NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 586 of 2021

(Arising out of the Order dated 08th April, 2021 passed by National Company Law Tribunal, New Delhi, Court – V, in IA No. 641/2021, in CP (IB) No. – 2413(ND)/2019

IN THE MATTER OF:

1. Rahul Khilnani
R/o 203, Jacaranda, Shipra Srishti,
Indirapuram, Ghaziabad – 201301.
Email: anubhavgupta.law@gmail.com

Office at: F-4, Jagat Puri,
Parwana Road, Gali No. 14,
Delhi – 110051. **…Appellant No. 1**

2. H&R Enterprises
Through Sole Proprietor
Mr. Mangharam Khilnani,
Available at:
F-4, Jagat Puri, Parwana Road,
Gali No. 14, Delhi – 110051.
Email: anubhavgupta.law@gmail.com **…Appellant No. 2**

Versus

1. Sh. Atul Kumar Jain
Resolution Professional
B-4/522 Ekta Gardens,
9 IP Extension, Delhi – 110092
Reg. No. IBBI/IPA-002/IP-N00734/2018-2019/12266
Email: cirp.solven@gmail.com
atulkj@gmail.com **…Respondent No. 1**

2. Committee of Creditors
Through
M/s. SM Finlease (82% Voting Rights)
Through Authorized Representative
Availbale at M-10, Greater Kailash-II,

New Delhi-48.
Email: sharad@smgpower.com **…Respondent No. 2**

3. M/s Ranjit Fin Trade Pvt. Ltd.
Resolution Applicant
Through Authorized Representative
1/50, 2nd Floor, Ganga Apartments, Lalita Part,
Laxmi Nagar, New Delhi – 110092.
Email: fintraderanjit@gmail.com **…Respondent No. 3**

Present

For Appellant:	**Mr. Anubhav Gupta & Mr. Ajit Singh Joher, Advocates.**
For Respondent No. 1:	**Mr. Pratik Malik, Advocate for R-1.**
For Respondent No. 3:	**Ms. Ekta Chaudhary, Advocate for R-3.**

(J U D G E M E N T)

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Impugned Order dated 08.04.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal New Delhi Bench, Court – V), in IA 641/2021 in IB 2413(ND)/2019, dismissing the Application preferred by the Appellants herein objecting to the Resolution Plan as only 2% of their 'Claims' has been admitted, while the workman and other statutory dues have been paid 100%.

2. Facts in brief, are that the Adjudicating Authority admitted the Petition and CIRP was initiated on 18.02.2020 and the Appellant/'Operational Creditors' filed their 'Claims' before the IRP for an amount of Rs.11,05,850/- on 14.03.2020. On 07.01.2021, the Resolution Applicant was directed to give details regarding

whether the interest of the 'Operational Creditors' was in adherence to Section 30(2) of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code'). The 'Operational Creditors' issued a Notice dated 20.01.2021 to the RP and the COC Members claiming that their dues of Rs.51,91,935/- is payable. Another Notice was issued on 22.01.2021 seeking all the documents which the RP had relied upon for assessing the Liquidation Value of the 'Corporate Debtor', but there was no response. It is averred that the Appellant received an email dated 23.01.2021 from the Respondent/'Financial Creditor' requesting the RP to fix a CoC Meeting in view of the objection raised by the 'Operational Creditors' and observations made by the Adjudicating Authority in the Order dated 15.01.2021. The Adjudicating Authority while addressing to the issue whether Section 24(3) of the Code was complied with, held that there was no compliance of Section 24(3) of the Code and that the Notice was not issued upon the 'Operational Creditor', but in view of Section 24(4) of the Code, the proceedings shall not be invalidated.

3. Addressing to the issue of distribution of the assets, the Adjudicating Authority while dismissing the Application observed as follows:

> *"87. Therefore, at this juncture, we would like to refer the Resolution which is at page 31 of the revised Resolution Plan and we notice that at page 32, the CoC has discussed the Section 30(2)(b) of the IBC and Regulation 38 Sub Regulation 3(a) and (b) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016:*

Explanation I.- For removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

The Chairman informed the Board that the RA has made a submission that Rs. 655.21 lacs is the amount offered under Resolution plan against the liquidation value of Rs. 308.14 lacs of Corporate Debtor. Section 30(2)(b) would demonstrate that the amount to be paid to the Operational Creditors has to be higher of either the amount to be paid to such Operational Creditors under Section 53 of the Code in the event of liquidation of the Corporate Debtor.

[“Situation 1”| or the amount under the Resolution plan when distributed in accordance with the order of priority in sub-section (1) of Section 53 ["Situation 2”]. In the instant case under Situation 1, the amount payable to the Operational Creditors is NIL and in Situation 2, the amount payable to the Operational Creditors is also NIL. Nonetheless, as far as the debt owed to the other Operational Creditors are concerned, the Resolution Plan as approved, proposes a payment of 2% of their claim thereby increasing the plan value to Rs. 655.21 Lacs from earlier approved plan of Rs 650.70 Lacs. Now the financial summary of the plan is as follows.

88. On the basis of that Resolution, we are of the view that provision of Section 30(2) of the IBC and Regulation 38 have been discussed in the meeting of the Co and it was observed that liquidation value of the Resolution Plan was Rs. 308.14 lakhs whereas the resolution applicant has offered value of Rs. 655.21 lakhs, which is more than the liquidation value and it is further observed that there are two situations under Section 53, under situation 1, the amount payable to the operational creditors in the event of liquidation is NIL and in situation 2, the amount payable to the operational creditor is also NIL. Therefore, in our considered view that the provision regarding the payment of Operational

Creditor to the extent of 2% is in accordance with the provision of Section 30(2) (b) of the IBC and Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

89. For the reasons discussed above, we are of the considered view that the contention of the applicant, in the event of liquidation, the Operational Creditor is entitled to get more than the amount, which is proposed to paid to the Operational Creditor, in our considered view is not liable to accepted.....

93. In view of the aforesaid decision, we are of the considered view that since the power of adjudicating authority while considering the Resolution Plan which was duly approved by the CoC is very limited and we have already discussed that the Resolution Plan has made the provision for payment of Insolvency Resolution Process Costs, the repayment of debt of Operational Creditor, the management of the affairs of the Corporate Debtor, the implementation and management of the Resolution Plan and the plan does not contravened any provision of the law. Therefore, we have no option but to reject the prayer of the applicant of IA/641/2021. We find, no force in the contention raised on behalf of the applicant/Operational Creditor, in our considered view the objections raised by the Operational Creditor is not sustainable. Therefore, the prayer of the Operational Creditor/ Applicant to direct the Resolution Professional to induct the applicant in the Co© and also direct the Resolution Professional to convene a CoC meeting and to pay 100% of the dues of the applicant/ Operational Creditor are hereby rejected.

94. Accordingly, the present application i.e., IA/641/2021 filed on behalf of the Operational Creditor stands dismissed."

4. It is submitted by the Learned Counsel for the Appellant that the Adjudicating Authority ought to have allowed the CoC to reconsider their Plan

in the interest of justice, but the Adjudicating Authority approved the Plan even when 82% of the Voting Right Members moved an Application under Regulation 18 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, (hereinafter referred to as 'IBBI Regulations, 2016'), for convening a Meeting. But the RP issued an email to the Members of CoC stating that CIRP came to an end on 21.01.2021 and that he cannot hold the CoC Meeting, but the CIRP period has expired only on 22.03.2021. It is argued that the Information Memorandum demonstrates the supply of contracts that were pending with the 'Corporate Debtor' which substantiates the assertion that the CIRP was initiated only to usurp the monies of the Creditors. The fact is that the Order dated 15.01.2021 was not available before the CoC when the Meeting was convened on 17.01.2021 and the Resolution Plan was approved. The Plan in the present form is giving only 2% to the 'Operational Creditors' as opposed to 100% to all other stakeholders, which is unfair and discriminatory. The entire process is fraudulent as a Resolution Applicant is also a 'Financial Creditor' and is part of the CoC. The 'Operational Creditor' was never given any Notice of the CoC nor were they shared the Resolution Plan or their comments taken. Learned Counsel placed reliance on Section 24(3)(c) of the Code and Regulation 35(2) of the IBBI Regulations, 2016, in support of his case.

5. Learned Counsel for the Appellant has placed reliance on the Judgements of the Hon'ble Supreme Court in ***'Vijay Kumar Jain' Vs. 'Standard Chatered***

Bank & Ors., AIR 2019 SC 2377, 'ANG Industries Ltd.' Vs. 'Shah Brothers Ispat Pvt. Ltd. & Anr.', Company Appeal (AT) (Insolvency) No. 109 of 2018 and 'Swiss Ribbons Pvt. Ltd. & Ors.' Vs. 'Union of India (UOI) & Ors.', (2019) 4 SCC 17.

6. It is the case of the first Respondent that the RP Mr. Atul Jain has only assumed charge on 15.07.2020; that there is no discrimination against the 'Operational Creditor' and the revised Resolution Plan was approved with 100% Voting Shares in the CoC Meeting held on 17.01.2021 providing for payment of dues to the employees; neither the RP nor any Creditor can question the Commercial Wisdom of the Members of the CoC; that the true purport of the Order dated 15.01.2021 passed by the Adjudicating Authority was duly communicated and in fact was one of the items of Agenda of the Meeting that took place on 17.01.2021; that this Meeting was attended by Mr. Maheswari himself.

7. It is also submitted by the first Respondent that the CIRP period was increased by 90 days from 23.10.2020 to 23.01.2021. The said Mr. Maheshwari, representing the entire CoC with 82% Voting Right power, approved the Resolution Plan on both the occasions fully aware of the purport of the Order dated 15.01.2021. It is submitted that during the CIRP, 9 number of Meetings of the 'Operational Creditor' took place and all the payments during CIRP were made under the signature of Mr. Dhruv Maheshwari, son of Mr. Sharad Maheshwari who is the Promoter/Director of SM Finlease. It is submitted that the

Respondent had carried out the CIRP of the 'Corporate Debtor' in a fair and transparent manner and disclosed all the Contracts/Purchase Order existing on the date of issue of Information Memorandum. As regarding the objection to Section 24(3)(c) not being adhered to, it is submitted that none of the 'Operational Creditors' informed the first Respondent during the CIRP, the name of the representative of the 'Operational Creditor' who should be sent Notice and who should attend the Meetings, but without any Voting Rights. It is also contended that it is nobody's case that any prejudice has been caused to the 'Operational Creditor'. The 'Operational Creditor' has no Voting Power and could not have altered any of the decisions of the CoC. No discrimination has been caused to the 'Operational Creditors' as under Section 53 of the Code, whereunder there are 8 levels of priority and the employees fall under the 3rd level, whereas the Appellant falls in the 6th level i.e., Section 53(1)(f). Hence, there is no deficiency of service on behalf of the first Respondent.

8. Despite service of Notice, no one appeared for Respondent-2. Learned Counsel for the third Respondent/Successful Resolution Applicant ('SRA') submitted that the Minutes of Meeting dated 17.01.2021 clearly shows that the Order dated 15.01.2021 was discussed and the Meeting was attended by Mr. Maheshwari, the lead Member of the CoC with more than 82% Voting Rights and only after being satisfied about the compliance, the Plan was approved. It is submitted that the Appellants misguiding the Tribunal while acting in cahoots with the 'Financial Creditor' who had 82% Voting Rights and was the *de facto*

Committee of Creditors who initially filed their 'Claims' as a 'Secured Financial Creditor' and got it verified by the then IRP. The Resolution Plan was approved by the CoC with 100% voting and the said Mr. Maheshwari represented the entire CoC on both the occasions. The value which Mr. Maheshwari has offered was less than half of what the current SRA has paid. It is submitted that in the present Appeal, the averments are verbatim to the averments in the Interlocutory Application No. 641/2021 and the Application filed by SM Finlease who are hand in glove and making an attempt to derail the proceedings. The Information Memorandum contains all the details of the 'Corporate Debtor' including the Contracts and Purchase Orders receipt. It is argued that the Appellant are not entitled to know the Liquidation Value of the 'Corporate Debtor' or question the Liquidation Value arrived at by the valuers registered by the Insolvency and Bankruptcy Board of India. Reliance in this regard is placed upon Regulation 35 of the IBBI Regulations, 2016, whereby only the Members of CoC are entitled to know the Fair Value and the Liquidation Value after the receipt of the Resolution Plan. It is incumbent upon the Members of the CoC to maintain confidentiality about the Fair Value and the Liquidation Value to avoid undue claim or undue laws. It is common knowledge that the Resolution Plan submitted by the SRA is subject to negotiation, but none question the Commercial Wisdom of the Members of the COC in approving the Resolution Plan. With respect to non-compliance of Section 24(3)(c) it is argued that the Adjudicating Authority has rightly place reliance on Section 24(4) of the Code as the 'Operational Creditors'

do not have any Voting Rights and no prejudice was caused by not issuing the Notice to them. Further, the details of the representative representing them was never forwarded to the RP. The distribution to the 'Operational Creditors' has been done in accordance with the provisions of Section 30(2)(b) of the Code and hence the Plan is fair and equitable.

Assessment:

9. At the outset, we address to the contention of the Appellant that the Order dated 15.01.2021 passed by the Adjudicating Authority seeking explanation with respect to whether the interest of all stakeholders have been adhered to, was not complied with as the said Order was never placed before the CoC Meeting which took place on 17.01.2021. It is the case of the RP and the SRA that the Order dated 15.01.2021 was indeed placed before the CoC and was discussed in totallity. Further, the contention of the Appellant is that the 82% Voting Right Member Mr. Maheshwari also pointed out that there was a discrepancy and despite the fact that the said Mr. Maheshwari filed an Application before the Adjudicating Authority for convening a Meeting, the same was ignored and the Resolution Plan approved. It is also the case of the Appellant that Section 24(3)(c) of the Code was not adhered to. Section 24 of the Code reads as follows:

> ***"24. Meeting of committee of creditors.—***
>
> *(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.*

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) members of [committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];

(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;

(c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.

(4) The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) Any Creditor Subject to sub-sections (6), (6A) and (6B) of section 21, any creditor] who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified."

(Emphasis Supplied)

10. Section 24(3)(c) specifies that 'Operational Creditors' or their representatives if the amount of their aggregate dues is not less than 10% of the dues are to be given Notice of each CoC Meeting, Section 24(4) of the Code specifies that the representative of the 'Operational Creditors', **may** attend the Meeting of CoC but **shall** not have any right to vote in these Meetings. The word shell mentioned in Section 24(4) of the Code makes it clear that none of the 'Operational Creditors' or their representatives have any right to vote even if they attend the Meeting of the CoC. We also take into consideration that the Liquidation Value of the Resolution Plan was Rs.308.14Lakhs/- whereas the Resolution Applicant/Respondent 3 offered a value of Rs.655.21Lakhs/- which is much more than the Liquidation Value. However, it is significant to mention that the amount payable to the 'Operational Creditors', as provided for under Section 53 of the Code was 'NIL' in both the situations. Therefore, it cannot be stated that there was any 'prejudice' caused to the Appellants herein in terms of Section 24(3) not having been complied with. We are also conscious of the fact that there is no documentary evidence on record to establish that a name of a representative of the 'Operational Creditors' was indeed given to the RP and the

RP had chosen to ignore the same, as it is the specific case of the RP that no such information was ever tendered to him.

11. The RP has also submitted that the 82% Voting Right Member, whom the Appellant submits had raised objections about the Plan, is none other than the same 'Mr. Maheshwari' who had submitted the Resolution Plan *twice* and withdrew the same on both the occasions and had given a Plan for less than half of what the Resolution Applicant has paid. A perusal of the Minutes of the Meeting dated 17.01.2021 clearly shows that the directions given by the Adjudicating Authority on 15.01.2021 were discussed in totallity and were duly addressed to by the SRA. It is pertinent to mention that the 82% shareholder whom the Appellant states had raised objections which were not adhered to, had also attended the Meeting and approved the Plan.

12. Now we address to the contention of the Appellant that a copy of the Plan was never given to them and they did not know the Liquidation Value of the 'Corporate Debtor'. Regulation 35 of IBBI Regulations, 2016, read as follows:

> ***"35. Fair value and Liquidation value –***
> *(1) Fair value and liquidation value shall be determined in the following manner:-*
>
> *(a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;*
>
> *(b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he*

may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and

(c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

(2) After the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, on receiving an undertaking from the member to the effect that such member shall maintain confidentiality of the fair value and the liquidation value and shall not use such values 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.

(3) The resolution professional and registered valuers shall maintain confidentiality of the fair value and the liquidation value.]"

(Emphasis Supplied)

13. The aforenoted Regulation specifies that only the Members of the CoC are entitled to know the Fair Value and the Liquidation Value after the receipt of the Resolution Plan in accordance with the provisions of the Code. In fact, the confidentiality is to be maintained regarding the Fair Value and Liquidation Value lest it should cause any undue claim to itself or any third party. This Tribunal is of the earnest view that as per the provisions of the Code, the Appellants are not required to know the Liquidation Value.

14. At this juncture, we find it a fit case to place reliance on the Judgement of the Hon'ble Supreme Court in ***'Kalparaj Dharamshi & Ors.' Vs. 'Kotak***

Investment Advisors Ltd. & Ors.', [2021] 166 SCL 583 (SC), in which the Hon'ble Supreme Court has laid down that the Commercial Wisdom of the CoC is non-justiciable:

> *"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)

15. We are of the considered view that there is no material irregularity warranting any interference as it is compliant with Section 30(2) of the Code. Having regard to the fact that the Resolution Plan was approved on 17.01.2021 by the CoC and subsequently by the Adjudicating Authority on 08.04.2021 and more than a year has lapsed, and also keeping in view that the 'Operational Creditors' do not have any Voting Right in the CoC and that the Commercial Wisdom of the CoC is nonjusticiable and when there is no material irregularity on the face of the record, we do not see any illegality or infirmity in the Order of the Adjudicating Authority.

16. For all the aforenoted reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Principal Bench,
New Delhi
23rd September, 2022

himanshu