Insolvency and Bankruptcy Board of India
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16th March 2021

Subject: Judgment[1] dated 10th March, 2021 of the Hon'ble Supreme Court of India in the matter of Kalparaj Dharamshi & Anr. Vs. Kotak Investment Advisors Ltd. & Anr. [Civil Appeal Nos. 2943-2944 of 2020]

The Hon'ble Supreme Court in the above case held that (i) equity underlying section 14 of the Limitation Act, 1963 (Limitation Act) would be applicable to the parties for exclusion of time while counting the period within which time an appeal can be filed under the Code if it were bona fidely prosecuting in a wrong forum, (ii) the respondent bidder has not waived or acquiesced its rights of filing an objection against the approved resolution plan just by agreeing to submit a revised resolution plan, and (iii) the commercial wisdom of Committee of Creditors (CoC) holds primacy in the matters of approval of resolution plans. The Hon'ble Supreme Court in its order dated 10th March 2021 made some important observations in the context of insolvency proceedings hereunder:

Sl. No.	Theme/Issue	Observation/Ruling	Para / Page No.
1.	Applicability of Section 14 of Limitation Act	(a) The equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded. When a litigant *bona fide* under a mistake litigates before a wrong forum, he would be entitled for exclusion of the period, during which he was *bona fide* prosecuting such a wrong remedy.	51/57
		(b) Though strictly, the provisions of section 14 of the Limitation Act would not be applicable to the proceedings before a quasi-judicial Tribunal, however, the principals underlying the same would be applicable i.e. the proper approach will have to be of advancing the cause of justice, rather than to abort the proceedings.	51/57
		(c) Though an alternative remedy is available to the respondents, it was invoking the writ jurisdiction of the High Court (HC) since the question involved was regard to the manner in which the jurisdiction was	64/69-70

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		exercised by National Company Law Tribunal (NCLT). Thus, the respondent was *bona-fide* prosecuting the proceedings before the HC with due diligence. (d) The respondents were entitled to extension of the period during which it was *bona-fide* prosecuting a remedy before the HC with due diligence.	 85/89
2.	Exercise of Writ Jurisdiction	(a) That non exercise of jurisdiction by the High Court under Article 226 of the Constitution is not a hard and fast rule, but a rule of self-restraint. (b) The HC could have exercised jurisdiction under Article 226 of the Constitution in as much as, the grievance was regarding the procedure followed by NCLT to be in breach of principles of natural justice. (c) That would come within the limited area earmarked by this Court for the exercise of extraordinary jurisdiction under Article 226 despite the availability of an alternate remedy.	59/66 83/87 83/87-88
3.	Waiver and Acquiescence of Right by Kotak Investment Advisors Ltd. (KIAL)	(a) The courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. (b) This principle will apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. (c) Resolution Professional (RP) and the resolution applicant cannot be said to be the contracting parties having equal bargaining power. RP functions under the Code for discharging duties bestowed upon him and assisting the process for finalization of resolution plan for survival of the Corporate Debtor, it cannot be said that it is a purely commercial transaction between RP and the resolution applicant. (d) For establishing waiver, it will have to be established, that a party expressly or by its conduct acted in manner, which is inconsistent with the continuance of its rights. However, the mere acts of indulgence will not tantamount to waiver.	94/96 94/96-97 97/98-99 104/102-103

		(e) The principle of waiver although is akin to the principle of estoppel; estoppel is not a cause of action and is a rule of evidence, whereas waiver is contractual and may constitute a cause of action. It is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration. (f) For constituting acquiescence or waiver it must be established, that though a party knows the material facts and is conscious of his legal rights in a given matter but fails to assert its rights at the earliest possible opportunity it creates an effective bar of waiver against him. Whereas, acquiescence would be a conduct where a party is sitting by, when another is invading his rights. The acquiescence must be such as to lead to the inference of a license sufficient to create a new right in the defendant. (g) Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege. It is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them.	110/107 112/112 112/113
4.	Commercial Wisdom of CoC – A paramount consideration	(a) 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. (b) 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. The opinion expressed by CoC after due deliberations in the meetings through voting, as per voting shares, is a collective business decision. (c) The legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the AA and that the decision of CoC's 'commercial wisdom' is made non justiciable. (d) Appeal is a creature of statute and that the statute has not invested jurisdiction and authority either with NCLT or NCLAT, to review the commercial decision exercised by CoC of approving the resolution plan or rejecting the same.	142/140 142/140 142/140 149/146

		(e) The commercial wisdom of CoC is not to be interfered with, excepting the limited scope as provided under Sections 30 and 31 of the I&B Code.	155/150
5.	Conclusion	(a) In view of the paramount importance given to the decision of CoC, which is to be taken on the basis of 'commercial wisdom', NCLAT was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%. (b) NCLAT acted in excess of jurisdiction in interfering with the conscious commercial decision of CoC. The appeals were accordingly allowed.	156/151 157/152