(2024) 05 NCLAT CK 0079

National Company Law Appellate Tribunal New Delhi

Case No: Company Appeal (AT) (Insolvency) No. 690, 693, 694, 695 & 714 Of 2024

Slimline Realty Private Limited	APPELLANT
Vs	
Mr. Jigar Bhatt	RESPONDENT

Date of Decision: May 31, 2024

Acts Referred:

- Insolvency and Bankruptcy Code 2016 - Section 7, 25A(3), 28(3), 28(4), 33(5), 35(1)(k)
- Consumer Protection Act, 1986 - Section 13
- Companies Act, 2013 - Section 171
- Companies Act, 1956 - Section 446
- Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 20A

Hon'ble Judges: Ashok Bhushan, Chairperson; Barun Mitra, Member (T)

Bench: Division Bench

Advocate: Gyanendra Kumar, Rahul Jain, Rhea Verma, Navin Pahwa, Himanshu Satija, Karan Valecha, Harsh Saxena, Shevaaz Khan

Final Decision: Dismissed

Judgement

Ashok Bhushan, J.

1. These Appeals have been filed against order dated 07.02.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad, Division Bench, Court-1 by which order the Adjudicating Authority allowed the application filed by the Liquidator seeking ex-post facto approval in respect of Section 7 applications which were filed by the Liquidator against the Appellants' companies. All the Appeals arise from same set of facts and raises common question of law, hence, they were heard together and are being decided by this common judgment. It shall be sufficient to refer to Company Appeal (AT) (Ins.) No.690 of 2024 for deciding all these appeals. Brief facts

of the case giving rise to these appeals are:

(i) The Corporate Debtor – Reliance Marine & Offshore Limited (hereinafter referred to as 'RMOL') was admitted to Corporate Insolvency Resolution Process (CIRP) vide order dated 21.08.2019.

(ii) The order of Liquidation was passed against RMOL on 06.12.2021. The Respondent – Jigar Bhatt was appointed as Liquidator. The Liquidator issued Demand Notice to the Appellants to make payment with respect to Non-Convertible Unsecured Bonds subscribed by the Corporate Debtor.

(iii) No payments having been made by the Appellants, the Liquidator in September, 2023 filed Section 7 applications against the Appellants. Section 7 application filed against M/s Slimline Realty Private Limited was registered as Company Petition (IB) No.1007/2023. Similarly, with regard to other Appellants, Company Petition No. 1019/2023 against Avocado Realty Pvt. Ltd., Company Petition No. 1020/2023 against Replenish Realty Private Ltd., Company Petition No. 1021/2023 against Budding Mercantile Company Pvt. Ltd. and Company Petition No. 1022/2023 against Winsome Realty Pvt. Ltd. were registered.

(iv) The case set up by the Liquidator in Section 7 application was that the Corporate Debtor has no business, no physical assets or any employees. The only asset of the Corporate Debtor is subscription in Non-Convertible Unsecured Bonds of five private limited entities (Appellants herein). The Bonds were subscribed in the year 2013 and were due for redemption on 25.07.2019 and have a face value of Rs.306.73 crore which has to be redeemed at 40% premium. The management of the Corporate Debtor and the erstwhile Resolution Professional as well as the Liquidator has issued Demand Notice to the Appellants and the Appellants failed to redeem the amount and pay the amount due to the Corporate Debtor.

(v) The Liquidator filed an application being IA/189(AHM)2024 in IA 794 of 2020 in CP(IB) 171 of 2017 praying for various reliefs. The Adjudicating Authority heard the I.A. filed by the Liquidator and by order dated 07.02.2024 allowed the I.A. and granted ex-post facto approval to the Liquidator to continue and proceed with the Company Petitions filed by the Liquidator against the Appellants.

(vi) Aggrieved by the order dated 07.02.2024 granting ex-post facto approval to the Liquidator, these Appeals have been filed by the Appellants.

2. We have heard Shri Gyanendra Kumar, learned counsel for the Appellants and Shri Navin Pahwa, learned senior counsel with Mr. Himanshu Satija, learned counsel appearing for the Liquidator.

3. Learned counsel for the Appellant challenging the impugned order submits that the Adjudicating Authority has no jurisdiction to grant ex-post facto approval of Section 7 application which were filed by the Liquidator without obtaining prior approval of the Adjudicating Authority as contemplated in Section 33(5) of the IBC Code. It is submitted that Section 33(5) provides that after liquidation order has been passed no suit or legal proceeding can be instituted by or against the Corporate Debtor and proviso to the section provides for an exception that a suit or legal proceeding may be instituted by the Liquidator only after obtaining prior approval of the Adjudicating Authority. It is submitted that the provision under Section 33(5) is a mandatory provision according to which Liquidator was not competent to initiate any proceeding on behalf of the Corporate Debtor without obtaining prior approval. The prior approval contemplated under Section 33(5) proviso cannot be equated with post-facto approval. The proceeding initiated by the Liquidator without obtaining prior approval is void and nullity and cannot be cured by any post-facto approval. There is distinction between expressions 'sanction/permission', 'approval' and 'prior approval'. When a statute requires a sanction, permission or approval, a post-facto approval may cure the defect. However, when a statute mandates a prior approval, defect in initiation of proceedings cannot be cured by post-facto approval. The language of provisions under Section 33(5) are clear, plan and unambiguous. The expression 'prior approval' has been used cautiously and every word used in the statute has to be given its proper and effective meaning, as the legislature uses no expression without purpose or meaning. It is submitted that order dated 07.02.2024 has been passed in violation of principles of natural justice. The Appellant was also entitled to be heard before the Adjudicating Authority since it is party which raised objection against proceeding under Section 7 which was initiated by the Liquidator against the Appellant. It is further stated that the order impugned is an unreasoned and non-speaking order. No reasons have been given as to why the Adjudicating Authority has granted ex-post facto approval, as prayed for by the Liquidator.

4. Learned counsel for the Liquidator refuting the submissions of learned counsel for the Appellant submits that the provision of Section 33(5) of the Code is only directory and not mandatory in nature. It is submitted that the provision under Section 33(5) does not provide for any consequences for its non-compliance. When no consequences are provided, the provision is always treated as directory. Since the section does not expressly provide for nullification of the proceedings as a consequence of non-compliance with the requirement of the section, it only renders the provision directory in nature. It is submitted that there are other provisions in the code like Section 28(3), Section 28(4) and Section 25A(3) which expressly provides for consequences for non-compliance of said section. Not providing of any consequence of breach in Section 33(5) is clear indicator of the intention of the legislature that breach of Section 33(5) is not viewed as breach of any mandatory provision. The Liquidator is

also empowered to initiate proceedings on behalf of the Corporate Debtor by virtue of Section 35(1)(k) of the Code. It is submitted that Section 33(5) has to be read with object and purposes of the statute which is to maximize the value of the assets of the Corporate Debtor. The Liquidator in fulfilment of objectives mentioned in the statute has initiated proceeding under Section 7 against the Appellants who failed to redeem the bonds. The objective of Section 33(5) is that the Adjudicating Authority be made aware of the actions of the Liquidator. Learned counsel for the Respondent has also referred to provisions of Section 171 of the Companies Act, 1913 and Section 446 of Companies Act, 1956 and it is submitted that in terms of pre-requirement of permission, Hon'ble Supreme Court has already held that leave of court is not condition precedent. It is submitted that out of the five Section 7 applications filed by the Liquidator, two applications have already been admitted by the Adjudicating Authority and with respect to three other applications order have already been reserved.

5. Learned counsel for both the parties have placed reliance on various judgments of Hon'ble Supreme Court, High Court and this Tribunal in support of their respective submissions which shall be considered hereinafter.

6. On submission of learned counsel for the parties following issues arise for consideration in these appeals:

(1) Whether the statutory requirement under Section 35 Sub-section (5) proviso to obtain prior approval of the Adjudicating Authority by the Liquidator to institute a suit or proceeding on behalf of the Corporate Debtor is a mandatory requirement or only a directory requirement?

(2) What are the consequences and status of the proceedings instituted by the Liquidator on behalf of the Corporate Debtor without prior approval of the Adjudicating Authority?

(3) Whether a post facto approval granted by the Adjudicating Authority of proceedings instituted by the Liquidator without obtaining prior approval shall make the proceedings authorized/ competent?

(4) Whether before approval under Section 33(5) to the Liquidator to institute proceeding on behalf of the Corporate Debtor, the party against whom proceedings are to be instituted has to be given an opportunity?

(5) Whether the impugned order dated 07.02.2024 passed by the Adjudicating Authority is unsustainable and deserves to be set aside?

7. Before we proceed to enter into the issues framed as above and respective submissions of learned counsel for the parties, it is necessary to notice certain provisions of I&B Code as well as Companies Act, 1956 and Companies Act, 1913.

Section 33 of the I&B Code deals with initiation of liquidation. Section 33(5) provides as follows:

"33(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority."

8. There was similar provisions in Companies Act, 1913 as well as Companies Act, 1956 which provides that after winding up order of the Company no suit or other legal proceeding can be instituted by or against a Corporate Debtor without leave of the court. Section 171 of the Companies Act, 1913 is as follows:

"171. When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose."

9. Similar provision being Section 446 was in Companies Act, 1956, which provides as follows:

"446. SUITS STAYED ON WINDING UP ORDER

(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the 1[Tribunal] and subject to such terms as the 1[Tribunal] may impose.

(2) The 2[Tribunal] shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of –

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or

after the commencement of the Companies (Amendment) Act, 1960.

(3) 3[***]

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a high Court."

10. From the facts as noticed above, it is clear that order of liquidation was passed on 06.01.2021. After passing of order of liquidation, the Liquidator sent Demand Notice to the Appellants to make payment due from July, 2019 to the Corporate Debtor. The Stakeholders Consultation Committee (SCC) was constituted after order of liquidation. The SCC did not accede to the request of the Liquidator for initiating proceeding against the Appellant companies. The Liquidator, however, on 30.09.2023 filed application against the Appellants under Section 7 claiming default of financial debt. For example: Principal Amount claimed against the company – Slimline Realty Pvt. Ltd. in Company Petition No.1007/2023 is Rs.53 Crores and date of default is mentioned as 26.07.2019 along with interest due till 25.09.2023. Similarly, default of financial debt was claimed in other Company Petitions. Total financial debt claimed in default in the above companies was Rs.306 Crore. It is further pleaded by the Liquidator that the Corporate Debtor has no business, no assets and no employees and only asset of the Corporate Debtor was Non-Convertible Unsecured Bonds issued by the Appellants whose payment was due on 25.07.2019. In I.A. No.189 of 2024, which has been decided by the impugned order dated 07.02.2024, the Liquidator has made following prayers:

"a) To allow the present application;

b) To grant the post facto approval under sub-section

(5) of section 33 of the Insolvency and Bankruptcy Code, 2016 for instituting legal proceedings under section 7 of the Insolvency and Bankruptcy Code, 2016 by the Liquidator on behalf of the corporate debtor against 5 bond issuer entities namely Avocado Reality Private Limited, Budding Mercantile Company Private Limited, Replenish Realty Private Limited, Slimline Realty Private Limited and Winsome Realty Private Limited for the debt they owe towards corporate debtor and having defaulted in repayment of the same on due date;

c) To permit the Liquidator to continue and proceed with Company Petition No. IB/1022/2023, and Company Petition No. IB/1021/2023, pending before Hon'ble NCLT Mumbai bench as filed under section 7 of the Insolvency and bankruptcy Code, 2016 by the Liquidator on behalf of corporate debtor;

d) To further permit the Liquidator to file any fresh applications against all or any of the 5 bond issuer entities, if any of the petitions as specified in prayer (c) above gets dismissed on the ground of non-availability of the prior approval of the

Adjudicating Authority under sub-section (5) of section 33 of the Insolvency and Bankruptcy Code, 2016;

e) Such other reliefs as this Hon'ble Tribunal may deem fit and proper in the interest of justice and facts and circumstances of the present case in the interest of justice."

11. The Adjudicating Authority by the impugned order has granted prayers (b) and (c) in Para 15, 16 and 17 of the order of the Adjudicating Authority is as follows:

"15. The only asset of the Corporate Debtor is the bond issued by the 5 entities as mentioned above. The liquidator has initiated Section 7 proceedings against the 5 entities. In terms of Section 33(5) of the IBC, 2016, no prior permission was taken from this Tribunal before initiation of such proceedings.

16. By this application, the liquidator seeks post facto approval of the action already initiated by the liquidator.

17. As the only assets of the Corporate Debtor is bond held by 5 entities, in the interest of the Corporate Debtor and in order to maximize the value during the liquidation process, this Adjudicating Authority hereby allows prayer (b) and (c) as stated above. In view of the above, this application i.e. IA/189(AHM)2024 is allowed and accordingly disposed off."

Question No.1

12. We need to first examine as to whether the provision of Section 33(5) is a mandatory provision as contended by learned counsel for the Appellant or the provision is only directory as submitted by learned counsel for the Respondent. When we look into the expression used in Section 33 Sub- section (5), Section 33(5) provides that when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor. The provision begins with a negative injunction with regard to suit or legal proceeding by or against the Corporate Debtor after an order of liquidation has been passed. The object of such provision is not far to seek. When a liquidation order has been passed, the estate of the Corporate Debtor has to be protected, hence, there is an embargo on initiating any suit or legal proceeding against the Corporate Debtor. The moratorium as enforced under Section 14 after commencement of insolvency is also with the same objective of protecting the assets of the Corporate Debtor. Proviso to Sub-section (5) contains an exception to the prohibition i.e. a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority. The question to be answered is as to whether requirement of prior approval of the Adjudicating Authority for instituting a suit or proceeding by the Liquidator is a mandatory requirement or a directory requirement. Learned counsel for the parties

have relied on various judgments of Hon'ble Supreme Court and this Tribunal on statutory interpretation, which need to be briefly noticed.

13. Learned counsel for the Appellant has relied on judgment of the Hon'ble Supreme Court in **"AIR 1956 SC 1296, State of Rajasthan vs. Leela Jain".** Hon'ble Supreme Court had occasion to consider the provisions of Jaipur Municipal Act, 1943. The Hon'ble Supreme Court in the above case has laid down that it is not permissible to omit or delete words from the operative part of an enactment, which have meaning and significance. Following observations were made in Para 11 of the judgment:

"11. With due respect to the learned Judges we do not find it possible to agree that it is permissible to omit or delete words from the operative part of an enactment, which have meaning and significance in their normal connotation merely on the ground that according to the view of the Court it is inconsistent with the spirit underlying the enactment. Unless the words are unmeaning or absurd, it would not be in accord with any sound principle of construction to refuse to give effect to the provisions of a statute on the very elusive ground that to give them their ordinary meaning leads to consequences which are not in accord with the notions of propriety or justice entertained by the Court."

14. Next judgment relied by learned counsel for the Appellant is judgment of Hon'ble Supreme Court in "**Gurudevdatta Vksss Maryadit and Others vs. State of Maharashtra and Others, (2001) 4 SCC 534".** The Hon'ble Supreme Court in the above judgment after noticing earlier judgments on the statutory interpretation laid down that it is cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense. Following was observed in Para 26:

"26. Further we wish to clarify that it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute."

15. We may also refer to earlier judgment of Hon'ble Supreme Court in **"(1976) 2 SCC 953, Lachmi Narain Etc. Etc. vs. Union of India & Ors.",** where it is held that if the provision is couched in prohibitive or negative language, it can rarely be directory. Para 68 of the judgment is as follows:

"68. Section 6(2), as it stood immediately before the impugned notification, requires the State Government to give by notification in the Official Gazette "not less than 3 months' notice" of its intention to add to or omit from or otherwise amend the Second Schedule. The primary key to the problem whether a statutory provision is mandatory or directory, is the intention of the law-maker as expressed in the law, itself. The reason behind the provision may be a further aid to the ascertainment of that intention. If the legislative intent is expressed clearly and strongly in imperative words, such as the use of "must" instead of "shall", that will itself be sufficient to hold the provision to be mandatory, and it will not be necessary to pursue the enquiry further. If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory. (Crawford, The Construction of Statutes, pp. 523-24). Here the language of sub-section (2) of Section 6 is emphatically prohibitive, it commands the Government in unambiguous negative terms that the period of the requisite notice must not be less than three months."

16. We may refer to another judgment of Hon'ble Supreme Court in **"(2011) 6 SCC 358, Rangku Dutta v. State of Assam",** where the Hon'ble Supreme Court noticing express provision under Section 20 Sub-section (a) of Terrorist and Disruptive Activities (Prevention) Act, 1987 held that whenever the intent of a statute is mandatory, it is clothed with a negative command. In Para 18 of the judgment following has been laid down:

"18. It is obvious that Section 20-A(1) is a mandatory requirement of law. First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression "No" after the overriding clause. Whenever the intent of a statute is mandatory, it is clothed with a negative command. Reference in this connection can be made to G.P. Singh's Principles of Statutory Interpretation, 12th Edn., at pp. 404-05, the learned author has stated:

"... As stated by CRAWFORD: 'Prohibitive or negative words can rarely, if ever, be directory. And this is so even though the statute provides no penalty for disobedience.' As observed by SUBBARAO, J.: 'Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative.' Section 80 and Section 87-B of the Code of Civil Procedure, 1908; Section 77 of the Railways Act, 1890; Section 15 of the Bombay Rent Act, 1947;

Section 213 of the Succession Act, 1925; Section 5-A of the Prevention of Corruption Act, 1947; Section 7 of the Stamp Act, 1899; Section 108 of the Companies Act, 1956; Section 20(1) of the Prevention of Food Adulteration Act, 1954; Section 55 of the Wild Life (Protection) Act, 1972; the proviso to Section 33(2)(b) of the Industrial Disputes Act, 1947 (as amended in 1956); Section 10-A of the Medical Council Act, 1956 (as amended in 1993), and similar other provisions have therefore, been construed as mandatory. A provision requiring 'not less than three months' notice' is also for the same reason mandatory."

We are in respectful agreement with the aforesaid statement of law made by the learned author."

17. Another judgment to be noticed of Hon'ble Supreme Court is "**(2017) 14 SCC 663, Mukund Dewangan vs. Oriental Insurance Company Limited**", where it was held that every word and expression which the legislature uses has to be given its proper and effective meaning, as the legislature uses no expression without purpose and meaning. In Para 35 following was laid down:

"35. The conclusion that the language used by the legislature is plain or ambiguous can only be arrived at by studying the statute as a whole. Every word and expression which the legislature uses has to be given its proper and effective meaning, as the legislature uses no expression without purpose and meaning. The principle that the statute must be read as a whole is equally applicable to different parts of the same section. The section must be construed as a whole whether or not one of the parts is a saving clause or a proviso. It is not permissible to omit any part of it, the whole section should be read together as held in State of Bihar v. Hira Lal Kejriwal."

18. Learned counsel for the Appellant has also placed reliance on constitutional bench judgment of Hon'ble Supreme Court in **"(2020) 5 SCC 757, New India Assurance Co. Ltd. vs. Hilli Multipurpose Cold Storage Pvt. Ltd**.". The Constitution Bench had occasion to consider the provisions of Consumer Protection Act, 1986, Section 13 which provides for limitation for filing reply/response. The question was as to whether the time provided for filing of reply is a mandatory provision or the provision is discretionary to extend the period prescribed. The Hon'ble Supreme Court held that in the said case that hardship cannot be a ground for changing the mandatory nature of the statute and that law prevails over equity, as equity can only supplement the law, and not supplant it. In Para 22, 25, 26 and 27 following has been laid down:

"22. This Court in Lachmi Narain v. Union of India has held that: (SCC p. 969, para 68)

"68. ... If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the intent that the provision is to be mandatory."

Further, hardship cannot be a ground for changing the mandatory nature of the statute, as has been held by this Court in Bhikraj Jaipuria v. Union of India and Fairgrowth Investments Ltd. v. Custodian. Hardship cannot thus be a ground to interpret the provision so as to enlarge the time, where the statute provides for a specific time, which, in our opinion, has to be complied in letter and spirit.

25. The contention of the learned counsel for the respondent is that by not leaving a discretion with the District Forum for extending the period of limitation for filing the response before it by the opposite party, grave injustice would be caused as there could be circumstances beyond the control of the opposite party because of which the opposite party may not be able to file the response within the period of 30 days or the extended period of 15 days. In our view, if the law so provides, the same has to be strictly complied, so as to achieve the object of the statute. It is well settled that law prevails over equity, as equity can only supplement the law, and not supplant it.

26. This Court, in Laxminarayan R. Bhattad v. State of Maharashtra, has observed that "when there is a conflict between law and equity the former shall prevail". In P.M. Latha v. State of Kerala, this Court held that "Equity and law are twin brothers and law should be applied and interpreted equitably, but equity cannot override written or settled law". In Nasiruddin v. Sita Ram Agarwal, this Court observed that : (SCC p. 588, para 35)

"35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom". In E. Palanisamy v. Palanisamy, it was held that "Equitable considerations have no place where the statute contained express provisions". Further, in India House v. Kishan N. Lalwani, this Court held that "The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations"."

27. It is thus settled law that where the provision of the Act is clear and unambiguous, it has no scope for any interpretation on equitable ground."

19. Judgment of this Tribunal in "**Company Appeal (AT) (Ins.) No.292 of 2022, Amit Jain vs. Siemens Financial Services Pvt. Ltd."** has also been relied by the Appellant where this Tribunal noticing the principles of statutory interpretation held that when a word of statute is clear, plan and unambiguous the courts are bound to give effect to that meaning irrespective of consequences.

20. Learned counsel for the Respondent has placed reliance on judgment of this Tribunal in "**Company Appeal (AT) (Ins.) No.807 of 2023, Soneko Marketing Private Limited vs. Girish Sriram Jundeja & Ors.**". It is submitted by learned counsel for the Respondent that this Tribunal had occasion to interpret Section 31(4) of the I&B Code and this Tribunal held that requirement provided in Section 31(4) proviso that approval of CCI be obtained prior to approval of CoC has been held to be directory. Section 31(4) of the I&B Code, which came for consideration in the above case is as follows:

"2[(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. This Tribunal, in the above case, after considering the timelines came to the conclusion that requirement of approval of CCI is mandatory whereas requirement of approval by CCI prior to CoC is directory. In Para 33 and 34 of the judgment following was laid down:

"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."

22. We may also notice one more judgment of the Hon'ble Supreme Court on interpretation of a proviso in **"(2013) 11 SCC 451, Rohitash Kumar & Ors. vs. Om Prakash Sharma and Others",** where the Hon'ble Supreme Court reiterated the principles for interpretation of a proviso. In Para 20 and 21 following was laid down:

"Interpretation of the proviso

20. The normal function of a proviso is generally to provide for an exception i.e. exception of something that is outside the ambit of the usual intention of the enactment, or to qualify something enacted therein, which, but for the proviso would be within the purview of such enactment. Thus, its purpose is to exclude something which would otherwise fall squarely within the general language of the main enactment. Usually, a proviso cannot be interpreted as a general rule that has been provided for. Nor it can be interpreted in a manner that would nullify the enactment, or take away in entirety, a right that has been conferred by the statute. In case the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the

main enactment, so as to exclude by implication, what clearly falls within its expressed terms. If, upon plain and fair construction, the main provision is clear, a proviso cannot expand or limit its ambit and scope. [Vide CIT v. Indo Mercantile Bank Ltd. [AIR 1959 SC 713], Kush Saigal v. M.C. Mitter [(2000) 4 SCC 526 : AIR 2000 SC 1390] , Haryana State Coop. Land Development Bank Ltd. v. Employees Union [(2004) 1 SCC 574 : 2004 SCC (L&S) 257], Nagar Palika Nigam v. Krishi Upaj Mandi Samiti [(2008) 12 SCC 364 : AIR 2009 SC 187] and State of Kerala v. B. Six Holiday Resorts (P) Ltd. [(2010) 5 SCC 186]]

21. The proviso to a particular provision of a statute, only embraces the field which is covered by the main provision, by carving out an exception to the said main provision. (Vide Ram Narain Sons Ltd. v. CST [AIR 1955 SC 765], AIR p. 769, para 10 and A.N. Sehgal v. Raje Ram Sheoran [1992 Supp (1) SCC 304 : 1993 SCC (L&S) 675 : (1993) 4 ATC 559 : AIR 1991 SC 1406] , SCC p. 315, para 14.)"

23. Now reverting to Section 33 Sub-section (5) of the IBC Code, it is clear that Section 33 Sub-section (5) uses a negative expression and contains an injunction that no suit or other legal proceeding shall be instituted by or against the Corporate Debtor, when the liquidation order has been passed. The legislative intendment of the said provision is clear i.e. that no suit or

proceeding be instituted by or against the Corporate Debtor to protect the liquidation estate. Further, institution of proceeding by the Corporate Debtor has also prohibited so as to save the liquidation estate from unnecessary expenses. There is an exception to the above injunction i.e. legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority. The proviso is an exception to the main provision of Section 33(5). In event, we accept the submission of the Respondent that prior approval of the Adjudicating Authority is directory, the Liquidator will be free to initiate proceedings against any entity without obtaining prior approval of the Adjudicating Authority, which cannot be the intendment of the provision of Section 33(5).

24. Learned counsel for the Appellant has referred to judgment of Hon'ble Supreme Court in **"(2016) 12 SCC 613, Bajaj Hindustan Ltd. Vs. State of Uttar Pradesh & Ors**.", where the Hon'ble Supreme Court has noticed the various expressions including 'approval', 'prior approval'. The Hon'ble Supreme Court has occasion to consider provisions of Uttar Pradesh Sugarcane Purchase Act, 1961. In Para 6 and 7 of the judgment following was laid down:

"6. From the aforesaid facts, what emerges is that there is no evasion of any tax. The claim of the appellant that it had paid the tax at the time of removal of the bags from the godown is not disputed by the assessing authority. In fact, as mentioned above, while granting ex post facto approval, the assessing authority

had satisfied itself about the due payment of the entire tax at the time of removal of the bags and that there was no evasion of tax. In these circumstances, we have to consider as to whether ex post facto approval amount to sufficient compliance with the proviso to sub-section (1) of Section 3-A of the Act. The issue is no more res integra and has been authoritatively determined by a series of judgments of this Court. It would be sufficient to refer to the judgment in Ashok Kumar Das v. University of Burdwan. The discussion contained in paras 10 to 12 and 15 of the said judgment squarely applies to the present case and therefore, we reproduce the same: (SCC pp. 619-20)

"10. The learned counsel for Respondents 1 to 3, on the other hand, submitted that Section 21(xiii) used the expression "approval of the State Government" and not "prior approval of the State Government" and it has been held by this Court in U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd. and High Court of Judicature of Rajasthan v. P.P. Singh that when an approval is required, an action holds good and only if it is disapproved it loses its force. He further submitted that promotions made on the basis of Resolution of the Executive Council of the University adopted on 26-6-1995, therefore, hold good and now that the State Government has approved the Resolution of the Executive Council of the University adopted on 26-6-1995 by Order dated 10-10-2002, the promotions made on the basis of the Resolution dated 26-6-1995 of the Executive Council of the University hold good and cannot be set aside by this Court.

11. In Black's Law Dictionary (5th Edn.), the word "approval" has been explained thus:

'Approval.—The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another.'

Hence, approval to an act or decision can also be subsequent to the act or decision.

12. In U.P. Avas Evam Vikas Parishad, this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow: (SCC pp. 458-59)

'6. This Court in LIC v. Escorts Ltd., considering the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in para 63 held that: (SCC p. 313)

"63. ... we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) [of the Act]."

Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act. As to the word "approval" in Section 32(2)(b) of the Industrial Disputes Act, it was stated in Lord Krishna

Textile Mills v. Workmen, that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1).'

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15. The words used in Section 21(xiii) are not "with the permission of the State Government" nor "with the prior approval of the State Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise."

7. As is clear from the above, the dictionary meaning of the word "approval" includes ratifying of the action, ratification obviously can be given ex post facto approval. Another aspect which is highlighted is a difference between approval and permission by the assessing authority that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. In the instant case, the action was approved by the assessing authority. The Court also pointed out that if in those cases where prior approval is required, expression "prior" has to be in the particular provision. In the proviso to sub-section (1) of Section 3-A word "prior" is conspicuous. For all these reasons, it was not a case for levying any penalty upon the appellant. We, therefore, allow this appeal and set aside the impugned judgment [Bajaj Hindustan Ltd. v. State of U.P., Misc. Single No. 3088 of 1999, order dated 30-9-2004 (All)] of the High Court as well as the penalty. No order as to costs.

25. The legislative scheme as occurring in Section 33(5) is clear and categorical and the legislative intendment is clear that after the liquidation order is passed, no suit or legal proceeding is instituted by or against the Corporate Debtor with only one exception that suit or legal proceeding on behalf of the Corporate Debtor can be instituted with the prior approval of the Adjudicating Authority.

26. We, thus, looking to the statutory scheme, in use of the prohibitory word in Section 33(5), are satisfied that the requirement of prior approval by the Adjudicating Authority for instituting any suit or proceeding is mandatory and cannot be held to be directory. The mere fact that no consequences has been provided in the provision, cannot be a ground to treat the requirement as directory. We have noticed the judgments of Hon'ble Supreme Court as above that every word used in a statute has to be given its proper and effective meaning, as the legislature does not use any word without any purpose and object. Use of prohibitory and negative language, even if no consequences are provided, is treated as mandatory requirement. We, thus, agree with the submission of learned counsel for the Appellant that the requirement as contemplated in Section 33(5) proviso of obtaining prior approval by the Liquidator is a mandatory requirement. We, thus, answer the Question No.1 in following manner:

Answer No.1: The statutory requirement under Section 35 Sub-section (5) proviso to obtain prior approval of the Adjudicating Authority by the Liquidator to institute a suit or proceeding on behalf of the Corporate Debtor is a mandatory requirement.

Question No. 2 and 3

27. Both the questions being interconnected are being taken together. As noted above no consequences has been provided for non-compliance of Section 33(5) in the statute itself. It is relevant to notice that with respect to certain other provisions in the statute namely Section 28(3), Section 28(4) and Section 25A(3) consequences are provided to the effect that any action in breach of the provision shall be void. Section 28(4) of the Code is as follows:

"28. Approval of committee of creditors for certain actions.

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(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void."

28. The question to be considered is as to what is the consequence of institution of proceedings by Liquidator without obtaining prior approval. We have noticed the statutory scheme as delineated by Section 171 of Companies Act, 1913 and Section 446

of Companies Act, 1956. The Hon'ble Supreme Court had occasion to consider the provision of Section 171 and Section 446 in reference to case where the Liquidator has initiated proceeding without obtaining leave of the Court which was requirement of statute. Learned counsel for the Respondent has relied on judgment of Hon'ble Supreme Court delivered on Section 171 of Companies Act, 1913 and Section 446 of Companies Act, 1956. We first come to the judgment of Hon'ble Supreme Court in **"(1970) 3 SCC 900, Bansidhar Shankarlal vs. Mohd. Ibrahim & Anr.".** In the above case, the plaintiff had obtained a decree against the company on 13.05.1955. Subsequently, on 22.08.1955, an order of winding up of company was passed. The plaintiff filed application for enforcement against the company without obtaining leave of the High Court under Section 171. On motion of the plaintiff, application filed for enforcement of decree was refused on the ground that application for enforcement was not maintainable since no leave of the High Court was obtained by the Company Court. The plaintiff filed an application to take leave, which was granted. The objection filed to the execution proceeding was rejected against which second appeal was filed, in which order of dismissal was confirmed by the Additional District Judge. Plaintiff filed appeal in the Hon'ble Supreme Court which was also rejected. The argument which was addressed before the Hon'ble Supreme Court is noticed in Para 3 of the judgment, which is as follows:

"3. Counsel for the appellant says that the Subordinate Judge was incompetent to entertain the application for executing the decree in Second Appeal No. 1380 of 1954, unless the High Court of Calcutta in its company jurisdiction granted leave to execute the decree under Section 171 of the Indian Companies Act, 1913. Counsel urged that leave of the High Court is by the terms of Section 171 of the Indian Companies Act made a condition precedent to the institution of a proceeding against a company ordered to be wound up by the Court and that the application for execution of the decree without, in the first instance, obtaining leave of the High Court was entertained without authority. The question sought to be raised in the proposed appeal, it was urged, was of general or public importance. In any case it was contended that there is conflict of opinion among the courts in India on the true interpretation of Section 171 of the Indian Companies Act, 1913, and Section 446 of the Companies Act, 1956 (which replaced Section 171 of the Act of 1913), and the High Court was bound to grant the certificate applied for either under Section 133(1)(b) or under Article 133(1)(c) or both the clauses."

29. Hon'ble Supreme Court also noticed two earlier judgments of Calcutta High Court and Andhra Pradesh High Court where it was held that leave of Court is condition precedent to institute a proceeding against a company. Contrary views in the other judgments were noticed in Para 5. Paras 4 and 5 of the judgment are as follows:

"4. Our attention is invited to the decision of the High Court of Calcutta in Har Narain Misra v. Kanhaiya Lal Lohawalla and of the High Court of Andhra Pradesh in Godavari Sugar and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy. In these cases it was held that leave of the High Court which has ordered winding up of a company is a condition precedent to the institution of proceedings against a company in liquidation, and that proceeding initiated without obtaining leave of the Court in the first instance must be dismissed.

5. There are however, other cases which take a contrary view. Nazir Ahmad v. Peoples Bank of Northern India Ltd; Suresh Chandra Khannabish v. Bank of Calcutta Ltd; People Industrial Bank Ltd. v. Ramchandra Shukul; Roopnarain Ramchandra Pvt. Ltd. v. Brahmapootra Tea Co. (India) Ltd.

Section 171 of the Indian Companies Act, 1913 provided that—

When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court and subject to such terms as the Court may impose. [21 Com Cas 110]"

This section is in terms analogous to Section 231 of the English Companies Act, 1948 (11 and 12 Geo. 6 Ch. 38). The object of Section 171 is plain. It is intended to ensure that the assets of a company ordered to be wound up by the Court shall be administered for the benefit of all the creditors, and that some creditors only shall not obtain an advantage over others by instituting or prosecuting proceedings against the company. The section is intended to maintain control of the Court which has made an order for winding up on proceedings which may be pending against the company or may be initiated after the order of winding up, and the Court may remain seized of all those matters so that its affairs are administered equitably and in an orderly fashion"

30. Hon'ble Supreme Court in the above context laid down following in Para 6 and 7:

"6. When the Second Appeal No. 1380 of 1954 was pending before the High Court of Calcutta at the instance of the Company and Bansidhar against the decree passed by the District Court in enjectment, the Company was ordered to be wound up by order of the High Court of Calcutta and the liquidators were appointed. The liquidators prosecuted the appeal. There is no evidence on the record whether the liquidators obtained the sanction of the Court under Section 179(1)(a) of the Companies Act, 1913. But there is no reason to suppose that the liquidators did not obtain the sanction of the Court. If sanction of the Court under Section 179 to prosecute the appeal before the High Court was obtained, and it must be so assumed, the contention raised on behalf of Bansidhar loses all

significance for an execution application is only a continuation of the suit and the control of the High Court enures during the execution proceeding also. If the sanction of the Court has been obtained for the prosecution of the suit, it would be plainly unnecessary to obtain fresh sanction to the institution of execution proceeding at the instance of the successful party. It is true that the sanction obtained by the liquidators is granted under Section 179 of the Companies Act to initiate or enforce a claim of the company or to defend an action, whereas the leave of the Court to institute or to continue a suit against the company in winding up is obtained under Section 171. It would be giving effect to a technicality divorced from the true object of the section to hold that even in a suit filed or prosecuted with the sanction of the Court, the decree may not be enforced by a successful party without leave under Section 171 of the Act.

7. Even granting that sanction under Section 179 does not dispense with the leave under Section 171 of the Act, to institute a proceeding in execution against a company ordered to be wound up, we do not think that there is anything in the Act which makes the leave a condition precedent to the institution of a proceeding in execution of a decree against the company and failure to obtain leave before institution of the proceeding entails dismissal of the proceeding. The suit or proceeding instituted without leave of the Court may, in our judgment, be regarded as ineffective until leave is obtained, but once leave is obtained the proceeding will be deemed instituted on the date granting leave.

In Buckley on the Companies Act, 13th Edn., at p. 490 it is observed:

"Leave to continue after winding up a debenture-holder's action, whether previously or subsequently commenced, will be given unless the liquidator is able and willing to give in the winding up the relief which could be obtained in the action."

The Calcutta High Court in Suresh Chandra v. Bank of Calcutta [(1950) 54 Cal WN 832 (FB)] examined the decisions of the English courts in some details and observed that as regards Section 171 of the Indian Companies Act, 1913, the High Court has jurisdiction to grant leave to proceed with the suit or other proceedings against a company in liquidation even if such leave was not obtained for its commencement. The proceedings may at best be regarded as instituted on the date on which the leave was obtained from the High Court."

31. What was held by the Hon'ble Supreme Court in Para 7 is clear that the Supreme Court held that the proceeding initiated without leave of the Court may be regarded as ineffective until leave is obtained but once leave is obtained the proceeding will be deemed instituted on the date granting leave. The Hon'ble Supreme Court in Para 8 has expressed disagreement with Calcutta High Court in the matter of "Har Narain Misra v.

Kanhaiya Lal Lohawalla". Para 8 of the judgment is as follows:

"8. Considering the question both on principle and authority we are unable to agree with the view expressed by the Calcutta High Court in Har Narain Misra case and in Godavari Sugar and Refineries Ltd. case by the Andhra Pradesh High Court."

32. We may notice both of the above judgments, to notice that what was disapproved by the Hon'ble Supreme Court. In "**AIR 1940 Cal 166, Har Narain Misra v. Kanhaiya Lal Lohawalla**", the Calcutta High Court relied on its earlier judgment in "**Steel Construction Company Ltd., (1935) 40 C.W.N 312".** The facts of the case are noticed in following words:

"PANCKRIDGE J. This application raises a question of some importance. In December last year the plaintiff filed a suit against Kanhaiya Lal Lohawalla and the Rajputana Films Co., Ltd. It now appears that, prior to the institution of the suit, that is to say, on October 6, 1938, an order was made at the instance of a creditor by the District Judge of Ajmere for the compulsory liquidation of the defendant company. The plaintiff states that, at the time when the suit was instituted, he was unaware of the order for compulsory liquidation, and, accordingly, he made no application to the Court, having jurisdiction in the winding-up proceedings, for leave under s. 171 of the Indian Companies Act to sue the company. The liquidator now applies that the suit should be dismissed against the company as being incompetent on account of the plaintiff's failure to ask for and obtain leave to sue."

33. The Calcutta High Court noticed its judgment in "**Steel Construction Company Ltd."** (Supra) and the ratio of the said judgment was adopted, which is as follows:

"The position, when a suit has been instituted against a company after an order for its compulsory liquidation without the leave of the Court, was con-sidered by me in Re: Steel Construction Co., Ltd. (1). In that case the winding-up order has been made by this Court, and an application was made by the liquidator to restrain a suit subsequently instituted in the Court of the first Subordinate Judge of Comilla. It appears from the report that the suggestion was made that the application to restrain the proceedings in the Comilla suit should be adjourned, in order to give the plaintiff an opportunity of regularising his position by asking for and obtaining leave under s. 171. As to that I observed :-

In my opinion if such application were made, the Court would have no jurisdiction to grant it. As I read s. 171 it means that leave to proceed with a pending legal proceeding can only be granted where that proceeding has been instituted prior to the winding-up order. I do not consider that the Court has jurisdiction to give

the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order."

34. The Calcutta High Court relying on the judgment in "Steel Construction Company Ltd." (Supra) held that suit must be dismissed it having been filed without obtaining leave of the Company Court. The above view was expressly disapproved by Para 8, as noted above.

35. Another judgment of Andhra Pradesh High Court reported in **"AIR 1960 AP 74, Godavari Sugar and Refineries Ltd. v. Kambhampati Gopalakrishnamurthy"** was a case where the question was considered as to whether leave of Court is a condition precedent. The Andhra Pradesh High Court also took the view that the proceeding which was initiated without leave was held to be incompetent. The Calcutta High Court, however, has held that if the Respondent want to proceed with execution, he may take leave of the Winding Up Court. The Hon'ble Supreme Court in "**Bansidhar Shankarlal vs. Mohd. Ibrahim & Anr."** (Supra) has expressly disapproved the law laid down by the Calcutta High Court and the Andhra Pradesh High Court. The judgment of Hon'ble Supreme Court makes the law clear that the proceedings initiated without leave of the Court are ineffective and they will be deemed to be instituted on the date when leave is granted.

36. Now we come to next judgment relied by the Respondent i.e. judgment of the Hon'ble Supreme Court in **"(2013) 15 SCC 655, Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr."**. The Hon'ble Supreme Court in the above case had occasion to consider Section 446 of the Companies Act, 1956. The Hon'ble Supreme Court held that grant of leave of Court under Section 446 is not a condition precedent for initiating civil action or the legal proceedings. Referring to Section 446, the Hon'ble Supreme Court has noticed the object of the provision. In Para 18 to 22 following was held:

"18. To appreciate the submissions in their proper perspective, we may refer to Section 446 of the 1956 Act which reads as follows:

"446.Suits stayed on winding-up order.—

(1) When a winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding-up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.

(2) The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of—

(a) any suit or proceeding by or against the company;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under Section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or rise in course of the winding up of the company;

whether such suit or proceeding has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960).

(3) (omitted by Act 11 of 2003, Section 61)

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

19. Reflecting on the said provision, this Court in Central Bank of India v. Elmot Engg. Co. [(1994) 4 SCC 159] has ruled that it aims at safeguarding the assets of a company in winding up against wasteful or expensive litigation as far as matters which could be expeditiously and cheaply decided by the Company Court are concerned. In granting leave under the said provision, the court always takes into consideration whether the company is likely to be exposed to unnecessary litigation and cost.

20. In Ammonia Supplies Corpn. (P) Ltd. v. Modern Plastic Containers (P) Ltd. [(1998) 7 SCC 105], while dealing with power under Section 446(1) of the 1956 Act, it has been observed that in the said sub-section the words used would indicate that the discretion to exercise such power is with the Company Court.

21. In State of J&K v. UCO Bank [(2005) 10 SCC 331], while interpreting Section 446(1) of the 1956 Act, the Court opined that a suit cannot be instituted once a winding-up order is passed except by leave of the court. The two-Judge Bench referred to the earlier decision rendered in Bansidhar Shankarlal v. Mohd. Ibrahim [(1970) 3 SCC 900] , wherein the leave had been obtained at the time of filing of the suit and the question was whether fresh leave ought to be obtained before proceeding under Section 446(1) of the 1956 Act before institution of execution proceedings. The Court considered the contrary views expressed by different High Courts on the effect and purport of Section 446(1) of the 1956 Act and came to the conclusion that the view that failure to obtain leave prior to institution of suit would not debar the court from granting such leave subsequently and that the only consequence of the same would be that the proceedings would be regarded as having been instituted on the date on which

the leave was obtained from the High Court.

22. We have referred to the aforesaid decisions solely for two purposes. First, grant of leave of the court is not a condition precedent for initiation of a civil action or the legal proceedings. It is because the section does not expressly provide for annulment of a proceeding that is undertaken without the leave of the court. There can be no shadow of doubt that leave of the winding-up court can be obtained even after initiation of the proceeding. Second, the seminal object behind engrafting of the said provision is to see that the interest of the company is safeguarded so that it does not face deprivation of its right and claims are adjudicated without the knowledge of the Company Court and further the court has a discretion to see whether leave should be granted and, if so, with what conditions or no condition. That apart, the court may grant leave if it felt that the company should not enter into unnecessary litigation and incur avoidable expenditure."

37. Learned counsel for the Appellant has relied on the judgment of Hon'ble Supreme Court in **"(1994) 4 SCC 159, Central Bank of India v. Elmot Engineering Company & Ors."** in which case the Hon'ble Supreme Court has occasion to notice the object of Section 446. In para 14 of the judgment following was laid down:

"14. This section aims at safeguarding the assets of a company in winding-up against wasteful or expensive litigation as far as matters which could be expeditiously and cheaply decided by the company court are concerned. In granting leave under this section, the court always takes into consideration whether the company is likely to be exposed to unnecessary litigation and cost."

38. Learned counsel for the Appellant has also relied on two judgments of Allahabad High Court in "(**2005) ILR 2 All 580, Vivek Srivastava vs.Union of India & Ors."** and another judgment of Allahabad High Court in **"(2017) 4 UPLBC 2717, Pawan Kumar Mishra vs. Joint Director of Education and Ors.**" to support his submission that when prior approval is contemplated, any action taken in breach, without obtaining prior permission/ prior approval, the action will be nullity. In "**Vivek Srivastava vs. Union of India & Ors**." (Supra), the Allahabad High Court had occasion to consider the provisions of Cantonment Land Administration Rules, 1937. Rule 14 Clause (3) provided that the land in Class-A(1) land shall not be used or occupied for any other purpose other than those stated in sub Rule (1) of Rule 5 without the previous sanction of the Central Government. In Para 36 of the judgment following was held:

"36. From a perusal of the aforesaid Rules, especially Rules 3, 5, 7, 10, sub clause (vi) and (vii) of Rule 10 read with Rule 13(2) and sub clause (3) and (5) of Rule 14, makes it abundantly clear beyond a reasonable doubt, that no addition or alteration in the General Land Register could be made except with the previous

sanction of the Central Government and that no building of any kind, either permanent or temporary, can be erected on Class-A and, except with the previous sanction and subject to such conditions as may be imposed by the Central Government."

39. In the above context, the Allahabad High Court held that any sanction afterwards cannot cure the initial defect. In Para 47 and 48 following was held:

"**47. In Shiv Gorakh Nath Charitable Society, Kanpur and Ors. v. Cantonment Board, Kanpur and Ors., 1997(3) AIR 616, a Division Bench of this Court held that where constructions were made without prior permission, post facto permission cannot be granted and that the constructions has to be dismantled.**

48. From the aforesaid it is clear that seeking previous approval from the Central Government is not an empty formality or an automatic event to be given on the mere asking. The Central Government is required to perform its duties in terms of the provisions contained in the aforesaid Rules of 1937 and the Central Government is also required to act in public interest. The Central Government has to consider the relevant materials and circumstances, such as the factors pointed out by the District Magistrate, Deputy Municipal Commissioner, etc. and, in a given case, the views of the general public. Thus, the statement of the learned counsel for the respondents that the military authorities have now moved the Central Government for the grant of requisite sanction would, in our view, be an empty formality and would not remove the duty that was cast upon the Central Government under the aforesaid Rules. The statute must be construed in such a manner whereby the intent and object of the Act could be given effect to. A discretion to grant sanction conferred on the Central Government must be exercised in public interest and judiciously. Therefore, seeking previous sanction from the Central Government at this stage would serve no useful purpose. In our view-by seeking sanction from the Central Government at this stage cannot cure the initial defect."

40. Similarly in Pawan Kumar Mishra's case, the High Court had occasion to consider provision of Regulation 101, which provided for prior approval of Inspector for appointment of class four staff. In the above case, the appointment was made without obtaining prior approval, hence, it was held that appointment was void. In Para 16 following was held:

"16. In the light of the aforesaid, we find that admittedly the appellant was appointed without seeking prior approval from the District Inspector of Schools. The said appointment was wholly illegal and was a void order, which conferred no right on the appellant."

41. The above two judgments relied by the Appellant were on their own facts and the High Court in the facts of those cases and statutory provision took the view that action without prior approval was nullity.

42. In the present case, we have noticed the judgment of Hon'ble Supreme Court in "**Bansidhar Shankarlal vs. Mohd. Ibrahim & Anr."** (Supra), where considering Section 171 the Hon'ble Supreme Court has laid down that if the proceedings are initiated without leave of the Court, the proceeding shall be unauthorized. However, it shall become competent from the date when the leave is granted. The above judgment, thus, clearly says that institution of proceeding shall not be void or nullity when it has been filed without leave of the Court.

43. Learned counsel for the Appellant submits that the judgment of Hon'ble Supreme Court in "**Bansidhar Shankarlal vs. Mohd. Ibrahim & Anr."** (Supra) and **"Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr."** (Supra) cannot be applied in Section 33(5) since the use of expression in Section 171 and Section 446 was 'leave of the Court' whereas in Section 33(5) the expression 'prior approval' is used. It is submitted that 'leave of the Court' and 'prior approval' are two different expressions.

44. When we look into the provision of Section 171 and Section 446, it is clear that leave of the Court has to be prior to the instituting any proceeding. Thus, the expression 'leave of the Court' and 'prior approval' denotes same meaning i.e. leave of the Court/ prior approval before any proceeding is instituted by the Liquidator. The legislative scheme which was earlier operating in the Companies Act, 1913 and Companies Act, 1956 has been carried forward by the IBC in so far as requirement under Section 33(5) are concerned. We, thus, are of the view that the judgment of Hon'ble Supreme Court in "**Bansidhar Shankarlal vs. Mohd. Ibrahim & Anr."** (Supra) and "**Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr."**(Supra) throw considerable light on interpretation of Section 33(5) of the I&B Code. The submission of the Appellant on this issue is not relevant. In view of the foregoing discussion, we answer Question No.2 and 3 is as follows:

Answer No.2: The consequence of the proceedings instituted by the Liquidator on behalf of the Corporate Debtor without prior approval of the Adjudicating Authority under Section 33(5) is unauthorized and incompetent.

Answer No.3: Post facto approval granted by the Adjudicating Authority with regard to continuation of proceedings already instituted by the Liquidator which were instituted without obtaining prior approval shall make the proceedings authorized and competent from the date when post facto approval is granted.

<u>Question No.4:</u>

45. The scheme delineated under Section 33(5) does not indicate that the Liquidator has to give any opportunity or notice to the party against whom approval is sought to initiate proceedings. The provision of Section 33(5) is that the Adjudicating Authority should keep control over estate in the liquidation proceeding so that no proceeding can be initiated by the Liquidator so as to expose the Corporate Debtor to unnecessary expenses. Hence, the approval of the Adjudicating Authority is required to institute proceeding. For approval by the Adjudicating Authority, the legislative scheme does not indicate any notice or opportunity to the party against whom proceedings are to be instituted. Question No.4 is answered in following words:

Answer No.4: Before granting approval under Section 33(5) proviso to institute proceedings by the Liquidator on behalf of the Corporate Debtor, the party against whom proceedings are to be instituted is not to be given a notice or hearing necessarily.

Question No.5:

46. Learned counsel for the Appellant has contended that the Adjudicating Authority has without any reason passed a non-speaking order. For grant of an ex-post facto approval, the Adjudicating Authority was required to give reason. It is submitted that ex-post facto approval cannot be granted mechanically.

47. In the order of the Adjudicating Authority it is noticed that the Adjudicating Authority has granted extension of liquidation period. In Para 11 of the judgment extension dated 16.01.2024 is referred to. Learned counsel for the Respondent has brought on record the order of the Adjudicating Authority passed on 16.01.2024 where the Adjudicating Authority has noticed about the proceedings initiated by the Liquidator for debt of Rs.306.73 Crores. It is useful to extract order dated 16.01.2024, which is to the following effect:

"ORDER

IA/65(AHM)2024 in IA 794 of 2020

This is an application filed by the liquidator seeking the following prayers:

(a) Allow the present application:

(b) Pass the appropriate order under sub-regulation (2) of Regulation 44 of the IBBI (Liquidation Process) Regulations, 2016 allowing further 12 months from 11.01.2024 for liquidation of the corporate debtor in the interest of justice;

(c) Such other reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case:

Learned Liquidator. Mr. Jigar Bhatt present during the hearing and states that 4th Meeting of SCC was held on 02.01.2024 wherein the agenda for extending the liquidation period of the corporate debtor was discussed and deliberated upon. On Page No. 175 of this application the learned liquidator has given the outcome which concluded on 04.01.2024 at 6:00 PM and extended till 05.01.2024 at 6:00 PM. It is seen that the 38.76% of the SCC voted in favour of Resolution for the extension of the time period of CIRP. The other financial creditor, namely, IFCI abstained from voting.

On Page No. 187, learned liquidator has given details of five entities from whom the debt of Rs.306,73,00,000/- is due to the corporate debtor in the liquidation. Learned liquidator states that against these five entities Section 7 application has been filed before the respective, NCLT having jurisdiction over these corporate debtors and which are pending for adjudication. Learned liquidator further states that as the process is continued, he may be permitted to continue with the liquidation process of the corporate debtor for a further period of 12 Months.

We have gone through the application, perused the documents and also heard the learned liquidator in person. In our considered view, there are assets which are still to be liquidated for which effective steps have been taken by the liquidator. The realization from the assets in liquidation may takes some more time.

In view of the above discussion, we hereby extend the liquidation period of the corporate debtor for a further period of one year from 11.01.2024.

Accordingly, IA/65(AHM)2024 in IA 794 of 2020 is allowed and stands disposed off."

48. When the Adjudicating Authority has passed impugned order on 07.02.2024, the earlier orders were well within its knowledge and in Para 17 it has been observed by the Adjudicating Authority that since only asset of the Corporate Debtor is bonds held by five entities, in the interest of the Corporate Debtor in order to maximize the value during the liquidation, prayer (b) and (c) were allowed. Para 17 of the judgment has already noticed above.

49. We, thus, are of the view that adequate reasons were given by the Adjudicating Authority for granting ex-post factor approval. Prayer (c) made before the Adjudicating Authority was prayer to permit the Liquidator to continue and proceed with the Section 7 proceedings, which having been granted, the Liquidator was entitled to proceed with the Section 7 proceedings. We, thus, do not find the order of the Adjudicating Authority unsustainable.

50. Before, we close we record that Shri Gyanendra Kumar, learned counsel for the Appellant has advanced his submission with great ability and clarity. Shri Navin Pahwa,

learned senior counsel for the Respondent has placed before us all relevant precedents to enable us to decide intricate questions of law involved in these appeals.

51. In view of the foregoing discussion, we do not find any ground to interfere with the order of the Adjudicating Authority dated 07.02.2024. All the Appeals are dismissed.