

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 196 of 2019

[Arising out of Order dated 29th January, 2019 passed by the Adjudicating Authority
(National Company Law Tribunal), Mumbai Bench in CP(IB) 1053 (MB) /2017]

IN THE MATTER OF:

Pratima P. Shah,
(Ex-Director Amar Remedies Limited),
1201, Tytan, 12th Floor,
Nepeansea Road, Mumbai-400036.

.... Appellant

Vs

1. IDBI Bank Limited,
Dy. General Manager
(NMG Mumbai Zone),
IDBI Bank Ltd., NBG, IDBI Tower,
1st Floor, Plot No.C-7, G Block
Opposite NSE, BKC, Bandra (E),
Mumbai – 400 051.

2. Anil Goel
(Resolution Professional
In the matter of
Amar Remedies Limited)
E-10A Kailash Colony,
Greater Kailash-1,
New Delhi – 110048.

3. Registrar of Companies
Mumbai,
100, Everest Marine Drive
Mumbai – 400 002.

.... Respondents

Present:

**For Appellant: Mr. P. Nagesh and Mr. Karan Kanwal,
Advocates.**

**For Respondents: Mr. Rajive R. Raj, Advocate for Respondent
No.1.**

**Ms. Shweta Thakur and Mr. Kanishk Khetan,
Advocates for Resolution Professional.**

Company Appeal (AT) (Insolvency) No. 210 of 2019

[Arising out of Order dated 29th January, 2019 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench in CP(IB) 1053 (MB) /2017]

IN THE MATTER OF:

M/s. Edelweiss Asset Reconstruction
Company Ltd.,
Edelweiss House,
Off C.S.T. Road, Kalina,
Mumbai – 400 098.

.... Appellant

Vs

1. M/s. Amar Remedies Limited
Sane Guruji Premises,
2nd Floor, Block No.3,
Veer Savarkar Marg,
Prabhadevi, Mumbai – 400029.
2. Anil Goel
Resolution Professional of
Amar Remedies Limited
AAA Insolvency Professional LLP
E-10, Kailash Colony,
Greater Kailash Part -I,
New Delhi – 110048.
3. IDBI Bank Limited,
Marigold House, Plot No A-34,
2, Dadabhai Cross Rd., M.I.D.C., Marol,
Andheri East, Mumbai,
Maharashtra 400093.
4. SBI Global Factors Pvt. Ltd.,
6th Floor, The Metropolitan Building,
E Block BKC, Bandra Kurla Complex,
Bandra (E, Mumbai, Maharashtra 400051).
5. Axis Bank Limited
167, Ground Floor, Ready Money Terrace,
Dr. Annie Besant Road,
Worli Naka-Worli,
Mumbai – 400018.

6. Saraswat Co-operative Bank,
Pioneer School Building,
Telang Road, Matunga (C.R.),
Mumbai – 400 019.
7. Bank of Maharashtra
Ground Floor, Shiv Smruti Chambers,
Dr Annie Beasant Road, Worli,
Near Worli Naka, Mumbai – 400018.
8. ICICI Bank Limited
ICICI Bank Tower, Ground Floor,
Bandra Kurla Complex-Bandra East,
Mumbai – 400051.

.... Respondents

Present:

For Appellant: **Mr. Amit Singh Chadha, Senior Advocate
with Mr. R.P. Aggarwal, Mr. Prateek
Kushwaha and Ms. Srishti Govil, Advocates.**

For Respondents: **Mr. Rajive R. Raj, Advocate for Respondent
No.1.**

**Mr. Shakunt Saumitra, Advocate for
Respondent No.7.**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

Amar Remedies Limited (Company) filed Form-6 for initiation of ‘Corporate Insolvency Resolution Process’ against it. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench treated the Form-6 as an application under Section 10 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the ‘**I&B Code**’) showing Amar Remedies Limited as ‘Corporate Applicant’ and admitted the application vide order dated 16th June, 2017.

2. Pursuant to the 'Corporate Insolvency Resolution Process', 'Interim Resolution Professional' collated the claims; constituted the 'Committee of Creditors'; prepared the 'Information Memorandum'; called for 'Resolution Plan' with the approval of the 'Committee of Creditors' and 'Resolution Plans' were placed before the 'Committee of Creditors'. The 'Resolution Plan' submitted by one of the 'Resolution Applicant' was approved by the 'Committee of Creditors' in its 7th meeting with voting share of 83.02%. The 'Resolution Professional' filed Miscellaneous Application No.524 of 2018 before the Adjudicating Authority for approval of the 'Resolution Plan' under Section 31 of the I&B Code.

3. The Adjudicating Authority (National Company Law Tribunal), Mumbai Bench heard the parties and noticed the submissions made on behalf of the IDBI Bank Limited that Hon'ble High Court of Bombay has already passed order of 'Liquidation' of the Company. The Counsel for the IDBI Bank also brought to the notice of the Adjudicating Authority the order of the Hon'ble Bombay High Court dated 25th January, 2017 passed in Company Petition No.7/2015, wherein the Hon'ble Bombay High Court observed and passed the following order: -

*"2. Ld. Counsel for the respondent states that the proceedings before AFFIR stand abated. **The Respondent Company is already wound up.***

*3. Given these admitted facts, **the Official Liquidator is directed to proceed with the procedure of winding up of the respondent company expeditiously. The Petitioner is at liberty to file affidavit of claim before the Official Liquidator. Official Liquidator's Report is disposed of in the terms above. The company's above petition is also disposed of in the aforesaid terms.***"

4. The Adjudicating Authority on hearing the parties took exception of filing application under Section 10 and in the impugned order dated 29th January, 2019 observed as follows: -

“33. *In this case, as stated earlier we are not examining the right of the corporate applicant for filing petition U/S 10 of the I & B Code. We are only examining whether the petitioner, i.e. corporate applicant has filed the petition suppressing the material facts, which were known to it as material.*

34. *The Hon’ble Supreme Court in **Civil Appeal No. 818/2018 in case of FORECH India Ltd vs Edelweiss Assets Reconstruction Company dated 22nd January 2019** has held that*

“section 11 of the code specifies which persons are not eligible to initiate proceedings under it. In particular, section 11 (d) reads as follows:

11. Persons not entitled to make application.—The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely—

...

(d) a corporate debtor in respect of whom a liquidation order has been made.

This section is of limited application and only bars a corporate debtor from initiating a petition under section 10 of the Code in respect of whom a liquidation order has been made. From

a reading of this section, it does not follow that until a liquidation order has been made against the corporate debtor, an insolvency petition may be filed under section 7 or Section 9 as the case may be, as has been held by the Appellant Tribunal. Hence, any reference to section 11 in the context of the problem in view of the law laid down by them was in the above mentioned case before us is wholly irrelevant.”

35. *Given the law laid down by Hon’ble Supreme Court in the above mentioned case, it is clear that after liquidation order passed in a winding-up petition against the corporate debtor then it is barred from filing a petition under section 10 of the Code. Here the corporate debtor has not only suppressed the material fact that the winding up petition has not only been filed and admitted, but liquidation order has also been passed against the corporate applicant/ corporate debtor liquidator has been directed to expedite liquidation proceedings expeditiously. The corporate applicant suppressed this material fact, knowing it to be material, and filed the petition under section 10 and in contravention of Rule 10 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The alleged act of the corporate applicant is punishable under section 77 (a) of the*

Insolvency and Bankruptcy Code 2016. The Registrar of Companies, Mumbai is directed to lodge prosecution against the corporate applicant under section 77(a) of the insolvency and bankruptcy code in 2016.

36. ***Since the petition has been filed under section 10 of the Insolvency and Bankruptcy Code 2016 after the suppression of the material facts, which were known to be material, therefore the petition is rejected with cost Rs.10 lakhs which shall be paid by the Corporate Applicant. The cost will be deposited in the account of the Prime Ministers National Relief Fund. It is to be clarified that by the order dated 25.1.2017 of Hon'ble Bombay High Court, the Corporate Applicant stands wound up and the Official Liquidator has already been directed to expedite process of liquidation expeditiously.***
37. *The Registry is directed to immediately communicate this order to the Resolution Professional, the CoC, the Official Liquidator, the Corporate Applicant and the Registrar of Companies, Mumbai.*

5. The Adjudicating Authority noticed the amended Section 4(b) of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (hereinafter referred to as the '**SIC Repeal Act, 2003**'). However, without deliberating on such issue observed that while admitting the application under Section 10, the other Bench of the Adjudicating Authority had not examined whether the 'Corporate Applicant' had right to file application under Section 10, being ineligible in terms of Section 11(d).

6. The questions arise for consideration in these Appeals are: -
- (i) Whether the application preferred by the Company in terms of Section 4(b) of the 'SIC Repeal Act, 2003' is barred under Section 11(d) of the I&B Code?
 - (ii) Whether the impugned order dated 29th January, 2019 passed by the Adjudicating Authority directing the Registrar of Companies to lodge prosecution against the Company under Section 77(a) of the I&B Code is uncalled for and without jurisdiction?

7. To decide the issues, it is desirable to refer to the relevant facts and law as discussed hereinafter.

8. About seventeen Company Petitions, including Company Petition No. 289 of 2013 was preferred by 'Jamnadas Mathuradas and others' for winding up 'Amar Remedies Ltd.' (Company - 'Corporate Debtor') before the Hon'ble Bombay High Court. In the said case, the Hon'ble Bombay High Court ordered to keep the petitions 'stand over' with further order to serve the copies of the reference on the office of the Official Liquidator and the Advocate for the Petitioners. The Petitioners were asked to appear before the BIFR and to make necessary representations. The Ex-directors of the Company were asked to report the Hon'ble Bombay High Court on 27th November, 2014 setting out the progress before the BIFR. In the aforesaid petition, the Hon'ble Bombay High Court, passed order for 'Liquidation' and the 'Provisional Liquidator' was appointed on 31st July, 2013, as quoted below:-

*"IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION*

COMPANY PETITION NO.289 OF 2013

*Jamnadas Mathuradas ... Petitioner
Versus
Amar Remedies Ltd. ... Respondent*

WITH
COMPANY PETITION NO.517 OF 2012

Enterprise International Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.26 OF 2013

IDBI Bank Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.166 OF 2013

Bhoruka Part Pvt. Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.187 OF 2013

L and T Finance Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.199 OF 2013

Prem Hemandas Rupani ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.264 OF 2013

Bank of India ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.279 OF 2013

Zigma Distributors Pvt. Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.280 OF 2013
Zigma Distributors Pvt. Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.281 OF 2013
Avadh Mercantile Company Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.288 OF 2013
Sunil @ Vithaldas Jamnadas ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.307 OF 2013
M/s. Aar Aar Arts Pvt. Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.332 OF 2013
M/s. Alfa Beta Chemicals Pvt. Ltd.... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.338 OF 2013
Phoenix Erectors Pvt. Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.398 OF 2013
Essel Propack Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.445 OF 2013
Columbia Petro Chem Pvt. Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

WITH
COMPANY PETITION NO.458 OF 2013

Firstrand Bank Ltd. ... *Petitioner*
Versus
Amar Remedies Ltd. ... *Respondent*

Mr. Amar Talreja, for Petitioner in in CP No.289 of 2013.
Mr. Ashish Kamat i/ by M/s. Desai and Diwanji, for
Petitioner in CP 298 of 2013.
Mr. Anindya Basakod i/ by M/s. Khaitan and Co., for
Petition in CP Nos.279, 280, 281 of 2013.
Mr. B.R.Palav with Mr. A. Mathkar, for Petition in CP 458
of 2013.
Mr. Dharmapal Dave with Ms. Mansi Tihyani i/ by M/s.
Mansukhlal Hiralal and Co., for Petitioner in CP 298 of
2013.
Mr. Amol Joshi i/ by M/s. C.R. Naidu and Co., for
Petitioner in CP 307 of 2013.
Mr. Darshan Mehta i/ by M/s. Dhruve Liladhar and Co.,
for Petitioner in CP Nos.166 of 2013
Ms. S.I.Joshi i/ by M/s. S.I. Joshi and Co., for Petitioner
in CP No.187 of 2013.
Mr. Mayur Khandeparkar with Mr. Amol Kumeria i/ by
Mr. Y.R. Kanchan, for Respondent.
Mr. S. Ramakantha, Official Liquidator, present.
Mr. Reddy and Mr. Gupta, Dy. Official Liquidator,
present.

CORAM: S.J. KATHAWALLA, J.

DATE: 13TH OCTOBER, 2014

RC.:

1. Stand over to 27.11.2014
2. Copies of the Reference shall be served on the office of the Official Liquidator as well as Advocates for the Petitioners. The Petitioners shall be entitled to appear before BIFR and make necessary representations if they so desire. The Ex-directors of the Company shall file their Affidavit before this Court on 27.11.2014 setting out the progress before the BIFR.

(S.J. KATHAWALLA, J.)”

9. The aforesaid order shows that the Petitioner(s) were allowed to move before the BIFR.

10. Earlier, order of winding-up was passed by the Hon'ble Bombay High Court on 27th August, 2014. On 19th September, 2014, the matter was taken up by the BIFR under Section 15(1) of Sick Industrial Companies Act, 1985 (hereinafter referred to as the 'SICA, 1985). According to the learned Counsel for the Appellant, in terms of Section 22 of the SICA, 1985, all proceeding remained stayed. However, the BIFR having refused to pass any order of restructuring, the Company moved before the Appellate Authority for Industrial & Financial Reconstruction (hereinafter referred to as the '**AAIFR**'), New Delhi in Appeal No.4/16. In the said Appeal, the AAIFR passed order on 7th November, 2016, as follows: -

“After hearing Ms. Varsha Banerjee ld. Counsel for the appellant and Mr. M.L. Rajora ld. Counsel appearing for M/s. Saraswat Bank and M/s. Edelweiss, we are of the view that the presence of M/s. State Bank of India is necessary to adjudicate this appeal. Registry is, accordingly, directed to issue notice to M/s. SBI to be present along with relevant documents relating to its consent for taking action under Sec. 13(2) and 13(4) of SARFAESI Act against the assets of the appellant company.

Let the matter be listed, accordingly, on 12th December, 2016.”

11. On 25th November, 2016, the Ministry of Finance (Department of Financial Services) issued Notification in exercise of powers conferred by sub-section (2) of section 1 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, and appointed 1st day of December, 2016 as the date on which the provisions of the said Act was to come into force, as reproduced below: -



भारत का राजपत्र The Gazette of India

असाधारण

EXTRAORDINARY

भाग II—खण्ड 3—उप-खण्ड (ii)

PART II—Section 3—Sub-section (ii)

प्राधिकार से प्रकाशित

PUBLISHED BY AUTHORITY

सं. 2792]

नई दिल्ली, सोमवार, नवम्बर 28, 2016/अग्रहायण 7, 1938

No. 2792]

NEW DELHI, MONDAY, NOVEMBER 28, 2016/AGRAHAYANA 7, 1938

MINISTRY OF FINANCE

(Department of Financial Services)

NOTIFICATION

New Delhi, the 25th November, 2016

S.O. 3568(E).— In exercise of powers conferred by sub-section (2) of section 1 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004), the Central Government hereby appoints the 1st day of December, 2016, as the date on which the provisions of the said Act shall come into force.

[F. No. 3/2/2011-IF-II]

R. N. DUBEY, Economic Adviser

5474 GI/2016

(1)

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THE GAZETTE OF INDIA : EXTRAORDINARY

[PART II—SEC. 3(ii)]

NOTIFICATION

New Delhi, the 25th November, 2016

S.O. 3569(E).— In exercise of powers conferred by clause (b) of section 4 of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (1 of 2004), the Central Government hereby notifies the 1st day of December, 2016, as the date for the purposes of clause (b) of section 4 of the said Act.

[F. No. 3/2/2011-IF-II]

R. N. DUBEY, Economic Adviser

12. Insolvency and Bankruptcy Code, 2016 came into force since 1st December, 2016. Pursuant to Section 252 of the I&B Code read with Schedule Eighth of the Code, amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 was made and in Section 4 for sub-clause (b), the following sub-clause was substituted: -

“The Insolvency and Bankruptcy Code, 2016

THE EIGHTH SCHEDULE

(See Section 252)

***AMENDMENT TO THE SICK INDUSTRIAL
COMPANIES (SPECIAL PROVISIONS) REPEAL ACT,
2003***

(1 OF 2004)

In section 4, for sub-clause (b), the following sub-clause shall be substituted, namely:--

“(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act, 1985 shall stand abated:

Provided that a company in respect of which such appeal of reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty days from the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause.”

13. As the Appeal No.4/16 preferred by the Company – “M/s Amar Remedies Limited” stood abated, pursuant second proviso of sub-clause (b) of Section 4 of SIC Repeal Act, 2013, made reference for ‘Corporate Insolvency Resolution Process’ as per Insolvency and Bankruptcy Code, 2016.

14. Learned Counsel appearing on behalf of the Appellant-Pratima P. Shah submitted that for reference in terms of substituted sub-clause (b) of Section 4 of the SIC Repeal Act, 2003, no specific Form was prescribed by the Insolvency and Bankruptcy Board of India in The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. In absence of such Form, M/s. Amar Remedies Limited (the Company) utilized Form-6, which is similar for initiation of ‘Corporate Insolvency Resolution Process’ by the ‘Corporate Debtor’.

15. On behalf of the Company, the Appellant–Pratima P. Shah (Promoter) filed Form-6 before the National Company Law Tribunal, Mumbai Bench, giving details as were required in Form-6. In the end of the Form-6, the reason for not depositing the fees was mentioned. It was informed that the Company was filing the said reference application pursuant to the substituted sub-Section (b) of Section 4 of SIC Repeal Act, 2003, as amended by Section 252 of the I&B Code r/w Schedule VIII of the I&B Code. It was submitted that the Company in respect of which appeal or reference or inquiry was pending before AAIFR or BIFR stood abated. The last order of the AAIFR dated 7th November, 2016 passed in the appeal of ‘Amar Remedies Limited’ (the Company) was enclosed as Annexure 17.

The relevant portions of Form-6 are extracted below: -

*“BEFORE THE HON’BLE NATIONAL COMPANY LAW
TRIBUNAL, MUMBAI
AMAR REMEDIES LIMITED (ARL)
(CORPORATE DEBTOR)
FORM-6*

(Sub-rule (1) of rule 7)

*APPLICATION BY CORPORATE APPLICANT TO INITIATE
CORPORATE INSOLVENCY RESOLUTION PROCESS
UNDER THE INSOLVENCY AND BANKRUPTCY CODE,
2016 (IBC)*

*(Under Rule 7 of the Insolvency and Bankruptcy
(Application to Adjudicating Authority), Rules 2016)*

29.05.2017

To

*The National Company Law Tribunal
6th Floor, Fountain Telecom Building,
No.1., Near Central Telegraph,
M.G. Road,
Mumbai – 400001*

From,

*Amar Remedies Limited (ARL)
(Corporate Debtor/ Corporate Applicant)
Block No.3,
Second Floor, Sane Guruji Premises,
386, S.V. Savarkar Marg,
Opp. Sidhivinayak Temple, Prabhadevi
Mumbai 400 025
Maharashtra*

In the matter of AMAR REMEDIES LIMITED

*Subject: Application to initiate Corporate Insolvency
Resolution Process in respect of AMAR REMEDIES
LIMITED (ARL) under the Insolvency and Bankruptcy
Code, 2016 (IBC)*

Madam Sir,

*We, hereby submit this application to initiate a Corporate
Insolvency Resolution Process in respect of AMAR
REMEDIES LIMITED. The details for the purpose of this
application are set out below:*

xxx

xxx

xxx

I, certify that, to the best of my knowledge, Ms. Jayashree Shukla Dasgupta is fully qualified and permitted to act as an Insolvency Professional in accordance with the provisions of Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

[The relevant fee is not being paid as the Company is filing this application pursuant to the notification of the SICA Repeal Act, 2003. As per Section 4(b) of the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 as amended by Section 252 read with Schedule VIII of the Insolvency and Bankruptcy Code, 2016 ("IBC"), a company in respect of which such appeal or reference or inquiry pending before AAIFR or BIFR stands abated, may make reference to the National Company Law Tribunal under IBC within 180 days from commencement of IBC, without payment of fees in accordance with the provisions of IBC.

Copy of last AAIFR order dated 07.11.2016 in the matter of Amar Remedies Limited is enclosed as Annexure 17.

Apart from the above stated annexure, certain further stated documents which are relevant to the filing of the present application are attached herewith as per index attached to the Application."

16. From the plain reading of the Form-6 filed by the Company ('Corporate Debtor'), it appears that in absence of any specific or separate Form for filing reference in terms of proviso to sub-section (b) of Section 4 of SIC Repeal Act, 2003 r/w Section 252 of the I&B Code, application in Form-6 was filed by the Company. It cannot be treated as an application under Section 10 of the I&B Code.

17. The Form-6 which is the Form filed by the Company ('Corporate Debtor') do not mention that it is an application under Section 10 of the I&B Code. On the other hand, at Sl. No.21 of the particulars of the Form-6, it is specifically mentioned that the reference application was filed consequent upon abatement of ARL's reference before BIFR.

18. The Adjudicating Authority while admitting the application by order dated 16th June, 2017 mentioned that this Company Petition was filed by Amar Remedies Ltd. (Company-‘Corporate Debtor’) under Section 10 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016. Though, wrong reference of Section 10 has been made therein, in the opening paragraph, the Adjudicating Authority noticed that the ‘Corporate Insolvency Resolution Process’ was sought for and earlier the matter was pending before the BIFR in reference No.55/2014, followed by Appeal No.4/2016 filed before AAIFR. Therefore, it is clear that reference case was filed by the Appellant, while admitting the application mentioning of a wrong provision of law such as Section 10 by the Adjudicating Authority, cannot take away the right of the Company to file application for ‘Corporate Insolvency Resolution Process’ under sub-section (b) of Section 4 of the SIC Repeal Act, 2003, as noticed and quoted above.

19. In view of Section 252 of the I&B Code read with Schedule Eighth annexed thereto; and substituted sub-section (b) of Section 4, particularly proviso thereto of Repeal Act, 2003 is a part of the Code. In terms of the proviso to Section 4(b) of SIC Repeal Act, 2003, as the Appeal before the AAIFR stood abated, the Company had a right to file reference for initiation of ‘Corporate Insolvency Resolution Process’ against it under the I&B Code.

20. Section 11 of the I&B Code deals with persons, who are ineligible to make application with the I&B Code. Clause (d) of Section 11 of the I&B Code prohibits the corporate debtor to prefer any application under Chapter II of Part II to initiate ‘Corporate Insolvency Resolution Process’ against itself in case liquidation order has been made, as quoted below: -

“11. Persons not entitled to make application.—*The following persons shall not be entitled to make an application to initiate corporate*

insolvency resolution process under this Chapter, namely:--

- (a) a corporate debtor undergoing a corporate insolvency resolution process; or*
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or*
- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or*
- (d) a corporate debtor in respect of whom a liquidation order has been made.*

Explanation.—For the purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.”

21. Applications under Section 7; Section 9 and Section 10, are the only applications, which are filed for initiation of ‘Corporate Insolvency Resolution Process’ under Chapter II of Part II, cannot be filed, if prohibited in terms of Section 11.

22. Apart from the aforesaid Section 7; Section 9 and Section 10 of Chapter II of Part II, the ‘Corporate Insolvency Resolution Process’ can also be initiated under Section 55 (Fast Track Corporate Insolvency Resolution Process) as provided under Chapter IV of Part II and reads as follows: -

“55. Fast track corporation insolvency resolution process.—(1) A corporate insolvency resolution process carried out in accordance with this Chapter shall be

called as fast track corporate insolvency resolution process.

(2) An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely:—

- (a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or*
- (b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or*
- (c) such other category of corporate persons as may be notified by the Central Government.”*

23. For initiation of ‘Fast Tract Corporate Insolvency Resolution Process’ under Section 55 (Chapter-IV), prohibition under Section 11 is not applicable.

24. Similarly, for initiation of ‘Corporate Insolvency Resolution Process’ by reference under sub-section (b) of Section 4 of SIC Repeal Act, 2003, the prohibition under Section 11 is not applicable.

25. The substituted sub-section (b) of Section 4 of SIC Repeal Act, 2003 provides relief to the Company in respect of which appeal or reference or inquiry stands abated, to make reference under sub-section (b) of Section 4 to Adjudicating Authority (National Company Law Tribunal) under I&B Code for initiation of ‘Corporate Insolvency Resolution Process’. There is no specific Form prescribed for such reference under “The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016” like Form 1, 5 or 6 for filing application under Section 7, Section 9 and Section 10. In fact, no Form has been prescribed even for initiation of ‘Fast Track Corporate Insolvency Resolution Process’ under Sections 55 and 56 of the I&B Code, in the Insolvency and Bankruptcy (Application to Adjudicating

Authority) Rules, 2016. In such circumstances, if the 'Corporate Debtor' for reference under sub-section (b) of Section 4 of SIC Repeal Act, 2003 if files application in a modified Form-6, it cannot be treated as a proceeding under Section 10. It should be treated as a 'Corporate Insolvency Resolution Process' by reference under sub-section (b) of Section 4 of SIC Repeal Act, 2003. In absence of prescribed Form, we hold that it was open to the Company/'Corporate Debtor' to suitably draft the format of reference. If the 'Corporate Debtor' chose the Form 6 for the purpose of reference, it will continue to be a reference by a Company/ 'Corporate Debtor' under sub-section (b) of Section 4 and such reference will not be hit by Section 11.

26. The Adjudicating Authority failed to notice that the Company/'Corporate Debtor' has right under substituted sub-section (b) of Section 4 of SIC Repeal Act, 2003 to file reference for its own Insolvency.

27. The Adjudicating Authority noticed the order of the Hon'ble Bombay High Court and the pendency of the petition for winding-up, but failed to appreciate that in terms of Section 434 of the Companies Act, 2013, the said proceeding is to be transferred from the Hon'ble High Court to the National Company Law Tribunal, which cannot proceed once a 'Corporate Insolvency Resolution Process' is initiated against the 'Corporate Debtor' in view of order under Section 14 of the I&B Code.

28. The Adjudicating Authority failed to notice the Form in which it has been specifically mentioned by the 'Corporate Debtor' that the matter was pending before the AAIFR, which passed order on 7th November, 2016 and stood abated in view of the I&B Code, which come into force since 1st December, 2016. The Adjudicating Authority also failed to notice that details of background were mentioned and highlighted by the Appellant-Pratima P. Shah, on behalf of the 'Corporate Debtor' in the end of Form. Having failed to notice the above facts, the Adjudicating Authority wrongly held that the Company/the Appellant- Pratima P. Shah has suppressed the fact of pendency of the winding-up proceeding.

29. It is also to be noticed that the Form-5 do not provide any column either in Part-I, Part-II, Part-III, Part IV or Part V to disclose pendency of any winding-up proceeding before any Court or Tribunal for the purpose of finding out ineligibility under Section 11 of the I&B Code. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also do not mandate to provide such intimation to the Adjudicating Authority.

30. Therefore, it cannot be alleged that the Company/ 'Corporate Debtor' or the Appellant – Pratima P. Shah, Director suppressed the material fact of the pendency of the winding-up petition.

31. In so far it relates to initiation of proceeding under Section 77(a) of I&B Code, we hold that the Adjudicating Authority before referring the matter was required to record its prima-facie opinion after giving opportunity of hearing to the Appellant. Such procedure is required to be followed before referring any matter to the Registrar of Companies/ Insolvency and Bankruptcy Board of India or the Central Government for punishment under Chapter VII of the I&B Code.

32. From the impugned order dated 29th January, 2019, it will also be evident that the Adjudicating Authority has not impleaded the appellant-Pratima P. Shah as party Respondent, nor formed any prima-facie opinion, nor issued any notice to her before passing the impugned order. Without any notice of hearing to the appellant Pratima P. Shah, Director, the direction was issued to initiate proceeding under Section 77(a) of the I&B Code, 2016 in violation of rules of 'natural justice'.

33. The 'Corporate Insolvency Resolution Process' was initiated more than a year back by a separate Bench of the Adjudicating Authority (National Company Law Tribunal) on 16th June, 2017. Subsequently, at the stage of approval of the 'Resolution Plan' under Section 31(1), it was not open to the another Bench of the Adjudicating Authority to declare the initiation of 'Corporate Insolvency Resolution Process' as illegal. A subsequent Bench of the Adjudicating Authority has no jurisdiction to sit in appeal over the order

passed by the earlier Bench of the Adjudicating Authority nor it is competent to deliberate on such issue.

34. For the reasons aforesaid, we set-aside the impugned order dated 29th January, 2019 and remit the case to the Adjudicating Authority (National Company Law Tribunal) to pass appropriate order under Section 31 of the I&B Code, taking into consideration the fact that the 'Resolution Plan' has already been approved by the 'Committee of Creditors' in their 7th meeting with a voting share of 83.02%. Appropriate order be passed immediately, after hearing the parties, preferably within three weeks, from the date of production of copy of this order.

35. The Appeal is allowed with the aforesaid observations and directions. No costs.

[Justice S. J. Mukhopadhaya]
Chairperson

(Kanthi Narahari)
Member (Technical)

NEW DELHI

30th September, 2019

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