

March 2025

## **For Resolution Plans involving combinations, Resolution Plan can be tabled for Committee of Creditors' approval only after obtaining the requisite approval by the Competition Commission of India**

The Hon'ble Supreme Court of India ("Supreme Court") by a 2:1 majority in *Independent Sugar Corporation Limited v Girish Sriram Juneja and Ors*<sup>1</sup>, has held that in case of resolution plans proposing a combination (i.e., a merger or amalgamation of the entities) of a corporate debtor, the Competition Commission of India ("CCI") must first grant the necessary approval before such Resolution Plan is placed before the Committee of Creditors ("CoC") for its approval under Section 30(4) of the Insolvency and Bankruptcy Code ("IBC").

### **Brief facts**

1. The present judgment arises out of the Corporate Insolvency Resolution Process ("CIRP") of Hindustan National Glass and Industries Limited ("HGNIL"/"Corporate Debtor"). In April 2022, 2 (two) resolution applicants, viz., AGI Greenpac Limited ("AGI") and Independent Sugars Corporation Limited ("INSCO") submitted their Resolution Plans for consideration ("Resolution Plans").
2. Since the resolution of the Corporate Debtor constituted a combination under the Competition Act, 2002 ("Competition Act"), these plans required the requisite CCI approval.
3. The Resolution Professional of the Corporate Debtor ("RP") permitted the resolution applicants to obtain the requisite CCI approval after receiving CoC's approval to its resolution plan, but prior to filing of a plan approval application with the National Company Law Tribunal ("NCLT").
4. Before the Resolution Plans were placed before CoC, AGI filed a merger notification in Form I on September 27, 2022, for its proposed acquisition of 100% of HNG's shareholding ("First CCI Notification"). The First CCI Notification was invalidated by CCI on October 22, 2022, directing AGI to refile the merger notification in Form II (the long form merger notification).
5. On August 25, 2022, CoC already approved the Resolution Plan submitted by AGI with 98% votes, whereas INSCO's Resolution Plan received only 88% votes. Accordingly, the RP filed its application seeking NCLT's assent to AGI's Resolution Plan under Section 31 of the IBC.
6. In the meantime, AGI refiled the merger notification in Form II with CCI on November 3, 2022 ("Second CCI Notification"). Subsequently:
  - a) CCI issued 2 (two) requests for information addressing gaps in AGI's Second CCI Notification;

<sup>1</sup> 2025 INSC 124

- b) after reviewing the information provided by AGI, on February 9, 2023 (i.e., 98 (ninety-eight) calendar days (subject to clock-stops) after the Second CCI Notification was filed), the CCI formed a prima facie opinion that the transaction proposed under the Resolution Plan of AGI ("**Proposed Transaction**") was likely to cause appreciable adverse effect on competition ("**AAEC**") in certain relevant markets in India and issued a Show Cause Notice on February 10, 2023 ("**CCI SCN**"), directing AGI to demonstrate why a phase II review should not be initiated in respect of the Proposed Transaction;
  - c) on March 10, 2023, AGI filed a response to the CCI SCN ("**SCN Response**"). As part of its SCN Response, AGI voluntarily proposed to divest the Rishikesh plant of the Corporate Debtor, as a modification to address the competition concerns raised by the CCI;
  - d) on March 15, 2023, after considering all information provided by AGI and assessing the effectiveness of the voluntary modification in addressing potential AAEC, CCI conditionally approved the Proposed Transaction, subject to the modification ("**Approval Order**");
  - e) the Approval Order was a reasoned order that included CCI's analysis in relation to the various competitive constraints imposed on AGI and the Corporate Debtor by the market forces. It also addressed the voluntary modification offered by AGI, which involved the divestment of a plant that was used in the manufacture and sale of container glass and was self-contained, such that it incentivises new entry/capacity enhancement and would provide the buyer with an additional market share of approximately 5%. To this end, CCI expressly noted that considering the Proposed Transaction in light of all relevant factors including the competitive constraints imposed by various market forces and the voluntary modification, the Proposed Transaction was not likely to cause any AAEC in the relevant market (as delineated in the Approval Order); and
  - f) INSCO challenged the Approval Order before the National Company Law Appellate Tribunal ("**NCLAT**").<sup>2</sup>
7. Aggrieved with the developments of the CIRP of the Corporate Debtor, INSCO also filed an application before the NCLT challenging the approval granted by CoC to AGI's resolution plan,<sup>3</sup> given that the pre-condition of obtaining CCI approval for the proposed combination was taken only after CoC's approval.
  8. On April 24, 2023, the NCLT rejected INSCO's application. Aggrieved, INSCO challenged the said order before NCLAT.<sup>4</sup>
  9. By the order dated July 28, 2023, and September 18, 2023 ("**Impugned Orders**"), the NCLAT upheld CCI's approval to AGI's resolution plan, and observed that while the requirement of approval for a proposed combination by CCI was mandatory in nature, obtaining the same prior to the approval by CoC was only directory.
  10. Aggrieved, INSCO proceeded to challenge the Impugned Orders before the Hon'ble Supreme Court.

## Issue

Whether CCI's approval for a proposed combination under a resolution plan must mandatorily precede the approval of the resolution plan by CoC, as envisaged under the proviso to Section 31(4) of the IBC?

## Findings

The Hon'ble Supreme Court allowed INSCO's appeal and in the judgment, made the following relevant findings on the position of law:

<sup>2</sup> Competition Appeal (AT) No. 7 of 2023

<sup>3</sup> I.A. No. 1497 of 2022

<sup>4</sup> Company Appeal (AT)(INS.) No. 735 of 2023

## Interpretation of the proviso to Section 31(4) of the IBC

1. The introduction of the proviso to Section 31 (4) of the IBC and use of the term 'prior' makes it clear that the intent of the legislature was to create an exception in cases containing combination proposals, where the approval of CCI is to be procured prior to the approval of the CoC.
2. It is held that it is necessary for the courts to interpret the provisions in their natural sense, as it is through the words used in a provision that legislature expresses its intention. When the language is unambiguous, the court must respect its ordinary and natural meaning instead of wandering into the realm of speculation an unintended overreach invoking the so-called 'spirit of law'.
3. The language of the proviso to section 31(4) of the IBC appears to be clear with no ambiguity and in those situations, all words finding place in the provision must be given their due meaning.
4. The use of the word 'prior' in the proviso must be given some meaning as by virtue of the same, the statute requires that the act of obtaining CoC approval for the resolution plan must be done in a particular manner i.e. the necessary approval for the resolution plans containing combination proposals must be obtained prior to such plans, being granted CoC approval.
5. The notes on clauses and memorandum for the said provision also suggest that the approval from CCI for the combination must be procured prior to the approval of the resolution plan by the CoC.

## No fundamental disharmony between timelines under the Competition Act and the IBC

1. The timelines for approval stipulated under the IBC and the Competition Act are not disharmonious, except in rare circumstances involving an extremely high degree of AAEC, which may require a longer review period (i.e., a large part of the 210 (two hundred and ten) days stipulated under the extant merger regime of the Competition Act).
2. In 2022-2023, CCI disposed of combination applications in an average of 21 (twenty-one) working days. It further noted that there has been no recorded instance till date where CCI took more than 120 (one hundred and twenty) days to approve a transaction, and it is extremely rare for a transaction to take more than 120 (one hundred and twenty) days, to receive approval. Therefore, the Hon'ble Supreme Court emphasised that undue importance need not be given to such outlier, rare and extreme examples.
3. In cases of CIRP under the IBC, the trigger event for filing a merger notification need not be limited to the submission of the resolution plan to the resolution professional. Instead, the merger notification can be filed post the execution of *any* agreement, which conveys the decision to acquire control over a target company, allowing sufficient time for CCI clearance within the IBC framework.
4. The timeline under the IBC can be elongated in rare circumstances, where the delay cannot be ascribed to the parties (including in such instances where delay is caused by CCI's assessment of a transaction) (relied on Committee of Creditors *Essar vs. Satish Kumar Gupta*).

## Relevance of CCI's scrutiny of a proposed combination in the IBC process

1. Any resolution plan must comply with all existing laws, including Section 6 of the Competition Act which holds any combination that leads to an AAEC in the relevant market, void. Therefore, CoC's approval cannot be granted until CCI decides on the legality of a proposed combination.
2. The Proposed Transaction was *prima facie* found to be in contravention of Section 6 of the Competition Act (given issuance of the SCN), and was only approved after AGI offered the voluntary modification. However, CoC approved the resolution plan prior to CCI's approval (i.e., before the modifications (i.e., divestments)) which ought to have been considered by CoC when approving the resolution plan.

## Procedural lapses under the Competition Act

1. CCI incorrectly issued the CCI SCN under Section 29(1) of the Competition Act only to AGI (i.e., acquirer) and not to the Corporate Debtor (i.e., target).
2. Both the acquirer and target are integral to the assessment of a combination, and not sending the CCI SCN to the target led to a procedural lapse, which undermined the fairness and completeness of the investigative process. The judgment interprets the use of the word 'parties' in plural form to mean that the CCI SCN must be addressed to both the acquirer as well as the target.
3. In cases where CCI forms a prima facie view that a transaction causes AAEC, CCI ought to thoroughly undertake the process prescribed under Section 29 of the Competition Act, which mandates a formal investigation (which is a far-reaching exercise of evidence-gathering and fact-finding) under the aegis of the Director General of CCI.

## Practical challenges posed by conditional approvals of CCI

1. The conditional approvals granted by CCI depends on the parties complying with such remedies in the future, whereas the CIRP process under the IBC is based on finality and decisiveness.
2. In this context, the Hon'ble Supreme Court highlighted certain concerns regarding the conditional approvals granted by CCI:
  - a) the Hon'ble Supreme Court noted that the absence of a comprehensive monitoring mechanism creates a lacuna in enforcing conditional approvals;
  - b) conditional approvals are not equipped to effectively mitigate risks that may arise during the interim period when such remedies are being implemented. The interim period is a regulatory vacuum which increases the likelihood of anti-competitive conduct;
  - c) the risk/lacuna is further exaggerated by the absence of oversight mechanisms as there is no active regulatory check during the execution of CCI imposed remedies; and
  - d) a divestiture may fail to achieve its intended purpose if the acquiring party lacks the capacity or intent to compete effectively in the market.

The Hon'ble Supreme Court also rejected AGI's objection to INSCO's *locus standi*, and distinguished the cases relied upon by the NCLAT, to finally allow the appeal by INSCO (Majority judgment by Hrishikesh Roy, J. and Sudhanashu Dhulia, J.).

## Dissenting judgment (S. V. N. Bhatti. J.)

1. The Hon'ble Supreme Court was obliged to interpret the word 'shall' in the proviso to Section 31(4) of the IBC as directory in nature so as to preserve the legislative effort and intent of the statute.
2. This conclusion was premised on the principle that the literal rule of interpretation may not necessarily be the tool of first resort merely because plain and simple words are found in the statute. IBC must be purposively interpreted so it does not cause undue hardship, inconsistency, or counteract the purpose of the legislation.
3. The literal interpretation of the proviso in isolation limits the number of eligible resolution applicants, thus defeating the core objects of the IBC, i.e. to maximise value for all stakeholders.
4. Therefore, to deem the proviso to be mandatory and compel prospective resolution applicants to obtain CCI's approval *before* the stage of CoC approval (as contemplated in Section 30 of the IBC), would amount to '*catapulting the proviso to a place not expressed by the parliament*', and cause undue hardship and difficulty to prospective resolution applicants.

## Conclusion

For a resolution plan containing a combination, CCI's approval of the resolution plan must be obtained before and consequently, CoC's examination and approval should be only after CCI's decision.

The statutory provision and legislative intent unequivocally affirm the mandatory nature of the Proviso to Section 31(4) of the IBC.

## Observations

1. By requiring approval from CCI before CoC evaluates a resolution plan, the judgment aims to mitigate potential risks of combinations with high market shares which could cause prima facie concerns on market structures resulting from insolvency resolutions. This ruling tries to strike a balance between ensuring efficient debt resolution and maintaining competitive market conditions to ensure finality, ease of doing business while promoting fair competition in the market.
2. The decision underscores the necessity of strictly following procedural norms in insolvency proceedings. It reinforces the principle that statutory compliance, such as securing regulatory clearances is essential to preserving the credibility and effectiveness of the IBC framework.
3. That being said, the judgment also hinges the timelines of the CIRP process on the efficiency and timelines of CCI in granting its approvals. Effectively the 330 (three hundred and thirty) days period prescribed under the IBC may be reduced to the extent of the time taken by the CCI in granting its approval.
4. This judgment assumes the importance of the complimenting interplay between the IBC and the Competition Act, to achieve the collective objectives of the respective legislations in a timely, efficient and effective manner.
5. This judgment tries to provide clarity on the merger control process under the Competition Act and provides direction in terms of involvement of both parties (i.e., the target and acquirer). However, this is not in line with the regulations and 14 (fourteen) years old merger regime practice of target having a limited tole in an acquisition. It is important to note that merger control under the Competition Act is a trust-based process where parties and the combination division of CCI work collaboratively to ensure that combinations do not cause AAEC, while at the same time activity in India by way of mergers and acquisitions is not hindered. To this end, the combination regulations allow the parties to file voluntary remedies and voluntary commitments. This mechanism has been enacted to make competition regulation business friendly to avoid time consuming scrutiny and investigation, while ensuring that the merger control regime meets its intended objective. Therefore, while CCI ought to follow the procedural rigour prescribed under the Competition Act and the accompanying regulations, putting every transaction through the same rigour would have the unintended consequence of slowing down commerce. Further, given merger control is *ex ante* and involves significant disclosure of current and forward looking competitively sensitive data of the parties, CCI has rightly ring-fenced access to such data and to date has not involved the DG in any investigation even post issuance of an SCN.
6. AGI has filed for a review of this judgment. It is to be seen whether the Hon'ble Supreme Court would be willing to reconsider its findings within the narrow scope of its review jurisdiction.



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