Page 1693 - 1698 **DOI:** *https://doij.org/10.10000/IJLMH.117221*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 2

2024

Analysis of the Proviso to Section 31(4) of The Insolvency and Bankruptcy Code, 2016

MR. DIPTI LAVYA SWAIN[1], PROF. (DR.) SANDHYA KUMARI[2] & MR. BADRINATH SRINIVASAN[3]

ABSTRACT

Section 31(4) of the Insolvency and Bankruptcy Code is a provision intended to collaborate the efficiencies of the various corporate and commercial laws when it comes to the resolution of a company. The sub-section was not a part of the original Code and was introduced by the way of an amendment and made effective on 6 June 2018. As per the provision, the Resolution Application is required to obtain the necessary approvals of the other Regulators and adjudicating authorities created under various other applicable laws, after the approval of the Resolution Plan by the Committee of Creditors and the Adjudicating Authority. The proviso to the Section states that in case the RP contains a plan for a 'combination', approval of the Competition Commission of India would be required 'before' the approval by the CoC. Such a distinction calls for an analysis as to the legislative intent of the proviso and the judicial trends to that effect. Thus, this paper delves into understanding the legislative intent and analyze the judicial trend before reflecting on personal impressions.

Keywords*: Insolvency and Bankruptcy Code, Competition Commission of India, Resolution Plan, NCLT, Insolvency.*

I. INTRODUCTION

Section 31(4) of the Insolvency and Bankruptcy Code [hereinafter referred to as the '**Code**' or '**IBC**'] is a provision intended to collaborate the efficiencies of the various corporate and commercial laws when it comes to the resolution of a company. The sub-section was not a part of the original Code and was introduced by the way of an amendment and made effective on 6 June 2018. The provision in its current form reads

"*(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:*

[1] Author is the Managing Partner at DLS Law Offices and PhD Scholar at Galgotias University, India.
[2] Author is a Professor at Galgotias University, India.
[3] Author is a PhD Scholar at Galgotias University, India.

 [ISSN 2581-5369]

Provided that where the resolution plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors."

As per the provision, the Resolution Application [hereinafter referred to as the '**RA**'] is required to obtain the necessary approvals of the other Regulators and adjudicating authorities created under various other applicable laws, after the approval of the Resolution Plan [hereinafter referred to as the '**RP**'] by the Committee of Creditors [hereinafter referred to as the '**CoC**'] and the Adjudicating Authority. Here what is important to note is the necessity to obtain the regulatory approval 'after' the RP has been approved by the CoC.

However, the proviso to the Section states that in case the RP contains a plan for a x1'combination', approval of the Competition Commission of India [hereinafter referred to as the '**CCI**'] would be required 'before' the approval by the CoC. The CCI is entrusted with the task of forming prima facie opinions with regard to combinations and whether they are capable of causing an appreciable adverse effect on competition in the market.[4]

Such a distinction calls for an analysis as to the legislative intent of the proviso and the judicial trends to that effect. Thus, this paper delves into understanding the legislative intent and analyze the judicial trend before reflecting on personal impressions.

II. LEGISLATIVE INTENT

The Insolvency Law Committee Report, which recommended the provision, advocated for timelines for obtaining statutory approvals but was silent when it came to expounding on the intent for the prior CCI approval.

However, the provision leaves little to the imagination with regards to the intent. Consider a situation where the Resolution Plan has been approved by the NCLT without obtaining the CCI approval: In such a case if the CCI post the approval of NCLT finds an infirmity can reject the plan and render the Corporate Insolvency Resolution Process nugatory. This is because the CCI is entrusted with the power to review all the mergers and amalgamations which cross the thresholds mentioned under § 5 of the Competition Act, 2002.

However, such a need is not extended to other statutory approvals and regulators as changes can be made to the plan in case of an infirmity unlike under competition act where the whole process can be rendered nugatory.

[4] The Competition Act, 2002, § 6(2).

 [ISSN 2581-5369]

III. Pre-NCLT Approval Stage: Is the Proviso Directory or Mandatory?

The question whether proviso to section 31(4) is mandatory or directory is still not settled. Where the intent of the Legislature is quite clear, the practice shows otherwise. The proviso makes use of the word "shall" implying that the provision is mandatory. However, there have been many instances where the approval has been taken by the CoC post the Resolution Plan has been approved by the NCLT.

Such a scenario leads to watering down of the provision and raises doubts as to whether the it is 'mandatory' or 'directory'.

The Supreme Court of India has, on various occasions held that the use of the nomenclature "shall" or "may" is not a decisive factor in determining whether a provision is mandatory or directory.[5]. Rather, if it can be ascertained that the object of law would be defeated by non-compliance of the provision, then the provision can be treated as 'mandatory'.

In the case of *Arcelormittal India Pvt. Ltd. v. Abhijeet Guhathakurta*[6], the NCLAT held that the proviso in Section 31(4) was directory in nature and not mandatory. The rationale behind the decisions was stated as – the CoC looks into the viability, feasibility, and commercial aspect of the Resolution Plan. The decision was relied upon in *Vishal Vijay Kalantri v. Shailen Shah* [7] as well.

However, I disagree with the decision as the perspective with which the CoC assesses the Resolution Plan and the perspective with which CCI assesses the plan are very different. Where the CoC uses its commercial wisdom, the CCI gauges whether the implementation of the Resolution Plan would cause an adverse effect on competition.

Recently, in the case of *Makalu Trading v. Rajiv Chakraborty*[8], the NCLAT held that the resolution plan would not fall foul of the section if prior approval of CCI has been taken before approval by NCLT. The Bench stated that the proviso is directory in nature. The Bench noted that the timelines under Competition Act section 31(11) and the 180-day timeline under IBC cannot be reconciled, giving the proviso a directory colour.

[5] Sharif-ud-din v. Abdul Gani Lone, 1980 AIR SC 303.
[6] Arcelormittal India Pvt. Ltd. v. Abhijeet Guhathakurta, CA (AT) (Insolvency) No. 524 of 2019, NCLAT, Order dated December 16, 2019.
[7] Vishal Vijay Kalantri v. Shailen Shah, CA (AT) (Insolvency) No. 466 of 2020, NCLAT, Order dated July 24, 2020.
[8] Makalu Trading v. Rajiv Chakraborty, CA (AT) (Insolvency) No. 533 of 2020, NCLAT, Order dated September 9, 2020.

 [ISSN 2581-5369]

However, a perusal of the past cases where the CCI has granted approvals under 35 days for companies coming under Section 31(4), it can be seen that the on-ground realities when it comes to non-reconciliation of timelines are totally opposite.[9]

At what stage must the resolution applicant approach the CCI?

The event for notifying CCI is triggered the moment a binding document conveying the intention of the acquirer to acquire control, shares, voting rights or assets, is executed. The Resolution Plan submitted by the Resolution Applicant was considered by CCI as a binding document triggering the notification and filing of notice with CCI.[10]

In the face of such treatment to the Resolution Plan: the question arose as to when must the Resolution Applicant approach the CCI – before the submission of the same to the CoC or after the approval of CoC and before the approval by the NCLT?

In the first case where the Resolution Applicant approaches the CCI prior to approval of CoC, there was apprehension that the same could be considered as 'pre-mature' filing as the in effect only one Resolution Plan would succeed.

This leaves the Resolution Applicant with two options for filing with the CCI – first upon filing the Resolution Plan with the Resolution Professional and second upon approval by the CoC. It is recommended to wait for the CoC approval to save on the filing fee and ancillary cost in the event the Resolution Plan is deemed to be unsuccessful by the CoC. Whereas notifying upon filing with Resolution Professional, on being confident of the Plan getting the approval by the CoC may save the time in the future. Thus, the time of filing with the CCI is purely a commercial call of the Resolution Applicant.

However, what must be kept in mind is that the transaction should in no way be 'consummated' unless the CCI gives its approval to avoid being penalised for 'gun-jumping' under § 43A of the Competition Act.

IV. CONSEQUENCES OF MERGER CONTROL POST IMPLEMENTATION OF COMBINATION: PEREMPTORY REMARKS

The CCI has been empowered to review every combination that takes place which can impact

[9] Mayank Udhwani & Ragini Agarwal, An Argument in Favour of an Effectively Mandatory CCI Approval Under Section 31(4) of the IBC – Part II, India Corp Law Blog (October 2020), https://indiacorplaw.in/2020/10/an argument-in-favour-of-an-effectively-mandatory-cci-approval-under-section-314-of-the-ibc-part-ii.html

[10] MM Sharma, Prior Competition Clearance In Insolvency Resolution Process Now Mandatory – Step Towards "Ease Of Doing Business", Mondaq (May 31, 2019), https://www.mondaq.com/india/antitrust-eu%20competition/810622/prior-competition-clearance-in-insolvency-resolution-process-now-mandatory-steptowards-ease-ofdoing-business

 [ISSN 2581-5369]

the Indian market. Thus, where the resolution plan contains a combination provision the same must be reviewed by the CCI prior to the approval of the plan by the adjudicating authority. However, there are situations when prior approval is not taken. Such a situation leads to two consequences – one where the CCI is asked to review a decision (approve/disapprove) a plan which has already been approved by the Adjudicating Authority, and second, where the disapproval by CCI can render the whole resolution process nugatory. The implications of these two consequences shall be discussed in brief in the following segment.

When the CCI reviews a combination implemented without its approval, it is essentially reviewing a decision approved by the NCLT. Such a process would technically mean that the CCI is reviewing a decision passed by a similarly placed body. This is because the decisions passed by the CCI and NCLT both go to the NCLAT.

Disapproval by CCI of a resolution plan not only overturns a decision passed by similarly placed body (NCLT) but also has the effect of rendering the whole resolution process nugatory. If the combination is found to potentially create competition concerns the CCI may treat the combination as void *ab initio* and may even impose structural remedies. Structural remedies may include dividing up of the firms, and at times these firms may not be able to sustain independently without the combination[11] thus rendering the whole resolution process nugatory. Unlike the pre-NCLT approval stage, where on disapproval by CCI the CoC can look at other resolution applications and plans, here in the post-NCLT approval stage such an option doesn't exist. In case the CCI rejects the approval the Resolution Plan once the NCLT approves the corporate debtor might risk going under liquidation. It is interesting to note that until now the CCI has not rejected the plans which have come for their approval post NCLT's approval.[12]

Furthermore, the corporate debtor, for entering into an amalgamation as per the NCLT approved Resolution Plan without CCI's approval risks being penalized for gun jumping. Gun jumping is when the companies implement their combination deal without first getting the approval from CCI.

V. CONCLUSION

The proviso to section 31(4) creates an important distinction when it comes to obtaining the approval CCI as a regulator and other regulators. The fact that the perspective with which CCI

[11] M. P. Ram Mohan and Vishakha Raj, Report on Merger Control for IRP's: Do Acquisitions of Distressed Firms Warrant Competition Scrutiny? Insolvency & Bankruptcy Board of India, IBBI Research Initiative RP-01/2020 (May 2020), https://www.ibbi.gov.in/uploads/publication/dc195510e9141a689e41ad181ab66cea.pdf (accessed December 1, 2023)

[12] Aparna Mehra, Partner Shardul Amarchand Mangaldas, at the Suveeksha Competition Law Course (July, 2021),

will assess the Resolution Plan is quite different from the one with which the CoC assesses the Resolution Plan. Thus, in my opinion, it would not be correct to say that once the CoC has applied its commercial wisdom the proviso may be watered down. The CCI has the power to ensure fair and healthy competition in the market for which the approval is deemed to be necessary by the Legislature. It is vital that such a mandatory provision in not watered down by the Adjudicating Authority by bypassing the CCI's need to approve.

In the light of the Resolution Plan being considered as a binding document, the filing of the notification with the CCI can be done on two occasions – upon filing with the Resolution Professional and secondly upon approval of the CoC. Where both the approaches have their pros and cons the stage of filing the notice with the CCI is purely a commercial decision.

Where CCI's approval is requested post the approval of resolution applicant by the Adjudicating Authority two consequences arise – one where CCI's approval is asked on a matter already approved by the similarly placed Adjudicating Authority, and second where on rejection of the proposal by CCI the whole resolution process can be rendered nugatory and the corporate debtor risks being penalised for the 'gun-jumping'.

Where the legislation lacks in mandating this requirement, the Competition Act covers the gap to some extent when it gives CCI the power to regulate every combination. Where the green channel route provides a relief to the companies not falling under the threshold, noncompliance and mistake in assessing the eligibility for green channel route may lead to serious penalties. The Competition Act also penalizes gun jumping which may occur on account of implementing a combination without the approval of CCI. Thus, where Competition Act ensures that no combination passes without their approval the Insolvency Bankruptcy Code is yet to catch up (by mandating it) when recognizing the need to take CCI's prior approval.

*****

 [ISSN 2581-5369]