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INSOLVENCY AND BANKRUPTCY MOOT

COMPETITION

15th–17th November 2018

National Law University Delhi



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SECOND EDITION

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Arvind Cement Limited (ACL), the flagship company of Arvind Group of Industries had emerged as a key leader in the Indian Cement Industry. Established in the year 1993, Arvind Cement Limited has many firsts to its name in the Cement Industry. Currently, it has fully integrated cement manufacturing plant with a capacity of 12 million tonnes per annum (MTPA) and a 140 MW captive power plant in Rajasthan. The 12 MTPA capacity of its manufacturing unit is the highest in India compared to all other cement manufacturing plants. ACL also employs superior technological know-how in manufacturing cement so that its cement is of superior quality and has longer shelf life compared to other products in the market. Part of ACL's success is due to its excellent relations with the suppliers and service providers.

The shares of ACL are listed on the Bombay Stock Exchange and the National Stock Exchange having face value of Rs. 10 each. ACL has raised Rs. 100 Crore divided into 50,00,000 shares of Rs. 200 each. The registered office of ACL is located in Hyderabad and has its other corporate offices in New Delhi and Mumbai. The corporate office in New Delhi, a ten-storey building, is situated at a prime location in Delhi and is owned by the promoter of ACL, Mr. Arvind Kumar.

ACL received logistics and carriage services from Imperium Carriers Limited (ICL), which could transport and store ACL's goods all over North India efficiently. Though ACL has its own storage facilities and dealerships, it has also engaged a number of dealers all over India. ACL's biggest dealer is GK Limited with a share of 35% of ACL's sales in the last financial year. GKL is not just a dealer to ACL. The 85 storage facilities owned by ACL all over India

were built by GKL's group company, GK Constructions Limited (GKCL). Under the agreement dated 05.07.2010 between ACL and GKCL, the ownership rights over these storage facilities vested in ACL immediately upon completion of construction. These storage facilities were state of the art with facilities for climate-controlled storage. The storage facilities could be used and was indeed used for purposes other than storage of cement. Under the agreement, GKCL were to be paid its consideration, amounting to INR 500 crore, in instalments along with interest over a period of 10 years. The agreement also stated that till the time the complete consideration amount of INR 500 crore was paid to GK Constructions along with interest, ACL shall engage GKL as their dealer for at least 30% of their sales in any given year.

In 2002, ACL acquired land measuring 100 acres adjacent to its manufacturing facility in Rajasthan. Arvind Power Limited (APL), a Special Purpose Vehicle (SPV) was constituted in the year 2003 to run the Captive Power Plant. By way of capital contribution in kind, ACL transferred the 100 acres land, worth around Rs. 10 crores, in the name of APL. The captive plant commenced operations in 2006. The captive power plant and the cement manufacturing unit utilise some of the common existing infrastructure.

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

The PPA also provided that ACL shall make minimum payments to the APL to meet the expenses, taxes and debt-service obligations to the lenders of the Captive Power Plant even if no sale of power happens in any given year. The PPA also contained a provision that required APL to supply fly ash generated from the power plant to the manufacturing unit as a raw material for the cement plant. ACL does not source fly ash from elsewhere since its requirements are fully met by the fly ash supplied by APL. In 2014-15, the net value paid by

ACL to APL under the PPA amounted to INR 95 crores, the said financial year being a normal year with both the cement manufacturing unit and power plant functioning at full capacity. APL is not integrated to the power grid yet. APL has not traded electricity with any party other than ACL since the commencement of its operations.

In 2007, ACL saw the potential in establishing a shipping and logistics company and hence, set up a fully-owned subsidiary, Aqua Logistics and Shipping Limited (ALSL). ALSL made huge investments to aggressively expand its business. By the year 2013, ALSL had come to own as many as 115 container vessels with an intake capacity of circa 1.3 million TEU. Within a short span of time, ALSL established itself as a reliable shipping company.

ACL had sought financial assistance from various financial creditors for the setting up and implementation of projects and its operations. The lenders, under a consortium led by People's Bank granted ACL rupee term loans, foreign currency loans, deferred payment guarantee facilities and other working capital facilities amounting to INR 2,000 crores as per the terms and conditions in their loan agreement dated 12.12.1994. Subsequently, in 2005, ACL also obtained working capital facility of 200 crores from RST Bank, which is not a part of the consortium of banks led by People's Bank. APL, on the other hand, obtained financial assistance in 2003 from two banks, namely People's Bank and Indo Bank. People's Bank extended a facility of INR 20 crores by a credit facility agreement dated 04.05.2003, while Indo Bank extended a facility of INR 25 crores by a credit facility agreement dated 15.10.2003.

ACL from time to time created securities by way of hypothecation of all its movable properties, including the machinery at the manufacturing unit in Rajasthan, and mortgage of its immovable properties pertaining to its unit at Rajasthan as security for the due repayment of the financing facilities extended by the consortium of lenders under loan agreement dated 12.12.1994. The 100 acres land acquired in 2002 was left unencumbered. The consortium led by People's Bank has first charge on the land and building of ACL in Rajasthan and has second charge on the manufacturing plant and machinery. In order to secure the working capital facility extended by RST Bank, ACL agreed to allow RST Bank first charge on the plant and machinery of ACL at the Rajasthan unit. Mr. Arvind Kumar also gave a personal guarantee to secure the loan granted by RST Bank.

APL obtained credit facility from People's Bank (INR 20 crores) and Indo Bank (INR 25 crores) on the condition that ACL give corporate guarantee to secure the credit facility extended to APL. ACL agreed and endorsed, with the signature of its Managing Director, the credit facility agreements entered into by APL. ACL played a big part in finalising the credit facility agreements of APL and it was quite active in the negotiations with the banks. The credit facility agreements dated 04.05.2003 and 15.10.2003 contained a stipulation that required APL to obtain the approval of lenders for creating interest, in favour of anyone, in the unencumbered assets of the company.

ACL has been servicing its debts regularly and has excellent relations with the bankers. In March 2017, ACL faced issues with supply of raw materials. The import of limestone bulk from Malaysia has become unviable on account of the change in regulations made by the Malaysian government. The Malaysian government had been facing intense criticism for the poor working conditions and scanty wages at its mines. In 2017, the workers at its mining sites organised large scale demonstrations and protests demanding better working conditions and better pay. In order to meet these demands and to make their mining industry financially viable, the Malaysian government, among other measures, benchmarked the prices for export of limestone bulk. ACL was deeply affected by this development. For the next six months, ACL imported limestone bulk at the increased tariffs while also exploring other options. ACL started sourcing limestone bulk domestically, but the compositional characteristics of domestic limestone varied significantly from the imported limestone. This led to a fall in the quality of cement manufactured by ACL. The highly competitive cement industry responded to this drop in quality and the sales of ACL started to suffer. Since March 2017, the manufacturing unit in Rajasthan has not been functioning at full capacity owing to the reduced supply of raw materials.

In September 2017, ACL decided to make some changes to their technology and machinery which will enable them to retain the original quality of cement production. ACL also decided to set up a plant in Karnataka with much easier access to domestically-mined limestone. However, ACL needed big capital contributions to make the desired changes. ACL

approached its existing consortium of lenders, led by People's Bank, with a proposal to expand its credit facilities for another INR 500 crores. The consortium demanded that they needed more security to cover the increased exposure. At this point, ACL brought the management of APL into the negotiations. APL decided to create securities by way of mortgage of 100 acres of land, currently valued at around Rs. 100 crores, in favour of the consortium led by People's Bank. Subsequently, ACL was granted an additional credit facility of 500 crores INR. The Managing Director of ACL wrote an e-mail to Indo Bank informing them of the mortgage created by APL on its land. Indo Bank did not acknowledge or respond to the e-mail.

ACL quickly proceeded to purchase land and import machinery and equipments for setting up the plant in Karnataka. ACL executed the documents for purchase of land, measuring 80 acres, in Karnataka. ACL also issued purchase orders for import of plant and machinery equipments. ACL made sure that the equipments were of superior quality and spared no expense in that regard. ACL issued Letters of Credit for making purchase of these equipments. ACL spent the remaining money on improving the plant and machinery in Rajasthan, while also doing some essential maintenance work at both the cement manufacturing unit and at the power plant. The company was all set to make a come-back when misfortune visited it again.

In February 2018, a major scandal erupted concerning the mining operations in the state of Karnataka. The apex court was seized of the matter. Considering, prima facie, the scale of corruption involved in the mining operations over the past two decades, the apex court cancelled all the mining licenses and constituted a Special Investigation Team for investigation into the allegations. The court also directed the Central Government to issue mining licenses through a fresh process of competitive bidding.

This development came as a severe blow to ACL, whose prospects for a complete revival were contingent on quickly setting up and operationalising a manufacturing plant in Karnataka with easier and cheaper access to limestone. ACL had already engaged T&T Constructions Limited (TTCL) to build the basic infrastructure for the plant in Karnataka. Though TTCL had begun work at Karnataka site, due to the uncertainty over payments for its service, it has done

only minimal off-site work so far and is awaiting an assurance of future payment. In March 2018, ACL had INR 20 lakhs left in one of its bank accounts. ACL could have used this money for making interest payment to the banks, but it chose to default to banks and instead paid the money to TTCL thinking that beginning construction of the plant in Karnataka was more important for the future of ACL. The management of ACL believed that the quickest route for revival of ACL was to operationalise the Karnataka plant.

APL, on the other hand, was facing problems of its own. Since March 2017, due to the reduced output, ACL has not been able to consume the entire electricity generated by the power plant. The payments from ACL to APL under the PPA had become irregular. ACL made ad-hoc payments to keep the power plant running as needed for the manufacturing unit in Rajasthan. The workers on the rolls of APL were not paid their salaries since May 2017. Since the plant was not connected to the grid, there was no way of selling power to third parties. The bankers lost all confidence in APL's ability to service its debts. As per the audited financial statement of APL for 2016-17, APL had received INR 100 crores from ACL, its sole source of revenue.

ACL defaulted on its instalment of interest to People's Bank in March 2018. It was also forced to default to its suppliers and other service providers. It was no secret that ACL was in severe financial stress. People's Bank, being the lead banker of the consortium, filed an application before the Adjudicating Authority for initiating corporate insolvency resolution process against ACL. People's Bank proposed to appoint Ms. Pooja Prakash as Interim Resolution Professional. ACL objected to the application before the Adjudicating Authority, but in vain. The Adjudicating Authority admitted the application and appointed Ms. Pooja as Interim Resolution Professional (IRP) on 30.03.2018.

The IRP quickly took control and custody of the assets of ACL. She visited the plant in Rajasthan and the site in Karnataka. The IRP appointed ABC security services for preserving the manufacturing unit in Rajasthan and the plant in Karnataka, which has only begun construction. She made a public announcement and invited claims from creditors of ACL. All the banks in the consortium, i.e., People's Bank, Bank of North India, SCB Bank and PSP Bank, submitted their respective claims. RST Bank filed its claim. The suppliers and service providers filed their respective claims as well.

GKCL submitted its claim as a Financial Creditor. It stated that it was a secured creditor because it had a charge on the storage facilities owned by ACL for which the purchase-money has not been fully paid yet. RP rejected the claim of GKCL stating that it is not a Financial Creditor. GKCL filed an application before the Adjudicating Authority contesting the decision of RP to reject its claim. GKCL filed its claim as an Operational Creditor till the time the Adjudicating Authority decides on the issue whether GKCL is a financial creditor to ACL.

The first meeting of the Committee of Creditors (CoC) of ACL was held on 27.04.2018. It was resolved that Ms. Pooja Prakash be continued as Resolution Professional (RP) in the matter.

The list of Creditors prepared by the RP was presented as below:

Particulars	Principal Amount (in INR crores)	Outstanding Amount as at 30.03.2018 (in INR crores)
People's Bank	875	800
Bank of North India	625	555
SCB Bank	625	555
PSP Bank	375	250
RST Bank	200	90
GKCL	500	250
GKL and Other Dealers	2	2.15
ICL	0.15	0.35
Raw material Suppliers	1.5	2
Electricity Discom in Rajasthan	1	1.15
Employees & Workmen of ACL	1.25	1.85
XYL Security Agency	0.25	0.30
TTCL	0.5	0.6

In the first CoC meeting of ACL, RP proposed raising an interim finance for INR 5 crores so as to continue minimal operations at the plant in Rajasthan, to start the construction work at Karnataka site and to pay salaries of workers and employees for the period since the commencement of CIRP. RP reasoned that TTCL has to be given assurance of payment during the Corporate Insolvency Resolution Process (CIRP) in order to avoid value erosion of assets

of the company in Karnataka. The consortium lenders led by People's Bank agreed to give interim finance.

RST Bank contested that the RP's proposal for interim finance, to the extent that payment was proposed to be made to TTCL, was unnecessary and contrary to the provisions of law. Upon approval of the interim finance proposal by majority members of the CoC of ACL, RST Bank filed an application before the Adjudicating Authority to prevent the RP from making any payment to TTCL. RST Bank argued that any interim finance raised by the RP shall be used for conducting the insolvency resolution process and for maintaining the debtor as a going concern, but it cannot be used for building new assets during CIRP. RST Bank also alleged that the payment of INR 20 lakhs to TTCL is an avoidable transaction under the law and that such transaction was carried out with intent to defraud the creditors of ACL.

RST Bank also proceeded to invoke the personal guarantee against Mr. Arvind Kumar. Mr. Arvind Kumar, promoter of ACL, opposed this. RST Bank filed an application before the Adjudicating Authority to enforce personal guarantee against Mr. Arvind Kumar for the debt owed by ACL. Mr. Arvind Kumar contested this application.

Out of the interim finance amount of INR 5 crores, RP of ACL set aside INR 2.5 crores for running operations at the manufacturing unit, which included money for purchasing power from APL. The remaining funds were disbursed amongst TTCL, workers and employees of ACL and remuneration to valuers, RP, auditors and other process costs.

ALSL had financed over 80 container vessels from a consortium of three banks/ financial institutions, viz Container Fin, Mecator Fin and Citi Fin, totalling 1.5 billion USD. Citi Fin was the leading lender of the consortium. During 2015 and 2016, ALSL provided loans of USD 100 million to ACL. Due to the high amount of loans and reducing margins, ALSL started falling behind in servicing its loan obligations to the consortium. By January 2018, it had already defaulted on certain loan obligations. In February 2018, Citi Fin filed an involuntary bankruptcy petition under Chapter 11 in the US Bankruptcy Court, as per section 303 of the US Bankruptcy Code. Mr. Kelvin Murray was appointed as the interim trustee by the bankruptcy court. Mr. Kevin applied as a foreign representative to the Adjudicating Authority

in India for recognition of the foreign proceeding. He sought cooperation in relation to the amount of USD 100 million loaned by ALSL to ACL, which is claimed to have been paid out of the amount loaned by Citi Fin and other consortium lenders to ALSL.

APL has been defaulting on its loan instalments since May 2017. In May 2018, People's Bank filed an application for initiation of corporate insolvency resolution process against APL. The Adjudicating Authority admitted the application and appointed Mr. Mahesh Kumar as Interim Resolution Professional (IRP). Mr. Mahesh took charge of the affairs of the APL. The IRP took note of the provisions of the PPA and wrote to the RP of ACL demanding full and complete payment of dues from ACL as per the terms of the PPA. The RP of ACL refused stating that ACL is itself in dire need of funds and hence, it cannot make payments to APL now. The IRP of APL submitted a claim for 95 crores to the RP of ACL. The claim was rejected by RP of ACL. RP of ACL stated that upon conducting forensic audit, she has found that certain transactions entered into by ACL before the commencement of insolvency resolution process was avoidable. She further stated that she has found that in the year 2016-17, ACL made payments to APL in excess of its obligation under the PPA.

The RP of ACL filed an application before the Adjudicating Authority for avoidance of certain transactions that led to payment of excess amount of INR 20 crores to APL. APL opposed this application stating that ACL is in default to APL and hence APL's claim as an Operational Creditor shall be admitted by the RP. APL argued that even if excess value was received by APL in 2016-17, such amount shall be allowed to be set off against the amounts owed to APL under the PPA.

After confirmation of his appointment as Resolution Professional of APL, Mr. Mahesh found that the mortgage created by APL over its land for securing the extended credit facility of ACL is an avoidable transaction under the law and also concluded that such transaction was wrongful and intended to defraud the creditors of APL. The RP found that APL undertook this mortgage on its land when APL itself was in dire need of funds and had by that time already defaulted in paying the workers on its rolls. The RP filed an application before the Adjudicating Authority for release of the mortgage over the land of APL and for other

appropriate remedies under the law. In the application, the RP alleged that the mortgage created for the benefit of ACL constituted asset-stripping of APL.

Meanwhile, RP of ACL made an invitation for resolution plan. RP of ACL also published the Evaluation Matrix and created a virtual data room with Information Memorandum and other relevant information. Soon, the RP started receiving resolution plans from various investors. The assets of ACL are much sought-after in the distressed assets market. ACL's superior plant and machinery, its efficient transportation and logistical networks, etc make ACL an extremely valuable investment opportunity in a highly competitive market. RP of ACL received several resolution plans.

In the 7th meeting of the Committee of Creditors of ACL held on 27.08.2018, the CoC resolved to file an application for extension of CIRP to another 90 days. The Adjudicating Authority allowed the application and granted an extension of 90 days. Subsequent to the extension, the CIRP was set to conclude on 25th December 2018.

As per the invitation for resolution plan published by RP of ACL, the deadline for submission of plan was 15.10.2018. Strictly on the basis of the Evaluation Matrix, the RP team of ACL evaluated the resolution plans. The resolution plan of Rambo Cements Limited (RCL) emerged as the plan with the highest score. The resolution plan of JM Cements Limited (JMCL) came a close second in the evaluation. The highest scoring resolution plan was submitted before the Committee of Creditors of ACL for approval. Further negotiations ensued between the members of CoC and the successful resolution applicant, RCL, regarding the haircut of 30 percent haircut for financial creditors proposed in the resolution plan. During the course of these negotiations, JMCL revised its resolution plan and submitted the same to the RP of ACL. The revised plan of JMCL offered a 10 percent haircut for financial creditors with a closing date for implementation of the plan, sooner than that offered by RCL. However, RP refused to accept the plan since it was submitted after the last date for submission of resolution plan fixed by RP and CoC of ACL. Aggrieved by this, JMCL filed an application to the Adjudicating Authority to have its resolution plan accepted by the RP of ACL.

The corporate insolvency resolution process of APL was underway during this time. The RP of APL had invited resolution plans from investors. Since the commencement of insolvency resolution process of ACL, both the manufacturing unit in Rajasthan and the power plant were functioning although the production levels had fallen drastically. The RP of APL had managed to raise some interim finance from its CoC members to pay salaries to employees and workers and to meet other process costs.

The RP and CoC of APL fostered apprehensions that the resolution plan approved for ACL may not take into consideration the interests of APL, specifically the PPA entered into by APL and ACL. They feared that a resolution plan of ACL that adversely affects the PPA would diminish the market value of APL and thus, hurt the interests of its creditors. RP of APL filed an application for impleadment in the suit filed by RP of ACL for approval of resolution plan, seeking protection from premature termination of its PPA with ACL.

The Committee of Creditors approved the resolution plan submitted by RCL. RP submitted RCL's plan before the Adjudicating Authority for approval. The Adjudicating Authority listed all applications arising in this matter, including the applications filed by RP of APL, for hearing on 16th November 2018.

Memorandum & Pleadings

1st Stage: Memorial selection rounds- submission of memorandum by 31st August 2018

Prepare a memorandum of analysis of all issues from all possible parties and angles. This is non-adversarial, not on behalf of any particular party.

2nd Stage: Preliminary Rounds- 16th November 2018

Eight shortlisted teams will be required to present oral submissions & pleadings as under: -

Preliminary Rounds-1: In Prelim round 1, teams will present Resolution Plan on behalf of Resolution Applicant, before a panel comprising of the Resolution, Professional supported by his/her, Legal and Financial advisors There will be a quantitative and qualitative assessment of the resolution plans- both written and oral submissions. This will be non-adversarial, where only one team shall plead/present before one panel.

Preliminary Rounds-2: NCLT proceeding (adversarial) upon the Resolution Plan

3rd Stage: Semi-Final Rounds- 16th November 2018

NCLT proceeding (adversarial) upon the Resolution Plan (4 top teams)

4th Stage: Final Rounds- 17th November 2018

NCLT proceeding (adversarial) upon the Resolution Plan (2 top teams)

Note on Authors:

This Moot Proposition has primarily been drafted by NLU Alumni- Mr. Hemant Kothari and Mr. R. S. Lakshman in consultation with Dr. Risham Garg. It has been reviewed by Mr. Anoop Rawat, Partner at SAM, Ms. Srishti Kapoor, Associate at KDB.

The Concept of Moot, Proposition along with the final review has been taken care of by Mr. Sumant Batra, Chief Mentor of SIPI.

We would like to express our deepest appreciation for their valuable time and efforts.

Teams are forbidden to contact any of the above-mentioned individuals, any violation of this may result in penalties extending up to disqualification.