

Bombay High Court Holds Liquidator's Arbitration Invocation Effective From Date of NCLT Approval

Authors: Vasanth Rajasekaran* and **Harshvardhan Korada****

Introduction

In ***Tecpro Systems Limited (In Liquidation) v. Reliance Infrastructure Limited***¹, the Bombay High Court considered whether a notice invoking arbitration, issued by a liquidator before obtaining the prior approval of the National Company Law Tribunal under Section 33(5) of the Insolvency and Bankruptcy Code, 2016 (the "**IBC**"), was void and incapable of supporting an application under Section 11 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**"). The Court held that prior approval is mandatory. However, since Section 33(5) does not declare proceedings instituted without such approval void, the invocation remains ineffective until approval is granted and is treated as having commenced from the date of that approval.

Facts

The dispute arose from a Purchase Order dated 17 January 2018 executed between Tecpro Systems Limited ("**the Applicant**") and Reliance Infrastructure Limited ("**the Respondent**") for the supply of goods. Clause 17 of the Purchase Order required the parties to attempt an amicable settlement for fifteen days and, failing such settlement, refer disputes arising out of the supply contract to arbitration under the Arbitration Act. Mumbai was designated as the venue of arbitration, and the courts at Mumbai were conferred exclusive jurisdiction.

On 16 January 2020, the National Company Law Tribunal, New Delhi ("**NCLT**"), directed the liquidation of the Applicant and appointed a liquidator to administer the liquidation process. Thereafter, on 10 March 2022, the Liquidator issued a notice under Section 21 of the Arbitration Act invoking arbitration against the Respondent. The Respondent did not reply to the notice.

The Liquidator had not obtained the NCLT's approval before issuing the invocation notice. On 23 December 2022, the NCLT granted post-facto approval under Section 33(5) of the IBC for initiating arbitration proceedings against the Respondent. The Applicant subsequently filed the application under Section 11 of the Arbitration Act on 10 January 2024, seeking the appointment of an arbitrator.

Respondent's Objections

The Respondent opposed the application on the ground that the proviso to Section 33(5) of the IBC permits a liquidator to institute a suit or other legal proceeding on behalf of a corporate debtor only with the prior approval of the Adjudicating Authority. According to the Respondent, the use of the expression "prior approval" made compliance mandatory and required approval to precede the institution of proceedings.

It was submitted that arbitral proceedings commence, under Section 21 of the Arbitration Act, when the request to refer the dispute to arbitration is received by the respondent. Since the Liquidator issued the notice on 10 March 2022 without the NCLT's prior approval, the Respondent contended that the invocation was unauthorised and void from its inception. The approval obtained on 23 December 2022 could not retrospectively cure that defect.

The Respondent relied upon the Supreme Court's decisions in *Bajaj Hindustan Limited v. State of Uttar Pradesh & Ors.*² and *Union of India v. Vinod Kumar*³ to argue that where a statute expressly requires prior approval, a subsequent approval cannot be treated as sufficient compliance. It therefore submitted that no valid arbitral proceedings had commenced and that the Section 11 application was not maintainable.

Applicant's Submissions

The Applicant accepted that approval under Section 33(5) had not been obtained before the invocation notice was issued. It nevertheless argued that the absence of prior approval did not render the notice void. The notice merely remained ineffective until the NCLT granted the requisite approval and should be treated as having become operative on 23 December 2022.

The Applicant drew a distinction between Section 28(4) of the IBC and Section 33(5). Section 28(4) expressly declares specified actions taken by a resolution professional without the prior approval of the Committee of Creditors to be void. Section 33(5), by contrast, prescribes prior approval for proceedings instituted by a liquidator but does not state that a proceeding commenced without approval is void.

Reliance was placed on *Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr.*⁴ and the decision of the National Company Law Appellate Tribunal in *Slimline Realty Pvt. Ltd. v. Mr. Jigar Bhatt*⁵. The Applicant also submitted that Section 33(5) should be interpreted consistently with the objective of maximising the liquidation value of the corporate debtor by enabling the Liquidator to pursue and realise its claims and receivables.

Issues Before the Court

The Court identified two questions for determination. First, whether the proviso to Section 33(5) makes the prior approval of the Adjudicating Authority mandatory before a liquidator institutes legal proceedings on behalf of a corporate debtor. Secondly, if prior approval is mandatory, what effect a post-facto approval has upon proceedings already initiated without such approval.

Court's Findings and Reasoning

Prior Approval Under Section 33(5) Is Mandatory:

The Court observed that the proviso to Section 33(5) expressly uses the words "prior approval". Drawing upon the distinction recognised by the Supreme

Court between approval, permission, and prior approval, the Court held that the statutory approval must be obtained before the proposed action is undertaken. The word "prior" could not be treated as redundant or satisfied by an approval obtained only after the institution of proceedings.

The Court further held that a notice invoking arbitration under Section 21 of the Arbitration Act constitutes the commencement of arbitral proceedings. Accordingly, the Liquidator was required to obtain the NCLT's approval before issuing the notice. The invocation dated 10 March 2022 was therefore issued without compliance with the mandatory temporal requirement under Section 33(5).

Absence of Prior Approval Does Not Render the Proceedings Void:

The Court next distinguished between a statutory requirement being mandatory and the legal consequence of its breach. While Section 28(4) expressly renders specified unauthorised actions void, Section 33(5) does not prescribe any equivalent consequence for proceedings initiated by a liquidator without prior approval. The Court considered this omission material and declined to treat the invocation as void from its inception.

The Court also referred to the Supreme Court's reasoning in *Erach Boman Khavar*, concerning proceedings instituted without the leave of the winding-up court. That decision recognised that, where the statute does not expressly annul proceedings initiated without leave, leave may be obtained subsequently, with the proceeding being regarded as instituted on the date on which leave is granted. Applying the same principle, the Court held that the invocation remained ineffective until the NCLT granted its approval.

The Invocation Became Effective From the Date of Approval:

The post-facto approval did not retrospectively convert 10 March 2022 into a valid commencement date. Instead, the Section 21 notice became effective only on 23 December 2022, when the NCLT granted approval. Any procedural steps taken pursuant to the notice before that date would have to be undertaken afresh, and all subsequent requirements would operate by reference to the effective date of approval.

The Court considered that requiring the Liquidator to issue an entirely fresh invocation notice would not advance the purpose of Section 33(5) and could create limitation difficulties because of the time lost in obtaining approval. Treating the existing notice as ineffective until approval was granted preserved the mandatory character of the provision without introducing a consequence of nullity that the legislature had not enacted.

Since the invocation was deemed effective from 23 December 2022 and the Section 11 application was filed thereafter, on 10 January 2024, the Court held that there was no legal impediment to entertaining the application.

Conclusion

The Bombay High Court allowed the application and appointed a sole arbitrator to adjudicate the disputes arising out of the Purchase Order. The Court directed the parties to bear the arbitral costs and fees equally in the first instance, subject to the final award on costs, and expressly kept all contentions open for consideration by the arbitral tribunal.

Comment

The judgment draws an important distinction between the mandatory nature of a statutory precondition and the consequence that follows from non-compliance. It confirms that a liquidator must obtain the NCLT's approval before commencing legal proceedings on behalf of a corporate debtor. At the same time, the absence of an express statutory declaration of nullity means that a premature invocation need not invariably be treated as void beyond repair.

The decision is particularly significant for insolvency practitioners and parties dealing with companies in liquidation. It does not permit liquidators to dispense with prior approval. Rather, it treats proceedings commenced prematurely as legally dormant until approval is obtained, with their effective commencement shifted to the approval date. This approach preserves the supervision of the Adjudicating Authority while avoiding unnecessary duplication and potential prejudice arising from limitation.

Endnotes

1. *Tecpro Systems Limited (In Liquidation) v. Reliance Infrastructure Limited*, Commercial Arbitration Application No. 245 of 2026 (Bombay High Court).
2. *Bajaj Hindustan Limited v. State of Uttar Pradesh & Ors.*, (2016) 12 SCC 613.
3. *Union of India v. Vinod Kumar*, (1996) 10 SCC 78.
4. *Erach Boman Khavar v. Tukaram Shridhar Bhat & Anr.*, (2013) 15 SCC 655.
5. *Slimline Realty Pvt. Ltd. v. Mr. Jigar Bhatt*, 2024 SCC OnLine NCLAT 6895.

* **Vasanth Rajasekaran** is the Head and Founder of Trinity Chambers, Delhi.

** **Harshvardhan Korada** is a Counsel at Trinity Chambers, Delhi.

Contact

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors



Vasanth Rajasekaran
Founder & Head
vasanth@trinitychambers.in



Harshvardhan Korada
Counsel
harshvardhan@trinitychambers.in