NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 344 – 345 of 2020

[Arising out of Impugned Order dated 28th November 2019 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench in Miscellaneous Applications No. MA/1039/2019 & MA/691/2019 in Company Petition (IB) No. 156/MB/2017]

IN THE MATTER OF:

Kotak Investment Advisors Limited
27 BKC, 7th Floor, Plot No. C-27
G Block, Kurla Complex Bandra (East)
Mumbai – 400051, India ...Appellant

Versus

1. **Mr Krishna Chamadia**
   (Resolution Professional in the matter of Ricoh India Limited)
   B, 1805, Raheja Height
   Off General, A K Vaidya Marg
   Dindoshi, Malad, East, Maharashtra ...Respondent No.1

2. **Mr Kalpraj Dharamshi**
   Successful Resolution Applicant
   At: Quest, 1073 Rajabhau
   Desai Marg Prabhadevi
   Mumbai – 400025 ...Respondent No.2

3. **Ms Rekha Jhunjhunwala**
   Successful Resolution Applicant
   At: 16-17C IL Palazzo CHS
   Little Gibbs Road, Malabar Hills
   Mumbai – 400006 ...Respondent No.3

Present:

For Appellant : Mr Ramji Srinivasan, Sr Advocate with
Mr Suresh Dutt Dobhal, Advocate
Mr Rishab Kapoor and
Mr Shikhar Singh, Advocates

For Respondent : Mr Krishnendu Datta, Mr Prateek Kumar,
Ms Raveena Raj and Mr Rohit Ghosh,
Advocates for R-2 & R-3.
Ms Pooja Mahajan and Ms Avni Shrivastav,
Advocates for RP/R-1

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These Appeals emanate from the two impugned Orders, both dated 28th November 2019, passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench in Miscellaneous Applications No. MA/1039/2019 and MA/691/2019 in Company Petition (IB) No. 156/MB/2017 whereby, the Adjudicating Authority, vide the first impugned Order, has rejected the Application No. MA/1039/2019 raising objections against the alleged illegalities committed in the conduct of CIRP and vide the second impugned Order passed in MA 691/2019, the Adjudicating Authority has approved the Resolution Plan. The Parties are represented by their original status in the Company Petition and Miscellaneous Applications for the sake of convenience.

2. The brief facts of the case are as follows:

MA No.1039 of 2019 is filed by M/s Kotak Investment Advisors Limited (from now on referred to as KIAL), stated to be unsuccessful Resolution Applicant. The Appellant has filed this Application on 14th March 2019 seeking rejection of the approved Resolution Plan submitted by a consortium of Kalpraj Dharamshi and Rekha Jhunjhunwala, based on the illegalities committed in the conduct of Corporate Insolvency Resolution Process. Since the Adjudicating Authority has passed Orders in MA No. 1039 of 2019 and MA No.691 of 2019 at the same time, and the facts being the same, both these appeals are taken together.

The Appellant/Applicant contends that an advertisement was made by the Resolution Professional on 09th July 2018 calling for Expression of Interest (from now on referred to as EOI). Pursuant to it, Phoenix Asset Reconstruction Company Limited, an Associate of the Appellant/Applicant, submitted EOI on 07th August 2018. On receiving EOI, the Resolution Professional had issued "Process Memorandum" on 17th & 27th August 2018 calling for submission of Resolution Plan. In the invitation for Resolution Plan, the last date for submission of Resolution Plan was 08th January 2019. Accordingly, Phoenix Asset Reconstruction Company Limited submitted a Resolution Plan on 08th January 2019.

3. Admittedly, two Resolution Applicants had filed their Resolution Plans within the deadline for submission of Resolution Plan. However, the Resolution Applicant Karvy Group, tendered its Resolution Plan without furnishing guarantee of Rs.10 Crore. On 10th January 2019, the Committee the Creditors (for Short 'CoC') had opened both the Resolution Plans. After that, on 15th January 2019, the Resolution Plans were discussed. In addition to the abovementioned Resolution Plans, two more Resolution Plans were accepted by the Resolution Professional after expiry of the deadline for submission of the Resolution Plans, one from "WeP" Peripherals on 13th January 2019 and another on 28th January 2019 from a consortium of Kalpraj Dharamshi & Rekha Jhunjhunwala.

4. The Applicant/Appellant questioned the Resolution Professional over acceptance of two Resolution Plans that had been submitted after the expiry of deadline for submission of Resolution Plan, without obtaining any CoC

resolution to extend the deadline and issuing notice for inviting EoI from other potential resolution applicants.

5. The CoC and the Resolution Professional, subsequently, permitted the Appellant to submit a revised Resolution Plan on or before 12th February 2019.The grievance of the Applicant/Appellant is that the Successful Resolution Applicant was allowed to submit its Bid after the expiry of the deadline for submission of Resolution Plan when the Bids by other Resolution Applicants had already been opened and deliberated upon by the CoC.

6. The Resolution Professional has contended that correct procedure was followed as prescribed under the Code and accompanying Regulations. It is further contended that the Appellant was one of the four Resolution Applicants who had submitted its Resolution Plan, which was rejected bythe CoC in its Meeting dated 13th February 2019 and on the same date, the Resolution Plan of the Successful Resolution Applicant was approved with 84.36% vote share. It is further stated by the Resolution Professional that an email was received from 'WeP' Solution Private Limited seeking time till 14th January 2019 to file a Resolution Plan. The CoC, in its Meeting dated 11th January 2019 allowed for submission of the Resolution Plan by 'WeP' Solutions Private Limited and in its 11th Meeting held on 24th January 2019, considered the Resolution Plan submitted by WeP Solutions Private Limited. Subsequently, the CoC in its 12th Meeting dated 30th January 2019 approved the joint Resolution Plan submitted by a consortium of Kalpraj

Dharamshi and Rekha Jhunjhunwala by vote share of 85%, which is under challenge in these Appeals.

7. The Adjudicating Authority has rejected the Application MA No. 1039 of 2019 by placing reliance upon the judgement of Hon'ble the Supreme Court of India in *K. Sashidhar v. Indian Overseas Bank & Ors in Civil Appeal No.10673 of 2018,*wherein it is held that the commercial decision of CoC for approval of resolution Plan is non-justiciable and hence, is required to be sanctioned by the Adjudicating Authority.

8. The Adjudicating Authority has further observed, "*it is a case where due opportunity was granted to all the Resolution Applicants. Moreover, the most attractive plan was sanctioned for approval by the Adjudicating Authority".*

9. The Appeal is filed mainly on the ground that impugned Order has been passed in violation of Principles of Natural Justice, as one of the Members of the Bench, which passed the impugned Order, was not a Member of the Bench that had heard the arguments on Application MA No.1039 of 2019.

10. The Appellant contends that the MA No.1039 of 2019 was heard, and the matter was reserved for Order on 3rd July, 2019 by Single Member Bench of Mr. M.K. Shrawat. The MA No.691 of 2019 for sanctioning the Resolution Plan was heard and decided by Division Bench but the argument raised in MA No.1039 of 1019 was never heard by the Technical Member of

the reconstituted Division Bench, which has passed the impugned Order regarding the rejection of the MA No 1039/2019.

11. The Appellant also contends that the Learned Adjudicating Authority has failed to appreciate that the Resolution Professional had accepted two other Resolution Plans, one from "WeP" Peripherals and another from a consortium of Kalpraj Dharamshi & Rekha Jhunjhunwala on 13th January 2019 and 28th January 2019 respectively. The Resolution Professional has not only accepted the Resolution Plan after the expiry of the deadline/cut-off date but also gave a go by to the deadline for submission of Expression of interest, in contravention of the provision of IBC and Regulation thereof. The Adjudicating Authority has failed to appreciate that the successful Resolution Applicant, Kalpraj Dharamshi and Rekha Junjhunwala had been allowed to take part in the Corporate Insolvency Resolution Process (for short 'CIRP') even after expiry of the deadline for submitting Expression of interest and Resolution Plan, which is in contravention of Clause 2.4 of the Process Memorandum issued by the Resolution Professional.

12. Appellant further contends that the Resolution Plan submitted by the Appellant was opened on 09th January 2019 and the fundamentals of the plan and financials of the plan and offers made by Appellant were disclosed to all the participants, including the Resolution Professional. After this, no further fresh bid or offer could have been accepted or considered. But the RP illegally and unlawfully received EOI from Kalpraj Dharamshi & Rekha Jhunjhunwala on 27th January 2019. It is further pleaded that the alleged

action of the RP is unlawful under the teeth of the provision of IBC and Regulation 36A of the CIRP Regulations.

13. The Learned Counsel for the Respondent No 2 & 3 contends that the Appeals are barred by limitation under Section 61(2) of the I&B Code, 2016 and thus, are not maintainable.

14. In reply to the objections of the Respondents regarding maintainability of the Appeals on limitation issue, the Appellant contends that the Appeal is filed against the impugned Order dated 28th November 2019. The certified copies of the Orders were issued on 18th December 2019, which were challenged before the Hon'ble High Court of Judicature of Bombay in Writ Petition No. 3621 of 2019. The Hon'ble High Court vide Order dated 28th January 2020 dismissed the abovementioned Writ petition on the ground that alternate and equally efficacious remedy is available. Copy of the Order of the Hon'ble High Court dated 28th January 2020 was uploaded on the website of the Hon'ble High Court on 04th February 2020, when the Appellant had the opportunity to have access to the same. After that, these Appeals were filed on 18th February 2020.

15. Since the certified copy of the impugned Order dated 28th November 2019 were issued on 18th December 2019, therefore, the time spent in obtaining the certified copy will not be computed for limitation. Thus, from 18th December 2019, 30 days were available for filing Appeal under Section 61(2) of the I&B Code, 2016.

16. It is also pertinent to mention that after getting the certified copy of the impugned Order, it was challenged before the Hon'ble High Court. Therefore, the time spent in the writ petition before the Hon'ble High Court shall be excluded from the computation of the limitation period. It is also evident that the copy of Judgment of the Hon'ble High Court was uploaded on the website on 04th February 2020. Therefore, the time spent in disposal of Writ Petition till 04th February 2020 shall be excluded from the computation of limitation, as per Section 12 of the Limitation Act.

17. Appellant has also applied under Rule 11 of NCLT Rules, read with Section 5 of the Limitation Act for Condonation of the delay in filing the Appeals wherein it is stated that there is an inadvertent delay of 31 days in filing the Appeals.

18. Since the Impugned orders were passed on 28th November 2019 in MA No. 1039 of 2019 and MA No. 691 of 2019 and certified copy of the impugned Order was received on 18th December 2019, after that impugned orders were challenged before the Hon'ble High Court in Writ Petition No. 3621 of 2019. The Hon'ble High Court dismissed the Writ Petition on 28th January 2020 which was uploaded on the website 04th February 2020. After that, this Appeal is filed in the shortest possible time, i.e. on 18th February 2020. Therefore, the present Appeals are maintainable and not barred by limitation.

19. We have heard the arguments of the Learned Counsel for the parties and perused the records.

20. Based on the submissions of the parties, issues that arise for our consideration are as follows;

1. Whether the Resolution Professional with the approval of CoC, was authorized to accept the Resolution Plans after the expiry of the deadline for submission of the Bid, without extending the timeline for submission of EOI?

2. Whether the act of the Resolution Professional, with the approval of CoC, in accepting the Resolution Plan after the expiry of the deadline for submission of Resolution Plan, can be treated as an act under commercial wisdom of the CoC?

3. Whether Amended Regulation 36A, which came into effect from 04.07.2018, will be applicable in this case, where CIRP is initiated against the Corporate Debtor before coming into force of the amended Regulation?

4. Whether Judgment of the Bench consisting of Member (Technical), who has not heard the argument regarding MA No.1039 of 2019 is valid?

Issue No 1 & 2;

The Appellant has challenged the illegalities and alleged fraud committed by the Resolution Professional in accepting the Resolution Plan submitted by a consortium of Kalpraj Dharamshi and Rekha Jhunjhunwala.

Admittedly, in the instant case the deadline for submission of Resolution Plan was 08th January 2019, and only two Resolution Applicants had submitted their Resolution Plans within the timeline. The first being KIAL/Appellant and other being one Karvy Group. Subsequently, CoC in its Meeting Dt. 10th January 2019 opened the two Resolution plans submitted by Appellant (KIAL) and Karvy Group and intimated to the Bombay Stock Exchange about the same. Furthermore, KIAL/Appellant was given to understand that CoC at its Meeting held on 15th January 2019, discussed in detail the Resolution Plans submitted by KIAL/Appellant and Karvy Group and clarifications/amendments were sought to the said plans. Several meetings were held, and correspondences were exchanged between the RP and KIAL/Appellant, detailing the revisions to be made by KIAL. However, it is after the opening of the bids and deliberation on the said two Resolution Plans, the successful Resolution Applicant had submitted the belated Resolution Plan.

21. The Resolution Professional belatedly accepted Resolution Plans of 'WeP' and from a consortium of Kalpraj Dharamshi & Rekha Jhunjhunwala on 13th January 2019 and 28th January 2019, respectively. Such acceptance of Resolution Plan was well beyond the stated cut-off date/deadline of 08th January 2019. The delayed submission of these two Resolution Plans is evidenced from the letters dated 14th January 2019 and 29th January 2019, written by Resolution Professional to the Bombay Stock Exchange, to intimate about the receipt of the two Resolution Plans.

22. Appellant has filed a copy of Form-G issued by the Resolution Professional on24th August 2018, 09th November 2018 and 11th December 2018 respectively. Form-G issued on 24th August 2018 shows that last date for submission of Resolution Plan was 28th September 2018. After that, Form 'G' published on 09th November 2018 shows the last date for submission of Resolution Plan to be 13th December 2018. Thereafter, Form-G was issued on 11th December 2018 in which the last date for submission of Resolution Plan was 08th January 2019 up to 6:00 pm. Thereafter, no further invitations for the invitation of Expression of Interest were published in Form-G, and after the expiry of the deadline for submission of EOI, two other Resolution Plans have been accepted by the Resolution Professional.

23. The Resolution Plan submitted by the Appellant was opened on 09th January 2019, and the fundamentals of the plan and financials of the plan and offer made by Appellant were disclosed to all the participants, including the Resolution Professional. After this, no further fresh bid or offer could have been accepted or considered. But, the RP illegally and unlawfully received EOI from Kalpraj Dharamshi & Rekha Jhunjhunwala on 27th January 2019, i.e. after the expiry of the deadline for submission of EOI.

24. The Resolution professional has accepted the Resolution Plan of Kalpraj after the expiry of the deadline for submission of Expression of Interest, under Clause 10.4 of the Process Memorandum. The Resolution Professional contends that under clause 10.4 of the Process Memorandum, he was authorized to accept any Resolution Plan, at any stage of CIRP with the approval of CoC.

25. It is contended that the use of the phrase, in Clause 10.4 of the process memorandum, stating that the Resolution professional shall be free to examine such Resolution Plan with the approval of the CoC' **at any stage of the resolution plan process'**, and the applicant will not have any right to object to submission or consideration of such plan, does not provide immunity to the Resolution Professional to accept the Resolution Plan of any Resolution Applicant, which has not submitted Expression of Interest/Bid within the timeline prescribed in the notification for inviting Expression of interest.

26. Appellant contends that the Resolution Professional/Respondent No.1 received the EOI from Respondents No.2 and 3 on 27th January 2019, i.e. much after the expiry of the deadline for submission of interest (i.e. 08th August 2018). A Non-Disclosure Agreement was also signed on the same day. The Resolution Professional allowed the Successful Resolution Applicant to have access to data Room post 08th January 2019 (cut of date to submit Resolution Plan) and also post 08th August 2018 (the last date to submit EOI) even without the approval of the Committee of Creditors or the Adjudicating Authority. However, access to the data Room of the Corporate Debtor had been closed for all concerned, post 07th January 2019. It is further alleged by the Appellant that the Adjudicating Authority has failed to appreciate that the CoC had approved a Resolution Plan submitted by a consortium of minority shareholders of the Corporate Debtor, which provides for significant, if not wholly unjustified, payouts to be made to the minority shareholders at exorbitant rates for their holding from the

Corporate Debtor. This blatant conflict of interest is ignored by the Resolution Professional. Regulation 38(3) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation 2016 mandates to include complete details and particulars of the Resolution Applicants, to enable the CoC to assess the credibility of the Applicant and connected persons to take a prudent decision. The role of minority shareholders as Resolution Applicant cannot be considered and credible, especially, because they first initiated a legal proceeding against the Corporate Debtor. The Appellant has raised several other objections regarding the decision of CoC in accepting the Resolution Plan of Kalpraj Dharamshi and Rekha Jhunjhunwala.

27. It is also noticed that two Resolution Plans which were submitted within the deadline, were under consideration before the CoC. But before taking any decision on these Plans, the Resolution Professional accepted two other Resolution Plans, after the expiry of the deadline for submission of the Resolution Plan. If the Resolution Professional, on the advice of CoC had decided to extend the timeline for submission of bids, then it was mandatory to issue a notification in Form-G, for inviting EOI and in compliance of sub-regulation (5) of Regulation 36A of the CIRP Regulation. Only after publication of fresh invitation in Form-G and fixing a deadline, the Resolution Plan could have been accepted with the consent of CoC. It cannot be said that as per Process Memorandum, the Resolution Professional was entitled to accept any Resolution Plan at any point of time, without following the due process under the guise of maximization of value. The alleged act of the Resolution Professional in accepting the Resolution Plan after the expiry

of the deadline for submission of Resolution Plan is arbitrary, illegal and against the principle of natural justice and cannot be treated as an act within the commercial wisdom of the CoC.

28. The Learned Adjudicating Authority, while rejecting MA No.1039 of 2019, observed that:

> *"4. Pleadings and Arguments of both the sides are considered. Keeping brevity in mind the Arguments revolving around certain case laws and legal ratio laid down therein are not reiterated. At the outset it is prudent to place reliance on a decision of Hon'ble Supreme Court pronounced in the case of K. Sashidhar V/s Indian Overseas Bank and Ors. in Civil Appeal No. 10673 of 2018 Order dated 05.02.2019, wherein it is held that the "Commercial decision" of Committee of Creditors is required to be sanctioned by the Adjudicating Authority when a Resolution Plan is submitted for approval. In addition to this Judgment, this Bench has also carefully perused the dates on which the Committee of Creditors Meetings were held time to time. As prescribed under the Code and the Regulations the Committee of Creditors as well as the Resolution Professional have followed the procedure which is evident from the list of events placed for due consideration of this Bench. It is a case where due opportunity was granted to all the Resolution Applicants, moreover, the most attractive plan was sanctioned for approval by the Adjudicating Authority. This is not a case where the Committee of Creditors has not applied commercial wisdom judicially. Rather the basis on which the Committee of Creditors had approved the Resolution Plan shall again be scrutinized at the time of considering the Resolution Plan placed before this Bench for due approval as per law."*
>
> *"Verbatim copy"*

In case of Committee of Creditors of Essar Steel India Limited *v.* Satish Kumar Gupta and Others; 2019 SCC Online SC 1478, Hon'ble the Supreme Court of India has dealt with the powers of the Adjudicating Authority and the Appellate Tribunal for exercising limited jurisdiction for approval of Resolution Plan. In this case, Hon'ble Supreme Court has held;

> *"**44.** On a bare reading of the provisions of the I&B Code, it would appear that the remedy of Appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)" - which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of Appeal including the width of jurisdiction of the appellate authority and the grounds of Appeal, is a creature of statute. The provisions investing jurisdiction and authority in the NCLT or NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner. Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds - be it under Section 30(2) or under Section 61(3) of the I&B Code - are regarding testing the validity of the "approved" resolution plan by the CoC; and not for approving the resolution plan*

which has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

45. *Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the Resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.*

46. *In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 06.06.2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter-III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October, 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified percent (25% in October, 2017; and now after the amendment w.e.f. 06.06.2018, 44%). The inevitable outcome of voting by not less than requisite percent of voting share of financial creditors to*

disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

At best, the Adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors - be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the Appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite percent of voting share to approve the resolution plan; and in the process authorize the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

48. *Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of Section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and Section 32 read with Section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in K. Sashidhar (supra)."*

29. Based on the ratio of the above case-law of Hon'ble the Supreme Court of India, the CoC indeed, has the power to exercise its commercial wisdom in approval or rejection of the Resolution Plan. However, the same cannot

mean that the Resolution Professional, whether with the approval of CoC or without that, or in pursuance of Process Memorandum under the guise of maximization of value, is empowered to adopt a procedure in the conduct of CIRP which is, ab-initio illegal, arbitrary and against the Principles of Natural Justice.

30. We are of the considered opinion that after the expiry of the deadline for submission of Resolution Plan, the Resolution Professional, with the approval of CoC, was fully authorized to invite fresh invitation for Expression of Interest for submission of Resolution Plan. It is apparent that three notices for inviting Expression of Interest were issued and the offer was open to the public to submit Resolution Plans. When Expression of Interest is invited, then notices should be published, and the offer for inviting EOI should be made public. It is noticed that the Resolution Professional had earlier issued public notices in Form-G as per Regulation 36A on 24th August 2018, whereby offer was made public to submit EOI/Resolution Plan by 06:00 pm on 28th September 2018. It is also on record that another notice in Form-G was published by Resolution Professional on 09th November 2018, which was also made public and the offer was made to submit Resolution Plan by 06:00 pm on 13th December 2018. Thereafter, again notice inviting Expression of Interest was published on 11th December 2018 in which the deadline for submission of Resolution Plan was 08th January 2019. All the above notices inviting Expression of Interest were made public, and Resolution professional under Regulation 36A published the notice in Form-G as per CIRP Regulation, 2016.

31. We fail to understand as to why the Resolution Professional had deviated from the earlier procedure of publication of notice for the invitation of EOI. Per contra, the Resolution Professional has accepted the Resolution Plan of the successful Resolution Applicant Kalpraj Dharamshi & Rekha Jhunjhunwala after the expiry of the deadline for submission of Resolution Plan without following the due process, under the guise of maximization of value. The act of the Resolution Professional to accept the Resolution Plan after opening the other bids, which were all submitted within the deadline for submission of Resolution Plan cannot be justified by any means and is a blatant misuse of the authority invested in the Resolution Professional to conduct CIRP. However, if the CoC took a commercial decision to extend the timeline, it should have done so by publishing a fresh notice in Form 'G' under Regulation 36A of the CIRP Regulations. By adopting a special procedure for accepting the Resolution Plan of the Successful Resolution Applicant, under the guise of maximization of value, the Resolution Professional and the CoC have deviated from the norms prescribed under the Code and the Regulations framed there under, which vitiates the Corporate Insolvency Resolution Process conducted by the RP.

32. It is further to notice that for effective analytical financial bidding and to understand and analyze the status of the company, Resolution Applicants are given access to the data room on the signing of Non-Disclosure Agreement with Resolution Professional. As per terms, the said data room was closed on 07th January 2019, and after this date, no one has access to the data room.

33. There are remarkable similarities between the belated Resolution Plan submitted by a consortium of Kalpraj Dharamshi and Rekha Jhunjhunwala with Appellants/KIAL's Resolution Plan, that was submitted, opened for discussion and deliberated upon within the timeline.

34. The Counsel for the Respondents contends that for maximization of value the Resolution Plan submitted by a consortium of Kalpraj Dharamshi and Rekha Jhunjhunwala was accepted by the CoC. It is further argued that in the case of Binani Industries, this Appellate Tribunal has justified the negotiation process for maximization of value. It is also contended that process memorandum also authorizes to accept any resolution plan at any stage of CIRP and CoC in its commercial wisdom was fully authorized to do so. Therefore, there is no illegality or irregularity in accepting the resolution plan of the successful resolution applicant Kalpraj Dharamshi & Rekha Jhunjhunwala, after the expiry of the deadline for submission of Expression of Interest. We are not convinced with the submission of the Learned Counsel for the Respondent.

35. The Resolution Professional/Respondent No 1 contends that both the Resolution Plans (i.e. of the Appellant and Successful Resolution Applicant) were before the CoC and, after evaluating both, CoC approved the Resolution Plan of the Successful Resolution Applicant by 84.36% voting share. Only one Financial Creditor, i.e. Kotak Bank holding 0.97% voting share voted in favour of the Appellant's Resolution Plan. The evaluation of Resolution Plans and the selection of one Resolution Plan (of the Successful Resolution Applicant) over another (of the Appellant) is within the

commercial wisdom of CoC, which is not justiciable. The Resolution Professional has placed reliance on the Judgement passed by the Hon'ble Supreme Court in the case of *K. Sashidhar v. Indian Overseas Bank (2019) SCC OnLine SC 257 (para 52)*. It is contended that the Applicant/unsuccessful Resolution Applicant has no vested right that its Resolution Plan should be approved.

36. The Respondent Resolution Professional further contends that as per the terms of the process memorandum guiding the resolution process of the Corporate Debtor (which the Appellant agreed to abide by), the CoC had the sole discretion to adopt the negotiation process as it deemed fit, including simultaneous negotiations with various Resolution Applicants, for maximization of value to the stakeholder in a time-bound manner. In doing so, the CoC was not bound by the concept of H1 bidder, and in fact, no such declaration of H1 or H2 was ever made by the CoC. Both the Resolution Plans were put before the CoC for voting wherein, the Resolution Plan of Successful Resolution Applicant was overwhelmingly approved while the Resolution Plan of Applicant/Appellant was rejected.

37. The Respondent further submits that Clause 8.1 of the Process Memorandum (which was binding on all the Resolution Applicants) envisages that the CoC may vote on one or more Resolution Plans presented to it and a Resolution Applicant, whose plan was finally approved by CoC, would be declared successful. Clause 8.1 of the Process Memorandum is given as under:

"8.1 The Committee of Creditors ***may vote on one or more Resolution Plans presented to it,*** *and the Qualified Applicant whose Resolution Plan is approved by the Committee of Creditors will be identified as the Successful Applicant. The Committee of Creditors shall have the right to approve the Resolution Plan subject to modifications it deems fit."*

38. The Resolution Professional has submitted his response to the allegations of accepting the Resolution Plan after the expiry of the deadline. In its response to the above contention, the Resolution Professional submits that Clause 10.4 of the Process Memorandum provides that at any stage of the CIRP, the Resolution Professional with the approval of CoC shall be free to examine any Resolution Plan. Clause 10.4 of the Process Memorandum is as under:

"10.4 If any Resolution Plan is received by the Resolution Professional from any eligible Applicant(s) ***at any stage of the Resolution Plan Process, the Resolution Professional shall be free to examine such Resolution Plan with the approval of Committee of Creditors and the Applicant(s) will not have any right to object to submission or consideration of such plan.****"*

39. Based on Clause 10.4 of the Process Memorandum, the Resolution Professional has contended that the process memorandum had allowed consideration of the plans received after last dates with CoC approval. The Appellant has agreed to abide by the terms of the process memorandum and actively participated in the process. Therefore, the Appellant has no right to

object to the consideration of the Resolution Plans received after 08th January 2019.

40. That the Resolution Professional has placed reliance on the case-law of this Appellate Tribunal in the matter of Binani Industries Ltd.,(2018) SCC Online NCLAT 565, wherein this Appellate Tribunal has upheld the principle of maximization of value of the assets. In this case, this Appellate Tribunal has held that;

> **"31.** *The Adjudicating Authority has noticed that the 'Committee of Creditors' had extensive negotiations and consultations with the 'Rajputana Properties Private Limited' on the ground that it was the highest' Resolution Applicant' and also obtained certain clarification; after due deliberation voted in favour of the 'Resolution Plan' of the 'Rajputana Properties Private Limited' in its Meeting held on 14th March, 2018. At the same time the 'Committee of Creditors' discriminated with the other 'Resolution Applicants' which will be evident from the fact* ***that the proposal for negotiation and better proposal given by the 'Ultratech Cement Limited' was not at all considered though it was submitted on 8th March, 2018 i.e. much prior to the approval of the plan (14th March, 2018****). The 'Committee of Creditors' have taken plea that the revised offer given by 'Ultratech Cement Limited' was merely an email with an offer. The other plea taken was that the offer was not made in accordance with the 'process document' and if it is considered then it would be a deviation of the process laid down in the 'process document' by the 'Committee of Creditors'. Third objection was that the offer was beyond the time as stipulated under the 'I&B Code'.*

32. *The Adjudicating Authority has rejected such objections by detailed impugned Order. It appears that the 'process document' was issued on 20th December, 2017 which inter alia stipulated general and qualitative parameters. It clearly indicated that 'Committee of Creditors' will negotiate only with the 'Resolution Applicant' which reveals highest score based on the evaluation criteria and whose 'Resolution Plan' is in compliance with the requirements of the 'I&B Code' as confirmed by the 'Resolution Professional'. We have dealt with the object of the 'I&B Code' as recorded above. The 'Resolution Professional' as well as the 'Committee of Creditors' are duty bound to ensure maximization of value within the time frame prescribed by the 'I&B Code'. Such an object in finding out a 'Resolution Applicant' who can offer maximum amount so as to safeguard the interest of all stakeholders of the 'Corporate Debtor' is lacking in the case in hand from the side of the 'Committee of Creditors'.*

33. *In the present case, the 'Committee of Creditors' not only failed to safeguard the interest of the stakeholders of the 'Corporate Debtor' while approving the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited', also ignored the revised 'Resolution Plan' offered by 'Ultratech Cement Limited' which has taken care of maximization of the assets of the 'Corporate Debtor' and also balanced the claim of all the stakeholders of the 'Corporate Debtor'.*

34. *Section 25 (2) (h) provides invitation of prospective lenders, investors and any other persons to put forward a 'Resolution Plan'. Submission of revised offer is in continuation of the 'Resolution Plan' already submitted and accepted by the 'Resolution Professional'. It is not in dispute that after invitation was called for, the 'Ultratech Cement Limited' submitted the revised 'Resolution Plan' on 12th February, 2018 i.e. well within the time. It is not the case of the 'Committee of Creditors' that the*

plan of the 'Ultratech Cement Limited' was in violation of Section 30(2) of the 'I&B Code'. The 'Resolution Plan' having submitted by 'Ultratech Cement Limited' within time on 12th February, 2018, it was open to the 'Committee of Creditors' to notice the revised offer given by 'Ultratech Cement Limited' on 8th March, 2018. The 'Committee of Creditors' has taken note of revised offer given by the 'Rajputana Properties Private Limited' on 7th March, 2018 but refused to notice the revised offer submitted by 'Ultratech Cement Limited' on 8th March, 2018 i.e., much prior to the decision of the 'Committee of Creditors' (14th March, 2018).

39. *On a careful reading of the aforesaid clauses, it is clear that all the 'Resolution Plans' which meet the requirements of Section 30(2) of the 'I&B Code' are required to be placed before the 'Committee of Creditors' and the 'Resolution Professional' can review the 'Resolution Plan' and the 'Committee of Creditors' is entitled to negotiate and modify with consent of the 'Resolution Applicant'. To apply this clause there is no time limit prescribed except that the 'Resolution Process' should be completed within the stipulated period of 180 days or maximum 270 days.*

40. *The 'Committee of Creditors' have failed to notice the aforesaid 'process document' and the provision of the 'I&B Code'. Only considering one of the 'Resolution Plan' of 'Rajputana Properties Private Limited' and ignoring the other 'Resolution Plans' including that of the 'Ultratech Cement Limited' which are in consonance with Section 30(2) for the purpose of negotiation and for maximization of the value of the assets. Non-application of mind by the 'Committee of Creditors' and discriminatory behavior in approving the plan submitted by the 'Rajputana Properties Private Limited' is apparent.*

49. *According to learned Senior Counsel for the 'Rajputana Properties Private Limited', the revised offer was submitted by*

'Ultratech Cement Limited' at a belated stage on 8th March, 2018, only after becoming aware of the financial elements of 'Rajputana Properties Private Limited'. However, it is not clear that as to how revised 'Resolution Plan' submitted by the 'Resolution Professional' on 7th March, 2018 before the 'Committee of Creditors' was made known to the 'Ultratech Cement Limited' who submitted its revised plan on 8th March, 2018.

50. *From the record it will be evident that 'Ultratech Cement Limited' always offered for revision of its 'Resolution Plan' and having noticed that an opportunity given to the 'Rajputana Properties Private Limited' on 7th March, 2018, it submitted the revised offer on 8th March, 2018. The revised offer of 'Ultratech Cement Limited' is Rs. 2,427 Crores as against the offer of the 'Rajputana Properties Private Limited' which is Rs. 2,224 Crores. Thereby there is a gap of Rs. 203.1 Crores.*

61. *Therefore, according to learned Senior Counsel for the 'Committee of Creditors', if need be and if an extraordinary situation so arises, the 'Committee of Creditors' holds the discretion in conformity with the Regulations framed by the Board to extend the timeline over and beyond the 'process documents'. The said fact is also evidenced in the proviso to Clause 1.3.1 of the 'process document' which provided that even after the deadline of the submission of the 'Resolution Plan', any 'Resolution Plan' could be verified by the 'Resolution Professional' as per 'I&B Code' and be considered by the 'Committee of Creditors'. However, it is also provided that the 'Committee of Creditors' may it its discretion, evaluate, accept or reject such 'Resolution Plans'."*

In the abovementioned case, this Appellate Tribunal has upheld the actions taken for maximization of the assets of the corporate debtor, i.e.

Negotiations with the Resolution Applicants. It is further held **that all the 'Resolution Plans' which meet the requirements of Section 30(2) of the 'I&B Code' are required to be placed before the 'Committee of Creditors' and the 'Resolution Professional' can review the 'Resolution Plan' and the 'Committee of Creditors' is entitled to negotiate and modify it with the consent of the 'Resolution Applicant'. However, the CoC can negotiate with only those Resolution Applicants whose plans are already under consideration and which otherwise also, is compliant with the provision of Sec 30(2) of the Code, for maximization of assets of the Corporate Debtor.** It does not mean that the Resolution Professional or the CoC is authorized to accept a Resolution Plan from a new Resolution Applicant that had not submitted the EOI within the prescribed timeline.

41. The Ld Counsels for the Respondent further argued that the acceptance of the Resolution Plan is under the exercise of commercial wisdom of CoC which is non-justiciable as per the law laid down by Hon'ble the Supreme Court of India in case of ***K. Sashidhar v. Indian Overseas Bank*, (2019) 12 SCC 150: (2019) 4 SCC (Civ) 222: 2019 SCC OnLine SC 257 at page 183.**

42. In the above mentioned case, Hon'ble the Supreme Courthas held;

> **"52.** *As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating Authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating Authority (NCLT) with the jurisdiction or Authority to analyze or evaluate the commercial decision of CoC much less to enquire into the justness of the*

rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating Authority. That is made non-justiciable.

59. *In our view, neither the adjudicating Authority (NCLT) nor the appellate Authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the*

financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

64. *Suffice it to observe that in the I&B Code and the regulations framed the reunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating Authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the Resolution professional precedes the consideration of the resolution plan by CoC. The Resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At best,* ***the adjudicating Authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors — be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at***

the time of voting. *To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite per cent of voting share to approve the resolution plan; and in the process authorize the adjudicating Authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating Authority under Section 31 of the I&B Code dealing with approval of the resolution plan."*

43. In the above case, Hon'ble the Supreme Court has laid down the law that the Adjudicating Authority (NCLT) may cause an inquiry into the "approved" Resolution Plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. But it cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors — be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the appellate Authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code.

44. Thus, it is clear that for approval of Resolution Plan the Adjudicating Authority can only exercise power U/S 30(2) read with Sec 31(1) and the Appellate Court can only exercise its power **under Sec 61(3) of the I&B Code**, which provides that;

> An appeal against an order approving a resolution plan under Section 31 may be filed on the following grounds, namely—

(i) the approved resolution plan is in contravention of the provisions of any law for the time being in force;

(ii) there has been material irregularity in exercise of the powers by the Resolution professional during the corporate insolvency resolution period;

(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;

(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or

(v) the resolution plan does not comply with any other criteria specified by the Board.

Thus it is clear that approved Resolution Plan can be challenged before the Adjudicating Authority on limited grounds referred to in Section 30(2) or the Appellate Authority on ground of material irregularity in exercise of the powers by the Resolution Professional during the Corporate Insolvency Resolution period. The material irregularity in exercise of powers by the Resolution Professional, even with the approval of CoC, in the conduct of CIRP cannot be treated as an exercise of Commercial Wisdom.

In the instant case, the Adjudicating Authority has not given any finding on the issues raised in MA 1039 of 2019 by the Appellant, specifically regarding illegalities committed, in accepting the Resolution Plan of the successful Resolution Applicant. The Adjudicating Authority has justified the actions of the Resolution Professional on the ground that the alleged act of accepting the Resolution Plan is based on the commercial

decision of the CoC. It is important to mention that the approval of the Resolution Plan depends on the business decision of CoC. Still, the CoC is not empowered to approve the illegalities committed in the conduct of CIRP.

45. In the instant case, the Resolution Professional/Respondent No.1 received the EOI from a consortium of Respondents No.1 and 2 on 27th January 2019, i.e. much after the expiry of the deadline for submission of interest (i.e. 08th August 2018). The Resolution Professional allowed the Successful Resolution Applicant to have access to data Room post 08th January 2019 (cut of date to submit Resolution Plan) and also post 08th August 2018 (the last date to submit EOI) even without the approval of the Committee of Creditors or the Adjudicating Authority. However, access to the data Room of the Corporate Debtor had been closed for other concerned resolution applicants post 07th January 2019. The Bid/Resolution Plan submitted by the Appellant was opened, and deliberations took place on the Resolution Plans already submitted up to the deadline for submission of Resolution Plans. Indeed, the CoC was fully authorized to either accept or reject the Resolution Plan or negotiate with the Resolution Applicants in the exercise of its power under commercial wisdom. But in the exercise of commercial wisdom, CoC was not authorized to approve the arbitrary and illegal conduct of corporate insolvency resolution process, which has been done in this case. After expiry of the deadline for submission of EOI, CoC was fully competent to extend the timeline for submission of EOI. It could have done so by following the Rules and Regulations as per due process. We have noticed that earlier, the RP had thrice issued notices in 'Form G' for

inviting Expression of Interest. As to why the same procedure was not adopted in accepting the Resolution Plan of successful Resolution Applicant/Respondents No. 2 and 3, the RP has failed to come up with any proper justification. At the cost of repetition, we reiterate that illegal exercise of power by the Resolution Professional in conducting CIRP cannot be treated as an exercise of power for maximization of value under Commercial Wisdom.

Issue No 3;

46. It is further contended that the Regulation 36A was amended w.e.f. 04th July 2018, which prohibits the Resolution Plan received after the last date from being considered. In response to the above Regulation, it is contended that in the instant case, the CIRP started on 14th May 2018. Therefore, the amendment introduced vide notification dated 04th July 2018 will not be applicable in this case.

The Ld. Counsel for the Appellant emphasizes on the violation of Amended Regulation 36A of the CIRP Regulations 2016. Amended and unamended Regulation 36A is given as under for ready reference.

Regulation 36A ***Subs. by Noti. No. IBBI/2018-19/GN/REG031, dt. 3-7-2018 (w.e.f. 4-7-2018).*** *Sec 36 A of the Code is as under;*

> *[**36-A. Invitation for Expression of interest**.—(1) The Resolution professional shall publish brief particulars of the invitation for Expression of interest in Form G of the Schedule at the earliest, not later than seventy-fifth day from the insolvency commencement date, from interested*

and eligible prospective resolution applicants to submit resolution plans.

(2) ***The Resolution professional shall publish Form G—***

(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the Resolution professional, the corporate debtor conducts material business operations;

(ii) on the website, if any, of the corporate debtor;

(iii) on the website, if any, designated by the Board for the purpose; and

(iv) in any other manner as may be decided by the committee.

(3) ***The Form G in the Schedule shall—***

(a) state where the detailed invitation for Expression of interest can be downloaded or obtained from, as the case may be; and

(b) provide the last date for submission of Expression of interest which shall not be less than fifteen days from the date of issue of detailed invitation.

(4) The detailed invitation referred to in sub-regulation (3) shall—

(a) specify the criteria for prospective resolution applicants, as approved by the committee in accordance with clause (h) of sub-section (2) of Section 25;

(b) state the ineligibility norms under Section 29-A to the extent applicable for prospective resolution applicants;

(c) provide such basic information about the corporate debtor as may be required by a prospective resolution applicant for Expression of interest; and

(d) not require payment of any fee or any non-refundable deposit for submission of Expression of interest.

(5) ***A prospective resolution applicant, who meet the requirements of the invitation for Expression of interest, may submit Expression of interest within the time specified in the invitation under clause (b) of sub-regulation (3).***

(6) ***The Expression of interest received after the time specified in the invitation under clause (b) of sub-regulation (3) shall be rejected.***

(7) An expression of interest shall be unconditional and be accompanied by—

(a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of Section 25;

(b) relevant records in evidence of meeting the criteria under clause (a);

(c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under Section 29-A to the extent applicable;

(d) relevant information and records to enable an assessment of ineligibility under clause (c);

(e) an undertaking by the prospective resolution applicant that it shall intimate the Resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;

(f) an undertaking by the prospective resolution applicant that every information and records provided in Expression of interest is true and correct and discovery of any false information or record at any time will render the Applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and

(g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of Section 29.

(8) The Resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with—

(a) the provisions of clause (h) of sub-section (2) of Section 25;

(b) the applicable provisions of Section 29-A, and

(c) other requirements, as specified in the invitation for Expression of interest.

(9) The Resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The Resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of Expression of Interest to the committee and to all prospective resolution applicants who submitted the Expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11), the Resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.]

***Regulation 36A has come into force w.e.f. 04th July 2018 prior to this amendment Regulation 36A was as under**:*

Prior to substitution it read as:

*"**36-A. Invitation of Resolution Plans.—**(1) The Resolution professional shall issue an invitation, including evaluation matrix, to the prospective resolution applicants in accordance with clause (h) of sub-section (2) of Section 25, **to submit resolution plans at least thirty days before the last date of submission of resolution plans**.*

(2) Where the invitation does not contain the evaluation matrix, the Resolution professional shall issue, with the approval of the committee, the evaluation matrix to the prospective resolution applicants at least fifteen days before the last date for submission of resolution plans.

(3) The Resolution professional may modify the invitation, the evaluation matrix or both with the approval of the committee within the timelines given under sub-regulation (1) or sub-regulation (2), as the case may be.

(4) The timelines specified under this Regulation shall not apply to an ongoing corporate insolvency resolution process—

(a) where a period of less than thirty-seven days is left for submission of resolution plans under sub-regulation (1);

(b) where a period of less than eighteen days is left for submission of resolution plans under sub-regulation (2).

*(5) **The Resolution professional shall publish brief particulars of the invitation in Form G of the Schedule:***

(a) on the website, if any, of the corporate debtor; and

(b) on the website, if any, designated by the Board for the purpose."

47. Regulation 36A came into force w.e.f. 04th July 2018 by the amendment in CIRP Regulation, 2016. There is nothing in the amended Regulation which provides for retrospective operation of the amended Regulation.

48. However, the Learned Counsel for the Respondent No.1 contends that Regulation 36A(6) was introduced vide Notification No. IBBI/2018-19/GN/REG031, which clearly states that the amended CIRP Regulations shall apply to CIRP commencing on or after 04th July 2018. The law intends that for CIRPs commencing before 04th July 2018 (like the present case), the earlier CIRP Regulation (as they stood before the amendment) should apply. The Corporate Debtor was admitted to CIRP on 14th May 2018, and hence, the amendments introduced vide notification No. IBBI/2018-19/GN/REG031 are not applicable to Corporate Debtor's CIRP.

Regulation 36A(6) was introduced vide Notification No. IBBI/2018-19/GN/REG031, **which clearly states that the amended CIRP Regulations shall apply to CIRP commencing on or after 04th July 2018.**The Corporate Debtor was admitted to CIRP on 14th May 2018, and hence, the amendments introduced vide notification No. IBBI/2018-19/GN/REG031 is not applicable to Corporate Debtor's CIRP.

Issue No. 4;

49. The Appeal is filed mainly on the ground that impugned Order has been passed in violation of Principles of Natural Justice, as one of the Member of the Bench, which considered and pronounced the impugned Order, was not a part of the Bench, which heard argument on MA No.1039 of 2019.

50. Appellant contends that it participated in CIRP of the Corporate Debtor and submitted its Resolution Plan/Bid. The Resolution Professional accepted the two other Resolution Plans, after the expiry of the last date of submission of the Bid. That was done after the Resolution Plan of the Appellant was already opened. The acceptance of the Bid after the expiry of the deadline for submission of EOI and Resolution Plan is illegal and against basic tenets of natural justice. However, Resolution Plan of successful Resolution Applicant, Kalpraj Dharamshi and Rekha Jhunjhunwala is accepted by the Resolution Professional on 28th January 2019, i.e. after the expiry of the deadline for submission of EOI, i.e. .8th Jan 2019 after opening the other bids. After that Appellant/KIAL lodged its protest against the belated submission of the Resolution Plan and acceptance thereof by the Resolution Professional vide its email dated 29th January 2019 and 10th February 2019.

51. Based on the above facts, the Appellant filed MA No.1039 of 2019 before the Adjudicating Authority, assailing various illegalities and irregularities committed by the Resolution Professional in the conduct of CIRP and approval of the Resolution Plan.

52. After that, Resolution Professional filed MA No.691 of 2019 before the Adjudicating Authority for approval of the Resolution Plan. The Adjudicating Authority passed an order that the MA No 1039 of 2019, which is concerning the objections against the acceptance of the Resolution plan, shall be heard first. After that, the Miscellaneous Application 691 of 2019, filed by Resolution Professional for approval of Resolution Plan will be taken up.

53. On perusal of the order sheet of the Adjudicating Authority dated 10th June 2019, it appears that on that day the Adjudicating Authority adjourned the hearing of MA No.1039 of 2019, MA No.1040 of 2019 for 12th June 2019. Thereafter, this MA No.1039 of 2019 was heard along with the MA No.2023 of 2019 on 03rd July 2019 by Single Member Bench of Member (Judicial) Mr M. K. Shrawat, and was reserved for the Order.

54. It is also noted in the Order sheet dated 10th June 2019 that the MA No.1039 of 2019 was adjourned to 3rd July 2019 for hearing. Thereafter, on 3rd July, the arguments on MA 1039 of 2019 were heard and the application was reserved for Order by the same Bench. It is also evident that from 07th August 2019 onwards, the Bench was reconstituted from a Single Member Bench to a Division Bench consisting of one Judicial Member and one Technical Member.

55. Thus, it is clear that argument on MA No.1039 of 2019 was heard by Single Member Bench consisting of Mr M.K. Shrawat, Member (Judicial) and after that, it was reserved for Order. However, the impugned Order dated 28th November 2019 passed on MA No.1039 of 2019 is passed by the

reconstituted Bench consisting of Mr Chandra Bhan Singh, Member (Technical) and Mr M.K. Shrawat, Member (Judicial). It is evident from the order sheet that Member (Technical) of the reconstituted Division Bench had no occasion or opportunity to hear the arguments of the parties in MA No.1039 of 2019 yet, was part of the Bench that passed the Order. It is pertinent to mention that on 28th November 2019, the reconstituted Division Bench of NCLT pronounced two orders simultaneously in MA No.1039 of 2019 and MA No.691 of 2019, which are under challenge in the present Appeals.

56. The salutary principle applicable in the instant case is that of the maxim, "one who hears the matter must decide". It is the Single Member Bench which had heard the argument of the Miscellaneous Application 1039 of 2019 and thus, it alone could have decided it. Merely because the presiding member of the Single Member Bench was also a part of the reconstituted Division Bench of the Tribunal comprising of two members, it does not mean that he could have taken up the Applicant's MA No.1039 of 2019 along with the MA No.691 of 2019. Thus, the Bench has passed the Order on the MA No.1039 of 2019, even though the other Member of the Bench, Member (Technical), didn't get an opportunity to hear the arguments on that application. Rule 150(2) NCLT Rules, 2016 provides for the Bench which hears the case to also pronounce the Order.

57. In the circumstances as stated above, we are of the considered opinion that the Resolution Professional committed a grave error in accepting the Resolution Plan of the Resolution Applicant Kalpraj Dharmshi

& Rekha Jhunjhunwala after the expiry of the deadline for submission of the Bid/Resolution Plan without notifying/publishing the extension of the timeline for submission of EOI, as per provision of the I&B Code and Regulations thereof. The Adjudicating Authority has also failed to appreciate the illegalities and irregularities pointed out by the Appellant. We also noticed that the Order on MA 1039 of 2019 is passed by Member Judicial and Member Technical, but the argument was heard by only one Member Bench consisting of Judicial Member. Thus, the Appeals succeed and the impugned Orders both dated 28.11.2019 are set aside.

58. The CoC is directed to take a decision afresh in the light of the directions given above for consideration on the Resolution Plans already submitted within the stipulated timeline within ten days from the date of this Order. If no decision is communicated to the Adjudicating Authority and the timeline for completion of CIRP has already expired, then the Adjudicating Authority is to pass an order for liquidation of the corporate debtor. There shall be no order as to costs.

[Justice Bansi Lal Bhat]
Acting Chairperson

[V. P. Singh]
Member (Technical)

[Alok Srivastava]
Member (Technical)

NEW DELHI
05th AUGUST, 2020

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