

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

CP (IB) No. 55/9/HDB/2019

U/s 9 of IBC, 2016

R/w Rule 6 of I & B (AAA) Rules, 2016

IN THE MATTER OF M/S. SMARTRON INDIA PRIVATE LIMITED

M/s. ZTE Corporation, China

Registered Office:

ZTE Plaza, Keji Road South,
Hi-Tech Industrial Park, Neshan District,
Shenzhen, P.R.China.

... Petitioner/
Operational Creditor

VERSUS

M/s. Smartron India Private Limited,

Registered Office:

5th Floor, Corporate Court,
Plot No.115/1, 115/29, Financial District,
Nanakramguda, Hyderabad- 500032.

... Corporate Debtor/
Respondent

Date of order: 09.09.2019

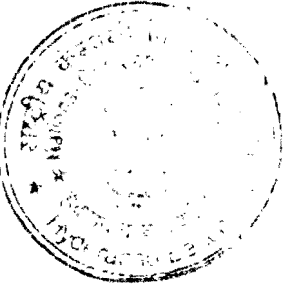
Coram:

Hon'ble Shri Ratakonda Murali, Member (Judicial)

Parties / counsels present:

For the Petitioner: Shri Mritunjay Kumar Tiwari, Bhupender
Sharma Advocates.

For the Respondent: Shri D.V.A.S.Ravi Prasad, Advocate.



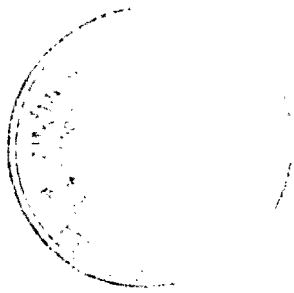
PER: HON'BLE SHRI RATAKONDA MURALI
MEMBER (JUDICIAL)

ORDER

- 1) This petition is filed by M/s. ZTE Corporation stating that M/s. Smartron India Private Limited, the Corporate Debtor had defaulted in repaying a sum of USD 1,397,166 (One Million Three Hundred Ninety Seven and One Hundred Sixty Six Dollars) and hence this petition is filed under Section 9 of Insolvency and Bankruptcy Code, 2016, R/w Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016, seeking admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.
- 2) The brief averments made in the Application are as follows:
 - a) It is averred that Operational Creditor is a company incorporated under the laws of China and is a global leader in telecommunications and information technology, engaged in the business of providing telecommunication equipments and network solutions. The Operational Creditor has been providing the said services across the globe for the past more than 22 years under the Trade Name – ZTE and enjoys very high reputation and goodwill in the said business.
 - b) It is averred that the Corporate Debtor in its normal course of business approached the Operational Creditor in the year 2017 for the supply of smart phones manufactured by the Operational Creditor. After series of discussions & negotiations, the parties entered into an Agreement dated 07.12.2017 (“Supply Agreement”), wherein the Operational Creditor agreed to supply the smart phone products and services related thereto to the

was agreed under Supply Agreement that payment with respect to the invoices raised by the Operational Creditor will be paid through Letter of Credit ("LC").

- c) It is averred that In terms of the Supply Agreement, the Corporate Debtor from time to time, placed Purchase Orders upon the Operational Creditor for the supply of T phone units, as per the rates agreed and specified therein. The payment in terms of the Purchase Orders were to be made 100% through 90 days Letter of Credit from the date of shipment. The Purchase Orders of the Corporate Debtor were duly accepted by the Operational Creditor and the Operational Creditor even supplied the desired Tphone units to the Corporate Debtor through Airway Bills & Invoices indicating that the equipment being supplied by them were of the correct specifications, quality and quantity.
- d) It is averred that the Corporate Debtor failed to make the payments for the following invoices:
- i. Invoice bearing no. ZTESMT201712001 dated 28.12.2017 for an amount of USD 132,000 raised under Purchase Order bearing no. PO-201710-000002 dated 07.10.2017 (PO - I).
 - ii. Invoice bearing no. ZTESMT201803008 dated 28.03.2018 for an amount of USD 577,500 and Invoice bearing no. ZTESMT201804009 dated 07.04.2018 for an amount of USD 522,500, both raised under Purchase Order bearing no. PO-201801-000007 dated 25.01.2018. (PO - II)
- e) The Corporate Debtor placed a Purchase Order dated 07.10.2017 bearing no. PO-201710-000002 upon the Operational Creditor for supply of 20,000 Units of RIMO A6 – Chipset MSM8940; LCD:5.2", IPS, HD; Memory: 3+32GB; Cam: 13+5MP; Battery: 5000mAh to the



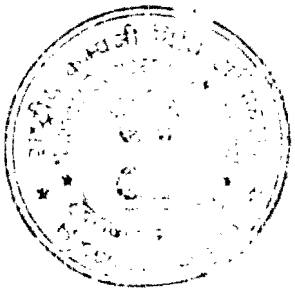
per the P.O., the Operational Creditor was required to have the said equipment shipped to Hong Kong to the Corporate Debtor's carrier agent, which was to be ultimately shipped to Hyderabad, India by the carrier agent of the Corporate Debtor.

- f) As per the P.O., the Operational Creditor had initially supplied 18,800 Tphone units out of the total 20,000 units to the Corporate Debtor. During the ongoing transaction, the Corporate Debtor vide its email, requested the Operational Creditor to send the dispatch documents for the balance 1,200 Tphone units to be shipped to Palestine instead of India and the same was delivered by the Operational Creditor on 03.01.2018 to the Corporate Debtor's Carrier Agent (Geodis Wilson Hongkong Limited) at Hong Kong.
- g) It is averred that the payment of USD 132,000 against the supply of 1200 of Tphones units to Palestine, is still not paid even after numerous follow-ups and request by the Operational Creditor. The balance payment of USD 132,000 was not made by the Corporate Debtor against the said invoice to the Operational Creditor.
- h) It is averred that Apart from the above Purchase Order, the Corporate Debtor had also placed Purchase Order dated 25.01.2018 bearing no. PO-201801-000007 on the Operational Creditor, for supply of 2,000 Tphone Units of RIMO A6 Gold and 8,000 Tphone Units of RIMO A6 Black. The Corporate Debtor issued LC bearing No. 0076MLC00003318 dated 07.03.2018 for an amount of USD 700,000 and LC bearing No. 0076MLC00003018 dated 16.03.2018 for an amount of USD 620,000 towards payment under this P.O.
- i) It is averred that the Operational Creditor duly accepted the said Purchase Order and supplied 5,250 and 4,750 Tphone units on 31.03.2018 and 11.04.2018 respectively to the carrier agent of the Corporate Debtor and



for USD 577,500/- and USD 522,500/- respectively. In accordance with the Purchase Order, the Operational Creditor submitted the requisite documents for encashment of the LC on 19.07.2018 and 24.07.2018 for an amount of USD 577,500 and USD 522,500 respectively. The Sender Bank, i.e. ICICI Bank vide letters dated 24.07.2018 and 06.08.2018 stated that the "LC Expired/LC Closed" and dispatched back the documents to the Operational Creditor.

- j) The Corporate Debtor vide its email dated 12.10.2018 (22:30) committed to do the needful for clearing the outstanding dues under the P.O. for 10,000 Tphone units and requested 10-15 days period for renewing its LC limits. Despite the Corporate Debtor's assurance in its email dated 12.10.2018 and the continuous follow-up by the officers of the Operational Creditor, the Corporate Debtor have failed to address the issue and release the withheld payments.
- k), It is averred that the Corporate Debtor have failed and neglected to pay the said amount to the Operational Creditor, They are also liable to pay the agreed interest thereon @ 18% pcr annum with effect from 03.01.2018 for USD 132,000 and from 31.03.2018 & 11.04.2018 for USD 522,500 & 577,500 respectively, till the date of payment of the entire outstanding amount to the Operational Creditor. Therefore, the Corporate Debtor is liable to pay to the Operational Creditor a total sum of USD 1,232,000 (One Million and Two Hundred Thirty Two Thousand Dollars), towards the principal sum recoverable by the Operational Creditor in terms of the supplies made under the PO-I and PO-II, along with USD 165,166/- (Dollars One Thousand Sixty Five One Hundred and Sixty Six only) towards interest calculated at the agreed rate of 18% per annum.



- 3) The brief averments made in the Counter are as follows:
- a) It is averred that as per supply agreement dated 7th

the Singaporean International Law. As per Clause-14 of the Agreement if dispute between the parties which was not resolved through negotiations in 30 days from the date of occurrence of dispute, has to be referred to the sole Arbitrator appointed with the mutual consent of the parties for adjudication and such arbitration shall be conducted as per Singaporean Arbitration Law.

- b) It is averred that as per the agreement if the Operational Creditor failed to supply the products within time, the Operational Creditor has to pay the liquidated damages up to 5% of the aggregate value of the order.
- c) It is averred that the rejection of payment through Letter of Credit for the invoice bearing No. ZTESMT12001 Dated 28.12.2017 for an amount of USD 132,000 is because of "LC Overdrawn". If the LC is rejected as overdrawn that means that the commitment for the required ordered quantity and supplied quantity has already been fulfilled.
- d) It is averred that the reason for the rejection of LC in the invoice bearing no.ZTESMT201803008 Dated 28.03.2018 for an amount of USD 577,500 is as follows:
1. LC Expired.
 2. LC Closed.
- e) It is averred that the reason for the rejection of LC in the invoice bearing no.ZTESMT201804009 Dated 07.04.2018 for an amount of USD 522,500 is as follows:
1. LC Expired.
 2. LC Closed.
- f) It is averred the above reasons for rejection of LC are not on account of any default or wilful act by the Corporate Debtor, it was on account of non performance by the Operational Creditor. The reasons for returning



- g) It is averred that the products of the Operational Creditor are banned in USA and US Department of Commerce kept the Operational Creditor under Banned list of Parties. Due to this the Corporate Debtor suffered huge loss and the Corporate Debtor was forced to sell the products less than the cost of the products.
- h) It is averred the there is voluminous record in the internet in relation to the adverse orders passed by the US Government and other authorities against the products of the Operational Creditor. The Operational Creditor till date did not disclose or share the litigation issue it has been facing in USA to the Corporate Debtor.
- 4) The brief averments made in the Rejoinder are as follows:
- a) It is averred that mere mentioning of arbitration clause cannot be taken into consideration to hold that there was an existence of dispute.
- b) It is averred that the present Application is filled with proper authorization. The Board Resolution authorizing Mr. Wang Biao, Legal Counsel of ZTE Corporation is filed along with the Application.
- c) It is averred that the Corporate Debtor specifically admitted that it had received the TPhones of the desired specifications and never alleged any dispute regarding the same.
- d) It is averred that the Corporate Debtor have admitted of receiving the Tphone Units from the Operational Creditor under two (2) Purchase Orders for a sum of USD 3,306,446.40 (Three Million Three Hundred Six Thousand Four Hundred Forty Six Dollars and Forty Cents). Thereafter, it is a fact that the Corporate Debtor itself on 27.03.2018 vide its email (Annexure – A/12 at Page No. 100) admitted that they have asked their bankers ICICI to clear the payment of 1200 Tphone units



28.12.2017 for an amount of USD 132,000, raised by the Operational Creditor. The Corporate Debtor also vide its email dated 12.10.2018 (Annexure – A/22 at Page No. 125) confirmed that they are in process of getting their LC limits renewed and requested for some more time to make the pending payment of approx. USD One Million in respect of the Invoice bearing no. ZTESMT201803008 dated 28.03.2018 for an amount of USD 577,500 and Invoice bearing no. ZTESMT201804009 dated 07.04.2018 for an amount of USD 522,500.

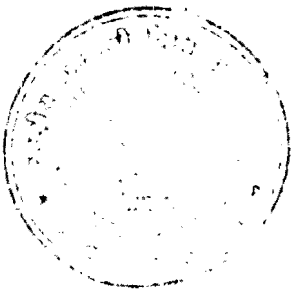
- e) It is averred Corporate Debtor did not notify the Operational Creditor that it had suffered any kind of loss or damages whatsoever, or that it intended to claim damages against the Operational Creditor for the reason of delay. If the Operational Creditor was liable to pay Liquidated Damages for the alleged delayed shipments, why it was not levied earlier during the transaction or replied to the Statutory Demand Notice contending the same.
- f) It is averred that the Corporate Debtor had not suffered any loss or damages on account of any delay in supply of Goods by the Operational Creditor, and as such, the applicability of liquidated damages against the Operational Creditor does not arise at all.
- g) It is averred that the Operational Creditor fulfilled all its obligations under the supply arrangement. It is also evident from one such email dated 08.03.2018 at 2:22 P.M. (Annexure – A/10 at page No. 98 of the Application) shows that Operational Creditor always offered for inspection before the dispatches and the Corporate Debtor had already confirmed the quality and the certification.
- h) It is averred that from the time of the execution of the Supply Agreement between the Operational Creditor



Counter Affidavit before this Tribunal was implemented. The Corporate Debtor with *malafide* intention has presented the aforesaid facts in a distorted way and coloured the same to portray as a dispute for the first time in its Counter Affidavit, even when it did not relate to the 'Tphone of the Corporate Debtor and is not a material fact with respect to the operational debt.

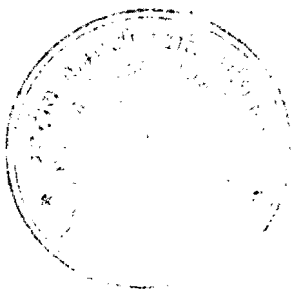
5. I have heard the Counsel for Operational Creditor and also the Counsel for Corporate Debtor. Written submissions are filed on behalf of Operational Creditor as well Corporate Debtor. The Operational Creditor is a China Company. It is the case of Operational Creditor that it supplied TPhone Units to Corporate Debtor in pursuance of two purchase orders placed by the Corporate Debtor. The Purchase Orders dated 07.10.2017 is shown as Annexure A-5 at page no. 81 and purchase order dated 25.01.2018 is shown as Annexure A-13 at page No. 102. The Counsel contended that the supply is secured with Letter of Credit bearing No. 0076MLC00001918 dated 16.10.2017. Copy of letter of credit of purchase order No.1 is dated 16.10.2017 is shown at page Nos. 82-83 of paper booklet. The total amount payable under the two purchase orders was 1,397,166 USD. The Learned Counsel contended that in spite of repeated demands, the Corporate Debtor had failed to pay the amount. The contention of the Learned Counsel for Operational Creditor that three invoices were raised for supply for T-Phones Units to the Corporate Debtor. They are shown as Annexure-9 at page No. 97 for an amount of USD 132,000.00 for supply of 1,200 Units which were sent to Palestine as per the request of the Corporate Debtor through its carrier agent in Hong Kong. Invoice is dated 28.12.2017. The Learned Counsel for Operational Creditor further contended that invoice dated 28.03.2018 for USD 577,500.00 in respect of 5250 Units shipped to India through Corporate Debtor carrier agent in Hong Kong in pursuance to Purchase order dated 25.01.2018, and invoice is shown as Annexure A-18 at page No. 117.

6. The contention of Learned Counsel for Operational Creditor that one more invoice dated 07.04.2018 was also raised for



pursuance of Purchase Order No.2 dated 25.01.2018, which is shown at Annexure A-19. Thus, the contention of the Learned Counsel for Operational Creditor that Corporate Debtor has placed two purchase orders for supply of 20,000 T-phone Units at the first instance and 10000 T-phones units at the second instance. The contention of the Learned Counsel is that as per Purchase Order, the Units to be delivered to the agent of Corporate Debtor at Hong Kong and from there to Hyderabad in India. The Letter of Credit was payable within a period of 90 days from the date of shipment as per the purchase orders. Counsel contended that initially Operational Creditor supplied 18,800 T-phones to the Corporate Debtor which was accepted and sold by the Corporate Debtor.

7. Counsel contended that on the request of the Corporate Debtor, remaining 1200 Units were despatched to Palestine instead of India and the same were delivered to the Corporate Debtor's carrier agent at Hong Kong. Necessary papers are shown at Annexure A-8 at page No. 93-96 containing airway bill. The commercial invoice is dated 28.12.2017. So the invoice was raised for 132,000 USD in respect of 1200 Units because of change of destination. The Operational Creditor approached the Receiver Bank (Bank of China) on 28.02.2018 along with documents as specified in the Letter of Credit. However, the Operational Creditor made a request to the Corporate Debtor to change certain terms of the Letter of Credit and issue fresh Letter of Credit because of change of destination. The Corporate Debtor failed to issue fresh Letter of Credit though it promised to issue. Thus, Corporate Debtor committed default. The rejection of Letter of Credit was also informed to the Corporate Debtor and reason for LC being returned on account of over drawn whereas the Corporate Debtor gave assurance to do needful vide email dated 27.03.2018 shown as Annexure A-12 at page No. 100. So, the contention of the Learned Counsel for Operational Creditor that Corporate Debtor agreed to attend to the payment by doing the needful as Letter of Credit was rejected on the ground of overdrawn. However, this amount was not paid

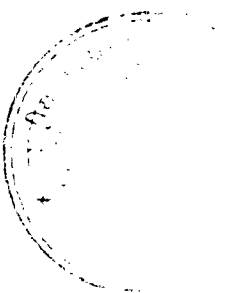


Thus, Counsel contended that the Corporate Debtor committed default.

8. The further contention of the Learned Counsel is that the Corporate Debtor placed another purchase order dated 25.01.2018 for supply of 10000 T phone Units. As per purchase order, the Operational Creditor has to ship equipment to Hong Kong to the Corporate Debtor's carrier agent and from there to Hyderabad by the Carrier Agent. The Corporate Debtor with a delay issued Letter of Credit dated 07.03.2018 for 700,000 USD. Delivery Copy of LC dated 16.03.2018 is shown as Annexure-14 at page No. 103 to 105 of paper book let. The LC to be paid within 90 days after date of shipment.
9. Counsel contended that the Operational Creditor supplied 5250 and 4750 T phone Units on 31.03.2018 and 11.04.2018 respectively and delivered to the carrier agent of Corporate Debtor at Hong Kong. All relevant papers are shown at Annexure-16 and 17 of paper book let and raised invoices for USD 577,500 dated 28.03.2018 and 07.04.2018 respectively. The Corporate Debtor has confirmed delivery of 10000 T Phones in pursuance of Purchase Order No.2 by its email dated 14.05.2018 which is shown at Annexure-20 at page Nos 119-122. Thus, the Learned Counsel contended that Corporate Debtor has clearly admitted having received 10000 Tphones and they were received before 15.04.2018. At no time the Corporate Debtor raised any dispute with regard to the alleged delay. The Operational Creditor in fact delivered T-phones to the carrier agent of Corporate Debtor at Hong Kong on time. When Operational Creditor submitted the LCs for encashment to the sender bank ICICI, they replied with endorsement "Letter of Credit expired/ LC closed" and returned the documents submitted by the Operational Creditor. It was immediately brought to the notice of the Corporate Debtor and requested to issue fresh LC but nothing was done by the Corporate Debtor and thus committed default. The Operational Creditor demanded the Corporate Debtor to pay the amount and send email and finally Corporate Debtor vide email dated 12.10.2018 shown as

for payment. The Learned Counsel contended that Letter of Credit though agreed to be valid for 90 days, however the validity of Letter of Credit given was only for 10 days which is against the agreement. Thus, the Operational Creditor has not received 110,000 USD due under purchase order No.2 and USD 132,000 USD due under Purchase Order No.1. Counsel contended that at no time did the Corporate Debtor raised any dispute prior to the demand notice either with regard to quality, quantity or bill. Therefore, Operational Creditor issued statutory notice dated 15.12.2018 in Form No.3 along with Form-4 enclosing unpaid invoices claiming principal amount along with interest which was duly delivered on Corporate Debtor and no notice of dispute was received from the Corporate Debtor. The demand notice and delivery of notice is shown as Annexure-23. Thus, there is absolutely no material on the side of Corporate Debtor to show any pre-existing dispute. The Counsel contended that there are voluminous evidences placed by the Operational Creditor to prove that the Corporate Debtor committed default and there is no pre-existing dispute and petition is liable to be admitted.

10. On the other hand, the Learned Counsel for Corporate Debtor contended that it suffered losses and damage due to the conduct of the Operational Creditor. There was a ban on the Operational Creditor which fact was suppressed. The US Department of Commerce imposed a ban on Operational Creditor where under the products of Operational Creditor are banned for export to USA. So, it was doubtful whether products of USA can be used in T-Phone supplied by Operational Creditor. Further, big Companies viz Flipkart and Amazon rejected the request of the Corporate Debtor to sell T-phones through them. This has resulted in loss to Corporate Debtor. Thus, Learned Counsel contended, the Tribunal can consider this aspect and that Operational Creditor committed breach. When ban was there, it suppressed the fact and Operational Creditor illegally dumped their products in India. Counsel contended that the Corporate Debtor in fact paid money. The Operational Creditor paid through Letter of Credit an amount which is



sought or given by Corporate Debtor for supply of T phones. The Letter of Credit was rejected only due to late shipment and not for any other ground. Even shipment under Purchase order No.2 was also delayed and no extension was given by Corporate Debtor for supply of products under Purchase Order No.2 and no waiver of time granted. Thus, Operational Creditor committed breach of various terms of agreement. , Learned Counsel contended that there was a pre-existing dispute and the Petition is liable to be rejected.

11. The Learned Counsel for OC relied on the following decisions:-

01.	Hon'ble Supreme Court decision in Mobilox Innovations Pvt Ltd. Vs Kirusa Software reported in MANU/SC/1196/2017, AIR 2017 SC 4532, (2018) 1 SCC 353.
02.	Hon'ble NCLAT decision in Company Appeal (AT) (Insolvency) No. 101 of 2018 in the matter of Milton Consultancy & Engineering Services Ltd vs Vitthal Corporation Limited.
03.	Hon'ble NCLAT decision in Company Appeal (AT) (Insolvency) Nos 72 & 77 of 2017 in the matter of International Road Dynamics South Asia Pvt Ltd Vs Reliance Infrastructure Ltd & Ors.
04.	Hon'ble NCLAT decision in Company Appeal (AT) (Insolvency) Nos 97 of 2017 in the matter of Achenbach Buschhutzen GmbH & Co. Vs Arcotech Limited
05.	Hon'ble NCLAT decision in Company Appeal (AT) (Insolvency) Nos 715 of 2018 in the matter of Rajeev K. Aggarwal Vs Panipat Texo Fabs Pvt Ltd & Ors.
06.	Hon'ble Apex Court decision in the matter of Pr. Commissioner of Income tax Vs Monnet Ispat and Energy Ltd reported in MANU/SCOR/25330/2018
07.	Hon'ble Apex Court decision in the matter of Laxman Prasad Vs Prodigy Electronics Ltd & Ors reported in MANU/SC/4571/2007
08.	Aloe Vera of America Inc vs Asianic Food (S) Pte. Ltd & Anr
09.	Hon'ble Apex Court decision in the matter of Haryana



10.	Hon'ble Apex Court decision in the matter of Booz Allen and Hamilton Inc Vs SBI Home Finance Ltd & Ors reported in MANU/SCOR/0533/2011
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12. The Learned Counsel for CD relied on the following decisions.

01.	Hon'ble NCLAT decision in Company Appeal (AT) (Insolvency) Nos 622 of 2018 in the matter of Karpara Project Engineering Private Limited Vs BGR Energy Systems Ltd
02.	NCLT Hyderabad Bench decision in CP No. 04/2017 in the matter of Amitasha Enterprises Pvt Ltd Vs Lanco Solar Energy Private Limited.
03.	Hon'ble Apex Court decision in the matter of National Insurance Co. Ltd Vs Boghara Polyfab Private Limited reported in MANU/SC/4056/2008
04.	NCLT Delhi Bench decision in Case No. (IB)-370 (ND)/2017 in the matter of Vimal Organics Limited Vs Anya Polytech and Fertilizers Pvt Ltd.
05.	NCLT Chandigarh Bench decision in CP No. 08/2016 in the matter of Wanbury Ltd Vs M/s Panacea Biotech Ltd.
06.	NCLT Mumbai Bench decision in CP No. 1681/IBC/2017 in the matter of CG Power & Industrial Solutions Ltd Vs ACC Ltd.

13. The Petitioner is Operational Creditor. The Petitioner has to establish the debt and default and further to show there was no pre-existing dispute before issuing demand notice under Section 8 of IBC. The Petitioner has placed voluminous documentary evidence to support its claim. On the other hand, the case of Corporate Debtor is that there was a pre-existing dispute. Before going into the documents filed, it is very interesting to note that during the pendency of the Petition, there were email correspondences where under the Corporate Debtor made a proposal for settlement of the claim due. The

considered with reference to the documents filed. The case of Operational creditor that Corporate Debtor placed Purchase Order on 07.10.2017 (PO No.1 for the sake of brevity) for supply of 20000 Tphone Units of RIMO A-6. Annexure A-5 is the purchase order shown at page No. 81 dated 07.10.2017. The Corporate Debtor raised Letter of Credit in respect of this PO-I. True copy of Letter of Credit dated 16.10.2017 is shown as Annexure A-6. I have seen the Purchase Order and Letter of Credit. The Purchase order shows that the goods to be delivered at Hong Kong by air. The payment terms in the Purchase Order that 100% amount through 90 days Letter of Credit after shipment date.

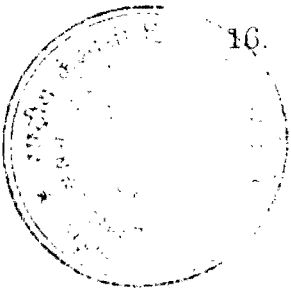
14. On the request of the Corporate Debtor, 1200 Tphone Units out of 20000 were to be sent to Palestine instead of India. The copy of email sent by Corporate Debtor dated 30.12.2017 is shown as Annexure A-7. It is very clear from the emails that Tphone Units to be sent to Palestine irrespective of Letter of Credit amendments. Annexure A-7 (colly) are the emails from Corporate Debtor which shows directions were given to the Operational Creditor to supply 1200 Tphone Units through its carrier agent at Hong Kong to Palestine. The Operational Creditor has placed necessary documents to establish that there was supply of 20000 Tphone Units to the Corporate Debtor. The copy of invoice raised for 1200 Tphone Units at 132,000 USD is shown as Annexure-9 at page No. 97. The invoices goes to establish that it was raised for 1200 Units and valued at 132,000 USD. It is dated 28.12.2017. So necessary papers have been filed by Operational Creditor in support of its case that 1200 Tphone Units were sent to Palestine through Hong Kong and delivered to the Corporate Debtor at Hong Kong. Since there was a change of destination, the Operational requested the Corporate Debtor to issue fresh Letter of Credit and Corporate Debtor vide email dated 08.03.2018 shown at Annexure A-10. It is made clear that separate Letter of Credit will be issued for the goods sent to Palestine and assurance was given to the Operational Creditor not to worry. I have seen the email shown at page No. 98 of the book-let. The LC was not accepted because it

was also communicated to the Corporate Debtor by Operational Creditor through email shown at Annexure A-12. So, it was made clear that Letter of Credit was rejected and Bank has not accepted the papers submitted by the Operational Creditor for release of 132,000 USD equivalent to the value of 1200 Tphone Units. This was communicated to the corporate Debtor. However, Corporate Debtor failed to issue fresh Letter of Credit for value of Tphones supplied to Palestine. Thus, value of 1200 Tphone remains unpaid.

15. It is also the case of Operational Creditor that Corporate Debtor placed another Purchase Order for supply of 10000 Tphone Units dated 25.01.2018. The purchase order is shown as Annexure A-13. I have seen the Purchase order dated 25.01.2018 for supply of 10000 Units and delivery and other terms are on the same lines as in the case of PO-1. In other words, the terms of supply, payment etc under both the Purchase Orders are one and the same.

16. It is the case of Operational Creditor that it had supplied the Tphone Units covered by PO-2 to the Corporate Debtor and raised invoices. The Corporate Debtor raised Letter of Credit over 700,000 USD dated 07.03.2018. Copy of it is shown as Annexure A-14. It is true that ICICI Bank issued Letter of Credit for 700,000 USD and receive Bank is Bank of China. Another Letter of Credit for Rs. USD 620,000 USD dated 16.03.2018 is shown as Annexure A-15. Airway Bill dated 31.03.2018 for sending 5250 Tphone Units is shown as Annexure A-16. Thus, there is evidence from the side of Operational Creditor for purchase Order No.2. At the first instance 5250 Tphones were supplied and remaining 4750 were supplied on 11.04.2018 under Airway bill which is shown as Annexure A-17. The Operational Creditor raised invoices for supply of Tphone Units for USD 577,500 and 522,500 USD shown as Annexures A-18 and A-19.

17. The main document relied by the Operational Creditor is Annexure A-20, which is email dated 14.05.2018 sent by Operational Creditor to Corporate Debtor to confirm delivery of 10000 Tphone Units and Corporate Debtor sent email reply



received the shipment before 15.04.2018. So, there is absolutely no dispute about delivery of 10000 Tphone Units to the Corporate Debtor. The LCs raised by the Corporate Debtor were rejected by ICICI Bank for the invoices for payment of 5250 and 4750 Tphone Units. Annexure A-21 is the copy of LC rejection letter. It is made clear by ICICI Bank that it was rejected on the ground (i) LC expired (ii) LC closed. So, it is very clear, invoices for USD 577.500 and 522.500 USD were not paid as LCs were rejected. This was also informed to the Corporate Debtor through email shown as Annexure A-22. The Corporate Debtor made it clear that LCs were not honoured and they were taking steps with the Bank officials for renewal etc and further to take appropriate steps. So assurance is given to the Operational creditor by Corporate Debtor that payment will be made for two invoices. At no time the Corporate Debtor raised any dispute with regard to delay of delivery of Tphone Units or on any other ground. So prior to the Demand Notice dated 15.12.2018, there was no dispute raised by the Corporate Debtor at any point of time. In the email shown as Annexure-22 dated 12.10.2018, the Corporate Debtor in fact requested time for renewal of Letter of Credit limits and to make payments. Delivery of consignment is accepted and secondly rejection of Letter of Credit was also confirmed and further requested time. Thus, there is no pre-existing dispute raised by the Corporate Debtor prior to issue of demand notice.

18. In the rejoinder, the Operational Creditor further filed screen shots of Flipkart where under these Tphon Units supplied by the Operational Creditor were put up for sale by the Corporate Debtor. So alleged ban on the products manufactured by the Operational Creditor for export to USA is not at all a ground and cannot be considered a ground for dispute. The goods were delivered to India. The Tphone Units were put up for sale. The Corporate Debtor has not taken any convincing defence for the claim made by the Operational Creditor. There was absolutely no prior dispute and whatever is alleged is only after filing of the Petition against Corporate Debtor. The alleged dispute is only imaginary and is not supported by

Tphones and dishonour of Letter of Credit and also default. Therefore, the Petition deserves to be admitted.

19. The Operational Creditor failed to name anyone as Interim Resolution Professional and has requested the Tribunal to appoint one for the Corporate Insolvency Resolution Process. The Insolvency and Bankruptcy Board of India (IBBI) has recommended a panel of Insolvency Professionals for appointment as Insolvency Resolution Professional for the period 1st July 2019 to 31st December, 2019 in compliance with Section 16(3)(a) of the Code in order to avoid delay. Accordingly, this Tribunal appoints Mr. Ganapati Ram Appana having registration number IBBI/ IPA-002/ IP-N00351/ 2017-2018/11001, Mob No. 9490094900 e-mail id: Ganapati.ram1@gmail.com as Interim Resolution Professional. The aforesaid interim resolution professional has no disciplinary proceedings pending against him. He shall file his written communication and all relevant paper immediately before Registrar of this Tribunal but not later than two days.

20. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code. with following directions:-

- (1) The Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, Tribunal, arbitration panel or other authority; Transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;



- (2) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (3) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) The Interim Resolution Professional shall perform all his functions religiously and strictly which are contemplated, inter alia, by Sections 15, 17,18,19,20, and 21 of the Code. He must follow best practices and principles of fairness which are to apply at various stages of CIRP. His Conduct should be above Board and independent and he should work with utmost integrity and honesty. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the management of the Corporate Debtor are under legal obligation under Section 19 of the code to extend every assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the Corporate Debtor. The interim resolution professional is under duty to protect and preserve the value of the property of the Corporate Debtor and shall perform all his functions strictly in accordance with the provisions of the Code.
- (5) The Petitioner is directed to pay a sum of Rupees 2,00,000/- (Two Lakhs Only) to the interim resolution professional to meet out the expenses to perform the functions assigned to him in accordance with regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the committee of creditors as accounted for by interim resolution professional and shall be paid back to the petitioner.
- (6) That the order of moratorium shall have effect from 09.09.2019 till the completion of the Corporate



Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.

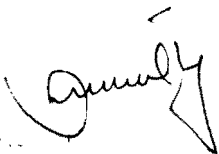
- (7) That the Public announcement of Corporate Insolvency Resolution Process shall be made immediately as specified under section 13 of the code.

Accordingly, this Petition is admitted.

(RATAKONDA MURALI)
MEMBER (JUDICIAL)

viswaraj (LRA)/
binnu

By Registrar
National Company Law Tribunal



CP (11) No. 35/9/HDB/2019
9/09/2019
9/09/2019