

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.903 of 2019

[Arising out of Order dated 09.08.2019 passed by National Company Law Tribunal, Allahabad Bench in CA No.259/2018 in Company Petition No.(IB)64/ALD/2017]

IN THE MATTER OF:

Before NCLT

Before NCLAT

Amit Gupta
Promoter/Shareholder
M/s. Varanasi Auto
Sales Pvt. Ltd.
J-15/65C& J-15/65C-1A,
Mohalla Alaipur,
Ward Jaitpura,
District,
Varanasi – 221001
Uttar Pradesh

Applicant

Appellant

Versus

Yogesh Gupta,
Resolution Professional
of M/s. Varanasi Auto
Sales Pvt. Ltd.
C/o. Motiwala Industrial
Estate, PAC Thana,
Maduadih,
Bhullanpur,
Varanasi 221108

Resolution Professional/
Respondent

Respondent

For Appellant:

Shri Abhijeet Sinha, Ms. Bonita Singh, Ms. Naomi Chandra and Shri Saikat Sarkar, Advocates

For Respondent:

**Shri Siddharth Gautam and Shri Vijay Kumar, Advocates
Shri Yogesh Gupta, RP**

J U D G E M E N T
(20th December, 2019)

A.I.S. Cheema, J. :

1. The Appellant – Amit Gupta (Promoter/Shareholder of Corporate Debtor – M/s. Varanasi Auto Sales Pvt. Ltd.) has filed this Appeal against Impugned Order dated 9th August, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Allahabad Bench) in CA No.259/2018 in Company Petition No.(IB)64/ALD/2017 rejecting his prayer that Resolution Professional (Respondent) may be directed to revise expression of interest (EOI) issued and float new revised EOI by making changes suggested by him and extending date.

2. It is stated that the Appellant had filed Application under Section 10 of the Insolvency and Bankruptcy Code, 2016 (IBC – in short) on behalf of the Corporate Debtor as Applicant on the basis of Board Resolution and the Application under Section 10 was admitted by the Adjudicating Authority on 26th April, 2018. After initiation of the CIRP process, Respondent – Resolution Professional issued (Annexure A-3) “Invitation for Expression of Interest and Submission of Resolution Plan” with regard to the Corporate Debtor. The invitation specified last date to submit EOI by 12 Noon of 18.08.2018. It is stated for the Appellant that the Appellant sent e-mail dated 18.08.2018 (Annexure A-9 – Page 135) to the Resolution Professional. The contents of which read as under:-

“Amit Gupta <amit.gupta@varanasiauto.com> Sat, Aug 18, 2018 at 12:07 PM
To: yogesh gupta <yogeshgupta31@rediffmail.com>

Cc: Yogesh Gupta <ip.varanasiauto@gmail.com>

Dear Mr. Yogesh,

I, Amit Gupta s/o Late Mr. Jag Mohan Gupta is interested to bid for resolution of M/s Varanasi Auto Sales Limited.

Kindly enlist my name for the same.

Thanking you,

With Regards,

Amit Gupta

Enclosed : ITR and pan”

The e-mail had four attachments – three were Income Tax Returns and one was copy of the PAN Card of the Appellant.

3. The Resolution Professional on 27th August, 2018 sent following Reply to the Appellant:-

“Dear Mr Amit Gupta,

The Committee of Creditors at its meeting held on 21 August 2018 at Varanasi was briefed about your email communication received on 18th August, 2018, stating your interest for revival of Varanasi Auto Sales Limited along with a copy of your PAN and ITRs, in response to EOI for resolution Applicant.

The documents were produced before the COC and the matter was discussed and the Committee formed a decision that your communication by email was found not in conformity with the requirements asked for and the applicable provisions of IBC law and therefore you were considered as non-compliant for the purpose.

Thanking you,

Yogesh Gupta

Resolution Professional

Varanasi Auto Sales Limited”

4. Appellant then on 30th August, 2018 sent another e-mail (Annexure A-11 – Page 137) mentioning to the Resolution Professional “Kindly list out the requirements which are not fulfilled as per you”. The Resolution Professional replied on 31st August, 2018 informing the Appellant that “The EOI requirements were released in public domain and you can find out why your communication by e-mail was found not in conformity with the requirements asked for”. Record shows that after a lapse of more than 1½ months on 19th October, 2018, the Appellant filed CA 259/2018 (Annexure A-2 – Page 47) before the Adjudicating Authority making various allegations against the Resolution Professional (which have been summarized by the Adjudicating Authority in its Impugned Order) and inter alia claimed that Section 240-A of IBC provides that provision under Section 29A (‘c’ and ‘h’) did not apply to Resolution Applicant claiming that the Director of MSME is eligible to apply and such eligibility was not specified in the invitation for EOI. The Appellant before the Adjudicating Authority claimed that the Corporate Debtor was MSME.

5. The Respondent – Resolution Professional filed “Counter Affidavit” (Annexure A-4 – Page 101) before the Adjudicating Authority disputing the claims made by the Appellant and stated that it was for the first time before the Adjudicating Authority, claim was made that the Corporate Debtor is MSME and that the claim had no supporting material or registration details. The Affidavit also claimed that the e-mail was sent on the last date of submitting EOI. The Resolution Professional stated in the Affidavit that the e-mail was received at 11:50:58 on 18th August, 2018. (Although

Respondent stated this in the Affidavit, the copy of e-mail filed at Annexure A-9 Page – 135 filed by the Appellant himself shows the date and time of the e-mail to be “Sat, Aug 18,2018 at 12:07 PM”). The Resolution Professional claimed before the Adjudicating Authority that the e-mail had only attached copy of PAN Card and Income Tax Returns for the 3 years and the same was not in accordance with the requirements of document for submission of expression of interest and such deficiencies were informed to the Appellant. The other averments made against the Resolution Professional were also resisted including the claim that there were employees in the Company. Respondent claimed that the Corporate Debtor had only the Agency of Tata Motors which also was terminated in August, 2017, for which documents were filed.

6. Before Adjudicating Authority, the Appellant filed Rejoinder Affidavit (Annexure A-5 – Page 118) and additional Affidavit (Annexure A-6 – Page 124). In the Affidavit given, the Appellant tried to refer to the provisions of Sections 7 and 8 of “The Micro, Small and Medium Enterprises Development Act, 2006” (MSME Act in short) to show as to how the Appellant qualified to be treated as a small enterprise and that Section 8 of the MSME Act made it optional for the Corporate Debtor to submit Memorandum as required by Section 8 as the Corporate Debtor was already pre-existing when the Act was brought into force. The Appellant, however, filed “MSME Acknowledgement”. Copy of the same has not been filed by the Appellant in Appeal but Respondent has with additional Affidavit in Appeal (Diary No.15211) filed (Annexure – 2) copy of the

acknowledgement of submission of Form by the Corporate Debtor dated 30th March, 2009.

7. The Respondent has filed Affidavit in Reply in this Appeal earlier, in addition of the additional Affidavit referred above, and resisted the various claims made by the Appellant against the Resolution Professional denying the same and disputing that the Corporate Debtor was MSME.

8. We have heard learned Counsel for both sides. It is stated for the Appellant that Section 240-A was inserted in the IBC with effect from 6th June, 2018 and provided that notwithstanding anything to the contrary contained in the Code, the provisions of Clause 'c' and 'h' of Section 29-A shall not apply to the Resolution Applicant in respect of Corporate Insolvency Resolution Process of any Micro, Small and Medium Enterprise. The Explanation below Section 240-A has been referred by the Counsel, which reads as under:-

“Explanation.— For the purposes of this section, the expression “micro, small and medium enterprises” means any class or classes of enterprises classified as such under sub-section (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006.”

[Emphasis needs to be kept in view]

It is argued that in view of such Explanation, Section 7 of the MSME Act has been adopted by reference for the expression Micro, Small and Medium Enterprises. The learned Counsel referring to the Impugned Order stated that the Adjudicating Authority referred to Section 7 and relied on

Section 8 and held that the Corporate Debtor was not MSME. It is argued that when only Section 7 is referred, the Adjudicating Authority could not have relied on Section 8. In this regard, after referring to the rival cases (which we have also referred above), the Adjudicating Authority in the Impugned Order analysed Section 7 and 8 of MSME Act. It may be recalled that the Appellant himself in the CA 259 of 2018 relied on Sections 7 and also Section 8 of MSME Act to claim that Section 8 had given option to the existing enterprise if it was micro or small enterprise to submit memorandum under Section 8, when the Act came into force. The Adjudicating Authority observed in Para – 18 of Impugned Order:-

“If the person who established the enterprises, is not exercised the option of filing the memorandum with the specified authority under sub-section (3) or (4) of Section 8, then the person who is running the enterprises, is not entitled for the benefits under the MSME Act.”

9. Adjudicating Authority then referred to the acknowledgement which had been filed and reproduced note from the acknowledgement issued by the Authority under MSME that,

“Issue of this acknowledgement does not confer any legal right. It is mandatory for the entrepreneur to obtain No Objection/License/Permit required under legal obligation under the laws of Central Government/State Government /Administrators of UT/Court Orders.”

On this basis, the Adjudicating Authority found that the Applicant had failed to establish that Corporate Debtor was MSME. It also observed that the Applicant had not raised any such issue of being MSME before COC

(Committee of Creditors) and that issue was raised when CIRP (Corporate Insolvency Resolution Process) period was to expire. It also found that the Appellant had not raised any concrete Resolution Plan before COC. Adjudicating Authority held as under:-

- “21. In view of the finding that, applicant is not able to establish that corporate debtor comes under the MSME, it cannot urge that it is within the knowledge of the RP that the Corporate Debtor is MSME. Moreover, applicant even in its email dated 18.08.2018 did not state that it is MSME. Even thereafter, applicant did not bring to the notice of the RP that it is MSME. Moreover, it is not on the ground that applicant is disqualified U/s 29A, its offer to bid for resolution of the Corporate Debtor is rejected. The RP did not act upon the email dated 18.08.2018 issued by the applicant on the ground that the requirements of documents for submission of expression of interest have not been furnished inspite of such deficiencies were intimated to the applicant.

22. Therefore, the averment of the applicant that expression of interest issued by the applicant without mentioning the exemption U/s 240A of the IBC cannot be taken as a ground to ask the RP to treat the Corporate Applicant as a prospective Resolution Applicant, unless and until it is established that applicant being a Promoter & Director establish that Corporate Debtor is MSME. The Promoter, Director is not qualified U/s 29A of the Code to present the resolution plan. Above all the applicant did not approach the IRP or this Authority till the closure of the CIRP period.”

It thus found no merits in the Application and the same was disposed of.

10. Learned Counsel for the Appellant relied on Judgement in the matter of **“M/s. Ramky Infrastructure Private Limited v. Micro and Small Enterprises Facilitation Council & Anr.”** reported in 2018 SCC OnLine Del 9671 to submit that if an enterprise fulfils the requirements of Section 7, it is not necessary for the entity to file memorandum under Section 8 of MSME Act. In the said matter which was before the Hon’ble High Court of Delhi, the Petition was filed against reference being made by the Respondent whereby disputes between RIL and Respondent No.2 in that matter were referred to arbitration. The reference was made in terms of provisions of Section 18 of MSME Act. RIL assailed the decision of the Council to make a reference claiming that at the material time, GCIL was not registered under the MSME Act and was not a supplier as defined under Section 2(n) of the said Act and so the Council had no jurisdiction to refer the subject to the arbitration. In Para – 26, Hon’ble High Court observed as under:-

“26. As noticed above, there is no dispute that GCIL would fall within the definition of micro/small enterprise even at the material time when it had executed the contract with RIL. GCIL is a company and the services provided by GCIL are clearly services rendered by a micro/small enterprise and, therefore, GCIL - being engaged in supply of services rendered by a micro/small enterprise - would fall within the fourth category of entities that are included as a ‘supplier’: that is, a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises. It is not necessary for such entities to have filed the Memorandum under Section 8(1) of the Act.”

[Emphasis supplied]

11. In that matter as the above paragraph shows there was no dispute that GCIL would fall within the definition of micro/small enterprise even at the material time when it had executed the contract with RIL. The observations of the Hon'ble High Court appear to be in that context. In the present matter, however, the Resolution Professional has raised disputes with regard to the claim of MSME. Even in the Reply (para – 12) filed in this Appeal, issue has been raised with regard to the claim to be small enterprise and reference is being made to the valuation report.

12. Section 7 of MSME Act may be reproduced. The same reads as follows:-

“7. Classification of enterprises.—

(1) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called,—

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as—

(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty-five lakh rupees;

- (ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or
 - (iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;
- (b) in the case of the enterprises engaged in providing or rendering of services, as—
- (i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees;
 - (ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or
 - (iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

Explanation 1.—For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Explanation 2.—It is clarified that the provisions of section 29B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), shall be applicable to the enterprises specified in sub-clauses (i) and (ii) of clause (a) of sub-section (1) of this section.

(2) The Central Government shall, by notification, constitute an Advisory Committee consisting of the following members, namely:—

- (a) the Secretary to the Government of India in the Ministry or Department of the Central

Government having administrative control of the small and medium enterprises who shall be the Chairperson, *ex officio*;

- b) not more than five officers of the Central Government possessing necessary expertise in matters relating to micro, small and medium enterprises, members, *ex officio*;
- (c) not more than three representatives of the State Governments, members, *ex officio*; and
- (d) one representative each of the associations of micro, small and medium enterprises, members, *ex officio*.

(3) The Member-Secretary of the Board shall also be the *ex officio* Member-Secretary of the Advisory Committee.

(4) The Central Government shall, prior to classifying any class or classes of enterprises under sub-section (1), obtain the recommendations of the Advisory Committee.

(5) The Advisory Committee shall examine the matters referred to it by the Board in connection with any subject referred to in section 5 and furnish its recommendations to the Board.

(6) The Central Government may seek the advice of the Advisory Committee on any of the matters specified in section 9, 10, 11, 12 or 14 of Chapter IV.

(7) The State Government may seek advice of the Advisory Committee on any of the matters specified in the rules made under section 30.

(8) The Advisory Committee shall, after considering the following matters, communicate its recommendations or advice to the Central Government or, as the case may be, State Government or the Board, namely:—

- (a) the level of employment in a class or classes of enterprises;
- (b) the level of investments in plant and machinery or equipment in a class or classes of enterprises;
- (c) the need of higher investment in plant and machinery or equipment for technological upgradation, employment generation and enhanced competitiveness of the class or classes of enterprises;
- (d) the possibility of promoting and diffusing entrepreneurship in micro, small or medium enterprises; and
- (e) the international standards for classification of small and medium enterprises.”

(9) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), the Central Government may, while classifying any class or classes of enterprises under sub-section (1), vary, from time to time, the criterion of investment and also consider criteria or standards in respect of employment or turnover of the enterprises and include in such classification the micro or tiny enterprises or the village enterprises, as part of small enterprises.”

[Emphasis supplied]

13. When at the time of arguments, the learned Counsel for the Appellant tried to show the investments made by the Corporate Debtor to claim that it was a small enterprise, it was noticed that the above explanations require not merely seeing the investment but other factors also. Under Section 29B of the Industries (Development & Regulation) Act,

1951, Central Government has powers to exempt any industrial undertaking in public interest from applying all or any of the provision of that Act, subject to conditions as it may think fit. The learned Counsel for the Appellant has not been able to show us as to how Resolution Professional when he receives expression of interest could be expected to go into accounts and other factors or facts and go into Notifications to apply law and hold under which classification an applicant would or not fall. It is not shown how Resolution Professional with time bound milestones fixed in IBC can decide if or not the Corporate Debtor fits into classifications under Section 7 or is not covered by MSME Act at all. The Appellant pointed out an old acknowledgement of submission of Form to the concerned Authority under MSME on 30th March, 2009 but has not shown what happened thereafter. Counsel for the Resolution Professional at the time of arguments referred to Memorandum Certificates being issued by the authorities under MSME Act which clearly record the name of the concerned enterprise including whether it was in manufacturing, services or it was micro or small or medium under further head of manufacturing or services. It was stated that the Ministry has also issued guidelines specifying procedure for registration for an enterprise under MSME. The argument is that there is no reason why the Corporate Debtor should not have registered itself under MSME if it wanted to claim the benefit.

14. Section 7 itself shows that the Central Government has to “classify” any class or classes or enterprises either as micro or small or medium on

the basis of parameters fixed in Section 7. The Appellant has not brought on record that the Corporate Debtor has been classified by Central Government and if yes, under which parameter. In the Summary Procedure under IBC, the Resolution Professional and Adjudicating Authority are not expected to go into accounts and investigate if and in which category an application falls under Section 7 examining Notifications under Explanation 2 or Sub-Section 9 of Section 7 of MSME Act.

15. We need not enter into the question whether or not the Corporate Debtor was liable to submit a Memorandum Certificate in terms of Section 8 of MSME Act. We are concerned with the procedure under the IBC which inherently is a summary procedure fully time bound for various stages of the CIRP.

16. Under Section 25(2)(h), the Resolution Professional is required to invite prospective Resolution Applicants who fulfil such criteria as may be laid down by him with the approval of Committee of Creditors having regard to the complexity and scale of operations of the business of the Corporate Debtor and such other conditions as may be specified by the Board, to submit a Resolution Plan or plans. This was done by the Resolution Professional as can be seen from Annexure A-3. The invitation was issued with last date and time fixed as 12 o'clock noon of 18th August, 2018. Regulation 36-A of "The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016"

(‘Regulations’ – in short) deals with invitation for expression of interest. Clause – 6 of Regulation 36-A provides that “The expression of interest received after the time specified in the invitation under Clause (b) of the sub-regulation (3) shall be rejected.” Although the Resolution Professional in his Affidavit before Adjudicating Authority mentioned the time of receipt of e-mail dated 18th August, 2018 (Annexure A-9) from the Appellant at 11:50:58 hours, the document filed by the Appellant himself shows that it was received/sent after 12 o’ clock. In terms of Clause – 6 of Regulation 36-A, even if such e-mail was to be categorized as an expression of interest, it would require to be rejected. Apart from this, if Sub-Clause – 7 of Regulation 36-A is seen, it requires that the expression of interest shall be unconditional and should be accompanied by undertakings, records, information as specified in Sub-Clauses ‘a’ to ‘g’. One of the requirements for the prospective Resolution Applicant is giving undertaking that it meets the criteria specified by the Committee under Clause ‘h’ Sub-Section (2) of Section 25. We have already reproduced the e-mail dated 18th August, 2018. It can hardly be said to be complying with any of the requirements as provided under IBC. No doubt the RP sent the Appellant e-mail (Annexure A-10) that the COC had discussed and found the e-mail not to be in conformity with the requirements asked for and also the provisions of IBC. We have gone through the expression of interest (Annexure A-3), it is apparent that the requirements had not been complied with. Such e-mail like (Annexure A-9) cannot at all qualify the Appellant as prospective Resolution Applicant, even if it was to be said that the Corporate Debtor is MSME.

17. At the time of arguments, the learned Counsel for Respondent pointed out that the Appellant had himself moved Section 10 Application so as to invoke provisions of IBC for the Corporate Debtor and neither at that time nor at any time including when e-mail dated 18th August, 2018 was sent at any point of time, the claim was made that the Corporate Debtor is an MSME. It appears from record that such claim was made directly before the Adjudicating Authority by filing CA 259/2018. This too after more than 1½ month after the last correspondence from Respondent which was Annexure A-12 dated 31st August, 2018.

18. Under Sub-Clause 'c' of Clause - 7 of Regulation 36-A, there is provision that the prospective Resolution Applicant should give undertaking that it does not suffer from any ineligibility under Section 29-A to the extent applicable. It is apparent from record that the Appellant gave no such undertaking and clearly the provisions of IBC were not complied and moving the Adjudicating Authority after a delay would not help. When the Resolution Professional receives the expression of interest, (if there is no dispute that the Corporate Debtor is MSME, it would be different, but otherwise), he is not expected to sit down and decide applying facts to provisions of Section - 7 of MSME Act and applying them to the Corporate Debtor on the basis of various parameters as provided to see whether or not the Corporate Debtor will fit into the requirement of one or the other class of enterprise or not under MSME. There is no reason why, looking to the nature of proceedings under the IBC the prospective Resolution Applicant who claims eligibility on the basis that the Corporate

Debtor is MSME, should not provide necessary Memorandum Certificate. The Resolution Professional cannot be going into investigations and enquiries and findings whether or not a Corporate Debtor falls under the classifications of MSME and Adjudicating Authority is also not expected to make such investigations, enquiries on such evidence or give findings on such issues, which may not be accurate without assistance of an opposite side or Government Counsel bringing forth which or the other Notification etc. applies. Under Sections of MSME Act, even if getting Memorandum Certificated for a given enterprise may be optional, if advantage is to be taken of MSME Act, the Applicant must take pains to get the Memorandum Certificate to seek benefits under IBC.

19. The learned Counsel for the Appellant relied on the Judgement in the case of **“Saravana Global Holdings Ltd. & Anr. Vs. Bafna Pharmaceuticals Ltd. & Ors.”** of this Tribunal in Company Appeal (AT) (Insolvency) No. 203 of 2019 dated 4th July, 2019 to submit that in that matter benefit was given to the Corporate Debtor when it was claimed that it was MSME. If para – 8 and para – 19 of that Judgement are seen, the Resolution Professional in that matter had confirmed that the Resolution Applicant therein was an MSME and was eligible under Section 29-A of IBC. That being not the case in present matter and there being disputes of facts being raised, the Appellant cannot take benefit of the said Judgement.

20. When this Appeal was filed, and the Appellant claimed that the Corporate Debtor was MSME by Interim Order dated 3rd September, 2019, this Tribunal had directed that during the pendency of the Appeal, the Order will not come in the way of Appellant submitting a Resolution Plan and that uninfluenced by the Order passed by the Adjudicating Authority and in accordance with Sub-Section 4 of Section 30, Committee of Creditors may consider the same which shall be subject to the decision of this Appeal. As we find that the Impugned Order where it finds that the Appellant has failed to show that it is MSME, for reasons recorded above although it is stated that the Appellant has submitted a proposed Resolution Plan, copy of which has been filed which is stated to have been sent only on 14.11.2019 (as endorsed on the copy), we do not propose to go into such plan which again has been put up only after 2 months of the September Order. The Counsel for Respondent has further submitted that the statutory period has also expired and COC has already moved the Adjudicating Authority for passing orders of liquidation in view of pendency of this Appeal.

21. Clinging to the last straw at the time of hearing, the learned Counsel for the Appellant came up with a new plea that this Application was filed under Section 10 of IBC without there being a resolution of the General Body. There is no dispute between the parties that the Section 10 Application at the behest of this Appellant was admitted on 26th April, 2018. The learned Counsel for the Appellant relied on the Judgement of this Tribunal in the matter of **“Gaja Trustee Company Private Limited**

& Ors. Vs. Haldia Coke and Chemicals Private Limited” in Company Appeal (AT) (Insolvency) No. 137 of 2017 which was passed (subsequent to the admission order in the present matter) by this Tribunal on 19th July, 2018. In that Judgement, this Tribunal had referred to the Articles of Association of the Corporate Debtor in that matter and in that context considered the said Appeal and found that no decision had been taken by the shareholders in their Extraordinary General Body Meeting and the Application under Section 10 was filed by person authorized by the Board of Directors which was not maintainable (see para – 26, 27, 28 and 38 of that Judgement).

The learned Counsel for the Appellant relied on Judgement in the matter of **“Armada Singapore Pte. Ltd. Versus Ashapura Minechem Ltd.”** in Company Appeal (AT) (Insolvency) No. 350 of 2019 and others dated 30th September, 2019 to submit that even in that matter, it was found that there was no dispute that to file Application under Section 10, approval of AGM/EGM was not taken. This Tribunal had observed that it was against the provisions of law. This also, we find was subsequent to 6th June, 2018 when Sub-Section (3) of Section 10 of IBC was substituted and Clause ‘c’ came to be added. By this amendment to move Application under Section 10, the Corporate Debtor was now required to file special Resolution passed by shareholders of the Corporate Debtor or Resolution passed by at least 3/4th of the total partners of the Corporate Debtor, as the case may be, approving filing of the Application.

This Tribunal has already observed in the matter of **“Mr. Umesh Aggarwal Versus RICOH India Ltd.”** in Company Appeal (AT) (Insolvency) No. 621 of 2018 in para – 11 where it was observed:-

“11. We have already noticed that the prior approval of the shareholders in the AGM has been substituted by the amendment made on 6th June, 2018, which is not applicable in the present case as it was admitted earlier in May, 2018.”

22. Under the statutory law, the requirement to get a special Resolution passed by AGM or EGM was provided on 6th June, 2018 in Section 10 of IBC vide Second Amendment Act, 2018 and thus, we do not find that the admitting of proceedings under Section 10 in the present matter on 26th April, 2018 (which was prior in time) to be bad.

23. The learned Counsel for the Resolution Professional has further pointed out that the Appellant himself is a holder of 93.30% of the shareholding of the Corporate Debtor with the rest remaining with Shyam Lal Gupta and which is apparent from the proposed Resolution Plan now tendered (copy of which has been brought before this Tribunal on 19.11.2019). If this factor is seen, the Appellant holding 93.30% can hardly claim that decision of AGM/EGM is or was necessary. The Counsel for Respondent submitted that the Appellant having moved Section 10 Application with his shareholding of 93.30% got the CIRP put into motion and enjoyed the protection which moratorium attracts to the Corporate Debtor and having taken advantage, is now trying to wriggle out on some or the other ground as Resolution Plan with benefit of haircut has not come

forward and is creating obstructions in the CIRP process. We find substance in submissions of Counsel for Respondent. Process of IBC cannot be allowed to be abused under Section 10 of IBC.

24. We do not find any substance in this Appeal. The Appeal is rejected.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md