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BEFORE THE ADJUDICATING AUTHORITY  
NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD BENCH  
AHMEDABAD  
Court 2

C.P. (I.B) No.852/NCLT/AHM/2019

Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL  
Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH  
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 15.03.2021

Name of the Company: STR Holding,Inc  
V/s  
Lucent Cleanenergy Pvt Ltd

Section 9 of the Insolvency and Bankruptcy Code,  
2016

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.				
2.				

**ORDER**

(through video conferencing/physical)

None appeared on behalf of parties.

The order is pronounced in the open court vide separate sheet.



CHOCKALINGAM THIRUNAVUKKARASU  
MEMBER TECHNICAL

Dated this the 15th day of March, 2021



MANORAMA KUMARI  
MEMBER JUDICIAL

**BEFORE THE ADJUDICATING AUTHORITY  
(NATIONAL COMPANY LAW TRIBUNAL)  
AHMEDABAD BENCH  
AHMEDABAD  
Court 2**

C.P. (I.B.)No. 852/NCLT/AHM/2019

**In the matter of:**

**M/s STR Holdings, Inc.**  
Through Mr. Robert S. Yorgensen,  
Having its address at:  
10 Water Street, Enfield,  
CT 06082, United States of  
America (CIN:4736954) (US Federal  
(TIN):27-1023344)

**...Petitioner  
(Operational Creditor)**

**Versus**

**M/s Lucent Cleanenergy Private  
Limited**  
**CIN: U23201GJ2011PTC066131**  
Having its Registered Office at:  
14/15, First Floor,  
Pushpak Apt,  
Opp. Kaladarshan Flats,  
Prernatrith Derasar Road,  
Satellite, Ahmedabad-380015,  
Gujarat, India

**...Respondent**

**(Corporate Debtor)**

**Order delivered on 15.03.2021**

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)  
Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

**Appearance:**

Ld. Advocate, Ms. Divya Bahl with Ld. Advocate, Ms. Amrita M Thakore  
appeared for the Petitioner.

Ld. CA, Mr Sanjay Majmudar with Ld. CA, Mr Hiten Parikh appeared  
for the Respondent.

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**ORDER**

**[Per se: Mr. Chockalingam Thirunavukkarasu, Member(Technical)]**

1. The present petition is filed by Mr Robert S. Yorgensen, on behalf of STR Holdings, Inc./Applicant under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('IB Code' for short) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ('IB Rules' for short) for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor, M/s. Lucent Cleanenergy Private Ltd. for the payments of the unpaid Operational Debt due of USD 1,698,440.
2. It is submitted by the Petitioner that the Respondent Company, M/s. Lucent Cleanenergy Private Limited having its registered address at 14/15, First floor, Pushpak Apt., Opp. Kaladarshan Flats, Prernatirth Derasar Road, Satellite, Ahmadabad-380015, Gujarat, India and was incorporated on 01.07.2011 with CIN No. U23201GJ20111PTC066131, having Authorized Share Capital of Rs. 40,00,000/- and Paid-up Capital of Rs. 29,28,840/-.
3. The Applicant (STR Holdings, Inc.) entered into a tolling arrangement with the corporate debtor/respondent for tolling Ethylene Vinyl Acetate(EVA) Film to make PV encapsulants. The corporate debtor/respondent was the tolling agent of the Applicant whose appointment as such was recorded by a legally binding term sheet for Tolling and Joint Venture Agreement with

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the respondent/corporate debtor executed in or around September 22, 2016 by the Applicant and the corporate debtor. The Agreement gave the Applicant an option to constitute a joint venture with the respondent/corporate debtor within six months of commencement of tolling. Further stated by the Applicant it did not exercise its option to constitute a joint venture with the respondent/corporate debtor who continued to operate as a tolling agent for the Applicant. The tolling fee was negotiated @ USD 0.125/sq.mt. of EVA film. The Applicant procured the raw materials through its third party suppliers and forwarded them to the respondent/corporate debtor as consignee, for tolling to make PV encapsulants. The respondent/corporate debtor released the raw material from customs, undertook the tolling and supplied the PV encapsulants to the end customers. For the service provided by the corporate debtor, the Applicant paid its tolling fee and also reimbursed the corporate debtor for customs duty, freight for raw materials and finished goods, transportation to end customers, GST and other incidental expenses undertaken by the corporate debtor in selling the PV encapsulants to the end customer.

4. Further, stated by the Applicant for ease of business, the orders for PV Encapsulants were placed with the Corporate Debtor and payments were received into the account of the corporate debtor. Up to February 15, 2018, the Applicant remitted payments in

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settlement of the invoices by the respondent. Payments in settlement of all subsequent invoices raised by the respondent/corporate debtor were adjusted/set off against payments due from the respondent to the applicant. After adjustment/set-off of tolling fee and reimbursements due from the applicant to the respondent, the receivables from end customers were remitted by the respondent/corporate debtor back to the Applicant. From July 2, 2016, to October 20, 2018, the Applicant raised its Invoices against the supply of raw material to the respondent, giving a credit period of 12 months in each case, to enable the respondent/corporate debtor to recover payments from the end customers. In January 2019, the respondent withheld payments due to the Applicant despite receiving the same from the end customers. However, on April 26, 2019, the respondent terminated its tolling relationship with the applicant and agreed to identify alternate business models and simultaneously identified Item heads for Reconciliation of Accounts for closure of accounts between the Applicant and the respondent/corporate debtor. On May 18, 2019, the respondent forwarded its sales register to the Applicant, recording up to May 15, 2019, the payments received from end customers and set-off of the tolling fee and reimbursements for the customs duty, GST and other miscellaneous costs.

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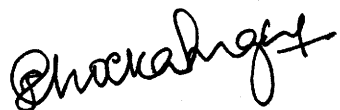
5. Further, stated by the Applicant that Based on the Accounts Reconciliation Statement for Item(s) 1,2, and 3, the Respondent admitted its liability to pay the Applicant a sum of USD 1,999,285. Since commencing reconciliation of accounts with the Applicant, on May 2, 2019, the Respondent affected a remittance of USD 108,732 to the Applicant, on May 24, 2019, the respondent/corporate debtor affected a remittance of USD 103,320 to the Applicant and on July 24, 2019 the Respondent affected a remittance of USD 217,525 to the Applicant against partial payment of outstanding dues. The remittance of USD 108,732 is captured in the Account Reconciliation Statement forwarded by the Respondent/corporate debtor to the Applicant on July 11, 2019.
6. The Applicant has issued a Demand Notice dated 25.09.2019 for the remaining payment of USD 1,698,440/- along with interest without annexures. The Applicant has attached the proof of acknowledgement of receipt/delivery report of a demand notice under section 8 of IB Code. This Petition is filed on 02.12.2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 for the unpaid Operational Debt due of USD 1,698,440/-.
7. The respondent/corporate debtor filed the Affidavit in Reply and submitted that the present petition is to be dismissed on the ground that the present application is not an operational creditor

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as defined under section 5(20) of the Insolvency and Bankruptcy Code based on the relationship between the parties and also the nature of the transactions entered into between the parties.

8. The Applicant filed the written submission in support of the Application are structured under the following headings:
- a. *There is a debt, admitted by the corporate debtor, as due and payable to the Applicant.*
  - b. *The Applicant is an Operational Creditor and the debt is an Operational Debt. Hence the Applicant is eligible to file the present proceedings under section 9 of the IB Code.*
  - c. *Save for recovery of the Operational Debt, there are no pre-existing disputes between the parties before the issue of the Demand Notice.*
9. The respondent in reply stated that the transactions are covered under the Term Sheet and as per clause 5 of the term sheet the respondent was supposed to do only troling (i.e. job work) utilizing the respondent existing manufacturing facilities and all raw materials and packing materials were to be supplied by the applicant and a tolling fee of US \$ 0.125 per sq.m is agreed to be paid by the applicant to the respondent. The responsibility of the respondent is only to carry out the production as a job worker and give finished goods to the applicant. It is the responsibility of the applicant to sell the products. It is further submitted by the





respondent that as per the term sheet the applicant's responsibilities include shift of their existing business from China to their JV, provide technology, sales and technical support and agreement to pay rent to the respondent for their factory. The respondent to lease their existing factory premises to the JV along with provisions for testing equipments, warehouse, etc. and pay royalty to the applicant on the sales made by JV.

10. It is submitted by the respondent that he has never raised any purchase order on the applicant or any of the suppliers of the imported raw material. The respondent also submitted that as per the relationship between the parties and as per the transaction structure, the application made by the applicant as operational debtor is not maintainable. He also submitted that without prejudice to the above there were also several pre-existing disputes between the parties.
  
11. The respondent/corporate debtor filed the written submission and submitted that the applicant has not made supply of any goods or services to the respondent, and there is not a single purchase booked by the respondent in the name of the applicant, the applicant has only facilitated the purchases as per the arrangements by way of advance payments made to the suppliers. All expenses incurred by the respondent on behalf of

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the applicant as per the tolling arrangement are required to be reimbursed by the applicant.

12. Heard the learned Counsels for the applicant and respondent and gone through the documents filed by both parties.

13. From the documents submitted it is noted that the transactions between the parties are carried out as per the agreement entered into between the parties called Term Sheet for Tolling and Joint venture agreement for EVA film/Sheet project enclosed with the application in Exhibit - C on page 99 to 104. Clause 5 of the Term Sheet as under:

<p><b>Clause</b> <b>5.</b></p>	<p><b>Tolling</b> <b>Facility</b></p>	<p>In exchange for payment by STR to Lucent of the Tolling Fee of \$0.125/m<sup>2</sup> exclusive of packaging materials, Lucent shall (i) produce product according to STR's formula and specification (ii) agree to compensate STR for materials used that do not meet customer requirements (iii) agree to limit recycled material content to less than 5% of the finished goods by weight (iv) agree to compensate STR for raw materials used beyond an agreed-upon scrap rate of 3%.</p>
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		<p>STR shall (i) provide raw materials necessary to fulfil manufacturing requirements (ii) provide packaging materials as needed (iii) provide technical assistance to maximize efficiency and throughput on the extrusion line. STR will also provide (i) raw materials for trials and (ii) blending equipment. The blending equipment and any unused raw materials are to be returned to STR at their request.</p>
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The transactions carried out were as per the above clause and is falling in the category of job worker for tolling and the respondent gets a tolling fee of will US\$ 0.125/m<sup>2</sup> from the applicant for the goods manufactured and supplied by him using the raw materials supplied by the applicant.

Apart from the above, the applicant has claimed US\$ 1698440 as the principal amount as per part IV of Form 5 of the application.

The break up the claim as submitted in Exhibit QQ- page 1724 of the application is towards:

a)	Payments from end customer up to May 2019	US\$ 15,50,525
b)	Equipment	US\$ 1,89,880

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c)	Inventory	US\$ 2,58,880
d)	Conditional Discount on Equipment added back	US\$ 20,000
	<b>Less:</b> Payments received since May 2019	US\$ 3,20,845
	Outstanding Principal dues	US\$ 16,98,440

From the above, it is noted that the claim is for remittance of money collected from end customers, cost of inventory given for tolling/production not used or accounted for and supply of equipment (Machinery for Production Line). The claim is made by the applicant as operational debt.

Section 5(21) of the IBC defines operational debt as under:

***“operational debt”** means a claim in respect of the provision of goods or services including employment or a debt in respect of the “repayment” of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;*

Remittance of payments from end customers will not fall under operational debt as it is not a claim in respect of the provision of goods and services. Claim towards the cost of inventory given for tolling/production not used or accounted for will also not come under operational debt and in addition, there are disputes regarding quantum of allowable scrap and about wastages in conversion/tolling between the parties before the issue of demand


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notice as shown in various mails enclosed with the application. In respect of the claim towards Equipment, the agreed value between the parties is US\$ 400,000 and the invoiced value is US\$200,000. As agreed between the parties vide mail dated 15.03.2018 and 19.03.2018 as shown in Exhibit J - page no. 1468 to 1470 of the application the balance of US\$ 200,000 is by way of recovery by a discounted tolling fee of US\$ 0.04 per sm. Invoiced value of US\$ 200,000 is paid by the respondent on 13.04.2018 and 28.05.2018 as submitted by the respondent on page no.77 of the reply which has not been denied by the applicant.

Further, there are disputes between parties among other things regarding scrap and other wastages on usage of inventory, functioning of some parts of equipments and on other claims of the applicant as shown in various mails attached in page no. 1468 to 1631 of the application and page no. 107 to 119 of the reply.

14. For the reasons stated above, this Adjudicating Authority is of the view that the instant petition does not qualify for admission under Section 9 of the IB Code and therefore, the same is rejected. No order as to cost.
  
15. It is made clear that observation made in this order shall not be construed as an expression of opinion on the merits of the

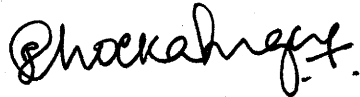




shall not be prejudiced on account of dismissal of the instant petition.

16. Registry is directed to communicate this order to both parties.

17. The instant application CP(IB) No. 852 of 2019 is rejected and disposed of.



**Chockalingam Thirunavukkarasu**  
**Adjudicating Authority**  
**Member (Technical)**



**Ms. Manorama Kumari**  
**Adjudicating Authority**  
**Member (Judicial)**

R.S.