IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 3621 OF 2019

1 Kotak Investment Advisors Limited, a Company registered under the Companies Act, 1956 and having its registered office at 27, BKC Plot No.C-27, G Block, Bandra-Kurla Complex, Bandra (East), Mumbai – 400 051]

2 Rahul Shah, an adult Indian inhabitant the Associate Director, Kotak Investment Advisors Limited, having its registered office at 27, BKC Plot No.C-27, G Block, Bandra-Kurla Complex, Bandra (East) Mumbai – 400051] ... Petitioners

Versus

1 Mr. Krishna Chamadia, Resolution Professional of Ricoh India Limited, having its office at B-1804, Raheja Heights Off General A.K. Vaidya Marg, Dindoshi, Malad (East), Maharashtra]

2 Kalpraj Dharamshi]

3 Rekha Jhunjhunwala Both adults, Indian inhabitants and members of Consortium Kalpraj Dharamshi, having their addresses at
i) Quest, 1073, Rajabhau Desai Marg, Prabhadevi, Mumbai 400 025
And
ii) 16-17C IL Palazza CHS Little Gibbs Road, Malabar Hill, Mumbai – 400 006.]

4 Insolvency and Bankruptcy Board of India]

7th Floor, Mayur Bhawan, Shankar Market]
Connaught Circus, New Delhi – 110001]

5 Union of India, through the Ministry of]
Corporate Affairs, having address at]
Everest, 5th Floor, 100, Marine Drive]
Maharashtra 400002] ... Respondents

Mr. Navroz Seervai, senior advocate with Mr. Prateek Seksaria, Mr. Rohit Gupta, Mr. Nivit Srivastava, Ms. Neha N. Shah and Ms. Yamini Maheshwari for the Petitioners.

Mr. Zal Andhyarujina with Mr. Mustafa Kachwala, Ms. Mahima Singh, Mr. Shrey Sancheti and Ms. Ketki Pansare i/b Kachwala Misar & Co. for the Respondent No.1.

Mr. Janak Dwardas, senior advocate, with Mr. Raj Panchmatia, Mr. Peshwan Jehangir, Ms. Anumeha Karnatak and Mr. Himanshu Vidhani i/b Khaitan & Co. for the Respondent Nos.2 and 3.

Mr. Pankaj Vijayan for the Respondent No.4 – IBBI.

Mr. Anil C. Singh, Additional Solicitor General with Mr. Aditya Thakkar, Mr. Ashish Mehta and Mr. Jonas Thomas i/b Ethos Legal for the Respondent No.5.

CORAM : S.C. DHARMADHIKARI &
R.I. CHAGLA, JJ.

TUESDAY, 28TH JANUARY, 2020

ORAL JUDGMENT : *[Per S.C. Dharmadhikari, J.]*

1 By this Writ Petition under Article 226 of the Constitution of India, the petitioner seeks the following relief :

"(a) That this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, direction or order in exercise of its power under Article 226 of the Constitution of India and after calling for the records and proceedings relating to Miscellaneous Application No. 1039 of 2019 in Company Petition No.156 of 2018 and Miscellaneous Application No.691 of 2019 in Company Petition No. 1256 of 2018 and after examining such records, proceedings and the Impugned Orders (i) passed in Miscellaneous Application No. 156 of 2018 and (ii) passed in Miscellaneous Application No. 691 of 2019 in Company Petition No. 156 of 2018 dated 28th November 2019 being Exhibit 'A' and Exhibit 'B' hereto be quashed and set aside;"

2 The petitioner No.1 is Kotak Investment Advisors Limited, a company registered under the Companies Act, 1956, and the second petitioner is the Associate Director of the petitioner No.1. Both are functioning from the address mentioned in the cause title and stated to be the registered office of the petitioner No.1.

3 The first respondent is an Indian national. He is claiming to be Resolution Professional of Ricoh India Limited, whereas respondent Nos.2 and 3 are Indian nationals and

members of Consortium Kalpraj Dharamshi and Rekha Jhunjhunwala whose Resolution Plan was approved by the National Company Law Tribunal ("NCLT" for short) by an order dated 28th November, 2019 in Miscellaneous Application No. 681 of 2019 in Company Petition No. 156 of 2018. Respondent No.4 is constituted under the Insolvency and Bankruptcy Code, 2016 ("IBC" for short). The fifth respondent before us is the Union of India through the Ministry of Corporate Affairs. It is in charge of and oversees the functioning of NCLT established under the Companies Act in 2013.

4 It is the case of the petitioner that it participated in Corporate Insolvency Resolution Process of respondent No.1 and submitted its Resolution Plan / Bid. The respondent No.1 accepted the bid of respondent No. 2 after the last date of submission. That was done after the bid of the petitioner was already opened. There is an illegality alleged in the acceptance of the bid of the second respondent. It is alleged that the petitioners objected to the process and enhanced its bid. That was highest in all terms. The petitioners state that their bid being the highest, it ought to have been accepted. However, the second highest bid was

accepted by the Committee of Creditors. It is this gross illegal process adopted by the Resolution Professional which was challenged by the petitioner by filing Miscellaneous Application No. 1039 of 2019 in Company Petition No. 156 of 2018. The Resolution Professional – respondent No.1 filed Miscellaneous Application No. 691 of 2019. That was accepted by the Tribunal and the Plan was sanctioned. The petitioners' application has been rejected.

5 After setting out the facts relating to filing of the proceedings before the National Company Law Tribunal, the petitioners state firstly in paragraphs No.6.1 that the NCLT admitted the petition filed by the Corporate Debtor - Ricoh India Limited and appointed a Resolution Professional. The appointment was confirmed by the Committee of Creditors. The petitioners state that the Invitation for Resolution Plans were issued and the case of the petitioners is that the Plan submitted by it was opened on 9th January, 2019 and the details of the same were disclosed to all participants, including the Resolution Professional. It is their case that at that stage no further offer or bid could have been accepted. After the deadline for submission

of Resolution Plan had expired, there was no question of thereafter entertaining any other Plan. However, there were two other Resolution Plans which were accepted by the Resolution Professional. Those were, *inter alia*, of Kalpraj Dharamshi and Rekha Jhunjhunwala. They were submitted allegedly on 13th January and 28th January, 2019, well beyond the stated deadline of 8th January, 2019. The petitioners immediately lodged their protest against this belated submission of the Resolution Plan and acceptance thereof by the Resolution Professional vide their e-mails dated 29th January, 2019 and 10th February, 2019. However, there are certain details revealed to the petitioner after it perused the reply filed by the respondent No.1 to their Miscellaneous Application. The petitioners, therefore, say that these facts, in addition to those narrated till paragraph 6.9, were set out by them in a Miscellaneous Application No. 1039 of 2019. They sought, *inter alia*, the rejection of the Resolution Plans. There are allegations made of collusion between the Resolution Professional, the Committee of Creditors and the successful Resolution applicant. Exhibit-C to the petition is a copy of this Miscellaneous Application.

6 The first respondent to this petition filed his reply to the Miscellaneous Application No. 1039 of 2019 of the petitioner. He raised various objections. The petitioner also filed Application No 1542 of 2019 seeking directions to the respondent No.1 to provide all the documents.. However, the Tribunal orally refused to provide documents and, therefore, the matter was argued without papers and proceedings of even the Miscellaneous Application No. 691 of 2019 which was filed by the Resolution Professional. The Tribunal was of the view that objection to the Plan should be heard first and thereafter, the Miscellaneous Application of the Resolution Professional can be taken up for disposal.

7 The case of the petitioner is that the Tribunal commenced hearing of the matter on 16th July, 2019, passed an order fixing the Miscellaneous Application of the petitioners for hearing on 12th June, 2019 and adjourned the main Miscellaneous Application of the Resolution Professional to 3rd July, 2019.

8 The Tribunal heard the Miscellaneous Application No. 1039 of 2019 alongwith other Miscellaneous Applications on

various dates, but reserved the matter for orders on 3rd July, 2019. Exhibit-G is a copy of the order dated 3rd July, 2019. However, no order was passed till November, 2009. There was another Application No. 1040 of 2019 which was heard and reserved for orders on 15th July, 2019. This Miscellaneous Application was filed by Commercial Tax Department of the Government of Rajasthan. The petitioner says that the Miscellaneous Application No. 691 of 2019 filed by respondent No.1 was listed on 23rd July, 2019. Since no order was passed it was adjourned to 7th August, 2019. The matter was again adjourned to 26th August, 2019. The copy of the order dated 7th August, 2019, is annexed as Exhibit-J to the petition.

9 In paragraph 6.22 of this petition the petitioners allege that the hearing of Miscellaneous Application No. 691 of 2019 was deferred till a decision on the aforementioned applications, including that of the petitioner, was taken. This order was the first order of the Bench (a two-Member Bench of the NCLT). Thus, the Member (Technical) was aware that Miscellaneous Applications were heard earlier and reserved for orders. The Tribunal heard the Miscellaneous Application No.

691 of 2019 and closed it for orders on 19th September, 2019. The advocates of the petitioner were present at the time of hearing on 19th September, 2019, but they were not heard and objections raised by them were not taken into consideration by the members of the Bench. The petitioners say that they were not allowed to raise any objections as their Miscellaneous Application was already heard and the matter was closed for orders. It was pointed out that that the learned Member (Technical) never heard the objection to the Resolution Plan. He was privy to the papers and proceedings in relation to the sanction and he sanctioned the plan without taking into consideration any objections raised by the petitioners or any other objector. Then in paragraph 6.25, the petitioners allege that on 28th November, 2019, the Tribunal proceeded to pass the impugned order. Though the order was not pronounced in open court, it was later uploaded on the website of the Tribunal in the evening.

10 The writ petition is filed in this Court on 11th December, 2019.

11 An affidavit has been filed in reply to it. The affidavit

has been affirmed by one Atul Thakker and he says that he has filed it as an authorised signatory of one Minosha Digital Solutions Private Limited, being the company / Special Purpose Vehicle created for implementing the Resolution Plan as approved by the Committee of Creditors of the Corporate Debtor and then by the National Company Law Tribunal by the impugned order. He says that this affidavit is necessitated because there is an incorrect statement of fact made in the writ petition. The affidavit-in-reply says that the Committee of Creditors was not in favour of the petitioner No.1 and, therefore, it filed the Miscellaneous Application No. 1039 of 2019. The deponent of this affidavit says that the application, namely, Miscellaneous Application No. 691 of 2019 filed by the Resolution Professional seeking approval to the Resolution Plan was not taken up due to the Miscellaneous Application of the petitioner. The Miscellaneous Application of the Resolution Professional was delayed from time to time and finally heard on 19th September, 2019. It was heard by the Bench of the Tribunal comprising of the Member (Judicial) and Member (Technical). At the time of hearing of this application, the advocates for the petitioners were present. The advocates for the petitioners made certain

submissions before the NCLT. They requested the NCLT to take on record,their Resolution Plan. The petitioners never raised any objection to the coram of the Hon'ble NCLT. Thus, the attempt in this affidavit is to demonstrate that though the petitioners application was heard before a Bench comprising of a single Member and reserved for orders, later on when the Miscellaneous Application No. 691 of 2019 of the Resolution Professional was heard, the petitioners were indeed present with their advocate and allowed the Tribunal to deal with the contents of even their Miscellaneous Application. They made brief submissions. They never objected to the course adopted by the Bench.

12 At the outset, we must clarify that the only point which has been throughout highlighted in this writ petition by the petitioners' senior counsel Mr. N.H. Seervai is that this petition deserves to be entertained as the Tribunal has departed and deviated from a salutary principle recognised in law. The argument is premised on the fact that principles of natural justice are part and parcel of the rule of law. These principles envisage equity, fairness and justice even in quasi judicial and judicial proceedings. They go to the root of the matter. If there is a

serious breach and violation of these salutary principles, the order passed in the proceedings is null and void. Thus, from the inception these proceedings cannot be declared to be in accordance with law. Mr. Seervai contended before us that Miscellaneous Application No. 1039 of 2019 was reserved for orders. That was the petitioners' application. It appeared on at least five occasions, namely 7th, 19th and 26th August, 2019 and on 6th and 7th September, 2019 and thereafter on 20th September, 2019. The petitioners application, as is clear according to Mr. Seervai, from Exhibit-G, was heard and reserved for orders. Our attention is invited to the order made on 3rd July, 2019 and the copy of this order is at Exhibit-G, page 192 of the paper-book. Mr. Seervai submits that once these two Miscellaneous Application Nos. 1039 and 2023 of 2019 were heard fully and reserved for orders, there was no question of the petitioners acceding to, much less, acquiescing in the hearing of these very applications by a Bench of which Mr. M.K. Shrawat, Member (Judicial) was a part. It is fallacious to contend that the petitioners agreed to either the formation or composition of the Bench. In other words, the order dated 28th November, 2019, is passed by a Bench of two Members. Mr. Seervai was at pains to point out that the composition of the

Benches and the directions in relation thereto are to be issued by the President of the National Company Law Tribunal. Mr. Seervai submits that after the petitioners' application was heard and orders were reserved, there was no question of the petitioners participating in any proceedings, much less in the hearing of Miscellaneous Application No. 691 of 2019. That was adjourned, in any event. The petitioners are not party to Miscellaneous Application No. 691 of 2019. No order was passed on the Miscellaneous Application No. 1039 of 2019 although it was reserved for orders as notified on 3rd July, 2019. The said matter was heard before the Miscellaneous Application No. 691 of 2019. The Presidential order is dated 23rd / 25th July, 2019. The Mumbai Bench was re-constituted by this order. The Bench of Mr. Shrawat was dissolved. If a Bench of two Members was constituted, but the petitioners being not a party to the Miscellaneous Application No. 691 of 2019, there is no question of the petitioners consenting to their Miscellaneous Application No. 1039 of 2019 being placed therewith or heard afresh. In fact, the petitioners would never become a party to the breach of the principles of natural justice. The salutary principle applicable in this case is that 'one who hears the matters must decide'. It is

Mr. Shrawat who heard the petitioners' Miscellaneous Application. He alone could have decided it. Merely because Mr. Shrawat became a part of a Bench of the Tribunal comprising of two Members does not mean that he could have taken up the petitioners' application along with Miscellaneous Application No. 691 of 2019 and delivered the impugned order dealing with the merits of the petitioners' application. It is not because Mr. Shrawat is a part of the Bench, that the petitioners consented to this manner of disposal of their Miscellaneous Application. The petitioners throughout insisted that their application should be heard and decided only by Mr. Shrawat who was sitting singly and there was, at the relevant time, no Bench of two Members as is now projected before this Court. Mr. Seervai says that because Mr. Shrawat is part of the Bench does not mean that the Bench comprising him can pass an order on the petitioners' Application No. 1039 of 2019.

13 Mr. Seervai has invited our attention to page 56 of the petition paper-book and particularly paragraph 4 of the impugned order to urge that the Bench proceeds on the footing that a Committee of Creditors takes a commercial decision. Such

a commercial decision is required to be upheld and the Resolution Plan undergoing the scrutiny of such Committee is required to be sanctioned or approved. The Bench projects as if arguments of the petitioners were canvassed or that they were also taken into consideration. In fact, the petitioners had no occasion to participate in the hearing on Miscellaneous Application No. 691 of 2019 and they would never endorse the statement of law stated to be culled out from a decision of the Hon'ble Supreme Court by the Tribunal. The Bench proceeds on the footing that there is no dispute to the Resolution Plan placed forward before the Committee of Creditors by another entity, namely, the respondent Nos.2 and 3. The finding of fact, therefore, is clearly vitiated inasmuch before that is rendered, the petitioners were not even heard.

14 Mr. Seervai has invited our attention to section 419 of the Companies Act, 1956 and Rule 150 of the NCLT Rules. The NCLT Rules, 2016, containing Rule 150(2) employs the words "which heard the case and pronounced the orders" and, according to Mr. Seervai, they would mean that Mr. Shrawat who heard the matter and he alone must pronounce the order. The other

Member Mr. Chander Bhan Singh was not the Member of the Bench which heard the petitioners' Miscellaneous Application No. 1039 of 2019. Thus, no consent can be inferred as far as the petitioners are concerned. In any event, no amount of consent or acquiescence would validate an order which, from inception, is a nullity. Thus, Mr. Seervai says that the entire order must be set aside.

15 As against this, Mr. Dwarkadas, learned senior counsel appearing for the respondent Nos.2 and 3 would submit that this writ petition under Article 226 of the Constitution of India is not maintainable for the IBC provides for two appeals. The petition is filed by asserting a fact, but the factual position is specifically disputed. The petitioners Resolution Plan was rejected by the Committee of Creditors on 15th February, 2019. Such a rejection is not justiciable. Mr. Dwarkadas would submit that the petition contains general and vague statements. The petition seeks to project as if the petitioners never participated in the proceedings once the order of the learned single Member was passed. In fact, our attention has been invited to the petition and particularly paragraph Nos.4 and 5 of the impugned order as also

the preceding paragraphs therein to urge that the petitioners have appeared before the Tribunal even after the single Member is stated to have heard their application fully and reserved it for orders. The petitioners never objected to their application being taken up along with Miscellaneous Application No. 691 of 2019. The petitioners, in fact, appeared through advocates and that is clear from the coram and the appearances of parties. That is apparent, according to Mr. Dwarkadas, from pages 46 to 48 of the paper-book. Thus, the petitioners took a chance and now are turning round to blame the Tribunal after it passed a verdict adverse to them. Surely, the petitioners cannot object when there is no prejudice. The petitioners took a chance until the Resolution Plan of respondent No.3 was approved. Once their plan was not approved, the petitioners have levelled allegations against Members of the Tribunal. In the circumstances, we should proceed to dismiss the petition. Mr. Dwarkadas also brought to our notice, page 196 of the paper-book. That is a copy of the order passed by the Tribunal on 26th August, 2019. That makes a reference to some of the applications which were heard on the occasion previous to this order. The Tribunal records that orders on these Miscellaneous Applications are also reserved and

they are yet to be pronounced. Miscellaneous Application Nos. 262 and 691 are to be heard on 6th September, 2019. However, the Bench heard Miscellaneous Application No. 691 of 2019 on 19th September, 2019, and reserved it for orders. Thus, according to Mr. Dwarkadas, the matter appeared subsequent to the date on which the petitioners application is stated to have been heard and reserved for orders. In support of his contentions, Mr. Dwarkadas relies upon the order sheet as well.

16 His attempt is to demonstrate that Miscellaneous Application No. 1039 of 2019 was adjourned to 12th June, 2019 and the main matter was listed for hearing on 3rd July, 2019. However, on 3rd July, 2019, the single Member also said that the Resolution Plan will be heard on two commercial aspects and, therefore, Miscellaneous Application No. 691 of 2019 together with other Miscellaneous Applications were adjourned to 23rd July, 2019. On 15th July, 2019, the rest of the matters were to be heard. On that date, the single Member only heard Miscellaneous Application No. 1040 of 2018, whereas he assigned a date of hearing, namely, 23rd July, 2019 to the other applications. On 3rd July, 2019, the Tribunal was comprising of only a single member,

but on subsequent dates, it was a two-Member Bench, namely, Member (Judicial) and Member (Technical). Thereafter, all matters were placed only before this Bench. In such circumstances, according to Mr. Dwarkadas, there is no merit in the contentions of Mr. Seervai.

17 Our attention has also been invited to the fact that we made an order on 6th January, 2020, calling for the original record. That was allowed to be inspected by both sides. On the record being inspected by both sides, we heard this petition.

18 The Insolvency and Bankruptcy Code, 2016, has been enacted by the Parliament so as to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner. The preamble to this law reads as under :

> *"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government*

due and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

19 In terms of this law, before the definitions is the Application section. That section (section 2) says that the provisions of this Code shall apply to any company incorporated under the Companies Act, 2013 or any previous company law. Then, section (3) contains Definitions and after the definitions comes Part II, which contains some additional definitions in section 5. The provision which has been invoked in this case by the debtor is to be found in Chapter II titled as Corporate Insolvency Resolution Process. We find that the application having been made and admitted, entails appointment of a Resolution Professional. His appointment and tenure is covered by section 16 and his duties are set out in section 18.

20 The appointment of the Resolution Professional thereafter results in constitution of a Committee of Creditors vide section 21. This Committee has the power to not only to consider the proposals, but related issues and the duties of the Resolution Professional in that regard are set out in section 25. What we

have noted from the scheme of these sections is that there is a Resolution Plan which can be submitted by even a resolution applicant (section 30). Then, by section 31, there is an approval thereto. Section 32 is vital for our purpose and it says that any appeal from an order approving the Resolution Plan shall be in the manner and on the grounds laid down in sub-section (3) of section 61. Section 61 of the Code provides for appeals and Appellate Authority. That reads as under :

> *"**61. Appeals and Appellate Authority.**-(1) Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.*
>
> *(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:*
> *Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days.*
>
> *(3) 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.

(4) An appeal against a liquidation order passed under section 33 may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order."

21 Then, by section 62 there is a further appeal provided to the Supreme Court on a question of law. That appeal can be filed by a person aggrieved by an order of the National Company Law Appellate Tribunal.

22 To our mind, the petition before us projects a factual dispute. The petitioners assert that they have filed a Miscellaneous Application No. 1039 of 2019. That was heard first in point of time and reserved for orders. Until and unless any order was made thereon, there is no question of taking up for consideration another Miscellaneous Application No. 691 of 2019. Further, no orders were passed in the petitioners' Miscellaneous Application No. 1039 of 2019, although it was fully heard by a single Member Bench. The two Member Bench of the NCLT, in the impugned order, attempts to demonstrate that the petitioners did not pray for a separate order on their application and allowed their Miscellaneous Application to be heard together with Miscellaneous Application No. 691 of 2019 of the respondent Nos.2 and 3. The petitioners state that by mere reference to their application in the title to the impugned order or, by including the petitioners' advocate's name in the list of advocates who appeared for parties, does not mean that the petitioners agreed or acquiesced in the hearing of their application afresh or taking up of their application by Mr. Shrawat, together with Mr. Chander Bhan Singh, Member (Technical). Thus, the petitioners did not agree at all to their application being heard by a Bench of two

Members although it was initially heard and reserved for orders by Mr. Shrawat. Merely because Mr. Shrawat was part of a Bench of NCLT does not mean that the petitioners allowed him to adopt the course that he has adopted in passing the impugned order. The petitioners maintain that in the absence of any consent or approval on their part, the course adopted by the Tribunal is contrary to law.

23 On the other hand, we have a rival version. The rival version is placed before us by the respondent Nos.2 and 3. They say on oath that the respondent No.1, pursuant to approval of successful Resolution Plan in terms of the IBC also filed a Miscellaneous Application bearing No. 691 of 2019 before the NCLT. The respondent No.1 sought approval to the successful Resolution Plan. It was, *inter alia*, due to the Miscellaneous Application of the petitioner (MA 1039 of 2019) that the hearing of Miscellaneous Application No. 691 of 2019 was delayed from time to time. That was finally heard on 10th September, 2019 by the Bench of the Tribunal consisting of the Member (Judicial) and Member (Technical). At the time of hearing of the Miscellaneous Application No. 691 of 2019, the advocates of the petitioners were

present. The advocates for the petitioners, after the concerned party was heard, made certain submissions before the NCLT and, in fact, requested the NCLT to take on record the Resolution Plan as submitted by petitioner No.1 before the Committee of Creditors. The petitioners never objected to the coram of the Hon'ble NCLT and, in fact, submitted to their jurisdiction. The coram of the NCLT reserved its order on Miscellaneous Application No. 691 of 2019 and did not take the Resolution Plan of petitioner No.1 on record. The Board / List of matters on 19th September, 2019, before the Bench, is relied upon. A copy of that is taken from the website of the NCLT. Thereafter it is said on 28th November, 2019, both Miscellaneous Applications, one filed by the petitioners and other by the respondent No.1 were listed on the Board under the caption "For Pronouncement of Orders". The orders were pronounced in both matters. The deponent of the affidavit filed on behalf of the respondent Nos.2 and 3 says that he was present in the Court when the order was pronounced. The petitioners have made a false and incorrect statement in paragraph 6.25 of the writ petition that the orders were not pronounced in open court. The Board / List of matters of 28th November, 2019, being the date on which the orders were

pronounced, the grievance raised by the petitioners that the impugned order is a nullity has no substance. Even the second objection taken and namely, the principle of 'one who hear must decide' has no application because the petitioners agreed and consented to the two Members taking up the Miscellaneous Application filed by them even though on two prior occasions, it was heard by a single Member and reserved for orders. The petitioners, therefore, have clearly consented to their application be taken up by the Bench comprising two Members. Equally, they do not deny that they were present.

24 To our mind, these are disputed questions of fact and as the petitioners can file an appeal against the impugned order, they can very well include the above challenge in the Memo of the same. We are of the opinion that a writ petition would not be maintainable in this case simply because the petitioners argue that there is a serious breach and violation of the principles of natural justice and that issue goes to the root of the case. The petitioners may say that a particular principle has been violated and breached and this aspect is very serious and goes to the root of the functioning of the Tribunal and the procedure adopted by

it. However, such issues would have to be considered in the backdrop of the facts. For a Writ Court to proceed and take up such a challenge, the facts have to be undisputed. In the instant case, there is a clear dispute on facts. The petitioners, in the Memo of this petition, clearly say that the single Member of the Tribunal had heard their Miscellaneous Application. However, the petitioners in the same breath say that the Bench of the Tribunal was re-constituted. The Tribunal, though listed the application of the respondents on 23rd July, 2019, proceeded to adjourn it. The Members of the Bench were aware that Miscellaneous Application of the petitioner was heard earlier and reserved for orders, still, the Member (Technical) proceeded to pass orders on the petitioners' application as a part of the Bench. The petitioners have also projected a grievance that without deciding their application and other Miscellaneous Applications, the Tribunal proceeded to hear the main Resolution Plan in Miscellaneous Application No. 691 of 2019. It was contrary to the view expressed and recorded earlier. The Tribunal closed the matter for orders, but when they closed it on 19th September, 2019, though the advocates for the petitioners were present at that hearing, they were not heard and objections raised by them

were not taken into consideration by the Members during the hearing of the Resolution Plan. They were not allowed to raise objections as they were already heard and the petitioners' matter was reserved for orders. The petitioners' advocate's request was to hear both the Resolution Plans before passing orders and that request was also not entertained. That is presumably because they were already heard on their Miscellaneous Application. To our mind, these are, therefore, disputed questions and the petitioners are not projecting only one or salutary grievance. They raise alternate grounds to support their argument that they were not heard when the two-Member Bench of the NCLT passed the impugned order. One of the grounds concerning this issue is that one of the Members of the Bench had heard the petitioners' application earlier separately and reserved it for orders. Although he did not pronounce that order and joined the Bench, he proceeded on the footing that the petitioners are consenting to their application being taken up by the Bench of two Members and disposed of by the Bench together with the application of the first respondent. This course, according to the petitioners, was not consented to, but strongly objected. Yet, paragraphs 6.22, 6.23 and 6.24 of the petition point towards the contrary.

25 To our mind, therefore, it would be highly unsafe to entertain this petition, all the more when the petitioners have an alternate equally efficacious remedy of filing an appeal against the impugned order in terms of sections 32 and 61 of the IBC. In the Memo of Appeal, they can always raise all grounds, including that are raised in the present petition. They can always urge before the Appellate Authority that the impugned order is a nullity because it is contrary to section 419 of the Companies Act, 2013 and Rule 150(2) of the NCLT Rules. They can always raise the plea that their consent was not obtained and in the absence of their consent, the Tribunal heard Miscellaneous Application No. 1039 of 2019 although it was fully heard prior to 19th September, 2019, and reserved for orders. Alternatively, on 19th September, 2019, the Members of the Bench did not hear the petitioners' advocate fully although he was present. All grounds being available, we do not think that in writ jurisdiction, we should interfere. That amounts to scuttling an elaborate process of resolution of disputes arising during the course of applicability of the Insolvency and Bankruptcy Code, 2016. That Code must be allowed to operate and run its full course. Merely because in

exceptional cases this Court can intervene in writ jurisdiction means that it is not obliged to intervene in each and every order and consider the grounds of challenge to the orders passed by the NCLT Bench at Mumbai. In fact, in the present case, to consider the grievance of the petitioners that the impugned order is a nullity and the contra version that it is not a nullity, but at best vitiated by a irregularity, we would be required to go through the facts in detail. On the records being summoned and perused by us, we realised that there is indeed a serious factual dispute. A Writ Court would ordinarily abstain from going into and deciding such disputes, when parties are not prejudiced and the law provides for an appeal. In IBC, the (NCLAT) Appellate Authority is empowered to consider and decide all questions of fact and law. No general rule can be said to be laid down in the judgments brought to our notice. We do not think that we should, therefore, entertain the present petition.

26 The order passed by the Division Bench of this Court in Writ Petition No.3492 of 2018 *Hardcastle Restaurants Pvt. Ltd. & Anr. vs. Union of India & Ors.,* decided on 1st October, 2019, has no application to the facts of the present case. In that case, the

main contention of the petitioner of violation of the principles of natural justice was raised in the context of hearing by a three-Member Bench but passing of an order passed by four Members. In considering that argument, the undisputed factual position is noted by the Division Bench of this Court in paragraphs 14 and 15. The Division Bench rendered its finding on the point and concluded that the decisions cited by both sides demonstrate that breach of the principles of natural justice are examined in the facts of each case. Certain basic position in law is settled. The rule that one who hears must pass the order is the basic proposition. In certain circumstances, this rule can be deviated from. The basic rule was found to be deviated by the Bench in the peculiar undisputed facts emerging from the record of that writ petition. The Bench, therefore, concluded that three Members of the Authority had heard the petitioner and they participated in the entire hearing, but the final order included the fourth Member. This has resulted in violation of the principles of natural justice and fairness and, therefore, the impugned order was set aside. To our mind, the argument of the petitioners' counsel based on this principle and relying on this judgment cannot be accepted as the Division Bench of this Court had rightly clarified

that the legal principle is well settled, but its applicability would be a point or issue to be considered in the backdrop of the facts and circumstances of each case. This is precisely the course followed by us.

26 As a result of the above discussion, we accept the preliminary objection raised to the maintainability of the Writ Petition and proceed to dismiss it on the ground that the petitioners have alternate and equally efficacious remedy of filing on Appeal to the National Company Law Appellate Tribunal and in that appeal, it can raise all grounds, including the one raised in the Memo of the present petition. We clarify that we have expressed no opinion on the merits of the rival contentions. There will be no order as to costs.

27 The original record and proceedings be returned by the Registry to the advocate appearing for the Union of India.

R.I. CHAGLA, J. ***S.C. DHARMADHIKARI, J.***