-NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 807 of 2023
& I.A. No. 2721 of 2023

(Arising out of Order dated 28.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-I in C.P.(IB) No.369/KB/2020)

IN THE MATTER OF:

Soneko Marketing Private Limited .... Appellant

Vs

Girish Sriram Juneja & Ors. .... Respondents

Present:

For Appellant: **Mr. Abhijeet Sinha and Ms. Aastha Vishwakarma, Advocates.**

For Respondents: **Mr. Vikram Nankani, Sr. Advocate, Mr. Vikram Wadhera, Ms. Smriti Churiwal, Mr. Sourabh Tandon, Advocates for R-1 (RP).**

Mr. Abhinav Vashisht, Sr. Advocate, Ms. Priya Seth, Mr. Siddhant Kant, Ms. Moulshree Shukla, Mr. Yugal, Advocates for CoC/R-2.

Mr. Mukul Rohatgi, Sr. Advocate, Mr. Arun Kathpalia and Mr. Krishnendu Datta, Sr. Advocates with Mr. Sanjeev Sharma, Mr. Vaibhav Gaggar, Ms. Sanya Sud, Mr. Udai Khanna, Ms. Vaishali Goyal, Ms. Threcy Lawrence, Ms. Vaishnavi Bansal, Ms. Kokila Kumar, Ms. Praniti Ganjoo, Mr. Aditya Arora, Mr. Ketan Saraf, Ms. Diksha Gupta, Mr. Rajat Sinha and Mr. Ankit Vashisht, Advocates for AGI Greenpac.

With

Company Appeal (AT) (Insolvency) No. 607 of 2023

(Arising out of Order dated 28.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-I in I.A. (IB) No.1497/KB/2022, I.A. (IB) No.628/KB/2023 and I.A. (IB) No.701/KB/2023 in C.P.(IB) No.369/KB/2020)

Cont'd.../

IN THE MATTER OF:

The U.P. Glass Manufacturers Syndicate .... Appellant

Vs

Girish Sriram Juneja
Resolution Professional of
Hindusthan National Glass
& Industries Ltd. & Ors .... Respondents

Present:

For Appellant: **Mr. Rajshekhar Rao, Sr. Advocate with Mr. Abhijeet Sinha, Mr. Indranil Ghosh, Mr. Debabrata Das, Mr. Palzer Moktan, Mr. Aditya Shukla, Mr. Saptarshi Mandal, Ms. Heena Kochar, Ms. Aanchal Tikmani, Ms. Manasa Damaalapati, Ms. Mrinal Chaudhry, Mr. Saikat Sarkar, Mr. Akash Chatterjee, Advocates.**

Mr. Yadunath Bhargavan, Mr. Akshay Chandra, Mr. Rahul Choudhary, Advocates in I.A. No. 3794 of 2023.

For Respondents: **Mr. Vikram Nankani, Sr. Advocate, Mr. Vikram Wadhera, Ms. Smriti Churiwal, Mr. Sourabh Tandon, Advocates for R-1 (RP).**

Mr. Abhinav Vashisht, Sr. Advocate, Ms. Priya Seth, Mr. Siddhant Kant, Ms. Moulshree Shukla, Mr. Yugal, Advocates for CoC/R-2.

Mr. Mukul Rohatgi, Sr. Advocate, Mr. Arun Kathpalia and Mr. Krishnendu Datta, Sr. Advocates with Mr. Sanjeev Sharma, Mr. Vaibhav Gaggar, Ms. Sanya Sud, Mr. Udai Khanna, Ms. Vaishali Goyal, Ms. Threcy Lawrence, Ms. Vaishnavi Bansal, Ms. Kokila Kumar, Ms. Praniti Ganjoo, Mr. Aditya Arora, Mr. Ketan Saraf, Ms. Diksha Gupta, Mr. Rajat Sinha and Mr. Ankit Vashisht, Advocates for AGI Greenpac.

With
Company Appeal (AT) (Insolvency) No. 724 of 2023

(Arising out of Order dated 28.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-I in C.P.(IB) No.369/KB/2020)

IN THE MATTER OF:

H.N.G. Karamchari Union & Anr ….Appellants

Vs.

Girish Sriram Juneja
Resolution Professional of
Hindusthan National Glass
& Industries Ltd & Ors.. ….Respondents

Present:

For Appellants: **Mr. Rana Mukherjee, Sr. Advocate with Mr. Amit Sanduja, Ms. Oindrella Sen, Ms. Sakshi Singh, Mr. Tushar Batra and Mr. Pawas Kulshrestha, Advocates.**

For Respondents: **Mr. Vikram Nankani, Sr. Advocate, Mr. Vikram Wadhera, Ms. Smriti Churiwal, Mr. Sourabh Tandon, Advocates for R-1 (RP).**

Mr. Abhinav Vashisht, Sr. Advocate, Ms. Priya Seth, Mr. Siddhant Kant, Ms. Moulshree Shukla, Mr. Yugal, Advocates for CoC/R-2.

Mr. Mukul Rohatgi, Sr. Advocate, Mr. Arun Kathpalia and Mr. Krishnendu Datta, Sr. Advocates with Mr. Sanjeev Sharma, Mr. Vaibhav Gaggar, Ms. Sanya Sud, Mr. Udai Khanna, Ms. Vaishali Goyal, Ms. Threcy Lawrence, Ms. Vaishnavi Bansal, Ms. Kokila Kumar, Ms. Praniti Ganjoo, Mr. Aditya Arora, Mr. Ketan Saraf, Ms. Diksha Gupta, Mr. Rajat Sinha and Mr. Ankit Vashisht, Advocates for AGI Greenpac.

With
Company Appeal (AT) (Insolvency) No. 735 of 2023

(Arising out of Order dated 28.04.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-I in I.A. (IB) No.1497/KB/2022 in C.P.(IB) No.369/KB/2020)

IN THE MATTER OF:

Independent Sugar Corporation Ltd. ….Appellant

Vs.

Girish Sriram Juneja & Anr. ….Respondents

Present:

For Appellant: **Mr. Abhimanyu Bhandari, Ms. Nattasha Garg and Mr. Thakur Ankit Singh, Advocates.**

For Respondents: **Mr. Vikram Nankani, Sr. Advocate, Mr. Vikram Wadhera, Ms. Smriti Churiwal, Mr. Sourabh Tandon, Advocates for R-1 (RP).**

Mr. Abhinav Vashisht, Sr. Advocate, Ms. Priya Seth, Mr. Siddhant Kant, Ms. Moulshree Shukla, Mr. Yugal, Advocates for CoC/R-2.

Mr. Mukul Rohatgi, Sr. Advocate, Mr. Arun Kathpalia and Mr. Krishnendu Datta, Sr. Advocates with Mr. Sanjeev Sharma, Mr. Vaibhav Gaggar, Ms. Sanya Sud, Mr. Udai Khanna, Ms. Vaishali Goyal, Ms. Threcy Lawrence, Ms. Vaishnavi Bansal, Ms. Kokila Kumar, Ms. Praniti Ganjoo, Mr. Aditya Arora, Mr. Ketan Saraf, Ms. Diksha Gupta, Mr. Rajat Sinha and Mr. Ankit Vashisht, Advocates for AGI Greenpac.

O R D E R

ASHOK BHUSHAN, J.

All these Appeal(s) have been filed against the same order dated 28.04.2023 passed by the National Company Law Tribunal (NCLT), Kolkata Bench, Court-I in I.A. (IB) No.1497/KB/2022 and I.A. (IB) No.628/KB/2023 and I.A. (IB) No.701/KB/2023 in C.P.(IB) No.369/KB/2020. All the Appeal(s) having been filed against the same order, have been heard together and are being decided by this common judgment.

2. Brief background facts giving rise to these Appeal(s) are:

(i) The Corporate Insolvency Resolution Process ("**CIRP**") against the Corporate Debtor – Hindustan National Glass & Industries

Limited commenced vide order dated 21.10.2021 on an Application filed by DBS Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**").

(ii) On 25.03.2022, the Resolution Professional ("**RP**") issued the Invitation for Expression of Interest. RFRP contained provision that there was mandatory requirement of Competition Commission of India ("**CCI**") approval, prior to approval of a Resolution Plan by the Committee of Creditors ("**CoC**").

(iii) Two Resolution Applicants namely - Independent Sugar Corporation Ltd. as well as AGI Greenpac Ltd. submitted their Resolution Plans in April 2022.

(iv) Independent Sugar Corporation Ltd., a Resolution Applicant sought a clarification from the RP with regard approval of CCI as well as the timelines for obtaining such approval as the RFRP had contradictory clauses. The RP vide email dated 25.08.2022 issued a clarification that in light of the available jurisprudence, the RFRP granted relaxation to the Resolution Applicants to procure the CCI approval post the approval of the Resolution Plan by the CoC, but prior to filing of the Resolution Plan before the Adjudicating Authority.

(v) On 27.09.2022, AGI Greenpac Ltd. submitted an Application with the CCI under Form-1 for approval of the combination.

(vi) On 30.09.2022, the Independent Sugar Corporation Ltd. received the requisite approval from the CCI. The Application filed by AGI Greenpac Ltd. was declared as not valid on 22.10.2022.

(vii) The Resolution Plans submitted by AGI Greenpac Ltd. as well as Independent Sugar Corporation Ltd. were placed for voting before the CoC. The CoC on 28.10.2022 approved the Plan of AGI Greenpac Ltd. with 98% vote share. Independent Sugar Corporation Ltd. received 88% votes.

(viii) On 03.11.2022, AGI Greenpac Ltd. submitted Application in Form-II before the CCI for approval.

(ix) In November, 2022, the RP filed IA No.1401 of 2022 before the NCLT, Kolkata for approval of the Resolution Plan under Section 30, sub-section (6) of the Code before the NCLT, Kolkata and I.A. No.1497/2022 was filed by the Independent Sugar Corporation Ltd. seeking setting aside the selection of the Resolution Plan submitted by Respondent No.2.

(x) On 15.03.2023, the CCI granted approval to the AGI Greenpac Ltd. combination proposal and the order was placed before the Adjudicating Authority by the RP.

(xi) The Adjudicating Authority vide impugned order dated 28.04.2023 rejected the IA No.1497/ 2022 filed by the

Independent Sugar Corporation Ltd. Aggrieved by the order dated 28.04.2023, these Appeal(s) have been filed.

Company Appeal (AT) (Insolvency) No. 735 of 2023

3. The Appellant - Independent Sugar Corporation Ltd. was the Resolution Applicant, who had submitted its Plan before the RP. The Appellant has also obtained the approval from the CCI on 30.09.2022. On 28.10.2022, the Plan submitted by the Appellant, received 88% vote share, whereas the Plan submitted by AGI Greenpac Ltd. was approved with 98% vote shares. The Independent Sugar Corporation Ltd. has filed an IA No.1497/2022 praying for setting aside the selection of the Resolution Plan submitted by AGI Greenpac Ltd. and for reconsideration of the Resolution Plan submitted by the Appellant, which Application was rejected by the impugned order.

Company Appeal (AT) (Insolvency) No. 607 of 2023

4. This Appeal has been filed by the U.P. Glass Manufacturers Syndicate, who is an industry body comprising of micro, small and medium scale manufacturers of glass, based out of Uttar Pradesh. The Appellant after coming to know about the three Resolution Plans submitted in the CIRP of Hindustan National Glass & Industries Limited, filed an Application before the Adjudicating Authority praying that aforesaid three Resolution Plans be withdrawn as any such acquisition would run counter to the provisions of the Competition Act, 2022 (hereinafter referred to as the "**Competition Act**"). The Application filed by the U.P. Glass Manufacturers

Syndicate was rejected on 21.09.2022. The Adjudicating Authority observed that at this stage the Resolution Plans are under consideration of the CoC and no decision could be arrived at in respect of the Resolution Plans. The U.P. Glass Manufacturers Syndicate also filed an Application before the CCI, objecting to the Combination Application submitted by the AGI Greenpac Ltd. A letter of objection was also filed by the U.P. Glass Manufacturers Syndicate before the CCI. The Appellant has also filed an Intervention Application before the NCLT, Kolkata seeking intervention, which Application was rejected by the Adjudicating Authority on 16.01.2023, against which order Company Appeal (AT) (Insolvency) No. 214 of 2023 was filed by the U.P. Glass Manufacturers Syndicate, which was disposed of by this Tribunal on 23.02.2023 by following observation:

> *"Learned counsel for Respondent No. 1 and 2 submits that the issue as to whether the approval under Section 31(4) proviso is necessary/mandatory or not has already been heard by the Adjudicating Authority in Intervention Application of other stakeholder and order has been reserved on 09.02.2023."*

5. The CCI subsequently approved the Combination Application submitted by AGI Greenpac Ltd. on 15.03.2023, which was sought to be placed by the RP before the Adjudicating Authority by filing I.A. No.701/KB/2023. The Appellant aggrieved by the order dated 28.04.2023 has come up in this Appeal.

Company Appeal (AT) (Insolvency) No. 724 of 2023

6. This Appeal has been filed by H.N.G. Karamchari Union and H.N.G Mazdoor Union, who are Trade Unions comprising of workmen, employees, labourers and mistris of Hindustan National Glass & Industries Limited. The Appellant claimed to represent all the workers and employees of the Corporate Debtor in its Bahadurgarh Unit. The Appellant claiming to be aggrieved by the order has come up in the Appeal. The Appellant claimed to have filed an Intervention Application in the interest of all the stake holders of the Corporate Debtor, including the constituent Member of the Appellant's Union.

Company Appeal (AT) (Insolvency) No. 807 of 2023

7. In this Appeal, the Appellant claimed to be engaged in the business of domestic and international trading of iron ore, fines, limestone etc. The Appellant's case is that bills were approved by the Promoters of the Corporate Debtor for supply of lime stones and imported Soda Ash. The Appellant claimed to had made supply to the Corporate Debtor from the year 2019 onwards. The Appellant filed a Claim Form claiming an amount of Rs.9,66,32,805.33. The Appellant's case is that Appellant and other Operational Creditors and stakeholders were kept in the absolute dark with regard to the developments in the CoC and the Appellant has been offered only a partly sum. The Appellant aggrieved by the order dated 28.04.2023, has come up in this Appeal.

8. We have heard Shri Joy Saha, learned Senior Counsel, Shri Rajshekhar Rao, learned Senior Counsel, Shri Rana Mukherjee, learned

Counsel, Shri Abhijeet Sinha, learned Counsel and Shri Abhimanyu Bhandari on behalf of the Appellant(s). We have heard Shri Mukul Rohatgi, learned Senior Counsel and Shri Arun Kathpalia appearing for Successful Resolution Applicant. We have also heard Shri Abhinav Vashisht, learned Senior Counsel on behalf of CoC. We have heard Shri Vikram Nankani, learned Senior Counsel appearing for RP.

9. Shri Abhimanyu Bhandari, learned Counsel for the Appellant submits that the Resolution Plan of the AGI Greenpac Ltd. ("**AGI**") ought to have been rejected, since AGI has failed to obtain mandatory approval of the CCI before the approval of Plan by the CoC. It is submitted that approval by CCI after the approval of the Resolution Plan by the CoC is a violation of the RFRP and instructions of the RP. It is submitted that requirement to get CCI approval under proviso to 31(4) is 'mandatory' and not 'directory' and the same is required to be availed before the approval of the Plan by the CoC. It is submitted that judgment relied by the Adjudicating Authority in the impugned order of the ***Arcelor Mittal India Pvt. Ltd. vs. Guhathakurta, Resolution Professional of EPC Construction,*** to come to the conclusion that conditions mentioned in Section 31, sub-section (4) has been complied with, is erroneous. It is submitted that judgment of ***Arcelor Mittal*** and three more judgments relied by the Respondents stating that the proviso is 'directory' and not 'mandatory' is also erroneous. The learned Counsel has relied on judgment of this Tribunal in ***Bank of Maharashtra vs. Videocon Industries Ltd. (Company Appeal (AT) (Ins.) No. 503 of 2021)*** decided on 05.01.2022

where the approval of the CCI was not obtained before the approval of the Resolution Plan by the CoC, the same was held to be not valid. It is further submitted that Resolution Plan being conditional, cannot be approved by the Adjudicating Authority. The CCI approval was obtained by the AGI, based on their voluntary undertaking to the CCI that they will divest one of the plants of the target company, HNG, which is undergoing CIRP. The said voluntary undertaking is deemed to be a 'Modification' under the Competition Act. The CCI approval is, therefore, subject to AGI carrying out modification. The Plan submitted by AGI being conditional, could not have been approved by the Adjudicating Authority.

10. The learned Counsel appearing on behalf of the U.P. Glass Manufacturers Syndicate submits that plain reading of Section 31(4) and its proviso makes it clear that CCI approval shall be obtained prior to approval of Resolution Plan by the CoC. It is submitted Section 31(4) and its proviso should be given plain and unambiguous meaning. On application of the principle of plain interpretation, no further analysis is required. The use of word 'shall' in an ordinary sense signifies the mandatory nature of the provision. There is no basis to change the word 'shall' used in the proviso to 'may'. Taking the view of the proviso as 'directory' shall be against the plain meaning of legislative intendment. The mandatory condition can never be subject of substantial compliance. Interpreting the word 'shall' as 'may' in proviso to Section 31, sub-section (4) will make word 'shall' opios. There being no ambiguity in the statutory provision under consideration, there is no need to refer to any external

aids. The judgment of this Tribunal in ***Arcelor Mittal India Pvt. Ltd. vs. Abjijit Guhathakurta; Makalu Trading Ltd. vs. Rajiv Chakraborty and Vishal Vijay Kalantri vs. Shailen Shah*** are judgments, which cannot be read to lay down any binding ratio. No reasons have been given in ***Arcelor Mittal*** case to hold that proviso is 'directory'. The issue did not arise in the ***Arcelor Mittal*** as the Appeal was dismissed on the basis of subsequent development. Other judgments have only followed the ***Arcelor Mittal*** case.

11. Shri Rana Mukherjee, learned Senior Counsel appearing for H.N.G. Karamchari Union submits that provisions of Section 31, sub-section (4) is 'mandatory' and not 'directory'. The learned Senior Counsel relied on judgment of this Tribunal in ***Bank of Maharashtra vs. Videocon Industries Ltd.*** and submits that there being difference of opinion in the judgment of ***Bank of Maharashtra vs. Videocon Industries Ltd.*** and ***Arcelor Mittal***, the matter needs to be referred to a larger Bench. It is submitted that any contrary interpretation of the said proviso would distort the meaning with which the legislature intended the proviso.

12. Learned Counsel appearing for Soneko Marketing Pvt. Ltd. also contended that interpreting the proviso as being 'directory' would be contrary not only to the plain language, but also by the law laid down by the Hon'ble Supreme Court. The proviso is drafted to carve out an exception to the main provision.

13. Shri Abhinav Vashisht, learned Senior Counsel appearing for the CoC submits that this Tribunal in ***Arcelor Mittal's*** case, which was followed subsequently in further cases has already held that proviso to Section 31(4) is 'directory'. It is submitted that no penalty/ consequences are provided in Section 31(4) on the basis of which, it can be said that proviso is 'mandatory'. It is submitted that approval by the CCI is mandatory and not the timeline and approval by the CCI can be prior to the approval by the Adjudicating Authority.

14. Shri Vikram Nankani, learned Senior Counsel appearing for RP submits that the expression 'shall' used in Section 31, sub-section (4) has to be read as 'may'. It is submitted that no consequence having been provided of non-compliance of the timeline in proviso, the word 'shall' has to be read as 'may'. Shri Nankani has referred to the judgments of this Tribunal in ***Arcelor Mittal; Makalu Trading Ltd. and Vishal Vijay Kalantri*** wherein this Tribunal held that timeline in proviso is 'directory'. It is submitted that against the judgment of this Tribunal in ***Makalu Trading Ltd.***, a Civil Appeal No.3338 of 2020 was filed in the Hon'ble Supreme Court, which was dismissed and further against the judgment of this Tribunal in ***Vishal Vijay Kalantri*** a Civil Appeal was filed in the Hon'ble Supreme Court, which too was dismissed. There being already decision of the Hon'ble Supreme Court on the judgments of this Tribunal, holding the proviso to be 'directory', there is no reason to review the settled position of law. Shri Nankani has referred to the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2018 and has relied on the

'Financial Memorandum' of the Second Amendment Bill. He has referred to Clause (d) of the Financial Memorandum under the Heading – memorandum explaining the modification contained in the Bill to replace the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, which provides as follows:

> *"(d) in clause 24 of the Bill, in sub-section (4) of Section 31 of the Code, a new proviso is inserted "Provided that where the resolution plan contains a provision for combination as referred to in section 5 of the Competition Act, 2002, 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" so as to clarify that the approval of the combinations from Competition Commission of India has to be obtained prior to the approval of resolution plan by the Adjudicating Authority;"*

The above Clause-(d) refers to Clause 24 of the Bill, which is to the following effect:

> *"Clause 24 of the Bill seeks to amend section 31 of the Code to provide that the Adjudicating Authority shall, before passing an order for approval of resolution plan satisfy that the resolution plan has provisions for its effective implementation and that the resolution applicant shall obtain the necessary approvals required within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority or within such period as provided for in such law,*

whichever is later and where it contains a provisions for combination the approval of the Competition Commission of India shall be obtained prior to the approval of the resolution plan by the committee of creditor."

15. Clause 24 of the Bill clearly mentions that the Bill seeks to amend Section 31 of the Code. Sub-clause (d) of Financial Memorandum indicates that what was intended is that approval of CCI has to be obtained prior to the approval of Resolution Plan by the Adjudicating Authority. It is submitted that it is intended that if the approval is obtained prior to the approval by the Adjudicating Authority, the same is in line with the objective and purpose of the legislation.

16. The learned Senior Counsel appearing for Successful Resolution Applicant contends that Appellant(s) have no locus to file the Appeal(s). It is submitted that judgment of this Tribunal in ***Arcelor Mittal*** and other two judgments are with reason and not *per incuriam* judgments. The Hon'ble Supreme Court while approving the judgments of this Tribunal in the above cases has observed that no question of law arises. Section 31, sub-section (4) is not 'mandatory'. Learned Senior Counsel has referred to Section 40A of the IBBI (Insolvency Resolution Profess for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") and submits that according to the timeline provided in Regulation 40A, the CoC has only 30 days to approve or reject a Resolution Plan, whereas under the Competition Act, the CCI has 210 days period for approval of the combination and if it is held that approval of CCI is mandatorily and has to be obtained prior to

the approval of CoC, the timeline in the Code shall render the whole process redundant, which cannot be said to the intention of the legislature. Hence, what is mandatory is approval and not the timeline. It is further submitted that timelines under the Code mentions 135 days for receipt of Resolution Plan and 165 days for the CoC to decide on the Plan. Proceedings before NCLT cannot be frozen till the combination approval is granted by the CCI. Hence, the proviso will nullify the entire scheme of the Code. A company cannot wait indefinitely. The learned Senior Counsel has also referred to Clause (d) of Financial Statement as referred above. It is submitted that what will be the purpose of timeline when there will be grinding halt after submission of the Plan, Resolution Applicant goes to the CCI for obtaining the approval. It is submitted that external aid is always utilized for interpreting the statute.

17. We have heard learned Counsel for the parties and perused the records.

18. While noticing the facts of the case, we have noticed that CoC has approved the Resolution Plan on 28.10.2022, whereas the CCI has granted approval to the Resolution Applicant on 15.03.2023 under approval of the combination. The Application for approval of Resolution Plan was filed by the RP in November 2022, at that stage an IA was filed by the Independent Sugar Corporation Ltd., objecting to the approval, which IA came to be rejected by the impugned order dated 28.04.2023. The Adjudicating Authority in the impugned order in paragraph 13.6, after hearing the parties laid down following:

> *"13.6. A perusal of paragraph 2 of this communication of CCI dated 15-03-2023 shows that CCI approved the combination of the successful Resolution Applicant and the Corporate Debtor and hence, we are of the considered opinion that there is approval by the CCI as required under section 31(4) of the Code and therefore the objection to it as such is hereby rejected."*

19. The Adjudicating Authority expressed the opinion that approval by the CCI on 15.03.2023 is approval as required under Section 31(4), hence, the objection raised to it has been rejected. By the same order dated 28.04.2023, the Adjudicating Authority directed that Application filed for approval of Resolution Plan be listed for hearing and fixed the date 09.06.2023. This Tribunal, in view of the entertainment of the Appeal(s) and continued hearing, has passed an interim order directing the Adjudicating Authority not to decide I.A. No.1401/KB/2022, since the Appeal(s) came under consideration. During the course of hearing of the Appeal(s), it was made clear to the parties that only issue, which is to be decided in these Appeal(s) are about the interpretation of proviso of Section 31, sub-section (4), i.e., as to whether the requirement of approval of the CCI prior to approval by the CoC is mandatory. Other aspects of the approval of the Resolution Plan since pending adjudication of the Adjudicating Authority, we need not express any opinion on other submissions raised by the parties.

20. We, now, need to notice the provision of Section 31, sub-section (4), which are under consideration in these Appeal(s). Section 31, as it exists as amended is as follows:

> *"**31.** Approval of resolution plan. - (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.*
>
> *Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.*
>
> *(2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.*
>
> *(3) After the order of approval under sub-section (1), -*
>
> *(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and*

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(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:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, 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."

21. Section 31, sub-section (4) came to be inserted by Insolvency and Bankruptcy Code Second Amendment Act, 2018 with effect from 6th June, 2018 by Bill No.127 of 2018 and was introduced in the Parliament. Clause 24 of the Bill is as follows:

*"**24.** In section 31 of the principal Act,—*

(a) in sub-section (1), the following proviso shall be inserted, namely:—

"Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.";

(b) after sub-section (3), the following sub-section shall be inserted, namely:—

"(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:

Provided that where the resolution plan contains a provision for combination as referred to in section 5 of the Competition Act, 2002, 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."."

In Notes on Clauses of the Bill with regard to Clause 24, following has been stated:

"Clause 24 of the Bill seeks to amend section 31 of the Code to provide that the Adjudicating Authority shall, before passing an order for approval of resolution plan satisfy that the resolution plan has provisions for its effective implementation and that the resolution applicant shall obtain the necessary approvals required within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later and where it contains a provisions for combination the approval of the Competition Commission

of India shall be obtained prior to the approval of resolution plan by the committee of creditors."

22. From the above, it is clear that timeline for obtaining necessary approvals required under any law has been introduced by sub-section (4) of Section 31 by Second Amendment Act, 2018. Sub-section (4), requires that necessary approval required under any law for the time being in force, should be obtained within a period of one year from the date of approval of the Resolution Plan by the Adjudicating Authority, which provision deals with all statutory approvals. The proviso has been added as an exception to the main provision, which requires that where the Resolution Plan contains a provision for combination, as referred to in Section 5 of the Competition Act, 2002, the Resolution Applicant shall obtain the approval of the CCI under that Act, prior to the approval of such Resolution Plan by the CoC. The proviso is, thus, clear exception to sub-section (4) of Section 31 and is an independent provision regarding to the combination, which requires approval under the CCI. The bone of contention of the parties are as to whether the requirement in proviso that approval of the CCI has to be mandatorily obtained prior to the approval of Resolution Plan by the CoC.

23. We may first notice the three judgments of this Tribunal where the proviso to sub-section (4) of Section 31 came for consideration. The first judgment is ***Arcelor Mittal India Pvt. Ltd. vs. Guhathakurta, Resolution Professional of EPC Construction - (2019) SCC OnLine NCLAT 920***. An argument was raised in the above case that approval by

the CCI has to be prior to the approval of the CoC. In paragraph 2 of the judgment following was contended:

> *"**2.** Learned counsel for the Appellant submitted that approval of plan is in contravention of the mandatory requirement under the proviso to Section 31(4) of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short), as amended, requiring 'Resolution Applicants' to obtain approval of the Competition Commission of India prior to approval by the 'Committee of Creditors'."*

This Tribunal noticed the provision of Section 5 of the Competition Act and made following observation in paragraph 15:

> *"**15.** We have noticed and hold that proviso to sub-section (4) of Section 31 of the 'I&B Code' which relates to obtaining the approval from the 'Competition Commission of India' under the Competition Act, 2002 prior to the approval of such 'Resolution Plan' by the 'Committee of Creditors', is directory and not mandatory. It is always open to the 'Committee of Creditors', which looks into viability, feasibility and commercial aspect of a 'Resolution Plan' to approve the 'Resolution Plan' subject to such approval by Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under Section 31 of the 'I&B Code'. In present matter already approval of the Competition Commission of India has been taken to the 'Resolution Plan'."*

24. This Tribunal held that the approval under the Competition Act prior to approval by the CoC is 'directory'. The judgment of this Tribunal was followed in ***Makalu Trading Ltd. vs. Rajiv Chakraborty and Ors.*** –

(2020) SCC OnLine 643, wherein this Tribunal noticed the rival submission of the parties in respect of proviso to Section 31(4). In paragraph 4, 5 and 6 contentions of the parties were noticed. This Tribunal in paragraph 12, after considering the submissions laid down that purpose is complied with the approval from CCI, if obtained prior to the approval by the Adjudicating Authority. Against the judgment of this Tribunal in ***Makalu Trading Ltd.*** a Civil Appeal No.3338 of 2020 was filed, which was dismissed by the Hon'ble Supreme Court, by observing following:

> *"**1** We find no reason to interfere with the impugned order since no substantial question of law is involved in the appeal.*
>
> ***2*** *The Civil Appeal is accordingly dismissed.*
>
> ***3*** *Pending applications, if any, stand disposed of."*

25. Next judgment is the judgment of this Tribunal in ***Vishal Vijay Kalantri vs. Shailen Shah – (2020) SCC OnLine NCLAT 1013***, where again in paragraph 15 of the judgment, following has been laid down:

> *"**15.** A plain reading of the provision makes it abundantly clear that the Resolution Applicant is required to obtain necessary approval required under any extant law within one year from the date of approval of the Resolution Plan by the Adjudicating Authority or within such time as may be provided in such law but not later than one year. However, this requirement of obtaining the necessary approval pursuant to approval of the Resolution Plan by the Adjudicating Authority has been subjected to one exception carved out in the form of proviso to sub-section (4) which enjoins upon the Resolution Applicant to obtain approval in*

regard to provision for combination, while such provision has been made in the Resolution Plan, prior to approval of such Resolution Plan by the Committee of Creditors. A cursory look at the provision engrafted in sub-section (4) of Section 31 of the 'I&B Code' reveals that while with regard to an ordinary Resolution Plan, the Resolution Applicant is required to obtain necessary approval required under any extant law within one year from the date of such approval by Adjudicating Authority only after such Resolution Plan has been approved by the Adjudicating Authority, however, a Resolution Plan containing the provision for combination is required to obtain approval of the Competition Commission of India prior to the approval of such Resolution Plan by the Committee of Creditors. It is manifestly clear that a Resolution Plan containing provision for combination has been treated as a class apart requiring approval of the Competition Commission of India even prior to such Resolution Plan being approved by the Committee of Creditors. However, treating such requirement as mandatory is fraught with serious consequences. The issue regarding the statutory requirement of a Resolution Plan containing a provision for combination requiring prior approval of the Competition Commission of India even before such Resolution Plan is approved by the Committee of Creditors, being not mandatory and only directory in nature stands addressed by this Appellate Tribunal in "Arcelormittal India Pvt. Ltd. v. Abhijit Guhathakurta — Company Appeal (AT) (Insolvency) No. 524 of 2019". Para 15 which is relevant for our purposes, is reproduced hereunder:

> *"15. We have noticed and hold that proviso to sub-section (4) of Section 31 of the 'I&B Code' which*

relates to obtaining the approval from the 'Competition Commission of India' under the Competition Act, 2002 prior to the approval of such 'Resolution Plan' by the 'Committee of Creditors', is directory and not mandatory. It is always open to the 'Committee of Creditors', which looks into viability, feasibility and commercial aspect of a 'Resolution Plan' to approve the 'Resolution Plan' subject to such approval by Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under Section 31 of the 'I&B Code'. In present matter already approval of the Competition Commission of India has been taken to the 'Resolution Plan'.""

In the above case also, the approval of the Plan given by the CCI was prior to the approval by the Adjudicating Authority, which was held not to violate Section 31, sub-section (4). In paragraph 16 and 17, following have been held:

*"**16.** The view taken by this Appellate Tribunal in "Arcelormittal India Pvt. Ltd." (Supra) holds the field as the same has not been reversed or set aside in appeal or other proceeding. Obtaining of requisite approval under Competition Act, 2002 with regard to the provision of the Combination in the instant case is stated to be not required as the same is below threshold limit. Objection raised to buttress the argument that in absence of necessary prior statutory approval of the Committee of Creditors qua the combination, Resolution Plan of 'APSEZ' is in contravention of Section 31(4) of the 'I&B Code', cannot be sustained and the Appellant cannot be heard to say that the approved Resolution Plan of 'APSEZ' being in contravention*

of law leaves no option but to send the Corporate Debtor into liquidation.

17. *All objections raised qua the action of the 'Resolution Professional' during Corporate Insolvency Resolution Process, approval of 'Resolution Plan' of 'APSEZ' by the Committee of Creditors and its subsequent approval by the Adjudicating Authority being unfounded are hereby repelled. There is no merit in this appeal and the same is dismissed. No order as to costs."*

26. Against the judgment of this Tribunal in ***Vishal Vijay Kalantri***, a Civil Appeal No.2228 of 2021 was filed in the Hon'ble Supreme Court, which was dismissed on 06.08.2021 by following order:

"This is an appeal filed under Section 62 of the Insolvency and Bankruptcy Code, 2016 against the judgment dated 24.07.2020 passed by the National Company Law Appellate Tribunal New Delhi in Company Appeal (AT) (Insolvency) No.466 of 2020.

Having considered the facts and circumstances on record, especially paragraphs 9, 10 and 17 of the judgment under appeal, we see no reason to interfere.

The civil appeal is, accordingly, dismissed."

27. The proviso to Section 31(4) is in two parts. First, it specifically refers to combination under the Competition Act, 2002 under which approval is required prior to approval of Resolution Plan by the CoC. There can be no dispute that requirement of approval by the CCI under combination is a mandatory requirement, with regard to such cases, which deals with such

acquisition, within specific duration. The provision of Competition Act, 2002, which requires approval by the Commission as has been engrafted in sub-section (4) is to take care of the appreciable adverse effect on the competition, for which the specific Statutory Authority under the Competition Commission of India has been constituted under the Competition Act, 2002. The second part is as to whether requirement of approval by the CCI prior to the approval of such Plan by the CoC is 'mandatory' or 'directory'.

28. The principles of statutory interpretation are well settled. The Hon'ble Supreme Court in ***(1980) 1 SCC 403 – Sharif-Ud-Din vs. Abdul Gani Lone*** in paragraph 9 has laid down:

> "***9.*** *The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the*

performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

29. The Hon'ble Supreme Court in large number of cases, thereafter has laid down that consideration of statute will depend on the purport and object for which the same has been used. We may refer to another judgment of the Hon'ble Supreme Court in ***(1983) 2 SCC 473 – M. Karunanidhi vs. Dr. H.V. Hande and Ors.***, where Section 117 of the Representation of People Act, 1951 came for consideration. In paragraph 17, 19 and 20, following has been laid down:

*"**17.** Taking up the contentions in the order in which they were advanced, we shall first deal with the submission that there was non-compliance with the mandatory requirements of sub-section (1) of Section 117 of the Act read with Rule 8 of the Election Petitions Rules framed by the High Court, which is common to all these cases. The factum of deposit of Rs 2000 in each of these cases on the strength of pre-receipted challans issued by the Accounts Department of the High Court in the Reserve Bank of India to the credit of the Registrar, High Court, Madras as security for costs well within the period of limitation for filing the election petition is not in dispute and the controversy turns on the question whether the deposit of the security amount was in accordance with the rules of the High Court. There are different sets of rules framed by different High Courts under Article 225 of the Constitution regulating the practice and procedure to be observed in all matters coming before the High Court in exercise of its jurisdiction under Section 80-A of the Act. The words "in accordance with the rules" must therefore connote "according to the procedure prescribed by the High Court". The mode of making deposit must necessarily be an internal matter of the concerned High Court.*

***19.** The submissions advanced by learned counsel for the appellant cannot be accepted as they proceed on the assumption that no distinction can be drawn between the requirement as to the making of a deposit in the High Court under sub-section (1) of Section 117 and the manner of making such deposit. There was considerable emphasis laid by learned counsel that sub-section (1) of Section 117 cannot be dissected into two parts, one part being treated as mandatory and the other as directory. The contention is*

wholly misconceived and indeed runs counter to several decisions of this Court. It is always important to bear the distinction between the mandatory and directory provisions of a statute. Sub-section (1) of Section 117 is in two parts. The first part of sub-section (1) of Section 117 provides that at the time of presenting an election petition, the petitioner shall deposit in the High Court a sum of Rs 2000 as security for the costs of the petition, and the second is that such deposit shall be made in the High Court in accordance with the rules of the High Court. The requirement regarding the making of a security deposit of Rs 2000 in the High Court is mandatory, the non-compliance of which must entail dismissal in limine of the election petition under sub-section (1) of Section 86 of the Act. But the requirement of its deposit in the High Court in accordance with the rules of the High Court is clearly directory. As Maxwell on the Interpretation of Statutes, 12th Edn., at p. 314 puts it: "An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." The rule of construction is well settled and we need not burden the judgment with many citations.

20. *It is well established that an enactment in form mandatory might in substance be directory and that the use of the word "shall" does not conclude the matter. The general rule of interpretation is well-known and it is but an aid for ascertaining the true intention of the legislature which is the determining factor, and that must ultimately depend on the context. The following passage from Crawford on Statutory Construction at p. 516 brings out the rule:*

> *"The question as to whether a statute is mandatory or directory depends upon the intent of the*

legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

This passage was quoted with approval by the Court in State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912 : 1958 SCR 533 : 1958 SCJ 150] , State of U.P. v. Babu Ram Upadhya [AIR 1961 SC 751 : (1961) 2 SCR 679 : (1961) 1 Cri LJ 773] and Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur [AIR 1965 SC 895 : (1965) 1 SCR 970] . The Court in Manbodhan Lal case [AIR 1957 SC 912 : 1958 SCR 533 : 1958 SCJ 150] where Article 320(3)(c) of the Constitution was held to be directory and not mandatory, relied upon the following observations of the Privy Council in Montreal Street Railway Company v. Normandin [1917 AC 170 : 86 LJPC 113 : 116 LT 162 (PC)] :

"The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th Edn., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duly and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the

> *duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.""*

30. Another judgment, which has been cited before us is judgment of Hon'ble Supreme Court in ***(2005) 4 SCC 480 – Kailash vs. Nanhku and Ors.***, where the Hon'ble Supreme Court considered the provision of Order 8 Rule 1 of Code of Civil Procedure, which used the word 'shall' and was held to be directory. In paragraph 45, following has been laid down:

> *"**45.** However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.*

31. We may also notice another judgement of the Hon'ble Supreme Court in ***AIR 1917 PC 142 – Montreal Street Railway Company vs. Normandin,*** where statutory provision, which cast a duty on the Public Authority, on which public in general has no control has been referred in the judgment as directory, in paragraph 6, following has been laid down:

> *"**6.** .....The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statutes must*

be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th. ed. p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2) Hale P.C. p. 50Rex v. Leicester Justices [[1827] 7 B. & C. 6.] and Parke B in Gwynne v. Burnell [[1835] 2 ???. N.C. 7.] to provisions as to rates (Reg. v. Inhabitants of Fordham [[1839] 11. Ad. & E. 73.] and Le Feuvre v. Millar [[1857] 26 L.J. (M.C.) 175.] ; to provisions of the Ballot Act (Woodward v. Sarsons [[1875] L.R. 10. C.P. 733.] and Philips v. Goff [[1886] 17. Q.B.D. 805.] and to justices acting without having taken the prescribed oath, whose acts are not held invalid (Margate Pier Co. v. Hannam [[1819] 3 B. & Al. 266. …"

32. To the same effect is judgment of the Hon'ble Supreme Court in ***AIR 1957 SC 912 – State of U.P. vs. Manbodhan Lal Srivastava***, where the Hon'ble Supreme Court had occasion to consider the provision of Article 320(3)(c) of the Constitution of India. The Article 320(3(c) has been noted by the Hon'ble Supreme Court in paragraph 6, which is as follows:

*"**6.** Article 320(3)(c) is in these terms:*

> *"320. (3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted.*
>
> *(a)-(b) * * **
>
> *(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;"*

The Hon'ble Supreme Court after considering the provision, held that use of word 'shall' as 'directory' and in paragraph 7, 10, 11 and 13, laid down following:

> ***"7.*** *....Perhaps, because of the use of the word "shall" in several parts of Article 320, the High Court was led to assume that the provisions of Article 320(3)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Article 320, itself, contemplates that the President or the Governor, as the case may be, "may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted". The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain cases or classes of cases in which the Commission need not be consulted. If the provisions of Article 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been*

intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the terms in which it stands. That does not amount to saying that it is open to the Executive Government, completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted. Once, relevant regulations have been made, they are meant to be followed in letter and in spirit and it goes without saying that consultation with the Commission on all disciplinary matters affecting a public servant has been specifically provided for, in order, first, to give an assurance to the Services that a wholly independent body not directly concerned with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind; and secondly, to afford the Government unbiased advice and opinion on matters vitally affecting the morale of public services. ……"

10. *The question may be looked at from another point of view. Does the Constitution provide for the contingency as to what is to happen in the event of non-compliance with the requirements of Article 320(3)(c)? It does not, either in express terms or by implication, provide that the result of such a non-compliance is to invalidate the proceedings ending with the final order of the Government. This aspect of the relevant provisions of Part XIV of the Constitution, has a direct bearing on the question whether Article 320 is mandatory. The question whether a certain provision in a statute imposing a duty on a public body or authority was mandatory or only directory, arose before their Lordships of the Judicial Committee of the Privy Council in the case*

of Montreal Street Railway Company v. Normandin [LR (1917) AC 170] . In that case the question mooted was whether the omission to revise the jury lists as directed by the statute, had the effect of nullifying the verdict given by a jury. Their Lordships held that the irregularities in the due revision of the jury lists, will not ipso facto avoid the verdict of a jury. The Board made the following observations in the course of their judgment:

> *"…The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th Edn., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."*

The principle laid down in this case was adopted be the Federal Court in the case of Biswanath Khemka v. King-Emperor [(1945) FCR 99] . In that case, the Federal Court had to consider the effect of non-compliance with the provisions of Section 256 of the Government of India Act, 1935, requiring consultation between public authorities before the conferment of magisterial powers or of enhanced

magisterial powers, etc. The Court repelled the contention that the provisions of Section 256, aforesaid, were mandatory. It was further held that non-compliance with that section would not render the appointment otherwise regularly and validly made, invalid or inoperative. That decision is particularly important as the words of the section then before their Lordships of the Federal Court, were very emphatic and of a prohibitory character.

11. *An examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory. If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter. This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on Statutory Construction — Article 261 at p. 516, is pertinent:*

> *"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...."*

> ***13.*** *In view of these considerations, it must be held that the provisions of Article 320(3)(c) are not mandatory and that non-compliance with those provisions, does not afford a cause of action to the respondent in a court of law. It is not for this Court further to consider what other remedy, if any, the respondent has. Appeal No. 27 is, therefore, allowed and Appeal No. 28 dismissed. In view of the fact that the appellant did not strictly comply with the terms of Article 320(3)(c) of the Constitution, we direct that each party bear its own costs throughout."*

33. We have noticed above that approval of the CCI, which is provided for a combination and the time prescribed under the Competition Act is 210 days. We have also noticed that CIRP Regulations also provide a timeline. Section 12 of the Code, contemplate completion of CIRP within 180 days, subject to further extension. Section 12, further provides that CIRP shall be completed within a period of 330 days from the insolvency commencement date. We have noticed that timeline prescribed under Regulation 40A for submission of Resolution Plan to CoC take additional

30 days and 135 days are provided for submission of Resolution Plan. Till the submission of Plan and by 165 days, the Plan is required to be considered by the CoC. The question of obtaining approval from the CCI only arises when Resolution Plan submitted contains a combination and require approval from the CCI. After submission of Plan, the Resolution Applicant applies for approval of combination from the CCI. It is not in his hand that as to when CCI will grant the approval. The CCI has to act as per statutory provisions of the Competition Act and it has been given 210 days to take a decision. If, we hold that prior approval of the CCI is mandatory prior to the approval of Plan by the CoC, it will lead to incongruous result, the CIRP cannot be frozen or cannot be put at halt because an application is submitted before the CCI. Looking to the timeline provided in the Code and that of the Competition Act and to hold that prior approval of CCI is required prior to approval of Plan by the CoC, mandatorily will lead to adverse effect on the CIRP. We may, however, observe that even if the requirement of approval by the CCI, prior to approval by the CoC is held to be 'directory', that does not mean that provision of Section 31(4) is not to be complied with. The proviso to Section 31(4) is clear as to what was contemplated was approval by the CCI prior to approval of CoC. Hence, in all cases the law has to be complied with. It cannot be held that since provision is there, approval by CCI has to be obtained prior to approval of Plan by the Adjudicating Authority. We have noticed above the judgments of this Tribunal where it has been laid down that approval by CCI, prior to approval by the CoC is 'directory' because

there is no consequences provided for non-compliance of Section 31(4) proviso.

34. In the present case, we have noticed that RFRP provided that CCI's approval has to be obtained prior to approval of Plan by the CoC, which RFRP was in accordance with Section 31(4). Although, the RP subsequently clarified that approval can be obtained even after the approval by the CoC, which was in accordance with the prevalent legal position as settled by this Tribunal in ***Arcelor Mittal*** and other cases. We thus are of the view that Section 31, sub-section (4) proviso has to be read to mean that though the approval by the CCI is 'mandatory', the approval by the CCI prior to approval of CoC is 'directory'. We, thus, do not find any error in the order of the Adjudicating Authority dated 28.04.2023 rejecting the I.A. No.1497/KB/2022 filed by the Independent Sugar Corporation Ltd.

35. The learned Counsel for the Respondent questioned the *locus* of the Appellants to file the Appeal. On the question of *locus*, there can be no doubt that Independent Sugar Corporation Ltd., which was L2 in the resolution process and who has filed the I.A. No.1497/KB/2022, on which impugned order was passed, has every *locus* to challenge the order of the Adjudicating Authority. The Independent Sugar Corporation Ltd. having *locus* to challenge the order, we have considered the submissions raised by the parties on the merits. In view of the one of the Appellant having *locus* to challenge the order, it is not necessary to enter into the issues regarding *locus* of other Appellant(s).

36. In view of the foregoing discussion, we do not find any ground to interfere with the impugned order dated 28.04.2023. The Adjudicating Authority may now proceed to consider I.A. No.1401 of 2023 filed for approval of Resolution Plan. However, we make it clear that in this judgment, we have only considered the interpretation of Section 31, sub-section (4) proviso and have not expressed any opinion on issues raised by the parties.

37. In the result, All the Appeal(s) are dismissed. Parties shall bear their own cost.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

NEW DELHI

18th September, 2023

Ashwani