NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 100 of 2020

(Arising out of the Order dated 28th November, 2019 passed by National Company Law Tribunal, Mumbai Bench, in MA 691/2019, in CP No. 156/I&BC/MB/MAH/2018

IN THE MATTER OF:

Connect Residuary Private Limited
Regd. Office at:
B/103, Satellite Gazebo,
Andheri – Ghatkopar Link Road
Andheri (East), Mumbai – 400073 (MH) **…Appellant**

Versus

1. Mr. Krishna Chamadia
Resolution Professional of:
Ricoh India Limited
(Reg. IBBI/IPA-001/IP-P00694/2017-18/11220)

Address at:
B-1804, Raheja Heights, Off Gen A.K. Vaidya Marg,
Dindoshi, Malad (East), Mumbai City,
Maharashtra – 400097. **…Respondent No. 1**

2. Ricoh India Limited
Corporate address at:
7th Floor, Tower 'B', Windsor IT Park,
A-1, Sector 125, Expressway,
Gautam Budh Nagar, Noida,
Uttar Pradesh – 201301. **…Respondent No. 2**

3. Deustsche Bank
Having registered Office Address at:
Deutsche Bank House,
Hazarimal Somani Marg,
Fort, Mumbai – 400001, Maharashtra. **…Respondent No. 3**

4. Citi Bank N.A. India
Having Corporate Office at:

First International Financial Centre,
Plot Nos. C-54 and C-55, G-Block,
Bandra Kural Complex (BKC),
Bandra (East), Mumbai 400098, Maharashtra. **…Respondent No. 4**

5. Corporation Bank
Having Corporate Office Address at:
Mangaladevi Temple Road,
Pandeshwar, Mangalore – 575001, Karnataka **…Respondent No. 5**

6. Kotak Mahindra Bank
Having registered Office address at:
27 BKC, C 27, G-Block,
Bandra Kurla Complex,
Bandra (East), Mumbai – 400051. **…Respondent No. 6**

7. Bank of India
Having head Office Address at:
Star House, C – 5, "G" Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400051. **…Respondent No. 7**

8. Mr. Kalparaj Dharmashi
Through his duly authorised representative
Mr. Atul Thakker S/o Ramnik Thakker
R/o 3603, Torino, Hiranandani Gardens, Powai,
Mumbai – 400018. **…Respondent No. 8**

9. Ms. Rekha Jhunjhunwala
Through his duly authorised representative
Mr. Atul Thakker S/o Ramnik Thakker
R/o 3603, Torino, Hiranandani Gardens, Powai,
Mumbai – 400018. **…Respondent No. 9**

Present

For Appellant: **Mr. Ramji Srinivasan, Sr. Advocate with Mr. Nazish Alam, Mr. R.N. Durga Prasad, Mr. Rohan Narula, Mr. Rajaram Dangi & Rajshree Chaudhari, Advocates.**

For Respondent/RP: **Mr. Arun Kathpalia, Sr. Advocate with Ms. Pooja Mahajan, Ms. Mahima Singh & Ms. Diksha Gupta, for Erstwhile RP.**

For Respondent/SRA: **Mr. Abhinav Vasisth, Sr. Advocate along with Mr. Prateek Kumar, Ms. Raveena Rai & Mr. Rohit Ghosh, Advocates for SRA.**

WITH

COMPANY APPEAL (AT) (INSOLVENCY) NO. 101 of 2020

(Arising out of the Order dated 28th November, 2019 passed by National Company Law Tribunal, Mumbai Bench, in MA 01/2019, in CP No. 156/2018

IN THE MATTER OF:

Connect Residuary Private Limited
Regd. Office at:
B/103, Satellite Gazebo,
Andheri – Ghatkopar Link Road
Andheri (East), Mumbai – 400073 (MH) **…Appellant**

Versus

1. Mr. Krishna Chamadia
Resolution Professional of:
Ricoh India Limited
(Reg. IBBI/IPA-001/IP-P00694/2017-18/11220)

Address at:
B-1804, Raheja Heights, Off Gen A.K. Vaidya Marg,
Dindoshi, Malad (East), Mumbai City,
Maharashtra – 400097. **…Respondent No. 1**

2. M/s. Ricoh India Limited
Corporate address at:
7th Floor, Tower 'B', Windsor IT Park,
A-1, Sector 125, Expressway,
Gautam Budh Nagar, Noida,
Uttar Pradesh – 201301. **…Respondent No. 2**

3. Mr. Kalparaj Dharmashi
Through his duly authorised representative

Mr. Atul Thakker S/o Ramnik Thakker
R/o 3603, Torino, Hiranandani Gardens, Powai,
Mumbai – 400018. **…Respondent No. 3**

4. Ms. Rekha Jhunjhunwala
Through his duly authorised representative
Mr. Atul Thakker S/o Ramnik Thakker
R/o 3603, Torino, Hiranandani Gardens, Powai,
Mumbai – 400018. **…Respondent No. 4**

Present

For Appellant:	**Mr. Ramji Srinivasan, Sr. Advocate with Mr. Nazish Alam, Mr. R.N. Durga Prasad, Mr. Rohan Narula, Mr. Rajaram Dangi & Rajshree Chaudhari, Advocates.**
For Respondent/RP:	**Mr. Arun Kathpalia, Sr. Advocate with Ms. Pooja Mahajan, Ms. Mahima Singh & Ms. Diksha Gupta, for Erstwhile RP.**
For Respondent/SRA:	**Mr. Abhinav Vasisth, Sr. Advocate with Mr. Prateek Kumar, Ms. Raveena Rai & Mr. Rohit Ghosh, Advocates for SRA.**

(J U D G E M E N T)

[Per; Shreesha Merla, Member (T)]

1. Challenge in these Appeals viz., *Company Appeals (AT) (Insolvency) No. 100 & 101 of 2020*, is to the Impugned Order dated 28.11.2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench), in MA 691/2019 & MA 01/2019 respectively in CP (IB) No. – 156/MB/2018, by which Order, the Adjudicating Authority has dismissed the Applications filed by the Appellant seeking a direction for admitting the Appellant's Claim in the Resolution Plan. The Adjudicating Authority has also

approved the Resolution Plan vide the Impugned Order dated 28.11.2019. Since both these Appeals deal with common facts, they are being disposed of by this common Order.

Facts in brief:

2. MA 01/2019 was preferred by the Appellant/'Connect Residuary' Private Limited (hereinafter referred to as ''Connect Residuary''), seeking the following main prayers:

> *"(b) Set aside the action of the Resolution Professional in not admitting the claim of the Applicant vide the updated List of the Petitioner's Creditors dated December 10, 2018.*
>
> *(c) Declare that the Applicant is an Operational Creditor of the Petitioner to the extent of Rs.25,52,08,897/- as set out in Form B dated June 11, 2018 filed by the Applicant before the Resolution Professional."*

3. The 'Corporate Debtor'/M/s. 'Ricoh India' Limited (hereinafter referred to as ''Ricoh India'') is a Company engaged in providing IT related services, Visual Industrial and Communication Systems. A Master Rental Agreement ('MRA') dated 06.12.2013 was executed between 'Connect Residuary' and 'Ricoh India', according to which terms, the first Rent Schedule was executed, for renting of UID/NPR Kits for 600 units for a period of 21 months. On 25.09.2014 the Board of 'Ricoh India' approved and ratified the transactions for procurement of IT related assets from 'Connect Residuary'.

4. 'Ricoh India' executed three more Rental Schedules RIL 002, RIL 003 and RIL 004 for renting 4,650 units of which 2,700 was SLB and two more Rental Schedules RIL 005 & RIL 006 for renting fit outs and furniture. For the SLB transaction covered in RIL 004, entered into on 26.03.2015, 'Connect Residuary' acquired 2,700 partly used UID Kits from 'Ricoh India' at Rs.9,71,16,469/-. Between the period 23.11.2016 and 02.12.2016 there was communication from 'Ricoh India' offering to pay back the UID Kits and sought a price quotation from 'Connect Residuary'. It is averred that the correspondence was in relation to rent payment default and failure to return the equipment taken on rent.

5. While so, 'Ricoh India' filed an Application on 29.01.2018 under Section 10 of the Code. On 16.02.2018, 'Connect Residuary' served a Demand Notice for Rs.6,24,00,577/-. On 14.05.2018, the Petition filed under Section 10 was admitted by the Adjudicating Authority and a Public Announcement was made inviting claims from the Creditors.

6. <u>Submissions of the Learned Sr. Counsel appearing on behalf of the Appellants/'Connect Residuary':</u>

- It is submitted by the Learned Sr. Counsel that on 11.06.2018, 'Connect Residuary' submitted the 'Claim Form-B' for Rs. 25,52,08,897/- and a follow up reminder letter was also sent to the RP on 01.12.2018 enquiring about the status of the said 'Form-B'. Even after 6 months time, the RP did not admit the 'Claim' of the Appellant/'Connect Residuary' on the ground that there was insufficient documentation, that the Respondent/'Ricoh

India' has already paid an amount more than the value of the equipment, and also that the equipment was untraceable.

- It is submitted that on 15.01.2019, Alvarez & Marshal India Private Limited ('A&M') submitted their Report to the RP on avoidance of certain transactions including renting transactions of 'Connect Residuary'. Learned Counsel drew our attention to paragraphs 7.11.1 to 7.11.9 of the Report, the relevant extracts of which are as follows:

> *"7.11.7 Automatic extension of lease term by 2 years causing additional lease pay-outs:*
>
> *In an email dated 17 October, 013 from Mr. Arvind to Mr. Manish Sehgal, Mr. Arvind Singhal had requested Mr. Manish to legally vet the MRA to be signed with 'Connect Residuary'. In response, Mr. Manish had addressed an email dated 19 November 2013 to Mr. Arvind with an edited version of the MRA. The edited version clearly states in clause 18.2. "The said Agreement can further be renewed only with the mutual consent of both of the Parties for a further period of time so to be decided mutually by both of the Parties." Manish Sehgal had also suggesting removing the clause which provided for an automatic extension.*
>
> *However, it can be observed that the signed MRA does not reflect the edits suggested by Mr. Manish Sehgal in relation to the Auto extension clause. As per clause 18.1 of the signed MRA, RIL has to give a written notice to Connect, 90 business days prior to end of the agreement, regarding its intention to return the asset or extend the lease term. If RIL fails to notify Connect, the rental agreement will be automatically extended for 6 months on the average quarterly rentals for the term……"*
>
> *"7.11.9 Extortionate buy back value demanded by Connect*

As per email dated 23 November, 2016, Mr. Amit Pathak of Finance Department had requested Connect to provide the buyback value of the UID Kits under schedules 1 to 4. Further email communication at varying dates were noted indicating continuous efforts by RIL in getting the buyback value of assets from Connect, citing the reason that immense efforts would be required in collecting the UID Kits from different locations across the country and the fact that these assets which have already been used, may not have any value in the market.

On December 2, 2016 an email was received from a Mr. Neeraj Bhargav of Connect, indicating unwillingness to sell these assets to RIL. Further, as per another email communication dated October 25, 2017 received from him, a buy back value of INR 22.50 Crore was demanded in relation to UID Kits leased under Schedules 1 to 4. As per the email, the buyback offer would stand valid till November 8, 2017……."

- It is submitted that even prior to receipt of the aforementioned Report (January 2019) RP had rejected the Appellant's Claim in 2018; that the *bona fide* of the Appellant can be seen from the fact that attempts were made to reduce the *bona fide* value and also drew or attention to the email communication between the parties, wherein the word 'equipment' was used and a 'buyback value' was mentioned. It is also contended that when the Board acknowledged the outstanding of Rs.18Crores/-, it was the RP's duty to collate these claims.
- Learned Sr. Counsel submits that 'Connect Residuary' had leased the equipment seeking repurchase of the used Kits. The Adjudicating Authority has erroneously come to a conclusion that the transaction was

extortionate and preferential in nature and fraudulent. Adjudicating Authority had clubbed MA 01/2019 with MA 262/2019 which was filed by the Resolution Professional seeking avoidance of the renting transactions between the parties alleging it to be extortionate and relying upon A&M Report. In this Application, the RP had sought to direct 'Connect Residuary' to contribute Rs.34.34Crores/- to 'Ricoh India'.

- On 12.02.2019, a consortium of Kalparaj Dharmashi and Rekha Jhunjhunwala, (Respondents 8 & 9) submitted a revised Resolution Plan which was approved on 14.02.2019. On 16.02.2019 an addendum to the approved Resolution Plan to amend Clause 33 therein was made, affording NIL/Zero payment treatment against the contested Claim of 'Connect Residuary'. Learned Counsel submitted that this payment treatment is to apply even if the Claims are admitted at a later date by the RP or the Adjudicating Authority. On 18.02.2019, the RP filed MA 691/2019 seeking the approval of the Resolution Plan under Section 30(6) of the Code. It is argued that the Hon'ble Supreme Court in ***'Kalparaj Dharamshi & Anr.' Vs. 'Kotak Investment Advisors Ltd. & Anr.', Civil Appeal Nos. 2943-2944 of 2020,*** dated 10.03.2021 has not delved into the merits of the Resolution Plan, so much so, that in respect of CA arising out of D. No. 24125/2020 filed by Fourth Dimensions Solutions Limited ('FDSL'), the Hon'ble Court had directed NCLAT to decide the Appeal of FDSL which was pending before NCLAT within a period of two months.

- It is strenuously submitted that the Hon'ble Supreme Court in paragraphs 157 & 158 of the said decision has held that the decision taken by CoC dated 13/14.02.2019, with a majority of 84.36% was taken in accordance with its Commercial Wisdom and that NCLT was not justified in interfering with the stated decision taken by the CoC. It is submitted that Hon'ble Court has clarified in paragraph 155 that the Commercial Wisdom of CoC is not to be interfered with excepting the limited scope as provided for in Sections 30 & 31 of the Code.
- It is vehemently contended by the Learned Sr. Counsel Mr. Ramji Srinivasan that the addendum dated 16.02.2019 to the approved Resolution Plan affording NIL treatment was bad in law. The condition that 'even if the Claim made by the Appellant are admitted at a later date by the RP and/or the Adjudicating Authority, pursuant to any circumstance, the payment shall be 'NIL/Zero' is unjustified. It is not clear as to when and how the addendum was conveyed, voted and approved by the CoC. Pertinently, the Resolution Plan itself was put to voting and was finally approved on 13/14.02.2019 in the 15th CoC Meeting and the addendum was approved on 16.02.2019 and within two days, on 18.02.2019, the RP moved an Application before the Adjudicating Authority seeking its approval.
- Being aware of the legal procedure and while MA 01/2019 and MA 262/2019 were pending adjudication before the Adjudicating Authority, on

16.02.2019, the Successful Resolution Applicant ('SRA') had introduced an addendum to the Resolution Plan to amend the existing Clause pertaining to treatment of 'Operational Creditors other than workman and employees'.

- It is submitted that in the original Resolution Plan, there was a proposal to pay to non-related 'Operational Creditors' a sum of Rs.19.07Crores/-. It is argued that even if the Appellant succeeds in *Comp. App. (AT) (Ins.) No. 100/2020*, and/or the outcome of the avoidance proceedings and the Claim of the Appellant is reinstated, still, by virtue of the addendum, the Appellant will be entitled NIL/Zero payment, which is totally unfair and discriminatory.
- Learned Counsel referred to Sections 26 & 51 of the Code which are as hereunder:

> ***"26. Application for avoidance of transactions not to affect proceedings.*** *The filing of an avoidance application under clause (j) of sub-section of section 25bythe resolution professional shall not affect the proceedings of the corporate insolvency resolution process."*
>
> ……..
>
> ***"51. Orders of Adjudicating Authority in respect of extortionate credit transactions.*** *Where the Adjudicating Authority after examining the application made under sub-section (1) of section 50 is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order –*
>
> > *(a) restore the position as it existed prior to such transaction;*

(b) set aside the whole or part of the debt created on account of the extortionate credit transaction;

(c) modify the terms of the transaction;

(d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or

(e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be."

- It is further submitted that a bare reading suggests that Section 51 prescribes for Orders that may be passed by the Adjudicating Authority setting aside extortionate credit transactions. Per contra, if the avoidance proceeding is not successful then the debt-claim of the Creditor pertaining to transaction is restored/reinstated. Upon the restoration/reinstatement of the debt-claim, in particular when avoidance proceeding is unsuccessful, then irrespective of the stage of any Corporate Insolvency Resolution Process (CIRP) such debt claim should become payable to the Creditor on equitable treatment basis in terms of the approved Resolution Plan. Inasmuch as, in order to have a Resolution Plan which is effective of its implementation it is an implicit statutory condition to have adequate provisions for payment to Creditor whose claims are sought for avoidance in the CIRP. In view hereof, hence, the approved Resolution Plan with amended Clause 3.3 vide the addendum dated 16.02.2019 wherein 'NIL'

payment treatment is afforded against the claim of the Appellant, the claim which is the subject matter of the Comp. App. (AT) (Ins.) No. 100 of 2020 (to challenge illegal rejection of claim by the RP) and M.A. 262 of 2019 (which is an avoidance proceeding preferred by RP to set aside the claim of the Appellant on extortionate reason) will be devoid of an effective implementation, and to the said extent the approved Resolution Plan (with an amended Clause 3.3) is bad in law and illegal.

- The Learned Counsel also placed reliance on Regulation 38 of the IBBI Regulations, 2016 which stipulates the mandatory contents of the Resolution Plan in support of his submission that the Resolution Plan must include as to how to deal with the interest of all the stakeholders including 'Operational Creditors' which in this case was not adhered to.

7. <u>Submissions of the Learned Sr. Counsel appearing on behalf of Respondent No. 1/the erstwhile Resolution Professional of 'Ricoh India' Limited:</u>

- It is submitted by the Learned Sr. Counsel that on 11.06.2018, the Appellant submitted its 'Claim' in 'Form-B' claiming as an 'Operational Creditor' and accordingly in the list of Creditors issued on 15.02.2018, the name of the Appellant was included in the list of 'Operational Creditors'. In pursuance of his duties, the erstwhile RP, under Section 25(2)(d) read in conjunction with Sections 43, 45, 49, 50 & 66 of the Code, on 13.07.2018, appointed A&M to assist in conducting an investigation and examination

of potential avoidance transactions in respect of the 'Corporate Debtor'. Based on the avoidance of the Report, it was noted that Rs.34.34Crores/- out of Rs.70.32Crores/- was paid by the 'Corporate Debtor' to the Appellant during the two years preceding the Insolvency commencement date, i.e., the period from 15.05.2016 till 14.05.2018.

- The Claim of the Appellant/'Connect Residuary' was rejected on 10.12.2018 on the ground that 'Ricoh India' had already paid an amount much more than the value of the equipment, the equipment was physically untraceable and MA 01/2019 was rejected by the Adjudicating Authority vide Order dated 28.11.2019.
- The RP arrived at a conclusion based on the findings of A&M and discussions with the 'Financial Creditors' of 'Ricoh India' regarding certain transactions undertaken by certain Officers/Directors of the 'Corporate Debtor' together with the Appellant that they were extortionate in nature as defined under Section 45 of the Code and hence RP preferred MA 262/2019, an avoidance Application before the Adjudicating Authority. While so, pursuant to the 15th CoC Meeting, the CoC approved the Resolution Plan with 84.36% majority and RP filed an Application MA 619/2019 under Section 30(6) of the Code seeking approval of the Plan.
- By way of an addendum to the Resolution Plan, the SRA *inter alia* proposed to pay NIL to the Appellant even if the Claim is submitted at a later stage.

- It is submitted that the Resolution Plan has been duly implemented by the Monitoring Committee and all payments/settlements as required to be done under the Resolution Plan has been completed in on 31.01.2020, the Board of 'Ricoh India' was also reconstituted and handed over to the SRA.
- It is submitted by Learned Counsel Mr. Arun Kathpalia that the provisions of the Resolution Plan have been strictly adhered to in consonance with Section 31(1) of the Code.
- Learned Sr. Counsel placed reliance on the Judgements of the Hon'ble Supreme Court in ***'Committee of Creditors of Essar Steel Limited, Though Authorized Signatory' Vs. 'Satish Kumar Gupta & Ors.', (2020) 8 SCC 531,*** wherein the Hon'ble Supreme Court *inter alia* has held as follows:

> *"Section 31(1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders, including guarantors. This is for the reason that this provision ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate as it were."*
>
> *(Emphasis Supplied)*

- The SRA cannot be saddled with undecided or disputed claim at such a belated stage as held by the Hon'ble Supreme Court in ***'Committee of Creditors of Essar Steel Limited, Though Authorized Signatory', (Supra)*** and also in *'JSW Steel Ltd.' Vs. 'Mahender Kumar Khandelwal & Ors.', Comp. App. (AT) (Ins.) No. 957/2019,* wherein it was held as follows:

"The Impugned Order, however, at para 106, has failed to appreciate that by treating the Appellant differently from other 'Operational Creditors', the 'Resolution Plan' is in derogation to Section 30 (2) (e) of the 'I&B Code' as it is not fair and equitable to all creditors.

In the present case, as the Appellant has been categorised as 'contingent creditor', we hold that the Appellant who claims to be 'Operational Creditor' but his claim has not been crystalized which made him 'contingent creditor' and as such cannot claim equitable treatment with all other Creditors.

Therefore, no ground is made out to interfere with the impugned order of approval of the plan."

8. <u>Submissions of the Learned Sr. Counsel appearing on behalf of Successful Resolution Applicant/Respondents 8 & 9:</u>

- It is submitted by Learned Sr. Counsel Mr. Vasisth that this Tribunal vide Judgment dated 05.08.2020 in *'Kotak Investment Advisors Ltd.' Vs. 'Krishna Chamadia & Ors.', Comp. App. (AT) (Ins.) No. 344-355 of 2020,* set aside the Impugned Order and passed further directions to the CoC of the 'Corporate Debtor' to be implemented within 10 days from the date of the Impugned Order, and if no decision was communicated to the Adjudicating Authority by the CoC and the timeline for completion of CIRP had already expired, then the NCLT, Mumbai Bench is to pass an Order for Liquidation of the 'Corporate Debtor'. The Respondents 8 & 9 challenged the Judgement of this Tribunal in *'Kotak Investment Advisors Ltd.', (Supra)* before the Hon'ble Supreme Court in ***Civil Appeal No. 2943-2944 of 2020*** in ***'Kalparaj Dharamshi & Anr.' Vs. 'Kotak Investment***

Advisors Limited'. Being aggrieved by the Impugned Order, RP had instituted Civil Appeal No. 2949-2950/2020, and the CoC independently filed Civil Appeal No. 3138-3139/2020 tagged together with the RA Appeal.

- The Hon'ble Supreme Court allowed these Appeals on 10.03.2021 by way of a common Judgement and held as under:
  - *That all the actions of the RP during the CIRP of the 'Corporate Debtor' has the seal of approval of the CoC, which discretion was exercised as per the Commercial Wisdom of the CoC.*
  - *That the CoC has approved the Resolution Plan of Respondents No. 8 & 9 by a thumping majority of 84.36%.*
  - *That paramount importance is given to the decision of CoC, which is to be taken on the basis of Commercial Wisdom, and this Tribunal in 'Kotak Investment Advisors Ltd.', (Supra) was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%.*
  - *That this Tribunal in 'Kotak Investment Advisors Ltd.', (Supra) acted in excess of jurisdiction in interfering with the conscious commercial decision of CoC.*
  - *That during the pendency of the 'Kotak Investment Advisors Ltd.', (Supra) as well as the Ricoh Appeal before this Tribunal, there was no*

restraint or stay on implementation of the Resolution Plan, which was duly approved by the Adjudicating Authority in the Impugned Order.

- *That during the said period of pendency of Appeals challenging the Impugned Order before this Tribunal, various steps have been taken by Respondents 8 & 9 by spending a huge amount for implementation of the Resolution Plan.*
- *That the decision taken by CoC dated 13.02.2019-14.02.2019, is taken in accordance with its Commercial Wisdom and which is duly approved by the Adjudicating Authority, will prevail.*
- *That the 'Kotak Investment Advisors Ltd.', (Supra) is quashed and set aside, and the Orders passed by NCLT dated 28.11.2019 (i.e., Impugned Order) are restored and maintained.*

- It is submitted that in view of the findings of the Hon'ble Supreme Court wherein the validity of the Impugned Order and separate Order dated 29.11.2019 passed by the Learned Adjudicating Authority in the Insolvency Petition disposing of objections by various Creditors ('Objective Order') has been upheld, and with the Resolution Plan having been successfully and irreversibly implemented by Respondents 8 & 9, the present Appeal is to be rendered infructuous.
- It is submitted that in any case, under the provisions of the Code, a Resolution Applicant submits its Resolution Plan based on the Claims admitted by the Resolution Professional and the said information is

provided to Resolution Applicant which takes the same into consideration during the preparation of the Resolution Plan. However, the Claims of Creditors as such cannot remain indeterminate, and must be crystallized Claim which can be accounted for in a definitive Resolution Plan submitted by the Resolution Applicant. It is settled law that upon approval of a Resolution Plan, the Resolution Applicant takes over the control, operations and management of the Corporate Debtor on 'fresh slate' basis and cannot be faced with undecided or contingent Claims after the approval of the Plan as it would interfere with the revival of the 'Corporate Debtor' and may even lead to Liquidation. Therefore, it is submitted that once a Resolution Plan has been approved by the Adjudicating Authority (subsequently upheld by the Hon'ble Supreme Court), and successfully and irreversibly implemented by the Respondents 8 & 9 any attempt to derail the implementation process is not justified.

Assessment:

9. It is an admitted fact that the RP filed an Avoidance Application before the Adjudicating Authority, in which Application, the Appellant/'Connect Residuary' was made a party and the grounds raised in that Application were based on the findings of the A&M Report dated 15.01.2019. It is pertinent to reproduce a brief extract of the Report, i.e., the concluding paragraph, detailed as hereunder:

> *"……As can be seen from the above calculation, the residual surrender value of the kits should have been INR 0.64 Crore as per table 33. However, Connect demanded, a value of INR 22.5 Crore, which is INR 21.86 Crore higher than the calculated residual value. Further they have been paid lease rentals of INR 65.71 as mentioned in para 7.11.7 as against a total price of UID kits of INR 32.17 Crore. Accordingly, in A&M view, this transaction is extortionate in terms of the value paid and demanded by Connect."*
>
> *(Emphasis Supplied)*

10. The Adjudicating Authority based on this Report has come to the conclusion that the transaction was extortionate in terms of the value paid and demanded. The Adjudicating Authority had dismissed the Application MA 01/2019 observing as follows:

> *"5.3 To verify the correctness of the claim, the Resolution Professional had appointed on 13.07.2018* ***Alvarez & Marshal India Private Limited*** *(A&M) as prescribed under Section 66 of the I&B Code. An adverse report was submitted by pointing out several irregularities. No cogent documentation on records were available to establish the delivery of these kits/equipment to the Corporate Debtor or installation or use of these assets at the customer site. The management of the Corporate Debtor informed that the entire transaction relating to the UID Kits was managed by Mr. Arvind Singhal and Mr. Anil Saini, then CFO and COO of the Corporate Debtor. From a review of various emails exchanged by Mr. Amalendu Mukherjee, Managing Director of FDSL, A&M has noticed that it is FDSL that was always in possession of these kits and in the said emails, Mr. Amalendu Mukherjee is confirming deployment, of these kits. It has also been informed by A&M that 3850 UID Kits were sold for a sum of Rs.23.10 Crores after showing a use off about 20months. Those UID Kits were sold to Connect/the Applicant and AS International. It has also been*

informed that there was a complex purchased & leased & repurchase of kits through several transactions between the Corporate Debtor, AS International and CRPL/Applicant. Certain misinformation was communicated to the management because OPEX Model (i.e., leasing model) was proposed as opposed to CAPEX Model (i.e., sale model). The Corporate Debtor had unnecessarily deposited security of Rs. 3.26 Crores to CRPL between February 2014 to July 2015. It has also been reported that there was auto extension clause which was not approved, therefore as a consequence the Corporate Debtor RICOH paid an additional amount of Rs.29.57 Crores to CRPL. In all as per Rental Schedule the Corporate Debtor had paid 70.32 Crores to the Applicant CRPL. According to the Report of A&M the strange position was that in the absence of whereabouts of the kits payments have been made by the Corporate Debtor. Hence it was reported that the present claim was false. It has also been reported that there was no basis to demand Rs.22.50 Crores.

5.4 Based upon several reasons and findings of A&M the Resolution Professional had decided that the transaction with the Applicant CRPL was extortionate in nature and nothing was payable to the Applicant/CRPL by the Corporate Debtor. As per Resolution Professional it was his duty to report under Section 25(2) read with Section 66 of the I&B Code about such transaction.

6. FINDINGS: Learned Representatives of both the sides have been heard. Certain case laws have been referred, revolving around the issue that whether the transaction in question could be held as extortionate transaction or fraudulent transaction. Reliance has also been placed on certain documents as annexed with the Rejoinder by the Applicant. However, keeping brevity in mind and the circumstances of the case there is no requirement to discuss all those legal points at length. In the opinion of this Bench the Resolution Professional was duty bound to ascertain the correct facts, that too, after due diligence and investigation, hence in his wisdom rightly appointed A&M. As per Section 25 of

Insolvency Code duties of Resolution Professional has been assigned, hence in compliance an investigation was carried out by appointing an Agency so as to ascertain whether the transaction as claimed by the Applicant CRPL was genuine and correct. On investigation it was reported that the transaction was extortionate, preferential in nature, incorrect and fraudulent, hence, the claim allegedly made as Operational debt was rejected.

7. After careful examination of the evidences and the reasoning given by the Resolution Professional based upon the report of A&M this Bench is of the view that there was no fallacy in rejection of the Claim. I find no force in this Miscellaneous Application, hence rejected."

(Emphasis Supplied)

11. The Hon'ble Supreme Court in ***'Anup Jain, IRP for Jaypee Infratech Ltd.' Vs. 'Axis Bank & Ors.' (2019) SCC OnLine SC 1775,*** has held that the Resolution Professional is duty bound under Section 25(2)(j) of the Code to identify the avoidance transactions including preferential transactions under Section 43 of the Code, which in the instant case, the RP has dutifully done. The Learned Sr. Counsel Mr. Arun Kathpalia submitted that the RP has rejected the Claims on the following grounds:

- Documentation approving the Claims is inadequate and not satisfactory.
- 'Corporate Debtor' has already paid an amount much more than the value of the said equipment for which the 'Claim' has been filed.
- The equipment referred to in the Rental Agreement is physically untraceable.

12. During arguments, Learned Sr. Counsel Mr. Ramji Srinivasan for the Appellant contended that the RP has not chosen to admit the Claim even prior to the receipt of A&M Report. A brief perusal of the material on record shows that the draft of A&M Report was received in October 2018 and was already available with the RP and the same was also tabled before the CoC on 14.11.2018 prior to non-admission of the Claim. We do not find any facts on record to the contrary. It is only the final Report which was shared by A&M on 15.01.2019 and it was the consistent case of the RP that the opinion was not based on A&M findings alone but also based on the nature of transactions, the examination of account books and records and enquiry made with the concerned officials. SEBI had also noted large scale fraud in the IT service business conducted by the 'Corporate Debtor' in the past. Be that as it may, the contention of the Appellant that only the buyback value demanded by 'Connect Residuary' was classified as extortionate is not correct as we note that the RP had classified the entire transactions with 'Connect Residuary' as extortionate given the very nature of the transactions. Para 7.11.9 of the A&M Report examined the emails and found that the buyback value demanded by 'Connect Residuary' for UID Kits, to be excessive. Since the Claim of the Appellant was not admitted and never figured in the Creditors List, the Plan did not provide any payment towards it. As regarding the addendum, it was clarified that even if the Appellant's Claim was later admitted, it would be paid NIL; when read with Clause 9.2 of the Resolution Plan, the addendum is merely clarificatory.

13. The Resolution Plan was approved by the CoC in its Commercial Wisdom by a majority of 84.36%. At this juncture, it is relevant to note the observations of the Hon'ble Supreme Court in the combined Appeals preferred by the SRA (Respondents 8 & 9 herein), the RP and the CoC in ***Civil Appeal Nos. 2943-2944/2020*** namely ***'Kalparaj Dharamshi & Anr.' Vs. 'Kotak Investment Advisors Limited',*** in which Judgement, the Hon'ble Apex Court in paragraphs 150 to 159 observed as follows:

> *"150. The position is clarified by the following observations in paragraph 59 of the judgment in the case of **K. Sashidhar** (supra), which reads thus:*
>
> > *"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....."*
>
> *151. This Court in **Committee of Creditors of Essar Steel India Limited through Authorised Signatory** (supra) after reproducing certain paragraphs in **K. Sashidhar** (supra) observed thus:*
>
> > *"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"*

152. It can thus be seen, that this Court has clarified, that the limited judicial review, which is available, can in no circumstance trespass upon a business decision arrived at by the majority of CoC.

*153. In the case of **Maharashtra Seamless Limited** (supra), NCLT had approved the plan of appellant therein with regard to CIRP of United Seamless Tubulaar (P) Ltd. In appeal, NCLAT directed, that the appellant therein should increase upfront payment to Rs.597.54 crore to the "financial creditors", "operational creditors" and other creditors by paying an additional amount of Rs.120.54 crore. NCLAT further directed, that in the event the "resolution applicant" failed to undertake the payment of additional amount of Rs.120.54 crore in addition to Rs.477 crore and deposit the said amount in escrow account within 30 days, the order of approval of the 'resolution plan' was to be treated to be set aside. While allowing the appeal and setting aside the directions of NCLAT, this Court observed thus:*

> *"30. The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been com- plied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel [Essar Steel India Ltd. Commit- tee of*

Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531], the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to en- hance their fund inflow upfront."

154. This Court observed, that the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. This Court clearly held, that the appellate authority ought not to have interfered with the order of the adjudicating authority by directing the successful resolution applicant to enhance their fund inflow upfront.

155. It would thus be clear, that the legislative scheme, as interpreted by various decisions of this Court, is unambiguous. 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."

156. No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, NCLAT was justified in view of the provisions of clause (ii) of sub-section (3) of Section 61 of the I&B Code to interfere with the exercise of power by RP. However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G', in the event he found, that the proposals received by it prior to the date specified in last Form 'G' could not be accepted. However, it has been the consistent stand of RP as well as CoC, that all actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the

decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL, having voting rights of 0.97%. We are of the considered view, that 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%.

157. It is further to be noted, that after the resolution plan of Kalpraj was approved by NCLT on 28.11.2019, Kalpraj had begun implementing the resolution plan. NCLAT had heard the appeals on 27.2.2020 and reserved the same for orders. It is not in dispute, that there was no stay granted by NCLAT, while reserving the matters for orders. After a gap of five months and eight days, NCLAT passed the final order on 5.8.2020. It could thus be seen, that for a long period, there was no restraint on implementation of the resolution plan of Kalpraj, which was duly approved by NCLT. It is the case of Kalpraj, RP, CoC and Deutsche Bank, that during the said period, various steps have been taken by Kalpraj by spending a huge amount for implementation of the plan. No doubt, this is sought to be disputed by KIAL. However, we do not find it necessary to go into that aspect of the matter in light of our conclusion, that NCLAT acted in excess of jurisdiction in interfering with the conscious commercial decision of CoC.

158. It is also pointed out, that in pursuance of the order dated 5.8.2020 passed by NCLAT, CoC has approved the resolution plan of KIAL on 13.8.2020. However, since we have already held, that the decision of NCLAT dated 5.8.2020 does not stand the scrutiny of law, it must follow, that the subsequent approval of the resolution plan of KIAL by CoC becomes non-est in law. For, it was only to abide by the directions of NCLAT. We are of the view that nothing would turn on it. The decision of CoC dated 13/14.2.2019 is a decision, which has been taken in exercise of its 'commercial wisdom'. As such, we hold, that the decision taken by CoC dated 13/14.2.2019, which is taken in accordance with its

'commercial wisdom' and which is duly approved by NCLT, will prevail. Further, NCLAT was not justified in interfering with the stated decision taken by CoC.

159. In that view of the matter, we find, that Civil Appeal Nos. 2943-2944 of 2020 filed by Kalpraj; Civil Appeal Nos. 2949-2950 of 2020 filed by RP and Civil Appeal Nos. 3138-3139 of 2020 filed by Deutsche Bank deserve to be allowed. It is ordered accordingly. The order passed by NCLAT dated 5.8.2020 is quashed and set aside and the orders passed by NCLT dated 28.11.2019 are restored and maintained.

(Emphasis Supplied)

14. From the aforenoted observations, it is evident that the Commercial Wisdom of the CoC is non-justiciable except when there is any material irregularity or error apparent on the face of record, which in the instant case is absent. We do not find any material irregularity to warrant our interference or exercise our powers under Section 30(2) of the Code. in the decision of the Adjudicating Authority in dismissing the Applications preferred by the Appellant herein based on the findings of the A&M Report.

15. It is significant to mention that the Resolution Plan was approved by the Adjudicating Authority on 28.11.2019 and has since been implemented. The contention of the Learned Sr. Counsel appearing for the Appellant that the addendum is unfair and discriminatory and hence ought to be set aside and that the Hon'ble Supreme Court has not delved into the merits of the matter cannot be sustained as notably, *The Hon'ble Supreme Court has categorically confirmed in para 159 of the Judgement in* ***'Kalparaj Dharamshi & Anr.', (Supra)*** *the Orders*

passed by the Adjudicating Authority dated 28.11.2019 and this Resolution Plan which is approved by the Hon'ble Supreme Court specifically includes the addendum of the Resolution Plan. Therefore, we are of the considered view that the approval of the Resolution Plan including the addendum has attained finality. We do not agree with the submissions of the Learned Sr. Counsel for the Appellant that there are no reasons for the specific addendum to have been added in the Resolution Plan, the reason being the final Report of A&M and the categorical findings of the Adjudicating Authority. It is significant to note that the Appellant was never included in the 'Creditors List'. *So, the question of any sort of discrimination meted out to the Appellant does not arise.*

16. For all the aforenoted reasons, these Appeals fail and are accordingly dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Ms. Shreesha Merla]
Member (Technical)

[Mr. Naresh Salecha]
Member (Technical)

Principal Bench,
New Delhi
10th October, 2022

himanshu