

**NATIONAL COMPANY LAW TRIBUNAL  
NEW DELHI BENCH  
COURT-V**

**Company Petition (IB) No. 2817 /ND/2019**

**In the matter of:**

**The Insolvency and Bankruptcy Code, 2016**

**AND**

**In the matter of:**

**Section 9 of the Insolvency and Bankruptcy Code, 2016**

**AND**

**In the matter of :**

**Trafigura India Private Limited  
Having its registered office at:  
D/64, Defence Colony,  
New Delhi-110024**

**.....Applicant/Operational Creditor**

**Versus**

**TDT Copper Limited  
Having its registered office at:  
Tolstoy House 512-512A  
Tolstoy Marg, Connaught Place,  
New Delhi- 110001**

**.....Respondent/Corporate Debtor**

**ORDER DELIVERED ON: 15.07.2020**

**CORAM :**

**Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)**

**Sh. Kapal Kumar Vohra, Hon'ble Member (Technical)**

**For the Applicant/ Operational Creditor: Adv. Krishanadu Dutta, Adv. Ms. Anjali, Adv. Rahul and Adv. Angad**

**For the Respondent/ Corporate Debtor: Adv. Vikas, Adv. Rishika, Adv. Mansa, Adv. Jayant, Adv. Amit, Adv. Vikram and Adv. Sarthkar**



**ORDER**

**AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

1. The present application is being filed by Trafigura India Pvt. Ltd. ("**Operational Creditor**") to initiate the corporate insolvency process against TDT Copper Ltd. ("**Corporate Debtor**"). The Corporate Debtor has defaulted in paying a sum of Rs. 59,72,40,162/- which is due and payable to the Operational Creditor under a settlement agreement dated 20-11-2018 entered into between the parties ("Settlement Agreement").
2. The Operational Creditor is engaged in the business of, inter alia, trading in non-ferrous metals including copper, zinc, tin. Aluminium, iron ore, coal and other refined metals and concentrates of such non-ferrous metals in various forms.
3. The Corporate Debtor is engaged in the business of manufacture and supply of a wide range of copper products using copper cathodes.
4. Facts of the Application in short are as follows:
  - i. In 2016, the Corporate Debtor approached the Operational Creditor for purchasing a specified quantity of copper cathodes from the Operational Creditor. Pursuant to negotiations, the Operational Creditor and the Corporate Debtor entered into a master sale agreement dated 27-01-2016, (as amended from time to time, the "**MSA**") under which the Corporate Debtor agreed to buy and the Operational Creditor agreed to sell, on the terms and conditions set out in the MSA, a specified quantity of copper cathodes (defined as 'Material' in the MSA). The rights and obligations of the parties were governed by the terms of the MSA.
  - ii. Further, in accordance with the provisions of the MSA, the Corporate Debtor was to place purchase orders for the supply of Material upon the Operational Creditor on a regular basis. Pursuant to such purchase orders placed, the Material was to be supplied by the Operational Creditor to the Corporate Debtor.
  - iii. Further, the Operational Creditor discharged its obligations under the MSA by supplying copper cathodes to the Corporate Debtor in accordance with terms of the MSA. Invoices were raised by the



Operational Creditor for the same from time to time. But despite the Operational Creditor supplying the copper cathodes to the Corporate Debtor, the Corporate Debtor failed to make payment to the Corporate Debtor in accordance with the terms of the MSA.

- iv. Further, the Operational Creditor and the Corporate Debtor entered into the settlement Agreement on 20-11-2018 and under the Settlement Agreement, the Corporate Debtor agreed to pay the admitted liability of Rs. 63,81,63,368/- which was due and payable as on 31-08-2018, together with interest @ 10.9 per cent per annum compounded monthly, to the Operational Creditor pursuant to the payment schedule set out therein. The entire outstanding amount was to be paid by the Corporate Debtor to the Operational Creditor by 30-04-2019.
- v. Further, after 31-08-2018 and till 10-12-2018, a net amount of Rs. 12,30,59,615/- was paid to the Operational Creditor by the Corporate Debtor towards the outstanding amounts due and payable to the Operational Creditor.
- vi. Further, Pursuant to further discussions between the Operational Creditor and the Corporate Debtor, on the request of the Corporate Debtor to give additional time until 15-05-2019, to pay the entire outstanding amount, the Operational Creditor agreed to give such additional time until 15-05-2019. Thus, by way of the Extension Notice dated April 30, 2019 addressed by the Operational Creditor to the Corporate Debtor, the deadline of April 30, 2019 provided under clause 5(c) of the Settlement Agreement was extended to May 15, 2019.
- vii. Further. The Demand notice dated 24-09-2019, was issued under the Insolvency and Bankruptcy Code, 2016 on the Corporate Debtor calling upon the Corporate Debtor to pay the Operational Creditor an amount of Rs. 64,13,59,330/-. This amount consisted of the total outstanding amount as on May 15, 2019 and interest on the aforesaid amount for the period from May 16, 2019 to September 24, 2019. This amount was inclusive of adjustments on account of price fixation and debit and credit notes issued for other adjustments over and above the amount mentioned in the Settlement Agreement.



viii. Further, the Corporate Debtor, sent a reply to the Demand Notice dated 12-10-2019 denying the alleged amount in default being Rs. 64,13,59,330/- on the following grounds:-

a. While contractually it was agreed between the Parties that repayment would be on mutual agreement, therefore the present Demand Notice is illegal and untenable. Thus, there is absolutely no reason for Trafigura to claim the alleged amount or any other amount as payable.

b. Separately, various disputes are pending between the parties, which include, and are not limited to i. Loss on account of non-supply of copper cathode in breach of the MSA; ii. Non-adjustment of payment made to Trafigura; iii intentional non reconciliation of accounts; iv not releasing the security interest for which payment has been received, among others things. All these disputes are pre-existing and covered in correspondence between the parties.

c. Without prejudice to aforesaid, the alleged amount in default being Rs. 64,13,59,330/- is also disputed and denied, you have not placed any statement of account maintained by Trafigura as proof that these amount are owed to Trafigura by TDT Copper.

ix. The Operational Creditor in its application under Section 9 of Insolvency and Bankruptcy Code, 2016 made the following submissions in respect of the reply to the demand notice dated October 12, 2019 sent by Corporate Debtor to the Operational Creditor:-

a. The events in relation to the purported loss on account of non-supply of copper cathodes arose in 2016-2017. However, no debit note was raised by the Corporate Debtor in respect of the same. Thereafter, on account of delay in lifting stock by the Corporate Debtor, the Operational Creditor had raised a debit note on the Corporate Debtor for the interest charges towards such delay by the Corporate Debtor. The same was communicated to the Corporate Debtor vide email dated February 21, 2017 by supplying the relevant balance ledger from April 1, 2016 to February 20, 2017. The amounts in the debit note were subsequently adjusted along with other amounts mutually owed between the parties following



discussions between the parties. This adjustment was agreed to by the Corporate Debtor.

- b. The Operational Creditor has taken into account the payment of Rs. 12,30,59,615/- made by the Corporate Debtor as also adjustments on various counts such as price fixation, debit and credit notes issued and the amount of Rs. 4.575 Crores retained and applied by the Operational Creditor to the credit of the Corporate Debtor under the material supply agreement dated June 3, 2019 entered into with Ashoka.
- c. The outstanding amounts payable by the Corporate Debtor to the Operational Creditor were secured by a mortgage created by TDT Infra Limited ("TDT Infra") (a group company of the Corporate Debtor) in favour of the Operational Creditor over certain land/plots in the registration district Vadodara, sub-district Savli, Moje Lamdapura, Gujarat consolidated block number constituting 43 plots. The mortgage was created by of a mortgage deed dated January 29, 2016 entered into between the Operational Creditor and TDT Infra. The mortgage deed contained a clause to the effect that if the Corporate Debtor intended to sell any part of the mortgaged property it had to take a No Objection Certificate from and pay a security amount to the Operational Creditor. Prior to the execution of the Settlement Agreement, the TDT Infra/Corporate Debtor had from time to time, approached the Operational Creditor for the sale of certain plots of the mortgaged property, which were sold by them with the assent of the Operational Creditor and the proceeds of the sale paid to the Operational Creditor. Following the execution of the Settlement Agreement, the Corporate Debtor had, in relation to the sale of plots 19 and 60 forming part of the mortgaged property, exchanged several emails with the Operational Creditor to obtain a No Objection Certificate. Vide email dated June 18, 2019, the Corporate Debtor wrote to the Operational Creditor stating that an amount of Rs. 49,94,550/- had been transferred and requesting the Operational Creditor to give its No Objection Certificate in respect of plots 19 and 60. However, the Operational Creditor did not receive any such amount. Upon enquiries being made by the Operational Creditor, the Corporate Debtor vide email dated June 21, 2019 swiftly reversed its stand and informed the Operational Creditor that the funds had not been transferred. Following the same, no communication was



received from the Corporate Debtor by the Operational Creditor for obtaining an No Objection Certificate in relation to the aforesaid plots or any other plots forming part of the mortgaged property.

- d. The Corporate Debtor had, as late as May 9, 2019 itself acknowledged, as per its calculation that an amount of Rs. 40.24 crores is due and payable by it to the Operational Creditor. From the same, it is clear that the Corporate Debtor has no intention to pay the amounts due and payable to the Operational Creditor and is attempting to evade its liability to pay such amounts in its reply to the Demand Notice.
5. The Corporate Debtor in its reply dated 29-01-2020 contended that:-
- i. Clause 2.1.6 of the Master Sale Agreement dated 27 January 2016, stipulates that the exposure of the Operational Creditor to the Corporate Debtor on any day shall not exceed the INR equivalent to USD 7.5 million, (the “**Maximum Exposure Amount**”) which was to be determined as per the Conversion Rate on that date. As such, under the abovementioned clause the Corporate Debtor had a limit of USD 7.5 Million which was subject to change in terms of Clause 2.1.7 of the Master Sale Agreement. In the present Petition, it is the case of the Operational Creditor that the date of default is 15 May, 2019 and amounts were due on the said date. It may be mentioned that on 15 May 2019, the Master Sales Agreement read with the contract for supply of Material dated 25 April 2019 was operational and as such the Corporate Debtor was entitled to the abovementioned limit of USD 7.5 Million subject to Clause 2.1.7 of the Master Sales Agreement. The Operational Creditor and the Corporate Debtor have done business even after 15 May 2019 in terms of the abovementioned Agreements and as such no amounts fell due for payment by the Corporate Debtor to the Operational Creditor on 15 May 2019 as the said Agreements were subsisting.
  - ii. Several disputes had arisen between the parties in respect of the said Master Sale Agreement and the Corporate Debtor repeatedly raised such disputes with the Operational Creditor, some of which are briefed as follows:
    - a. That the Operational Creditor debited GST in the Settlement Agreement of Rs. 4.89 Crores (approximately) without actually



fully paying the said amount to the Government and he has charged interest on the same. That out of the abovementioned amount of Rs. 4.89 crores (approximately), the Operational Creditor has issued debit notes to the Corporate Debtor in relation to the GST only for an amount of Rs. 2.51 Crores (approximately) till date and is yet to deposit with the government GST of Rs. 2.38 Crores (approximately) and issue the debit notes to Corporate Debtor to the extent of Rs. 2.38 Crores (approximately) in relation to the abovementioned GST amount.

- b. In breach of the Master Sale Agreement, the Operational Creditor failed to supply materials as per the requirements of the Corporate Debtor during major part of the year 2016 to the year 2018.
  - c. Email dated 16 May 2019 was sent by the Operational Creditor to the Corporate Debtor which clearly shows that various issues with respect to Interest Calculation, GST, MTM, Open foreign exchange remained unresolved.
  - d. The issue in respect of payment of GST amounts have not been concluded. Further, the accounts are yet to be reconciled.
- iii. In connection with the said Master Sale Agreement, the parties entered into a Contract for supply of Material for every year for the supply of LME Registered Grade A copper cathode for that particular year. The abovementioned disputes between the parties remained unsettled and the Corporate Debtor continued to raise its grievances against the Operational Creditor in connection with the said Master Sale Agreement. In November 2018 when the Corporate Debtor sought for the supply plan for the year 2019 and execution of Contract for Supply for Material of copper cathode to be made in the year 2019, the Operational Creditor coerced the Corporate Debtor to enter into a one-sided Settlement Agreement in its favour without taking into account the disputes and issues raised by the Corporate Debtor.
- iv. The Corporate Debtor and the Operational Creditor agreed to reduce the Outstanding liability of Rs. 63,81,63,368/- as on 31 August 2018, to Rs. 52,50,00,000/- by 30 November 2018, and only in the event the Corporate Debtor and the Operational Creditor fail to enter into a further contract for supply of Material



for 2019 by 21 December 2018, then the Corporate Debtor is liable to reduce the Outstanding amount to zero balance by 30 April 2019.

- v. Further, the said amount also includes accounts of third parties such as Lykos India Pvt. Ltd. the amount outstanding to which in the Settlement Agreement was shown as approximately Rs. 19.24 Crores. As such, on the date of entering into the Settlement Agreement, the Corporate Debtor was well within its limit of the Maximum Exposure Amount of INR equivalent of USD 7.5 Million as in the Settlement Agreement also the provisional outstanding amount shown against the Corporate Debtor to the Operational Creditor is approximately Rs. 44.56 Crores.
- vi. The Settlement Agreement is completely one sided in as much as it does not even take into account the amounts payable by the Operational Creditor to the Corporate Debtor.
- vii. In connection with the fresh Agreement that is to be executed between the Parties by 21-12-2018, the Operational Creditor vide its email dated 25 April 2019, gave a reference of the meeting held between the Parties wherein it was decided that by 15 May 2019, the exposure of the Corporate Debtor to the Operational Creditor should be brought down to USD 7.5 Million which was also the term of the Master Sale Agreement. It is stated that on 15 May 2019, the exposure of the Corporate Debtor to the Operational Creditor was less than USD 7.5 Million. Further, vide the said email the Operational Creditor also referred to the meeting held between the parties and indicated the terms of the Contract of Supply of Material for 2019. The Corporate Debtor vide its email dated 25 April 2019 confirmed and agreed to the terms mentioned in the email dated 25 April 2019 and as such a valid and binding contract came into existence between the parties for supply of material for the year 2019. The Corporate Debtor vide the same email requested the Operational Creditor to share a formal contract for its records.
- viii. Thereafter, a covering letter dated 25 April 2019 along with a formal contract was provided by the Operational Creditor to the Corporate Debtor itself shows that no amounts were due and payable on 15 May 2019 because the parties were doing business under the Master Sale Agreement read with the Contract for Supply of Material dated 25 April 2019, which was forwarded on 2



June 2019, i.e. after the date on which the said amounts allegedly became due and payable.

- ix. It is an admitted position that between August 2018 and November 2018, the Corporate Debtor paid a sum of Rs. 12,30,59,615/- to the Operational Creditor thereby reduced the outstanding liability from Rs. 63,81,63,368/- to Rs. 51,51,03,753/-.
- x. Although, the Corporate Debtor performed its sole obligation under the said Settlement Agreement, all the reducing exposure limit below Rs. 52,50,00,000/- within 30 November 2018, the Operational Creditor committed a breach of the said Settlement Agreement and continued to breach the said Master Sale Agreement in the following manner:
  - a. Payment on the part of the Corporate Debtor is dependent on supply of materials by the Operational Creditor.
  - b. On many occasions, there were quality issues with the material supplied by the Operational Creditor and the Corporate Debtor had flagged the said issues to the Operational Creditor.
  - c. The Operational Creditor failed and/or refused to supply and deliver copper cathodes to the Corporate Debtor upon requisition being placed by the Corporate Debtor on the basis of workable letter of Credit on several occasions as a result of which the production of the Corporate Debtor at its manufacturing unit got affected adversely and the Corporate Debtor suffered huge loss and damage to that effect.
  - d. Vide email dated 24 November 2018, TDT Copper Ltd. informed Trafigura that GST amount of Rs. 5 Crores (approximately) is subsumed in the agreed amount of Rs. 63.81 Crore which is yet to be passed to TDT by Trafigura and whatever interest calculated and shown in the agreed amount requires revisit and rectification by either deducting GST payable to it from total agreed amount or pass on GST to TDT in the month of September 2018 to enable TDT to claim the same as its input and file the GST return which stands pending and that the same may attract penal interest.
  - e. In reply to the said email, Trafigura vide email dated 24 November 2018 informed TDT that GST figures can be



discussed separate of the present payment plan and further expressed their disinterest to settle the issue with respect to GST.

- f. Thereafter, vide email communication dated 29 November 2018, TDT informed Trafigura that settling the issue at a later stage is not a plausible option as the same would tantamount to accounting issues. Thereafter also, several emails have been exchanged between the parties as late as April 2019 regarding the reconciliation of accounts.
- g. Vide an email dated 15 April 2019, the Operational Creditor admitted and confirmed that there are several disputes remained to be resolved from the side of the Operational Creditor. In fact, a bare perusal of email dated 29 April 2019, shows that the accounts are yet to be reconciled between the Parties. Trafigura vide the said email called upon TDT to travel to Mumbai to close accounts/ledgers thereby making it clear that the accounts/ledgers were not closed as on the date of execution of the settlement agreement.
- xi. As per the Corporate Debtor, it has to recover a sum of Rs. 24,95,18,655,41 from the Operational Creditor after adjusting all the amounts which are reflected in the settlement agreement. These amounts are in relation to Quality claims, shortage claims, Freight, Excess Interest paid, work material processed and returned and High Seas Sales amount. The said amounts are inter alia reflected in the five ledger accounts maintained by the Corporate Debtor in respect of the account of the Operational Creditor.

Sr No.	Debit	Credit	Remarks
Annexure-1	135,944,578.25		Debit note issued for Quality Claim, Shortage, Freight, LC Interest excess paid, custom duty and others
Annexure-2	92,637,571.00		Proof of export not provided by Trafigura and hence TDT liable to pay to the

			Government.
Annexure-3		5,796,706.84	HSS amount
Annexure-4	424,547,927.00		JW material processed and returned invoiced with GST.
Annexure-5		397,814,714.00	JW Material received
<b>Amount receivable by TDT</b>		<b>249,518,655.41</b>	

xii. Under the Demand Notice dated 24 September 2019, the Operational Creditor has demanded a sum of Rs.64,13,59,330 (approximately) whereas under the present Petition under section 9, the amount claimed is Rs. 59,72,40,162.

xiii. The Operational Creditor has also filed a commercial civil suit bearing Commercial Civil Suit No. 2/2020 against TDT Infra Ltd. seeking a money decree of the same alleged outstanding dues, which the Operational Creditor has claimed to be due and payable by the Corporate Debtor in the instant proceeding.

6. The facts of rejoinder filed by Operational Creditor in short is that:

- i. The disputes raised by the Corporate Debtor have been either raised for the first time after the issuance of the Demand Notice, or are disputes which were resolved between the parties at the time of the Settlement Agreement.
- ii. The Corporate Debtor has, in its email dated May 9, 2019, admitted that as per its calculation, an amount of Rs. 40.24 crores is due and payable by it to the Operational Creditor, which has admittedly not been paid, there is a default in payment of an operational debt of over Rs. 1,00,000/-.
- iii. The Operational Creditor never entered into a contract dated April 25, 2019 with the Corporate Debtor, nor was any such contract to be read together with the MSA. Any supply of material made in 2019 to the Corporate Debtor has been on terms agreed between the parties with payment to be made on a cash basis than credit

basis. The same are not connected to the MSA in any manner and are not to be read together with the same.

- iv. Any disputes in such regard between the Corporate Debtor and the Operational Creditor have been resolved between them at the time of entering into the Settlement Agreement, whereby the parties undertook a full and final settlement of all amount. Without prejudice, the MSA was superseded by the Settlement Agreement, which superseded all previous agreements between the parties.
- v. The Corporate Debtor has not specified which period the alleged GST deduction relates to, nor has it placed any document on record to substantiate its allegations. It is submitted that the Operational Creditor has adjusted the same against amounts due and payable by the Corporate Debtor.
- vi. As per the correspondence annexed as Annexure R-5 to the Reply, the events in relation to the purported loss on account of non-supply of copper cathodes arose in 2016-2017. However, no debit note was raised by the Corporate Debtor in respect of the same. Thereafter, on account of delay in lifting stock by the Corporate Debtor, the Operational Creditor had raised a debit note on the Corporate Debtor for the interest charges towards such delay by the Corporate Debtor. The same was communicated to the Corporate Debtor vide email dated February 21, 2017 (annexed as Annexure 15 to the Application) by supplying the relevant balance ledger from April 1, 2016 to February 20, 2017.
- vii. The Operational Creditor never coerced the Corporate Debtor to enter into a Settlement Agreement.
- viii. It was never assured by the Operational Creditor that grievances of the Corporate Debtor which remained unresolved would be addressed by the Operational Creditor after the execution of the Settlement Agreement.
- ix. The parties did not enter into a fresh contract for the supply of materials for 2019 by the cut-off date stipulated in Clause 5(c) of the Settlement Agreement i.e. December 21, 2018 as claimed by the Corporate Debtor.



- x. The Corporate Debtor was required to reduce the entire outstanding amount to zero by April 30, 2019 (subsequently extended to May 15, 2019).
7. We have heard the learned counsel appearing for the Petitioner and perused the averments made in the application and the documents enclosed with the same.
8. Ld. Counsel for the petitioner submitted that earlier the petitioner had rendered service and in lieu of that the petitioner was entitled to get the defaulted amount but, in the meantime,, there was a settlement between the parties and a settlement agreement dated 20-11-2018 was executed between the parties and which is extended till 15.05.201. He further submitted that as per the settlement agreement when the corporate debtor fails to pay the amount then the petitioner sent a demand notice under Section 8 (1) of IBC which was duly delivered upon the corporate debtor and corporate debtor also filed reply to the demand notice and raised those dispute which has already been settled at the time of preparation of settlement agreement. He also raised all the facts mentioned in the application and rejoinder.
9. On the other hand, ld. Counsel appearing for corporate debtor submitted that petition filed by the applicant is not maintainable. He also raised all the facts mentioned in the reply to the demand notice as well as reply filed by them. He further submitted that applicant filed this application on the basis of settlement agreement which is not maintainable. He further submitted that the amount has already been paid between August 2018 to November 2018 and he further



submitted that that there are several disputes raised by the Corporate Debtor therefore, the present application is not maintainable. Learned Counsel for the Corporate Debtor further submitted that in course of hearing the Corporate Debtor has filed an application under Section 8 of the Arbitration and Conciliation Act for referring the matter before the Learned Counsel for Arbitrator by filing CA No. 585/2020.

10. In the light of that submissions, we have gone through the averments made in the application and the documents enclosed with the same and we find that the claim of the applicant is based on settlement agreement and on the basis of that the petitioner claimed that since the respondent violated the terms and conditions of settlement and there is default in payment of the settlement amount, therefore, the petitioner filed the present application for initiation of CIRP for default in payment of operational debt. Therefore, we would like to consider at first whether the terms and condition of settlement agreement comes under the definition of operational debt, therefore, we would like to refer definition of operational debt, default and debt and the same is quoted below: -

**Section 5 (21) of IBC**

*“operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the <sup>6</sup>[payment] 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;*

**Section 3 (12) of IBC**

*“default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be; and debt is defined U/S 3(11) of the IBC and same is quoted below:--*

*“debt means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.”*

When we shall read all three definition together then it can be said that definition of debt as defined under the IBC does not mean the operational debt only rather it includes financial debt as well as liability or obligation in respect of a claim which is due from any person and default means non-payment of debt, but in order to trigger Section 9 of IBC an Operational Creditor is required to establish a default for non-payment of Operational debt as defined in Section 5(21) of IBC , which means a claim in respect of the provision of goods or services including employment or a debt in respect of the <sup>o</sup>[payment] of dues arising under any law for the time being in force and if a person fails to establish that then they can not initiate CIRP under Section 9 of the IBC.

11. Now it is the settled principle of law that National Company Law Tribunal is not recovery court rather when a default of either financial debt or operational debt occurred in that case financial creditor or



operational creditor may file an application for initiating corporate insolvency resolution process u/s 7 or section 9 respectively.

12. In the light of that facts, when we shall consider the case in hand then we find that the settlement agreement on the basis of which the present application is filed by the applicant does not come under the definition of operational debt. At this juncture, we would also like to refer a decision of NCLT Allahabad Bench in ***“Company Petition (IB) No. 343/ALD/2018 in the matter of M/s Delhi Control Devices (P) Limited Vs. M/s Fedders Electric and Engineering Ltd.”*** decided on 14.05.2019, in which the NCLT Allahabad bench held that *“unpaid instalment as per the settlement agreement cannot be treated as operational debt as per Section 5 (21) of IBC. The failure or Breach of settlement agreement can’t be a ground to trigger CIRP against Corporate Debtor under the provision of IBC 2016 and remedy may lie elsewhere not necessarily before the Adjudicating Authority”*. and similar view is followed by this Bench in **IB No. 507/ND/2020**.

**IN THE MATTER OF NITIN GUPTA**

13. In the light of that decisions and provisions which we have referred in the aforementioned para, when we shall consider the case in hand then we are of the considered view that the case of the applicant is covered with the aforesaid decisions, therefore, we are of the considered view that default of instalment of settlement agreement does not come within the definition of operational debt, hence, we are



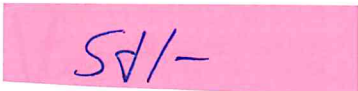
not inclined to admit the application rather we are of the view the present application is liable to be dismissed.

14. So far the contention of the Corporate Debtor that the matter may be referred to the Arbitration under Section 8 of the Arbitration and Conciliation Act is concerned, as we have already stated in the afore-stated para that the role of National Company Law Tribunal is very limited, while exercising its power under Section 7, 9 and 10 of the IBC, 2016. While exercising its power under Section 9, the Adjudicating Authority is required to see only there is a default in payment of debt or any dispute has been raised by the Corporate Debtor or not, so far refer the matter to the Arbitration is concerned, it is beyond the scope of Section 9 of the IBC, 2016. Therefore, we are unable to consider the prayer of the Corporate Debtor to refer the matter before the arbitration. However, the Corporate Debtor is at liberty to move before the Proper and Competent Court. As per the submissions of Corporate Debtor, Commercial Civil Suit No. 2/2020 is pending for consideration, therefore, Corporate Debtor is at liberty to raise this issue before that Court.

15. Accordingly, it is therefore,

ORDERED

that the application is hereby **DISMISSED**.

  
(K.K. VOHRA)  
MEMBER (T)

  
(ABNI RANJAN KUMAR SINHA)  
MEMBER (J)