¶ 12] In the present matter, the IRP has filed an application before the NCLT seeking appropriate orders for taking possession of the Mumbai flat.[19] The Corporate Debtor opposes this application as the sale of the Mumbai flat to the director of the Corporate Debtor has been effected already and so the IRP cannot take possession of the flat as it no longer belongs to the Corporate Debtor. Further, the sale is not liable to be set aside as it was made to run the business as a going concern and meet the financial obligations of the Corporate Debtor and was not an undervalued transaction under § 45 of IBC.

[¶ 13] The burden of proving that the transaction was an undervalue lies on the party claiming that the transaction is undervalued and mere speculation in this regard does not discharge the burden of proof.[20] In the present case the claims of undervalue of the consideration for Mumbai flat are mere speculation[21] and the same ought not to be relied upon to determine whether the transaction was undervalued.

[¶ 14] Further, in relation to setting aside of undervalued transactions, it has been held that the court must have regard to 'the company's circumstances', which would include the state of knowledge of the company when it entered into the transaction. The enquiry should not be into what the particular company might have done, but rather into whether a reasonable person would not have entered into the transaction.[22] In determining the value of the transaction, it has been held that it would be proper to take into account the company's needs for liquid funds because this may have an effect on the value of the assets to the Corporate Debtor.[23]

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[18] MOOT PROPOSITION, p. 7, ¶ 1.

[19] MOOT PROPOSITION, p. 8, ¶ 1.

[20] Phillips and Another v. Brewin Dolphin Bell Lawrie, [2001] 1 All ER 673.

[21] MOOT PROPOSITION, p. 5, ¶ 1.

[22] Lewis v. Cook, [2000] NSWSC 191 at ¶ 46.

[23] Demondrille Nominees Pty Ltd v. Shirlaw, (1997) 25 ACSR 535.

[¶ 15] In the present case, it is submitted that the Corporate Debtor was in urgent need of liquid funds as its loan installment was due on 31st December, 2016.[24] Thus, the sale of the Mumbai flat was a distress measure taken to avoid default to banks and to prevent the company from going into insolvency and therefore the transaction should not be set aside.

ISSUES ON BEHALF OF RHPL / PROMOTERS OF NEW AGE

1. WHETHER RHPL SHOULD BE INCLUDED IN THE COMMITTEE OF CREDITORS?

[¶ 16] It is submitted that the facts and circumstances of the instant case warrant the inclusion of RHPL in the Committee of Creditors ("**CoC**"). The power of the Resolution Professional ("**RP**") to include a party who is not a financial creditor can be inferred from § 21(2) of IBC, which states that the CoC shall *comprise* all financial creditors of the corporate debtor. It is submitted that the use of the word *'comprise'* denotes its inclusive nature, as the term is synonymous with the word 'include'.[25] This argument is substantiated by Regulation 24(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**"), which requires every participant attending the meeting to state to RP whether he is attending the same in the capacity of a member "*or any other participant"*, which indicates the possibility of including any participant other than the financial creditors in the meeting.

[¶ 17] Further, it is to be noted that while the BLRC had stated that the CoC is to be limited to only the financial creditors,[26] Parliament has not used the word "*only*" in the section, thereby implying that the intention was not to restrict,[27] the composition of CoC to only financial creditors, and if such a situation arises which demands of inclusion of other people apart from financial creditors, then such provision can be given an inclusive interpretation.

[¶ 18] Having thus argued that RHPL has a right of participation as member of CoC, it can be inferentially said that it also has the right to raise its concerns in a CoC meeting. This is in line with the comprehensive statement released by UNCITRAL of the key objectives and principles that should be reflected in an insolvency law of the State adopting Model Law. The statement envisages the concept of enterprise group, and provides that a solvent member

[24] MOOT PROPOSITION, p. 5, ¶ 1.

[25] N.D.P. Namboodripad v. Union of India, AIR 2007 SC 1782; Ponds India Ltd. v. Commissioner of Trade Tax, Lucknow, (2008) 8 SCC 369.

[26] *BLRC Report* at ¶ 5.3.1(4).

[27] Harnam Singh v. State, AIR 1975 SC 236.

company of an enterprise group may be included in the insolvency proceedings of another member of the same enterprise group if the two companies are closely integrated.[28]

[¶ 19] In the instant case, the factual matrix reveals a close integration between the corporate debtor and RHPL, for they were guided by a single corporate consciousness.[29] RHPL was set up by the promoters of the Corporate Debtor for the purpose of diversifying the business of the latter company. The two companies also entered into a JV to carry on the hotel and real estate business. Further, the Corporate Debtor agreed to transfer its land in Raipur for construction of the hotel thereon by RHPL. These factors, coupled with sharing of costs and revenue under the JV, point towards a high degree of integration between the two companies thereby making it desirable in the interests of the group as a whole, that such member be included in the proceedings. This would facilitate the development of a comprehensive insolvency solution for the whole group, "*avoiding the piecemeal commencement of proceedings over time, if and when additional group members become affected by the insolvency proceedings initiated against the originally insolvent members*." [30] In the instant matter, the JV agreement between RHPL and Corporate Debtor will get novated on the part of Corporate Debtor as the same will have an effect of replacement of a party, for which the consent of the other party, i.e, RHPL must be taken.[31] Therefore, the NCLT should exercise its inherent powers under Rule 11 of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules**") to include RHPL in the CoC in view of the aforesaid submissions.

II.
ARGUMENTS ON BEHALF OF OPERATIONAL CREDITORS

1. WHETHER THE OPERATIONAL CREDITORS SHOULD BE ALLOWED TO PARTICIPATE IN THE MEETINGS OF THE COMMITTEE OF CREDITORS?

[¶ 20] Pursuant to the public announcement after the CIRP was initiated in the present matter, the IRP received claims from various operational creditors.[32] It is submitted on behalf of the operational creditors, *viz.* JSEW Ltd., GSES and Xi Mao, that they should be

[28] UN, *UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency* (2012) at p. 23.

[29] Discon Inc. v. Nynex Corp., 93 F. 3d 1055 (2d Cir. 1996).

[30] *Id*.

[31] § 62, Indian Contract Act, 1872.

[32] MOOT PROPOSITION, p. 6, ¶ 6.

authorized to attend the meeting of the CoC as they have genuine concerns to raise before the CoC and their rights would be prejudicially affected if they are not allowed to participate and raise their concerns.

[¶ 21] It should be noted that IBC does not limit the right to participation in the meetings of the CoC to financial creditors alone but leaves the door open for other creditors and stakeholders as well. Regulation 2(1)*(l)* of the CIRP Regulations defines a participant as "*a person entitled to attend a meeting of the committee under section 24 or any other person authorised by the committee to attend the meeting."* Similarly, Regulation 24(2)(b) requires every participant attending the meeting to state to RP whether he is attending the same in the capacity of a member of the committee or *any other participant*. This indicates that there is a possibility of including participants other than financial creditors in the meetings of the CoC.

[¶ 22] It is further submitted that it is a well settled principle of interpretation that different words have different meanings, depending upon the context.[33] The Supreme Court has held that *"[t]he general rule is that when two different words are used by the same statute, prima facie one has to construe these different words as carrying different meanings*."[34]

[¶ 23] In light of the above, it is submitted that the word 'participant' is meant to be wider and more inclusive than 'members' in relation to the CoC. Thus operational creditors who do not meet the threshold of membership in the Committee can also be participants under the Regulations and thus entitled to attend the meetings of the Committee. Therefore, the aforementioned operational creditors should be allowed to attend the meeting of the CoC as participants and raise their concerns.

III.
ARGUMENTS ON BEHALF OF RESOLUTION PROFESSIONAL / IRP

ISSUES ON BEHALF OF INTERIM RESOLUTION PROFESSIONAL – MR. AMIT THAKUR

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

[¶ 24] It is submitted that an IRP holds an important position in the administration of the corporate insolvency resolution process.[35] Therefore, it is imperative that the decision making

[33] Sunil Kumar Kori v. Gopal Das Kabra, (2016) 10 SCC 467 at ¶ 15.

[34] Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Crpn. of UP Ltd., (2003) 4 SCC 305 at ¶ 20.

[35] *BLRC Report* at ¶ 4.4.

power of the IRP is respected by the parties, especially by the Corporate Debtor. The Report of the BLRC has, in relation to the role of the insolvency professionals, noted that:

> *"In administering the resolution outcomes, the role of the IP encompasses a wide range of functions...In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner."*

A. *Appointment of XYL Securities is valid*

[¶ 25] It should be noted that the purpose of appointing IRP is to run the entity (the company or undertaking of the Corporate Debtor) as a going concern.[36] In this regard, reference can be made to § 20(1) of IBC which provides that an IRP is to take all necessary steps to *protect* and *preserve* the assets of the Corporate Debtor. Further, § 20(2)(e) enables the IRP to take all such actions as are necessary to run the Corporate Debtor as a going concern. Therefore, after a conjoint reading of the above two provisions, it is submitted that the action taken by the IRP of appointing XYL Securities to secure the premises of the Corporate Debtor is valid and must be respected by the parties.

B. *Adjustment of lease rental amount is correct*

[¶ 26] It is submitted that, in the instant matter, People's Bank had been adjusting the due lease amount against the loan money provided by the Bank to the Corporate Debtor, and therefore, as already contended in the preceding paragraphs, the IRP – who is the administrator of the Corporate Debtor – had thought it appropriate to adjust the lease rental amount against the loans, if in his opinion, such action ensures that the Corporate Debtor is being run as a going concern.

C. *The inclusion of claims of Marvel Organics is valid*

[¶ 27] It is contended that the IRP, in the matter of collection and collation of claims, possess discretionary powers while computing list of claims. According to Regulation 10 of the CIRP Regulations, a discretionary power has been conferred on the IRP or the RP, as the case maybe. It is a settled principle of law that the word 'may' connotes a directory provision, and it is dependent upon the discretionary power of the authority whether to exercise such power or not.[37] The primary sense in which the words are used should be given effect,[38] and

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[36] *BLRC Report* at ¶ 5.3.1(3).

[37] Standard Chartered Bank and Ors. v. Essar Steel India Limited, CP No. (I.B)-39/7/NCLT/AHM/2017 (02.08.2017, NCLT - Ahmedabad) at ¶18.

[38] Sainik Motors v. State of Rajasthan, AIR 1961 SC 1480.

the use of 'may' at one place and of 'shall' at another strengthens the inference that the words have been used in their primary sense.[39]

[¶ 28] Moreover, the words *"..as he deems fit.."* appearing in the said regulation also buttresses the contention of the discretionary power of the IRP in collating and substantiation of claims.[40] Therefore, the individual who exercises discretion is quite free in discharging his duties according to the statute conferring such power.[41]

[¶ 29] Therefore, relying on the settled principles of law, and the regulations mentioned above, it is contended that the action of the IRP of admitting the claims, even though un-substantiated, does not make the IRP liable.

D. *The appointment of the registered valuer is valid*

[¶ 30] It is submitted that, in the present matter, the IRP had appointed a registered valuer – M/s. AKP Valuers Ltd. – who, during the process of the valuation, was found to be a related party to the Corporate Debtor. Regulation 27 of the CIRP Regulations provides that a person shall not be appointed as a registered valuer if he is a related party of the corporate debtor. It is submitted that, applying the literal rule of interpretation, the disqualification applies at the time of appointment of the registered valuer and not thereafter.

[¶ 31] It is submitted that all that the Tribunal is required to see is whether the IRP took the relation between the corporate debtor and the proposed registered valuer into consideration *at the time of appointment* of the said valuer. In the instant case, the facts and circumstances nowhere indicate that the IRP was aware, at the time of such appointment, of the fact that M/s AKP Valuers was a related party of the Corporate Debtor. The relation between the two came to light only at the time of valuation of the assets of the Corporate Debtor.[42] Such appointment by the IRP, made in good faith and without knowledge of the relation between the parties concerned is protected under § 233 of IBC from any suit, prosecution and other legal proceeding and therefore cannot be challenged.

[¶ 32] Further, the conduct of the IRP in continuing with the valuation notwithstanding the fact that one of the registered valuers was a related party, should not be taken as implying any

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[39] Chairman, Canara Bank, Bangalore v. M.S. Jasra, AIR 1992 SC 1341; Mahalaxmi Rice Mills v. State of U.P., AIR 1999 SC 318.

[40] Chariant International Ltd. v. SEBI, AIR 2004 SC 4236.

[41] WILLIAM ALEXANDER ROBSON, JUSTICE AND ADMINISTRATIVE LAW 409 (3rd ed. 1953); *See* Babu Singh v. State of U.P., AIR 1978 SC 527.

[42] MOOT PROPOSITION, p. 7, ¶ 3.

mala fides on his part, in the absence of facts and circumstances to the contrary. Courts have long held that *"it is to be presumed, unless the contrary were shown, that the administration of a particular law [has been] done not with an evil eye and unequal hand."* [43]

[¶ 33] Moreover, there is a presumption that statutory officials will discharge their functions honestly and in accordance with law.[44] Taking this presumption into consideration, it is submitted that the IRP should be presumed to have acted in good faith and to advance the purposes of IBC. If, in the opinion of the IRP, the valuation arrived at by M/s AKP Valuers was significantly different from that of the other registered valuer, it would ordinarily have exercised its power under Regulation 35 of the CIRP Regulations and appointed another valuer to arrive at a proper estimate.

[¶ 34] At any event, any challenge as to the conduct of IRP or the liquidation value arrived at as a result of such conduct should have been made within a reasonable time after such value was provided to the CoC by the IRP under Regulation 35(3).[45] Such a challenge made at a time when the insolvency resolution process is already on the verge of completion would be against the object of IBC to promote an efficient and timely resolution of insolvency.

2. WHETHER THE APPOINTMENT OF RESOLUTION PROFESSIONAL / REPLACEMENT OF INTERIM RESOLUTION PROFESSIONAL IS VALID?

[¶ 35] It is submitted that, in the instant matter, the CoC has appointed Mr. Dhivesh Sharma as the RP, whereas the IRP – Mr. Amit Thakur – had communicated his willingness to continue as the RP.[46] Even if the CoC has the power to replace a person from IRP to RP,[47] IBC lays down a detailed procedure which has to be followed while replacing a person as the RP.

[¶ 36] § 22 of IBC provides that an application is required to be filed before the NCLT for the appointment of the proposed RP, and thereafter, the NCLT shall forward the name of such proposed RP to the Insolvency and Bankruptcy Board of India ("**IBBI**") for its confirmation and shall make such appointment after confirmation by the IBBI. However, in the instant matter, the said procedure of "filing of an application" was not followed.

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[43] A. Thangal Kunju Musaliar v. Verikatachalam, [1995] 2 SCR 1196.

[44] Pannalal Binjraj v. Union of India, AIR 1957 SC 397.

[45] State of Mysore v. VK Kangan, [1976] 1 SCR 369.

[46] MOOT PROPOSITION, p. 9, ¶ 1

[47] § 22, Insolvency and Bankruptcy Code, 2016 ("**IBC**").

[¶ 37] It is submitted that the CoC *informed* the NCLT of the *appointment* of Mr. Dhivesh Sharma as the RP and the NCLT *vide* its order dated 07th April, 2017 recommended the name of Mr. Dhivesh Sharma as the RP to the IBBI for confirmation. It is contended that the CoC, in the instant matter, had already *appointed* the RP and had *informed* the NCLT of such appointment, whereas, § 22 of IBC envisages that the CoC should firstly apply to the NCLT with a proposed name. The NCLT, New Delhi has held that, "*when a statute required a thing to be done in a particular manner, it can only be done in that manner or not at all*."[48] Therefore, it is submitted that the appointment of the RP should be quashed by the Hon'ble Forum, and the erstwhile IRP should continue as the RP.

3. WHETHER PUBLIC DEPOSITORS ARE CREDITORS UNDER IBC?

[¶ 38] It is submitted that the claims of the public depositors of the Corporate Debtor were rejected by the IRP on the ground that they do not fall within the ambit of operational creditors.[49] A perusal of § 5 of IBC forms a conclusion that IBC contemplates only two types of creditors – 'financial creditor' and 'operational creditor.' In § 5(7) and § 5(20), the word 'means' is used, which implies that the definition provided therein is exhaustive.[50]

[¶ 39] It is submitted that the NCLAT has in the case of *Hind Motors*[51] deliberately left open the issue of whether 'public depositors' are 'financial creditors' within the purview of IBC. Towards this, it is contended that the judicial approach towards treating 'deposits' as such has been significantly different to that of 'loan.' Reference for this purpose is made to *DCIT v. Sahara India Commercial Corpn. Ltd.,*[52] wherein it was observed that, "*the term 'deposits' has a very wide amplitude in its meaning [...] all the three different words [loan, deposit and debenture] have separate meanings."*

[¶ 40] Further, the fact that 'public depositors' do not form a part of any category of creditors is highlighted by the recent order of NCLT Allahabad in *Prabodh Kumar Gupta & Ors. v. Jaypee Infratech Ltd.,*[53] wherein, the NCLT had termed the said public depositors as

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[48] Tehri Iron and Steel Casting Ltd. v. Punjab National Bank, CP No. (IB)-192 (ND)/2017 (27.07.2017, NCLT - New Delhi).

[49] MOOT PROPOSITION, p. 7, ¶ 4.

[50] P. Kasilingam v. P.S.G. College of Technology, (1995) Supp 2 SCC 348.

[51] Hind Motors India Ltd. v. NCLT Chandigarh, CA (AT) (Insolvency) No. 11/2017 (10.04.2017, NCLAT).

[52] DCIT v. Sahara India Commercial Corpn. Ltd., 2013 (28) ITR (Trib) 108 (Delhi).

[53] Prabodh Kumar Gupta & Ors. v. Jaypee Infratech Ltd., CP No. (IB) 68/Ald/2017 (28.08.2017, NCLT – Ahmedabad).

'other stakeholders'. Furthermore, in the said order, the Bench has given the decision making power to the IRP/RP to take appropriate action towards the depositors *"as the IRP/RP may deem fit."*

[¶ 41] In the light of the aforesaid submissions, it is contended that 'public depositors' cannot be considered as 'financial creditors' or 'operational creditors.' Therefore, the action of the IRP, in the instant matter, in rejecting the claims of the public depositors is correct.

4. WHETHER RHPL SHOULD BE INCLUDED IN THE COMMITTEE OF CREDITORS?

[¶ 42] It is submitted that IBC in § 21(2) specifies that the CoC shall comprise only of the financial creditors of the Corporate Debtor. In this regard, the BLRC observed:

> *"it is only the Financial Creditors who are primarily the members of COC since members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors.*[54]

[¶ 43] Furthermore, other participants who can be entitled to attend the meeting of the CoC are the ones enumerated under § 24 of IBC which talks about the parties to whom the RP is mandated to give notice of such meeting. It is submitted that RHPL in the instant case does not fall within any of the heads enumerated therein. Therefore, the objection of RHPL[55] as to its exclusion from representation and participation in the CoC cannot be sustained.

[¶ 44] Further, as regards the voting rights as claimed by RHPL, it is submitted that as per § 21(8) of IBC, the voting rights have been limited to only financial creditors. Therefore, it is submitted that the plea of RHPL ought to be rejected as IBC does not permit inclusion of a third party who is not even a 'creditor' let alone a 'financial creditor'.

ISSUES ON BEHALF OF THE RESOLUTION PROFESSIONAL – MR. DHIVESH SHARMA

1. WHETHER THE APPOINTMENT OF RESOLUTION PROFESSIONAL/REPLACEMENT OF INTERIM RESOLUTION PROFESSIONAL WAS VALID?

[¶ 45] In the instant matter, the CoC has appointed Mr. Dhivesh Sharma as the RP by replacing the IRP, Mr. Amit Thakur. It is submitted that, in this respect, the CoC has all the

[54] *BLRC Report* at 5.3.1(4).

[55] MOOT PROPOSITION, p. 8, ¶ 4.

powers to replace a person from IRP to RP,[56] and such power flows from IBC itself and all the requisite procedure(s) have been followed while replacing a person as the RP. The BLRC has, in this regard, observed that:

> *"with a creditor committee in place, the RP has a wider role, in addition to monitoring and supervising the entity, and controlling its assets. In carrying out this role…she can call on the creditors committee to give clarification or guidance on how she can proceed."*

[¶ 46] The above extract shows the importance and the role a CoC plays in the insolvency resolution process. All the business decisions, including that of appointment of RP, are to be taken by the CoC itself. In effect, the CoC forms as the board of the entity.[57]

[¶ 47] It is, therefore, submitted that, in effect, it is the CoC who appoints the RP, as the Code enshrines the final decision making power of the CoC in all business decisions. To further substantiate, it was observed by the BLRC that:

> *"The committee of creditors are likely to be most incentivised to select the person who is best suited for the task - they will often choose a person who has skills, knowledge or experience in handling the particular circumstances of a case."*[58]

[¶ 48] In the present matter, RST Bank had suggested Mr. S. Mahesh – its empanelled lawyer – as the IRP for the purpose of the § 7 application.[59] However, the NCLT rightly appointed Mr. Amit Thakur as the IRP for the resolution process.[60] This is because the proposed IRP was already an empanelled lawyer of the creditor, which raises the apprehension of bias. The IBBI while rejecting an application of registration of an insolvency professional observed that:

> *"This code does not allow him to engage in employment, as explained above. However, the applicant here is engaged in employment. Assuming that a requirement in the code of conduct is not an eligibility requirement, as claimed by the applicant, what purpose would it serve if he is granted registration as an IP if he is not to render services as an IP? … He would be violating the code of conduct the moment he is*

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[56] § 22, IBC.

[57] *BLRC Report* at ¶ 5.5.7.

[58] Notes on Clauses to the Insolvency and Bankruptcy Code Bill, 2015 at p. 121 ("**Notes on Clauses**")

[59] MOOT PROPOSITION, p. 5, ¶ 3.

[60] MOOT PROPOSITION, p. 5, ¶ 5.

granted registration as an IP and consequently violate Regulation 7 of the Regulations."[61]

[¶ 49] For this purpose, reference is to be made to first Schedule of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, which provides for 'Code of Conduct' for the Insolvency Professionals, under which clauses 5 to 9 specifically emphasize the importance of impartiality and objectivity in the resolution process.

[¶ 50] It is, therefore, submitted that the appointment was not bad in law. This is so notwithstanding that there was no application made by the CoC to the NCLT for the purpose of appointment, for such requirement is merely a procedural one for which substantial compliance would suffice.[62]

2. WHETHER THE RP HAS THE POWER TO TERMINATE THE LEASE OR NOT?

[¶ 51] It is most respectfully submitted that the RP has the power to terminate the lease of the Guest House, which is derived from § 20(2)(e), which obliges the RP to "*to take all such actions as are necessary to keep the corporate debtor as a going concern.*." The intent behind this provision, as stated in the Notes to the Insolvency and Bankruptcy Bill, 2015 ("**2015 Bill**"), is to grant power to the RP "*to raise interim finance and to enter into, amend or modify contracts on behalf of the corporate debtor*." [63]

[¶ 52] Presently, the Corporate Debtor is undergoing a financial crunch and does not even have the necessary liquidity to meet expenses which is apparent from the fact that it did not have funds to meet the installment due on account of the loan,[64] as a result of which the whole insolvency proceedings were triggered. The rent charged for the Guest House is stated to be Rs.12,00,000 per month,[65] which is subject to an increment of 30% which works out to be Rs. 15,60,000 per month for the next 3 years in case the lease is sought to be renewed.

[¶ 53] Since the RP becomes the custodian of the assets of the debtor and manages the affairs of the company as a going concern,[66] he has to prioritize the use of limited available

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[61] IBBI order dated 02.03.2017 (Unreported), *available at* http://www.ibbi.gov.in/02032017_ibbi.pdf.

[62] Bahadur Singh v. State of Haryana, (2010) 4 SCC 445.

[63] *Notes on Clauses* at p. 119.

[64] MOOT PROPOSITION, p. 5, ¶ 2.

[65] MOOT PROPOSITION, p. 3, ¶ 1.

[66] In Re: Vimal Prakash Dubey, IBBI order dated 14.03.2017.

resources. Further, the loss of the Guest House won't affect the business of the Debtor as it was merely an ancillary paraphernalia to the sales office situated in Hyderabad.

3. WHETHER THE FOREIGN INSOLVENCY PROCEEDINGS OUGHT TO BE RECOGNIZED AND WHETHER THE PRESENT PROCEEDINGS OUGHT TO BE STAYED?

[¶ 54] In the present matter, Mr. Chew John, an office holder in the insolvency proceedings initiated against THSPL in Singapore, has applied for recognition of the foreign insolvency proceedings and stay over the present proceedings.[67] It is contended that this relief cannot be granted as the UNCITRAL Model Law on Cross Border Insolvency ("**Model Law**") prescribes concurrent proceedings against two separate corporate debtors in competent jurisdictions and no question of stay would arise.

[¶ 55] It is submitted that insolvency proceedings in relation to the Corporate Debtor cannot be stayed as the Corporate Debtor and THSPL are separate legal entities, incorporated in India and Singapore, respectively. It is settled law that a company is a separate legal entity distinct from its members.[68] According to the Companies Act, 2013, a subsidiary company is also separate and distinct from its holding company.[69] As the Supreme Court has observed "*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*."[70]

[¶ 56] 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.[71] Thus, the insolvency proceedings against THSPL in Singapore have no bearing on the present proceedings in respect of the Corporate Debtor in India and the question of staying the insolvency proceedings against the Corporate Debtor does not arise.

[¶ 57] Also, the Model Law envisages that when insolvency proceedings with respect to two or more group members are initiated, these proceedings would run concurrently under competent jurisdictions and the Court should make all attempts to facilitate coordination between these concurrent proceedings.[72] The UNCITRAL Legislative Guide on Insolvency

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[67] MOOT PROPOSITION, p. 9, ¶ 4.

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

[69] *See* § 9 and § 2(87), Companies Act, 2013.

[70] Vodafone Intl. Holdings v. UOI, (2012) 6 SCC 613, ¶ 73.

[71] *Id*. at ¶ 60. *See also* United States v. Bestfoods, 524 US 51 (1998).

[72] *See* Article 28, UNCITRAL Model Law on Cross-Border 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 or the group as a whole and the insolvent members can be administered separately.[73] In view of the aforesaid, it is submitted that the appropriate course of action in such a situation is to allow the insolvency proceedings in relation to the Corporate Debtor and THSPL to run concurrently in India and Singapore, respectively.

[¶ 58] It is further submitted that the relief of stay on insolvency proceedings against New Age is not warranted as, under the Model Law, the proceeding that is expected to have principal responsibility for managing the insolvency of the debtor is the 'main proceeding', i.e., where the centre of main interests ("**COMI**") lies.[74] This principle is further outlined in Article 20 of the Model Law, which provides for automatic stay on commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, as soon as a 'foreign main proceeding' is recognized.[75] The relief of stay, therefore, is not warranted for a proceeding which is not a 'main proceeding' as per the Model Law. In the present case, the COMI for the New Age insolvency proceedings lies in India as the registered office of New Age is in India and its management and major business operations are located within India. [76]

[¶ 59] Further, one of the key objectives and the essence of IBC is to provide a time bound process for insolvency resolution.[77] The same has also been reiterated by the Supreme Court.[78] Therefore, it is submitted that granting stay in the present proceeding would be inexpedient and defeat the purpose of the 180-day window strictly prescribed under the IBC.

4. WHETHER THE SALE OF THE MUMBAI FLAT IS VALID?

[¶ 60] It is submitted that the sale of the Mumbai flat to the director of the Corporate Debtor was an undervalued transaction and is liable to be set aside in accordance with § 45 of

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

[74] UN, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014), at p. 19, ¶ 1.

[75] Article 20(1)(a), UNCITRAL Model Law on Cross-Border Insolvency.

[76] MOOT PROPOSITION, p. 1, ¶ 1.

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

[78] Innoventive Industries v. ICICI Bank, CA No. 8337-8338 of 2017 (31.08.2017, Supreme Court).

IBC. Under this provision, the RP after determining that certain transactions were undervalued, may make an application to NCLT to reverse the effect of such transaction. According to § 45(2), an undervalued transaction is "*a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and [..] has not taken place in the ordinary course of business of the corporate debtor*." The relevant period for the purpose of § 45 is two years for related party transactions one year for other transactions.[79] The intent behind the provision has been discussed in the 2015 Bill, *"to prevent the siphoning away of corporate assets by the management of the corporate debtor, which has knowledge of the corporate debtor's poor financial condition and may enter into such transactions in the vicinity of insolvency."*[80]

[¶ 61] Therefore, once it is found that the transaction has been effected during the relevant time, and the consideration is significantly less than the value of the property, then such transaction has to be set aside.[81] In the present case, at the time of the sale of the Mumbai flat on 4th December, 2016,[82] the Corporate Debtor was under severe distress as it had lost its two major clients, which held captive 85% of its production.[83] Further, the Corporate Debtor did not have any cash to service the installment of Rs. 35 lakhs due on 31st December, 2016. Thus, it can be inferred that sale was not effected in the ordinary course of business, was within the relevant period and the Directors were aware of the impending insolvency proceedings and the transaction was entered into with a view to screen the asset from the RP.

[¶ 62] In light of the above, it is humbly submitted that the transaction was undervalued and this Hon'ble Tribunal should set aside the sale of the property and restore possession of the flat to the Corporate Debtor, exercising power under § 48(a) of IBC.

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[79] § 46, IBC.

[80] *Notes on Clauses* at p. 124.

[81] Mann Aviation Group (Engineering) Limited (in Administration) v. Longmint Aviation Limited and Gama Support Services (Fairoaks) Limited, [2011] EWHC 2238 (Ch) at ¶ 93.

[82] MOOT PROPOSITION, p. 6, ¶ 1.

[83] MOOT PROPOSITION, p. 5, ¶ 1.

5. WHETHER THE RP'S REFUSAL TO SUPPLY INFORMATION MEMORANDUM TO JKL PVT. LTD. IS VALID?

[¶ 63] The RP in the instant case refused to supply the Information Memorandum ("**IM**") to JKL Pvt. Ltd. ("**JKL**") on the ground that "JKL was not a serious party."[84] It is submitted that the RP committed no error in doing so.

[¶ 64] Even though § 29(2) of the IBC uses the "shall" regarding the supply of IM, it does not prevent the RP to deny the IM in appropriate cases. In this regard, the Hon'ble Supreme Court has held in that, "*when a statute uses the word shall, prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute."* [85]

[¶ 65] In the instant case as well, the nature of the provision dealing with supply of information memorandum must be ascertained from the true intention of the legislature. Such intention could be gathered from the 2015 Bill, wherein the drafters stated that the concerned provision is aimed at facilitating "*proposals from persons interested in commercially viable but insolvent businesses to rescue such entities, creating value for all stakeholders in the process*." This indicates that the provision is not mandatory in that the RP should see whether the person seeking the information memorandum is interested in the revival of the company as a going concern. This is also in consonance with the duties of the RP, according to which he is required to act with objectivity in his professional dealings.[86]

[¶ 66] In the instant case, the Corporate Debtor is the largest manufacturer of solar panels in India, while JKL is the fourth largest manufacturer.[87] The core business of both the companies is the same. The two companies are competitors in the same market and it is unlikely in such circumstance that JKL would be genuinely interested in the revival of the corporate debtor. The conclusion of the RP that JKL is not a serious party is, therefore, not founded on relevant considerations and therefore should not be set aside.

[¶ 67] Further, the insolvency laws across jurisdictions give insolvency practitioners the flexibility to discharge their duties; such practitioners are entitled to a measure of deference

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[84] MOOT PROPOSITION, p. 10, ¶ 3.

[85] State of U.P. v. Babu Ram Upadhya, AIR 1961 SC 751.

[86] First Schedule, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

[87] MOOT PROPOSITION, p. 10, ¶ 2.

consistent with their expertise in the effective management of insolvency,[88] and it is no part of the Tribunal's function to look further into its merits.[89] Therefore, the Tribunal should uphold the refusal by RP to supply IM to JKL, considering its opinion on the case at hand.

6. WHETHER THE APPROVED RESOLUTION PLAN IS VALID?

[¶ 68] In the present matter, two Resolution Plans were submitted by two resolution applicants – promoters of the Corporate Debtor and Blue Plaza.[90] The Plan submitted by the former detailed out six points in total,[91] whereas the Plan submitted by Blue Plaza listed out for purchase of the properties of the debtor.[92] However, the Plan submitted by the Corporate Debtor was finally approved by the CoC and has been filed with this Hon'ble Tribunal.[93]

[¶ 69] It is submitted that the approved Plan is valid as all the mandatory contents of a plan as per Regulation 38 of the CIRP Regulations are present in the approved Plan. For this purpose, the importance of approval of the CoC must be taken into consideration. The BLRC, with regards to the role of NCLT, has said that it must *"ensure that all financial creditors were indeed on the creditors committee, and that 75% of the creditors do indeed support the resolution plan."*[94] It was also observed that, *"once a consensus has been reached, the Adjudicator should accept the agreement without any modification, and give the stamp of approval which will give effect to the agreement."*[95]

[¶ 70] Therefore, it is contended that the ultimate deciding authority on the viability of the plan is the CoC, and where the CoC approves the plan, no further enquiry is required, and the Plan would be binding on all the remaining creditors,[96] which reflects that there cannot be any re-scrutinizing of the Plan.

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[88] GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc., 2006 SCC 35 (Canada).

[89] Union of India v. SB Vohra, AIR 2004 SC 1402.

[90] MOOT PROPOSITION, p. 10, ¶ 2.

[91] MOOT PROPOSITION, p. 10, ¶ 5.

[92] MOOT PROPOSITION, p. 10, ¶ 6.

[93] MOOT PROPOSITION, p. 11, ¶ 4.

[94] *BLRC Report* at p. 14 (Executive Summary).

[95] *BLRC Report* at ¶ 6.4.2.

[96] *BLRC Report* at p. 13 (Executive Summary).

IV.
ARGUMENTS ON BEHALF OF FINANCIAL CREDITORS/CREDITORS' COMMITTEE

ISSUES ON BEHALF OF RST BANK

1. WHETHER THE INSOLVENCY PETITION SHOULD BE DISMISSED?

[¶ 71] It is submitted that the present insolvency petition filed by RST Bank is maintainable as it satisfies all the requirements of § 7 of IBC. It is submitted that the application filed under § 7 requires the financial creditor filing the application to submit the record of the default and to propose a name of a resolution professional to act as the IRP for the purpose of triggering the resolution process. In the instant matter, RST Bank filed the insolvency petition proposing the name of Mr. S. Mahesh upon occurrence of the default by the Corporate Debtor.[97]

[¶ 72] In this regard, it has been observed by the NCLAT in *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr.*[98] that:

> *"Under section 5 of section 7, the 'adjudicating authority' is required to satisfy – (a) whether a default has occurred, (b) whether an application is complete, and (c) whether any disciplinary proceedings exist against the proposed IRP. Once it is satisfied, it is required to admit the case…the adjudicating authority is not required to look into any other factor."*

Following the afore-mentioned principle, in the instant case, it is contended that all the requisites of the application are complete and the NCLT was right in admitting the application without looking into any other factor.[99]

[¶ 73] The mere allegation that the claims filed by the creditor(s) are inflated does not warrant a dismissal of petition, because the minimum default required for initiation of corporate insolvency resolution process, that is, Rs. 1 lakh,[100] already exists in the instant

[97] MOOT PROPOSITION, p. 5, ¶ 2.

[98] M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr, [2017] 142 SC L11 (NCLAT) at ¶ 82.

[99] ICICI Bank v. ABG Shipyard Ltd., CP No. (IB) 53/7/NCLT/AHM/2017 (01.08.2017 - NCLT – Ahmedabad) at ¶ 19.

[100] § 4, IBC.

case, and the said allegation does not materially affect the admission of such application.[101] Reliance is placed on the observation of NCLT Principal Bench in *State Bank of India v. Bhushan Steel Ltd.*:[102]

> *"The objection of this nature concerning discrepancy in calculation of the amount would surely be maintainable before the Committee of Creditors... once default in terms of Rule 3(12) of IBC is established and all other requirements are fulfilled, the Insolvency Resolution Process must be triggered."*

2. WHETHER THE APPOINTMENT OF INTERIM RESOLUTION PROFESSIONAL IS VALID?

[¶ 74] It is submitted that the appointment of the IRP – Mr. Amit Thakur – is not valid as the person suggested by the financial creditor, RST Bank, Mr. S. Mahesh, was not appointed by the NCLT as the IRP. It is contended that such appointment was not valid, and was against the statutory scheme of IBC. § 7 of IBC expressly uses the word "shall" as opposed to "may" for the name suggested by the financial creditor in the insolvency application. The essential difference between an application under § 7 and an application under § 9 of IBC was highlighted by the Principal Bench of NCLT in *Chharia Holdings v. Brys International,*[103] wherein, the NCLT had dismissed the petition due to want of a proposed IRP, by stating that:

> *"…it is apparent that while there is a provision for the Adjudicating Authority to make a reference to the Board for a recommendation of an Insolvency Professional in the case of an operational creditor, there is no such provision in the case of a financial creditor."*

The BLRC, in this regard, had observed:

> *"In case the financial creditor triggers the IRP, the Adjudicator verifies the default from the information utility...and puts forward the proposal for the RP to the Regulator for validation."*

[¶ 75] Therefore, it is submitted that the proposed IRP, instead of a new person, should have been appointed by the NCLT.

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[101] Bank of India v. Tirupati Infraprojects Pvt. Ltd., C.P. No. IB-104(PB)/2017 (03.07.2017, NCLT - Principal Bench).

[102] State Bank of India vs. Bhushan Steel, C.P. No. (IB)-201(PB)/2017 (26.07.2017, NCLT - Principal Bench).

[103] M/s. Chharia Holdings Pvt. Ltd. v. M/s. Brys International Pvt. Ltd., CP No. (IB)-80(PB)/2017 (27.06.2017, NCLT – Principal Bench).

3. WHETHER THE CLAIMS FILED BY MARVEL ORGANICS SHOULD BE ADMITTED?

[¶ 76] It is contended that Marvel Organics Ltd., a creditor of the Corporate Debtor has filed a claim of Rs. 136 crores without any corroboration thereto,[104] and yet the IRP admitted its claims. It is submitted that such admission of claims is against the provisions of IBC. Regulation 13 of the CIRP Regulations provides that the IRP *shall* have to verify all the claims filed before it, and only after such verification can such claims be added to the list of claims against the Corporate Debtor.

[¶ 77] The Mumbai Bench of NCLT has, in *Viraj Profiles Ltd. v. Kinetic Engineering Ltd.,*[105] dismissed the petition due to want to supporting documents against the claims. Further, the Hon'ble NCLAT had laid down that *"where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected."*[106] Where the claim(s) is over and above what the actual claim would be, then such claim does not commensurate with the right to payment and, therefore, the petition deserves to be rejected.[107]

[¶ 78] In the case of *Madhusudan Gordhandas & Co. v. Madhu Wollen Industries Pvt. Ltd.*,[108] the Hon'ble Supreme Court, while dismissing the winding-up application of the creditors on, *inter alia,* want of sufficient proof of the transaction, observed:

> *"The alleged debts of the appellants are disputed, denied, doubted and at least in one instance proved to be dishonest by the production of a receipt granted by the appellants. The books of the company do not show any of the claims excepting in respect of two invoices for Rs. 14,650 and Rs. 36,000. The appellants would therefore be required to prove their claim."*

Therefore, relying on the said principles, the claims of Marvel Organics Ltd. must be removed.

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[104] MOOT PROPOSITION, p. 7, ¶ 2.

[105] Viraj Profiles Ltd. v. Kinetic Engineering Ltd. (NCLT – Mumbai).

[106] M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr, [2017] 142 SC L11 (NCLAT) at ¶ 83.

[107] Astra Offshore Sdn. Bhd. v. Swiber Offshore (India) Pvt. Ltd., CP No. 05/I&BP/NCLT/MAH/2017 (30.01.2017, NCLT – Mumbai).

[108] AIR 1971 SC 2600.

ISSUES ON BEHALF OF THE COMMITTEE OF CREDITORS

1. WHETHER THE OPERATIONAL CREDITORS SHOULD BE ALLOWED TO ATTEND THE MEETINGS OF THE COMMITTEE OF CREDITORS?

[¶ 79] It is submitted that the operational creditors cannot be allowed the right of representation before the CoC as the IBC does not envisage operational creditors who do not meet the threshold as prescribed therein.

[¶ 80] The facts of the case show that none of the operational creditors in the present matter meet the threshold limit of 10 per cent of the aggregate dues amount prescribed for attending the meetings of the committee.[109] Therefore, the claim of the operational creditors as to representation ought to be dismissed.

2. WHETHER THE APPOINTMENT OF THE REGISTERED VALUER IS VALID?

[¶ 81] It is submitted that the registered valuer appointed by the IRP, M/s. AKP Valuers, is a related party to the Corporate Debtor. It is submitted that such appointment is not in accordance with the CIRP Regulations, wherein Regulation 27 bars a person who is *"a related party of the corporate debtor"*[110] from being appointed as a 'registered valuer'. Such registered valuer is appointed for the purpose of determining the liquidation value of the corporate debtor, as mandated by Regulation 35. Such liquidation value estimate forms an integral part of the resolution plan. With reference to the role of such professionals, the BLRC has observed that:

> *"...there professionals and intermediaries offer services to resolve financial distress of both registered entities as well as individuals. These include lawyers, accountants and auditors, valuers and specialist resolution managers. However, given the critical role that the Code envisages for these entities in the resolution process, the Board should set minimum standards for the appointment, functioning and conduct under the Code."*[111]

[¶ 82] In light of the above, it is submitted that the IRP has, in yet another instance, failed to act in accordance with the rules laid down under IBC.

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[109] § 24(3)(c), IBC.

[110] Regulation 27(b), Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

[111] *BLRC Report* at ¶ 4.4.1.

ISSUES ON BEHALF OF DISSENTING CREDITORS

1. WHETHER THE RESOLUTION PLAN IS VALID?

[¶ 83] In the present matter, two resolution plans were submitted by two resolution applicants – promoters of the Corporate Debtor and Blue Plaza.[112] The Plan submitted by the former detailed out six points in total,[113] whereas the Plan submitted by Blue Plaza listed out for purchase of debtor's properties.[114] However, the plan submitted by the promoters was finally approved by the CoC and has been filed with the Hon'ble Forum.[115]

[¶ 84] It is the contention of the dissenting financial creditors that the Plan so approved by the CoC is not in conformity with IBC. For this purpose, reference is to be made to Regulation 38 of the CIRP Regulations which details out the mandatory contents of a Plan – payment of CIRP costs, term, management, control and supervision. As per Regulation 39(4), the Plan can only be submitted if it meets the requirements of IBC.

[¶ 85] In the instant matter, the Plan provides for repayment of 60% of the CIRP costs, whereas according to the regulations mentioned above, all the CIRP costs must be disbursed in *priority*.[116] The prioritization as listed out in the said regulations is not followed, thus violating the mandatory provisions of IBC. Therefore, it is submitted that the said Plan must be rejected, and the CoC may be asked to formulate another Plan which conforms to IBC.

V.
ARGUMENTS ON BEHALF OF OTHER PARTIES

ISSUES ON BEHALF OF PUBLIC DEPOSITORS OF NEW AGE

1. WHETHER PUBLIC DEPOSITORS ARE CREDITORS UNDER IBC?

[¶ 86] It is humbly submitted that the claims of the public depositors of New Age were rejected by the IRP on the ground that they do not fall within the ambit of operational creditors. While it is true that public depositors do not form part of operational creditors, their claims must be taken into account as they fall in the category of financial creditors.

[112] MOOT PROPOSITION, p. 10, ¶ 2.

[113] MOOT PROPOSITION, p. 10, ¶ 5.

[114] MOOT PROPOSITION, p. 10, ¶ 6.

[115] MOOT PROPOSITION, p. 11, ¶ 4.

[116] § 44, IBC.

[¶ 87] The NCLT has in *M/s Hind Motors*[117] included public deposits under the list of financial creditors. Further, in *Prudential Capital*,[118] winding-up proceedings were initiated at the instance of public depositors. The above cases highlight the judicial trend towards treating public depositors as financial creditors for the purpose of insolvency/winding-up.

[¶ 88] It is submitted that § 5(7) of IBC defines a financial creditor to mean any person to whom a financial debt is owed. Further, § 5(8) provides that financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and, includes *inter alia* money borrowed against the payment of interest.

[¶ 89] It is submitted that a public deposit received by a company in accordance with the provisions of the Companies Act, 2013 is subject to the requirement of due repayment of the deposit amount with interest.[119] This provision, therefore, implies an element of compensation for the time value of the money received from the depositor. In other words, the bottom line in respect to obligation is, a man should repay the value, either in cash or kind, to what he has taken; for this, one has to apply law in such a way that claimant is provided remedy. The NCLT in *DF Deutsche Forfait AG v. Uttam Galva Steel Ltd.*[120] has observed that "*the premise for the claim is whether A has taken something from B with a promise to pay back the value or not, if it is prima facie evident that claim has to be paid, then to see what law is applicable to ensure that it is repaid, but not to dismiss the claim on the ground it is not in accordance with law*."

[¶ 90] A reference must be made to the case of *Hind Motors Ltd.,*[121] where the claims of the public depositors were ordered to be taken into account under the category of financial creditors to further the purpose of IBC, which is to balance the interest of all stakeholders, and to safeguard the assets of the corporate debtor which may otherwise be affected where an independent legal recourse is taken by public depositors in respect of their claims. In view of the aforesaid submissions, it is urged that the claims of the depositors be accepted and made part of the insolvency resolution process.

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[117] In re: M/s Hind Motors, [2017] 138 CLA 249 (14.02.2017, NCLT - Chandigarh).

[118] In re: Prudential Cap. Markets Ltd., (2008) 1 CompLJ 314 Cal (08.10.2007, Calcutta High Court).

[119] § 73(2), Companies Act, 2013.

[120] DF Deutsche Forfait AG v. Uttam Galva Steel Ltd., [2017] 141 SCL 392 (10.04.2017, NCLT – Mumbai).

[121] In re: M/s Hind Motors, [2017] 138 CLA 249 (14.02.2017, NCLT - Chandigarh).

ISSUES ON BEHALF OF MR. CHEW JOHN

1. WHETHER THE SINGAPORE INSOLVENCY PROCEEDINGS AGAINST THSPL SHOULD BE RECOGNIZED AND SHOULD THE PRESENT PROCEEDINGS BE STAYED?

[¶ 91] It is respectfully submitted before the Hon'ble Tribunal that the present insolvency proceeding should be put on hold until the insolvency proceeding in respect of THSPL, its Singapore-based subsidiary, is concluded. The submissions in this behalf are three-fold: **(a)** that the centre of main interests ("**COMI**") of THSPL is in Singapore, **(b)** that the corporate debtor is liable in part towards the debts of THSPL and that a resolution plan in respect of the corporate debtor could be drawn up only after taking into account such liability, and **(c)** the Tribunal should exercise its discretionary powers in the instant case to stay the insolvency proceedings in respect of the corporate debtor.

A. *The centre of main interests of THSPL is in Singapore*

[¶ 92] In the instant case, the request of the office holder for THSPL, Mr. Chew John, to put on hold any further action in the New Age insolvency proceedings, was denied by the RP, who stated that the COMI of THSPL is in India as its holding company is based in India and is also facing insolvency proceedings therein. The said denial is contested on the ground that the COMI of THSPL is in Singapore.

[¶ 93] It is submitted that the doctrine of separate legal entity of a company, regarded as one of the basic principles of company law,[122] is not affected merely because there is a holding-subsidiary relationship between two or more companies. The separate legal existence of the constituent companies of the group has to be respected.[123] It is therefore submitted that the COMI of the THSPL, which in this case is the subsidiary company, should be independently ascertained and should not be affected by the COMI of its holding company.

[¶ 94] The Model Law lays down a presumption under Article 16(3), providing that the registered office of the debtor would be presumed to be the debtor's COMI in the absence of proof to the contrary. The purpose of the presumption can be understood by referring to the following observation of the European Court of Justice in *Re Eurofood IFSC Ltd.*:[124]

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

[123] 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); Ebbw Vale Urban District Council v. South Wales Traffic Area Licensing Authority, [1951] 2 K.B. 366 (C.A.).

[124] Eurofood IFSC Ltd, in re, [2006] Ch. 508.

"...the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. [This is] necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."

[¶ 95] In light of the above, it can be concluded that the COMI of THSPL is in Singapore. THSPL is based out of Singapore; so is its hotel Davisson Continental. Further, the insolvency proceedings in respect of THSPL were also commenced in Singapore by its creditors. All these factors collectively strengthen the presumption created under Article 16(3). [125] Since the COMI of THSPL is in Singapore, the insolvency proceedings commenced therein should be recognized as the main proceedings so far as THSPL is concerned.[126]

B. *The Corporate Debtor is liable for the debts of THSPL*

[¶ 96] It is respectfully submitted that the instant case presents a situation where the holding company can be made liable towards the debts of its subsidiary notwithstanding that the two companies have separate legal entities. It is pertinent here to refer to the following observation of the Court in *Hackbridge-Hewittic and Easun Ltd. v. G.E.C. Distribution Transformers Ltd.*:[127]

"The orthodox approach that a company is a legal entity in itself and thus whether it is a subsidiary of another or not, 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."

[¶ 97] Courts across jurisdictions have recognized that one corporation may become an actor in a given transaction, or in part of a business, or in a whole business, and, when it has, will be legally responsible.[128] Thus, the "directness" of a holding company's involvement in the transaction in question may be conceived as a sliding scale; if the company has sufficiently overwhelmed its subsidiary in taking a certain step or action, such a showing is sufficient to create liability.[129] The court is required to discern which entity- the parent or the

[125] UN, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014), at p. 71, ¶ 147.

[126] Article 17(2). UNCITRAL Model Law on Cross-Border Insolvency.

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

[128] Esmark Inc. v. National Labor Relations Board, 887 F.2d 739.

[129] Pearson v. Component Technology Corp., 247 F.3d 471; Transamerica Leasing v. La Rep. De Venezuela, 200 F.3d 843.

subsidiary- was the final decision-maker for the transaction in question.[130] Courts will not permit themselves to be blinded or deceived by mere forms of law, but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.[131]

[¶ 98] In the instant case, THSPL was acquired for the purpose of diversifying into real estate and hospitality businesses. Soon after, in January 2017, THSPL had to obtain loan from LAVCA Capital Advisors in furtherance of the "expansion needs," which loan came at a huge cost of creating an equitable mortgage on the immovable properties, both land and building, of Davisson Continental. The urgency of obtaining the large amount of loan can be attributed to the fact that the corporate debtor's own core business of manufacturing solar panels was threatened on account of its two major clients, Dan Morris Energy Inc. and Texas Power International,[132] facing major legal proceedings in the USA. The facts and circumstances, therefore, indicate that THSPL's financial decision of taking loan for redevelopment and expansion purposes could reasonably be attributed to the corporate debtor.

[¶ 99] It is, therefore, submitted that the corporate debtor is liable to the creditors of THSPL, at least to the extent of its investment in the latter company.[133] The exact amount of liability of the corporate debtor, however, would be determined only when the insolvency proceedings in respect of THSPL are concluded. This, in turn, warrants a stay of the insolvency proceedings in respect of the corporate debtor, which submission is made in the following sub-issue.

C. *The insolvency proceeding in relation to the Corporate Debtor should be stayed*

[¶ 100] Article 21(1)(g) of the Model Law gives the judicial body discretionary power to grant the relief most appropriate to the circumstances of the particular case.**[134]** This power is also available to the Tribunal in its domestic law, for rule 11 of the NCLT Rules gives

[130] *Id*.

[131] Chicago, Milwaukee & St. Paul Railway Company v. Minneapolis Civic & Commerce Association, 247 U.S. 490 (1918).

[132] MOOT PROPOSITION, p. 4, ¶ 1. 85% of the production of the corporate debtor was captive with these two clients.

[133] Olympia Equipment v. Western Union Telegraph, 786 F.2d 794.

[134] UN, *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (2013), at p. 51, ¶ 150.

inherent power to the Tribunal to take suitable measures to do complete justice in a particular case.

[¶ 101] It is humbly submitted that the instant case requires the Tribunal to exercise its inherent powers to advance the interests of justice. As has been contended earlier, the corporate debtor is responsible for the debts of THSPL and, therefore, the creditors of THSPL are entitled to proceed against the former for recovery of the debts. Such claims are required to be ascertained before a resolution plan in respect of the corporate debtor is drawn up during its insolvency proceedings in India.

[¶ 102] Moreover, these claims must be brought before the committee of creditors in India and treated at par with the claims of the corporate debtor's creditors at the time of approving the resolution plan. Such parity in the treatment of claims is in consonance with the objective of the Model Law, which is to ensure fair and efficient management of international insolvency proceedings in the interests of all creditors and other interested persons, including the debtor.[135] In this regard, the following observation in the case of *Farrell v. Fences & Kerbs Ltd.*[136] becomes relevant:

> *"It is a generally accepted principle of insolvency law that collective action is more efficient in maximising the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment."*

[¶ 103] Therefore, the Hon'ble Tribunal is requested to grant the relief of stay of further proceedings in relation to the Corporate Debtor until conclusion of the insolvency proceedings against THSPL.

ISSUES ON BEHALF OF JKL PVT. LTD.

1. WHETHER THE DECISION OF RP IN REFUSING TO SUPPLY THE INFORMATION MEMORANDUM TO JKL PVT. LTD. IS VALID?

[¶ 104] In the instant case, the RP has refused to supply the information memorandum (IM) prepared by him to JKL Pvt. Ltd. ("**JKL**") on the ground that JKL was not a serious party. This indicates exercise of a power which has not been conferred by IBC.

[135] *See* Preamble to the UNCITRAL Model Law on Cross-Border Insolvency; *See also* UN, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014) ¶ 3.

[136] Farrell v. Fences & Kerbs Ltd., [2013] NZCA 91.

[¶ 105] Regulation 36(1) of the CIRP Regulations provides that the RP shall submit an IM to each member of the committee and *any potential resolution applicant*. The word "any" as used in the provision must mean "every"[137] potential resolution applicant without exception.

[¶ 106] That the supply of IM is mandatory and not directory on the part of the RP is evident from the use of the word "shall" in both the aforesaid provision as well as in § 29(2) of IBC that deals with providing access to all relevant information to the applicant. This is further substantiated by the BLRC Report which observes, in relation to the role of resolution professional, that:

> *"she is responsible for inviting and collecting proposals of solutions to keep the entity going. In this role, she is responsible for managing the process through which to invite proposals from the overall financial market, rather than just the creditors and the debtor. The Committee discussed that this could include other firms...Part of the task of the RP is to ensure as much equality of information about the entity to all participants in the negotiations as is possible."*[138]

[¶ 107] The aforesaid observations of the BLRC Report find place in the 2015 Bill, which notes that "the resolution professional is required to provide access to all relevant information [and that] there are no restrictions on who can be a resolution applicant."[139]

[¶ 108] It is, therefore, submitted that the refusal by the RP to supply IM to JKL is contrary to the provisions of law. This is so notwithstanding that the RP is of the opinion that JKL is not a serious party. If at all there is any risk in supplying IM to JKL, the same could be prevented by complying with the provisions of § 29(2) of IBC which requires supply of information subject to the condition of confidentiality.[140] Moreover, if the creditors forming part of the CoC are of the opinion that the resolution plan proposed by the resolution applicant is not in the interest of the corporate debtor, they have power not to exercise their voting rights in favour of the plan.[141]

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[137] The Chief Inspector of Mines v. Lala Karam Chand Thapar, [1962] 1 SCR 9.

[138] *BLRC Report* at ¶ 5.3.2.

[139] *Notes on Clauses* at p. 122.

[140] § 29(2)(a), IBC.

[141] *See* § 30(4), IBC.

PRAYER

*W*HEREFORE, 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

NEW AGE:

- *Hold* that the actions of the IRP in managing the affairs of the Corporate Debtor are illegal and are liable to be set aside;
- *Hold* that the sale of the Mumbai flat is correct and not liable to be set aside;
- *Dismiss* the present insolvency resolution petition;

PROMOTERS OF NEW AGE / RHPL:

- *Hold* that the RHPL must be allowed inclusion in the Committee of Creditors;

2. ON BEHALF OF OPERATIONAL CREDITORS

- *Hold* that the Operational Creditors must be allowed to participate and raise concerns in the meetings of the Committee of Creditors;

3. ON BEHALF OF RESOLUTION PROFESSIONAL / IRP

INTERIM RESOLUTION PROFESSIONAL – MR. AMIT THAKUR:

- *Hold* that the actions of the IRP are valid;
- *Hold* that the replacement of IRP and appointment of RP is invalid;
- *Hold* that Public Depositors are not creditors under the IBC;
- *Hold* that RHPL cannot be allowed to participate in the Committee of Creditors;

RESOLUTION PROFESSIONAL – MR. DHIVESH SHARMA:

- *Hold* that the appointment of RP and replacement of IRP is valid;
- *Hold* that the Insolvency Proceedings in relation to THSPL in Singapore cannot be recognised and the present proceedings ought not to be stayed;
- *Hold* that the sale of the Mumbai flat was an undervalued transaction and is liable to be set aside;
- *Restore* the possession of the Mumbai flat to the Corporate Debtor;
- *Hold* that the refusal to supply Information Memorandum to JKL is good in law;
- *Approve* the Resolution Plan as passed by Committee of Creditors;

4. ON BEHALF OF FINANCIAL CREDITORS / CREDITORS COMMITTEE

RST BANK:

- *Hold* that the Insolvency Proceedings against New Age are maintainable;
- *Hold* that the appointment of IRP is valid;
- *Strike-off* the claims filed by Marvel Organics from the list of claims prepared by the IRP;

COMMITTEE OF CREDITORS:

- *Hold* that the Operational Creditors should not be allowed to attend the meetings of the Committee of Creditors;
- *Hold* that the appointment of the Registered Valuer is bad in law;

DISSENTING CREDITORS:

- *Hold* that the Resolution Plan as passed by Committee of Creditors should not be approved by this Hon'ble Tribunal;

5. ON BEHALF OF OTHER PARTIES

MR. CHEW JOHN:

- *Recognise* the Insolvency proceedings in relation to THSPL in Singapore as a foreign main proceeding under the UNCITRAL Model Law on Cross Border Insolvency;
- *Stay* the present proceedings;

PUBLIC DEPOSITORS:

- *Hold* that the Public Depositors are to be treated as Creditors as per IBC and should be allowed to file claims before the RP;

JKL PVT. LTD.:

- *Direct* the RP to supply the copy of Information Memorandum to JKL;

*A*ND 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