

**VI SURANA & SURANA AND UPES SCHOOL
OF LAW, NATIONAL INSOLVENCY LAW
MOOT COURT COMPETITION, 2023**



18th - 20th August, 2023

Virtual Mode

MOOT PROPOSITION

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MOOT PROPOSITION

1. Malta is the world's largest democracy and the second fastest growing economy of the world. Malta also has the second largest GDP in the world. However, the economy has been suffering setbacks due to the demonic problems caused by Non-Performing Assets (NPA). NPA has been a major obstacle in the growth of Malta. The Capital of Malta is Mehli which is a metropolitan city.

2. Insolvency and bankruptcy are significant challenges faced by individuals, businesses, and economies worldwide. Insolvency refers to a situation where an entity is unable to pay its debts when they become due, while bankruptcy is a legal declaration of insolvency. These issues can have severe consequences, including financial distress, loss of jobs, and economic instability.

3. Before the enactment of the Insolvency and Bankruptcy Code, 2016 (hereinafter IBC, 2016), Malta had a fragmented and time-consuming insolvency resolution framework. Various laws and procedures, such as the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of debts due to Banks and Financial Institutions Act, 1993, were in place, but they lacked efficiency and effectiveness.

4. Deora NRE Coke Ltd ('DNCL') is a company which was incorporated on 03 December 1998. It is classified as a private company and is registered at the Registrar of Companies, Melvi.

5. DNCL (in Liquidation) is one of the largest metallurgical coke manufacturers in the country with an installed capacity of 1.18 MTPA. The company also generates electricity through wind power projects with an installed capacity of 87.5 MW. In addition, it operates a mini steel mill in the state of Devkhand that recycles steel scraps using green wind energy to manufacture TMT Bars. DNCL is a major company in Darbhanga district of Devkhand in the metcoke sector which is operational and has the largest industrial set-up both in terms of manpower and scale of operations

SCENARIO - I

6. Mr. Pipara, a promoter of DNCL, submitted a resolution plan for DNCL on 1st October 2020, which was presented by the Resolution Professional before the Committee of Creditors (*hereinafter referred as "CoC"*). The plan was to be put to a vote in a meeting of the CoC scheduled on 23-24 October 2020.

7. Meanwhile, In the case of Encana v. Singhania Group of Companies, the National Company Law Appellate Tribunal held that a person who is ineligible under Section 29A of the Insolvency Bankruptcy Code, 2016 to submit a resolution plan, is also barred from proposing a scheme of compromise and arrangement under Section 230 of the Companies Act, 2013.

8. The judgment was rendered in an appeal filed by Singhania Group of Companies, an unsecured creditor of the corporate debtor (i.e., DNCL). The appeal was preferred by Mr. Pipara against an order passed by the National Company Law Tribunal in an application under Sections 230 to 232 of the Companies Act, 2013.

9. The NCLT vide its decision had allowed the application and issued directions for convening a meeting of the shareholders and creditors. In its decision dated 24th September, 2022, the NCLAT reversed this decision and allowed the appeal by Singhania Group of Companies (SGOC). The decision of the NCLAT dated 24th September, 2022 is challenged in the appeal before this Court.

10. Mr. Pipara, challenged the order dated 24th September, 2022 of the NCLAT, inter alia, on the ground that Section 230 of the Companies Act, 2013 does not place any embargo on any person for the purpose of submitting a scheme. According to the Appellant, in the absence of a disqualification, the NCLAT could not have read the ineligibility under Section 29A of the IBC into Section 230 of the Companies Act, 2013

11. Due to the insertion of Section 29A, Mr. Pipara became ineligible to submit a resolution plan. Subsequently, no resolution plan was approved by the CoC due to the paucity of time. In the absence of a resolution plan, the NCLT passed an order of liquidation on 11th December 2020, after the expiry of 270 days. The order of the NCLT ordering liquidation was challenged in appeal by Mr. Pipara before the NCLAT. The appeal was dismissed by the NCLAT by its order dated 10th June 2021. The dismissal of the appeal by the NCLAT was challenged before the Supreme Court which issued notice to DNCL on 19th June 2022.

12. During the pendency of the appeal before NCLAT, Mr. Pipara moved an application under Sections 230 to 232 of the Companies Act of 2013 before the NCLT proposing a scheme for compromise and arrangement between the erstwhile promoters and creditors. This application was allowed by the NCLT through its order dated 15th April 2021, and a direction was issued for convening a meeting among shareholders, secured creditors, unsecured creditors and FCCB holders for approval of the scheme of compromise and arrangement.

13. Singhania Group of Companies was established in the year 1993 and forms a part of the Singhania Group LLP. The company is a leading player in the Steel, Power, Mining, Oil & Gas, and infrastructure industries. It produces economical and efficient steel and power through backward integration from its own captive coal and iron-ore mines and passes on the benefits to its customers.

14. The organization is wedded to ideals like innovation and technological leadership and is backed by a highly driven and dedicated workforce of 15,000 people. SGC Foundation is the social arm of Singhania Group of Companies and is focused on improving the Human Development Index by positioning itself as a parenting force of various social change agents operating at ground level.

15. Singhania Group of Companies, an ‘operational creditor’ of DNCL, preferred an appeal against the order of the NCLT dated 15th April 2021 before the NCLAT. The NCLAT allowed the appeal by its judgment dated 24th September 2022, holding that promoters who are ineligible to propose a resolution plan under Section 29A of the IBC are not entitled to file an application for compromise and arrangement under Sections 230 to 232 of the Companies Act, 2013.

SCENARIO - II

16. Fu-Sam Power Systems Limited provides a one stop solution for all types of power backup issues for both domestic and industrial markets. Their focus is on solar power which is an eco-friendly energy solution. Being one of the biggest names in the power backup industries of India, Fu-Sam is spread in more than 90 countries worldwide. They are pioneers in the making of innovative power backup systems with a speciality in R&D, and have been successful in products like batteries, inverters, solar products etc.

17. An appeal has been filed challenging an order dated 19th November 2022 of the NCLAT, in which it relied on the judgment dated 24th September 2022 wherein it was held that an individual ineligible for proposing a resolution plan under Section 29A of the IBC, is also ineligible to propose a scheme of compromise and arrangement under Section 230 of the Act of 2013.

18. The Appellant- Mr. Shroff was the promoter and director (since suspended) of Fu-Sam Power Systems Limited. An application under Section 7 of the IBC was filed by one of the financial creditors of Fu-Sam, which was admitted by the NCLT through its order dated 5th March 2021. After which, the Corporate Insolvency Resolution Process was initiated against Fu-Sam.

When the Resolution Professional invited applications for resolution plans for Fu-Sam, Mr. Shroff submitted a plan along with Allianz FRC Private Limited on 15th October 2021. However, Mr. Shroff was informed by an email dated 27th November 2021 issued by the RP, that the CoC had found him to be ineligible Under Section 29A(h) of the IBC and consequently annulled his resolution plan.

19. In the interim, due to the absence of any other resolution plan, the NCLT passed an order dated 3rd March 2022, under Section 34(1) of the IBC, directing the liquidation of Fu-Sam and appointing a Liquidator. The appointment of the Liquidator was challenged before the NCLAT in an appeal, which was disposed of by an order dated 29th March 2022 upholding the appointment of the Liquidator. The Liquidator was also directed to accept applications for schemes of compromise and arrangement under Sections 230 to 232 of the Act of 2013.

20. Mr. Shroff expressed his continued interest when the Liquidator invited expressions of interest for submitting schemes of compromise and arrangement. Subsequently, emails were exchanged between the Liquidator and Mr. Shroff, during the course of which Mr. Shroff was invited to present his plan to the lenders of Fu-Sam. However, before this could materialize, Mr. Shroff was informed by the Liquidator through an email dated 19th August 2022, that he was ineligible to propose a scheme under Section 230 of the Companies Act, 2013 in view of his ineligibility under IBC.

21. Mr. Shroff challenged this decision in an application filed before the NCLT, which was dismissed by an order dated 30th September 2022, based on the aforementioned judgment dated 24th September 2022, and on the basis of Sections 29A and Section 35(1)(f) of the IBC, 2016.

22. Mr. Shroff then filed an appeal against this order dated 31st September 2022 before the NCLAT, which dismissed it by an order dated 19th November 2022. Hence, this appeal.

SCENARIO - III

23. Axis telecom Pvt. Ltd (ATPL) is one of the leading players in Telecom Sector. It was established in the year 1993 and has many firsts to its name in the Telecom Sector. It is Asia's leading integrated telecom services provider with operations in Malta and Tri Lanka.

24. ATPL has been at the forefront of the telecom revolution and has transformed the sector with its world-class services built on leading edge technologies. Part of ATPL's success is due to its excellent relations with the customers.

25. Danobe Info Technology Limited is a leading global IT services company that helps global enterprises re-imagine and transform their businesses through Digital technology transformation. It was incorporated on 10th February, 1998 and is primarily engaged in providing a range of software services, business process outsourcing and Infrastructure services.

26. It leverages an extensive offshore global technology workforce and intellectual properties to deliver solutions across select verticals including Financial Services, Manufacturing, Life Sciences & Technology Healthcare Services.

27. The Petitioner (Axis Telecom Pvt. Ltd.) has filed the Company Petition under Section 7 of Insolvency and Bankruptcy Code, 2016 alleging a default of Rs. 7,71,32,111/- (Seven Crore Seventy-One lakhs thirty-two thousand one hundred one only).

28. In the company petition, a consent term was executed between the Financial Creditor and the Respondent (Danobe Info Technology Limited). The consent term was placed on record before the Adjudicating Authority on 05th August 2021. However, the company petition was admitted on 05th August 2021.

29. The Appellate Tribunal permitted the suspended director to withdraw the Appeal with liberty to move the NCLT for withdrawal of Company Petition under Section 12-A of the Code. Furthermore, it also issued direction to refrain from constituting the Committee of Creditors till the disposal of Section 12-A application. Based on consent terms, Insolvency Resolution Professional filed an Application under Section 12A, the Adjudicating Authority vide order dated 09.02.2022 allowed the withdrawal of the Company Petition.

30. Danobe Info Technology Limited subsequent to the withdrawal of the Company Petition 'defaulted' in making payment towards the fourth tranche as per consent term dated 05th August, 2021. The Petitioner filed an Interim Application seeking revival of the Company Petition which had been rejected on 21st December 2022 by the Adjudicating Authority. It was observed that when the Company Petition was withdrawn after the settlement and there is no specific provision in the IBC, 2016 for reopening of the Company Petition.

SCENARIO - IV

31. Vntek Auto Limited ("Corporate Debtor") approached VRS Malta Financial Services Limited ("Appellant No. 2") and M&N Finance Limited ("Appellant No. 3") to extend a short-term loan facility of INR 700 Crores to its group companies namely, Kapro

Engineering Limited (“Kapro”) and M.L.D Investments Private Limited (“MLD”), for the ultimate end use of the Corporate Debtor. As per the Appellants, it was an understanding that the Corporate Debtor will create a first ranking exclusive security by way of pledge over 11,72,46,100 equity shares having face value of INR 3/- each of K.M.P Auto Limited (“KMP”) held by the Corporate Debtor.

32. A security trustee agreement was executed on November 28, 2018, between Tipsra MSCL (India) Limited (“Appellant No. 1”) and MLD for an amount of INR 1,40,00,00,000/-. Further, a security trustee agreement was executed between Appellant No. 1 and Kapro for INR 1,40,00,00,000/-. Thereafter, another security trustee agreement was executed between Appellant No. 1 and Kapro for INR 2,00,00,00,000/-. Thereafter, an amended and re-instated pledge agreement was executed on July 05, 2016 (“Pledge Agreement”), between the Corporate Debtor, MLD, Kapro and Appellant No. 1, whereby the Corporate Debtor pledged 66.77% of its shareholding in KMP to secure the term loan facilities availed by MLD and Kapro from Appellant No.2 and Appellant No. 3.

33. On June 24, 2020, Corporate Insolvency Resolution Process (hereinafter “CIRP”) was initiated against the Corporate Debtor under the provisions of the Insolvency and Bankruptcy Code, 2016 (“IBC”) wherein Mr Kasi Nayinar Pararacacekaran (“Respondent No. 1”) was appointed as the interim resolution professional and he was subsequently confirmed as the resolution professional.

34. On October 2, 2020, Appellant No. 1 filed its claim as a secured financial creditor of the Corporate Debtor for a principal amount of INR 700 Crores. However, the aforesaid claim was rejected by the Respondent No. 1 in 2020 and such rejection was not challenged by the Appellants before the National Company Law Tribunal, Shahpur (“Adjudicating Authority”).

35. Further, the Respondent No. 1 had received two resolution plans from entities namely, Som House Group Private Limited (“SHG”) and Pixel Value Investors (“PVI”) respectively. However, PVI withdrew its resolution plan and the revised resolution plan submitted by SHG was approved by the CoC of the Corporate Debtor on March 2, 2021, with majority voting shares of 94.20%. Thereafter, the aforesaid resolution plan submitted by SHG was approved by the Adjudicating Authority on June 25, 2021. However, thereafter, SHG failed to fulfil its obligations as committed in terms of the approved resolution plan and the Adjudicating Authority passed an order directing the CoC to reconsider the resolution plan of PVI.

36. Thereafter, the Appellants filed an application before the Adjudicating Authority claiming their right on the basis of pledged shares. However, the Adjudicating Authority dismissed the aforesaid application filed by the Appellants. Thereafter, upon approaching

tthe National Company Law Appellate Tribunal, Melvi (“Appellate Authority”), the Appellate Authority dismissed the appeal. The Appellate Authority observed that the claim form submitted by Appellant No. 1 as a secured financial creditor was rejected by Respondent No. 1 in 2020 and the same was not challenged before the Adjudicating Authority. As a consequence, the Appellants are barred to raise the same.

Further, the Appellate Authority had also observed that the Appellant No. 1 has not lent any money to the Corporate Debtor and reiterated the view of the Adjudicating Authority that the Appellant would not come within the purview of financial creditor.

37. Aggrieved by the aforesaid decision of the Appellate Authority, the Appellants preferred a civil appeal before the Supreme Court of Malta.

38. Challenging the Impugned Order, this Appeal has been filed before the 2- judge bench. On 8th June 2023, the Hon’ble Chief Justice of Malta constituted a 5-member bench as it was felt that it was necessary for a larger bench to hear and decided the issues being raised in these appeals. The bench was to be presided by the Hon’ble Chief Justice of Malta, and would examine all the issues being dealt within the matters of DNCL SC, Fu-Sam SC ATPL SC and Vntek.

39. Based on the foregoing, the Hon'ble Supreme Court after due deliberation has agreed to decide the following issues:

- A. Whether in a liquidation proceeding under Insolvency and Bankruptcy Code, 2016, the Scheme for Compromise and Arrangement can be made in terms of Sections 230 to 232 of the Companies Act;
- B. If so permissible, whether the Promoter is eligible to file application for Compromise and Arrangement, while he is ineligible Under Section 29A of the IBC to submit a 'Resolution Plan'.
- C. Whether security interest created on the assets of corporate debtor be extinguished even if that interest has been created for the loan availed by the third party, not necessarily by the corporate debtor.
- D. Whether Insolvency proceeding can be restored in case of default when Consent term is entered between parties?

Note: The laws of Malta are Pari Materia to that of India.

ANNEXURE-1

NATIONAL COMPANY LAW APPELLATE TRIBUNAL MELVI

Company Appeal (AT) (Insolvency) No. XX of 20XX

IN THE MATTER OF:

Mr. Pipara

...Appellant

v.

Deora NRE Coke Ltd.

...Respondent

ORDER

10.06.2021 This application has been preferred by the appellant Promoter of Deora NRE Coke Ltd. (Corporate Debtor under Liquidation) against order dated 11th December, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata. By the impugned order the Adjudicating Authority, in absence of approval of 'resolution plan' and in want of time beyond 270 days, ordered for liquidation of 'Corporate Debtor' under Section 33 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'I&B Code').

2. Learned counsel appearing on behalf of the appellant submitted that the time consumed for certain purposes should have been excluded for the purpose of counting 270 days and requested the Appellate Tribunal exclude the period when 'resolution plan' was submitted and Section 29A was inserted vide Company Appeal (AT) (Insolvency) Nos. XX of 20XX Notification dated 23rd October, 2020 on account of which resolution process could not proceed and making the Promoter (appellant herein) ineligible in terms of section 29A.

3. Learned counsel for the appellant further submitted that there are four other 'resolution plans' which could have been taken up for approval by the 'Committee of Creditor' but due to paucity of time they have not considered the same.

4. In reply, learned counsel for the liquidator submitted that the 'resolution plan' submitted by the Promoter and rest of the 'Plans' were taken up for consideration by the 'Committee of Creditors'. However, it is accepted that no formal order passed by the 'Committee of Creditors'.

5. Learned counsel for the appellant referred to Section 230 of the Companies Act, 2013 and submitted that even during the period of liquidation, the Corporate Debtor can compromise with the creditors or shareholders or other members. Learned counsel for the appellant also submitted that application under Section 230 of the Companies Act, 2013 is pending before the National Company Law Tribunal, Kolkata Bench, which is likely to be taken up in near future. The meeting of shareholders will take place on 16th June, 2021.

6. Having heard the learned counsel for the parties, while we are not inclined to exclude any period for the purpose of counting the period of 270 days of 'insolvency resolution process' in absence of any valid ground and thereby not inclined to interfere with the impugned order dated 11th December, 2020 make it clear that the orders passed by the Adjudicating Authority and this Appellate Tribunal will not come in the way of the Tribunal to pass appropriate order in accordance with law on the petition filed under Section 230 of the Companies Act, 2013 which should not be in conflict with the provisions of the I&B Code. The appeal is dismissed with the aforesaid observations.

ANNEXURE-2

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, MELVI

Company Appeal (AT) (Insolvency) No. XXXX of XXXX

IN THE MATTER OF:

Mr. Shroff

...Appellant

v.

**Fu-Sam Power Systems Ltd., through
Udit Kumar Ralhan, Liquidator**

...Respondent

ORDER

19.11.2022 This Appeal has been preferred by Promoter/ Shareholder of Fu-Sam Power Systems Ltd. ('Corporate Debtor') against order dated 30th September, 2022 passed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by which application under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (for short 'I&B Code') preferred by Appellant with prayer to set-aside the impugned email dated 19th August, 2022 sent by the 'Liquidator' and to allow the Appellant to participate for submitting the proposal of scheme of compromise and arrangement has been rejected.

2. The 'Liquidator' held that the Promoter/ Shareholder cannot take part in the scheme of compromise or arrangement in terms of Section 230 of the Companies Act, 2013. This is also affirmed by the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi referring to Section 29A read with Section 35(1)(f) of the I&B Code, 2016.

3. Learned Counsel for the Appellant submits that the Appellant has given the best proposal scheme for compromise and arrangement, which is beneficial to all the creditors. If it is not accepted, then the 'Corporate Debtor' is to be liquidated without any 'resolution' or 'revival'. Therefore, it should have been entertained by the 'Liquidator', if the Members or the Creditors have no objection

4. Similar issue fell for consideration before this Appellate Tribunal in "Singhania Group of Company vs. Mr Pipara and Anr. In the said case, the question fell for consideration as to whether in the liquidation proceeding under Insolvency and Bankruptcy Code, 2016 in terms of Section 230-232 of the Companies Act, 2013 a promoter is eligible to file application for

compromise and arrangement, while he is ineligible under Section 29A of the I&B Code. This Appellate Tribunal by its judgment dated 25th September, 2022 held: -

“12. From the aforesaid provision, it is clear that the Promoter, if ineligible under Section 29A cannot make an application for Compromise and Arrangement for taking back the immovable and movable property or actionable claims of the ‘Corporate Debtor’.”

5. As the case of the appellant is covered by the decision of this Appellate Tribunal in Singhanian Group of Company, we hold that the Appellant in view of Section 29A of the I&B Code, cannot file any application for compromise and arrangement in terms of Section 230 and 232 of the Companies Act, 2013 to take over the Company. While we hold that there is no delay in preferring the appeal, the appeal is dismissed. No costs.