

**IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT-V, NEW DELHI
C.P. IB NO. 707/(ND)/2020**

An Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

IN THE MATTER OF:

ASHOKA CREATIONS LIMITED

Through its Authorized Representative
Mr. Murli Manohar Kothari
Registered Address at:
204 Eastern Building, 19 R N Mukherjee Road,
Kolkata, West Bengal - 700001

...Operational Creditor/Applicant

Versus

LYKOS INDIA PRIVATE LIMITED

Through its Directors
Registered Address at:
D-64, Defence Colony,
New Delhi – 110024

...Corporate Debtor/Respondent

Order Delivered on: 12.03.2024

CORAM:

SHRI MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant: Mohit Nandwani Adv.

For the Respondent: Ms. Avni Sharma, Adv.

O R D E R

PER: MAHENDRA KHANDELWAL, MEMBER (JUDICIAL)

1. This is a Company Petition filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('the Code') read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s Ashoka Creations Limited ('Operational Creditor') for initiation of Corporate Insolvency Resolution Process ('CIRP') against M/s Lykos India Private Limited ('Corporate Debtor').
2. M/s Ashoka Creations Limited (Operational Creditor) is a company registered under the Companies Act, 1956 [CIN- U51909WB1988PLC045388, having its registered office at 204 Eastern Building, 19 R N Mukherjee Road, Kolkata, West Bengal - 700001. M/s Lykos India Private Limited (Corporate Debtor) is a company registered under the Companies Act, 1956 [CIN- U51101DL2013PTC262458], having its registered office at D-64, Defense Colony, New Delhi - 110024. The Corporate Debtor has Authorized Share Capital of Rs. 3,50,00,000 (Rupees Three Crore Fifty Lacs) and Paid-Up Share Capital of Rs. 3,45,77,800 (Rupees Three Crore Forty-five Lacs Seventy-seven Thousand Eight Hundred).
3. The present Petition was filed on 04.03.2020 before this Adjudicating Authority by the Operational Creditor, duly authorized to initiate Corporate Insolvency Resolution Process ("CIRP") proceedings under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("Code"). The total amount claimed to be in default is Rs. 11,52,83,184 (Eleven Crore Fifty-two Lacs Eighty-three Thousand One Hundred Eighty-four) calculated till 20.02.2020 along with interest. The date of default is not expressly mentioned in the demand notice. However, there were multiple invoices raised by the Operational Creditor from 25.07.2016 to 30.01.2019.

4. Submissions by the Ld. Counsel appearing on behalf of the Operational Creditor

- a) The Operational Creditor is a limited company incorporated under the provisions of the erstwhile Companies Act 1956, which used to manufacture and supply Copper Cathodes and Rods.
- b) The Operational Creditor and the Corporate Debtor entered into a business relationship to supply Copper Cathode, which was based on the assurances, guarantees and representations of the Corporate Debtor. During the period 2016-2019 Operational Creditor supplied Copper Cathodes/Rods to the Corporate Debtor in lieu of which various invoices were raised by the Operational Creditor which were duly delivered to the Corporate Debtor. In lieu of the same, amount of Rs. 11,52,83,184/- is still pending (principal amount of Rs. 6,01,67,689/- + interest @27% of Rs. 5,52,15,495/-) and due on the part of the Corporate Debtor which is yet to be recovered from the Corporate Debtor.
- c) The Corporate Debtor failed to clear the payment towards the goods supplied by the Operational Creditor. The Operational Creditor got issued Demand Notices dated 18.10.2019 & 22.10.2019 under Section 8 of the Code, which were duly served upon and replied by the Corporate Debtor.
- d) The Operational Creditor had supplied Copper Cathodes to Corporate Debtor for which Rs. 6,01,67,689/- is due and Corporate Debtor arbitrarily and without intimation to the Operational Creditor adjusted the said amount with some third-party and this fact was disclosed to Operational Creditor by way of reply to the demand notice.
- e) In reply to the Demand Notices dated 03.11.2019, the Corporate Debtor has neither raised any dispute qua quality of goods nor made any payment to the Operational Creditor. However, the Corporate Debtor contended that the payment against the said invoices has already been made by the Corporate Debtor to the third-party.

- f) The Operational Creditor is having mutual and reciprocal transactions with Corporate Debtor whereby the Operational Creditor is selling Copper Cathodes to the Corporate Debtor and is also purchasing Aluminum Goods from the Corporate Debtor. The Ledger account of Operational Creditor is a running account and last payment made by the Corporate Debtor was on 30.01.2019. As per the ledger account filed by the Operational Creditor, the Corporate Debtor has not made the due payments. Further, the Corporate Debtor has failed to produce any document establishing the payment of all the invoices of the Operational Creditor.
- g) The Operational Creditor is maintaining a running account of the Corporate Debtor and as per the ledger account, the last payment of Rs. 71,61,378/- was made by the Corporate Debtor on 30.01.2019. Further, the Corporate Debtor in its reply dated 03.11.2019 made categorical admissions that the amount of Rs. 5,96,78,191.08/- was outstanding to Operational Creditor by the Corporate Debtor as on 31.03.2018 and by this admission the period of limitation gets extended by 3 years by virtue of section 18 of the Limitation Act, 1963.
- h) The Operational Creditor has issued an invoice no. 77 dated 31.01.2019 for the amount of Rs. 75,38,292/- and only 95% of that amount was paid by the Corporate Debtor. The Corporate Debtor contended that the balance payment under invoice no. 77 is adjusted with third party i.e. TDT Copper Limited. The pending 5% amount of Rs. 3,76,913/- is due from invoice no. 77 and the Corporate Debtor has defaulted in its payment.
- i) The Corporate Debtor alleged that the amount of Rs. 5,96,78,191.08/- due to Operational Creditor as on 31.03.2018 was transferred to the account of TDT Copper Limited at the request of Operational Creditor vide Letter dated 13.06.2019 per contra the Operational Creditor never requested the Corporate Debtor to transfer the due amount to TDT Copper Ltd. The Operational Creditor contended that even if amount is

transferred the same should reflect somewhere. No proof of such transfer was produced by the Corporate Debtor.

5. Submission by the Learned Counsel appearing on behalf of the Corporate Debtor

- a) The Corporate Debtor is a company incorporated in 2013 and deals in various metals such as Aluminum, Copper, Lead, Nickel, Tin and Zinc. Operational Creditor is in business relationship with the Corporate Debtor from 2016-19.
- b) The Operational Creditor sent a demand notice dated 18.10.2019 and 22.10.2019 in respect of unpaid Operational debt with respect to various invoices and one debit note is below:

S. No.	Excise Invoice	Date	Amount
1.	EX/001/16-17	25.07.2016	1,16,60,746/-
2.	EX/005/16-17	27.08.2016	85,30,182/-
3.	EX/006/16-17	27.08.2016	85,17,535/-
4.	EX/007/16-17	27.08.2016	24,23,324/-
5.	EX/008/16-17	27.08.2016	12,21,701/-
6.	EX/0012/16-17	09.09.2016	83,48,933/-
7.	EX/0013/16-17	09.09.2016	83,88,998/-
8.	EX/014/16-17	09.09.2016	32,93,418/-
9.	EX/068/16-17	02.02.2017	81,03,006/-
10.	EX/069/16-17	02.02.2017	40,29,258/-
11.	77	30.01.2019	75,38,292/-
12.	Debit Note No. _____		1,12,578/-

- c) However, the Operational Creditor has concealed the fact that the payment with respect to the above mentioned invoices has been made by the Corporate Debtor to the third party i.e. TDT Copper Ltd. in view of letter dated 13.06.2019. Further, the payment with respect to Invoice No. 77 is not due and payable as of now. The purported debit note of Rs. 1,12,578/- is also fictitious and fabricated.
- d) The Corporate Debtor further claims that the claim of the Operational Creditor based on 10 invoices are barred by limitation as on the date of

filing of this application. The Corporate Debtor alleged that the Operational Creditor was aware of the same facts and yet filed the present application on the basis of time barred claims in order to inflate the claim amount and to harass the Corporate Debtor.

- e) The invoice No. 77 as alleged by the Operational Creditor to have been unpaid is also not due and payable as on date. The Corporate Debtor has raised a purchase order for 25MT of Copper Cathodes however, the Operational Creditor delivered only 14MT of Copper Cathodes and raised its invoice. Vide email dated 30.01.2019, it was stated by the Corporate Debtor that “the payment would be 95% of the invoices”. Further on 15.02.2019 Corporate Debtor also requested the Operational Creditor through mail to supply the remaining quantity of Copper Cathodes pursuant to 25MT purchase order to complete the transaction. Hence, the Corporate Debtor had made payment of Rs. 71,61,378 on 30.01.2019 against the invoice no. ‘77’. The balance amount is neither due nor payable by the Corporate Debtor as remaining quantity is not yet delivered by the Operational Creditor.
- f) The debit note of Rs. 1,12,578/- as claimed by the Operational Creditor in Part IV of the application is not only fictitious but also on the basis of the fabricated claim. Further, the alleged debit note was also not produced during the course of the proceedings before this tribunal.
- g) The contention of the Operational Creditor that the account maintained between the parties is running account is not viable as the running account must be an open unsettled account as distinguished from a stated and liquidated account. It is evident from the documents produced by the Corporate Debtor that the payment of Rs. 71,61,378/- was made against the invoice no. ‘77’ not in the manner of running account. Hence, the account was not running account and the payments were made against the specific invoices during the transactions.
- h) The Corporate Debtor alleged that the present application is counterblast to an application under Section 9 of the Code bearing C.P.

IB No. 2817 of 2019 filed by the Trafigura India Pvt. Ltd., a sister concern of the Corporate Debtor against TDT Copper Limited, a group company of Operational Creditor. Trafigura issued demand notice to TDT on 24.09.2019 and just after that the Applicant issued Demand Notice to the Corporate Debtor on 18.10.2019 and corrigendum on 22.10.2022, however the first Demand Notice was issued by the counsel of TDT Copper Ltd. It is evident that the Applicant has moved the present application in bad faith, as a counterblast and mala fide attempt to exert pressure on the Respondent.

- i) The Operational Creditor never disclosed the letter dated 13.06.2019, by TDT Copper Ltd. addressed to the Corporate Debtor wherein the TDT Copper Ltd., on behalf of itself and the Applicant Operational Creditor requested the Corporate Debtor to transfer the due amount of Rs. 5,96,78,191.08/- which was outstanding from the Respondent to the Applicant to the TDT Copper Ltd. Account. It was also put forth by the Corporate Debtor that the Applicant Operational Creditor is related entity or group company of the TDT Copper Ltd. The Section 8 Demand Notice was first issued on 18.10.2019 under the name & seal of TDT Copper Ltd. which was further supplemented by Corrigendum Demand Notice dated 22.10.2019. The Corporate Debtor also placed on record the shareholders list (as on 30.09.2019) of Ashoka Creations Ltd. (Operational Creditor) wherein it is shown that Mr. Avinash Ladha who is a Director of TDT Copper Ltd. is also a Shareholder of the Operational Creditor. Further, the Email ID copperpurchase@tdt.co.in that sent the letter dated 13.06.2019 was also used to issue invoice no. 77.

Analysis & Findings

6. We have heard the Learned Counsels for the Operational Creditor and the Corporate Debtor, and further perused the averments made in the Petition, reply filed by the Corporate Debtor, Rejoinder filed by the Operational Creditor and Written Submissions presented by both the Operational Creditor and the Corporate Debtor. Since the registered office

of the Respondent Corporate Debtor is in Delhi, this Tribunal has territorial jurisdiction as the Adjudicating Authority in relation to prayer for initiation of Corporate Insolvency Resolution Process (CIRP) under Section 9 of the Insolvency and Bankruptcy Code, 2016, against the Corporate Debtor.

7. On the perusal of the application filed by the Operational Creditor, it is observed that the Operational Creditor has issued several invoices i.e. EX/001/16-17 dated 25.07.2016, EX/005/16-17, EX/005/16-17, EX/007/16-17 & EX/008/16-17 dated 27.08.2016, EX/012/16-17, EX/013/16-17 & EX/014/16-17 dated 09.09.2016, EX/068/16-17 & EX/069/16-17 dated 02.02.2017 and 77 dated 30.01.2019 along with one alleged undated Debit Note to the Corporate Debtor. The Operational Creditor has filed the present application on 04.03.2020. Before examining the present application on merits, it is necessary to assess the maintainability of the present application in light of the provisions of limitation as raised by the Corporate Debtor.
8. The Operational Creditor had raised 11 invoices against the sale of Copper Cathodes during the period of 2016-2019 and received two payments of Rs. 48,38,903.92/- and Rs. 71,61,378/- on 19.10.2016 and 30.01.2019 respectively. As contended by the Corporate Debtor out of 11 invoices raised by the applicant, 10 invoices dated 25.07.2016, 27.08.2016, 09.09.2016 and 02.02.2017 are barred by Limitation and the claim in respect of the 11th Invoice dated 30.01.2019, is not due on account of Pre-existing dispute. Also, the date of default pleaded by the Applicant in Part IV of Form 5 as well as in Section 8 Demand Notice is 25.07.2016 and the present application has been filed on 04.03.2020.
9. It is to be noted that the 'Operational Creditor' had sent demand notice dated 18.10.2019 and corrigendum dated 22.10.2019 to the 'Corporate Debtor' under Section 8 of The Insolvency and Bankruptcy Code, 2016 for payment of outstanding dues of Rs. 11,52,83,184 (Eleven Crore Fifty-two Lacs Eighty-three Thousand One Hundred Eighty-four). In Corrigendum

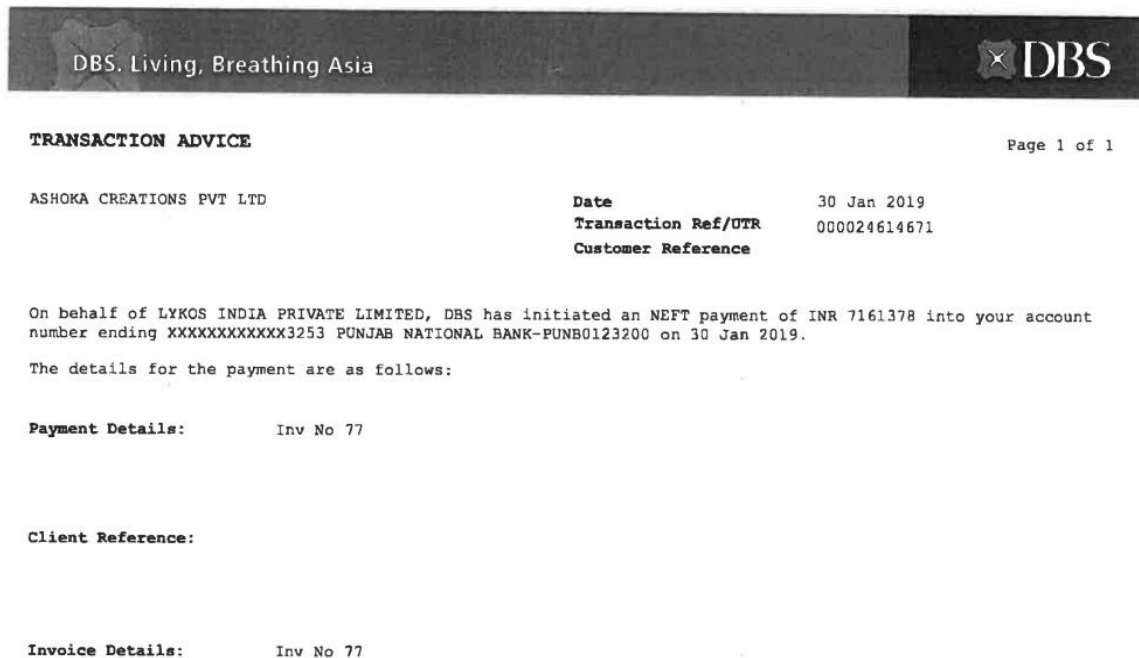
Demand Notice dated 22.10.2019 which was issued pursuant to some rectification also mentions the same date of default as 25.07.2016.

10. In order to determine the admissibility of petition for initiating CIRP under Section 9 of the Code, we refer to the judgment of the Hon'ble Supreme Court in **Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd., (2018) 1 SCC 353**. The said judgment makes it clear that in order to initiate CIRP proceedings under Section 9 of the Code, the Adjudicating Authority has to determine:
- a) Whether there is an **'Operational Debt'** exceeding Rs. 1 Lakh (1 Crore, in case the petition is filed after 24.03.2020) as defined under Section 4 of the IBC?
 - b) Whether the documentary evidence furnished with the application shows that the aforesaid **debt is due and payable** and has not yet been paid?
 - c) Whether there is **existence of a dispute** between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid Operational debt in relation to such dispute?
11. In the first instance, to determine that whether the said amount claimed by the Operational Creditor would fall under the ambit of 'Operational Debt', it is pertinent to analyze the definition of 'Operational Debt' as mentioned under Section 5(21) of The Insolvency and Bankruptcy Code, 2016. Under said Section, the 'Operational Debt' is defined as: *"A claim in respect of the provision of goods or services including employment or a debt in respect of the 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"*.
12. While analyzing the present facts in the light of said Section 5(21), the Operational Creditor and the Corporate Debtor entered into business relationship to supply the Copper Cathodes. The Operational Creditor supplied the goods as per the order placed and further raised invoices on the basis of goods supplied. It was asserted by the Operational Creditor

that the Corporate Debtor defaulted in making the payment to the Operational Creditor with respect to the Invoices bearing Invoice No. EX/001/16-17 dated 25.07.2016, EX/005/16-17, EX/005/16-17, EX/007/16-17 & EX/008/16-17 dated 27.08.2016, EX/012/16-17, EX/013/16-17 & EX/014/16-17 dated 09.09.2016, EX/068/16-17 & EX/069/16-17 dated 02.02.2017 and 77 dated 30.01.2019 for which present application is preferred by the Operational Creditor before this Adjudicating Authority. The Operational Creditor claims the outstanding amount of Rs. 11,52,83,184/- (Eleven Crore Fifty-two Lacs Eighty-three Thousand One Hundred Eighty-four) calculated till 20.02.2020 along with interest from the Corporate Debtor.

13. On the appreciation of the transactional invoices and the ledger account of the Operational Creditor, as annexed by the Operational Creditor, and placed before us, we are of the view that there had been a transaction between the Operational Creditor and the Corporate Debtor and that the Operational Creditor has supplied goods to the Corporate Debtor for which certain invoices were raised. Further, the Corporate Debtor had not disputed the contention of the Operational Creditor regarding the supply of goods to the Corporate Debtor. The undated Debit Note as alleged by the Operational Creditor was due from the Corporate Debtor has never been placed on record before this Adjudicating Authority in support of its claim. Therefore, averment in the absence of substantiating document is a mere contention and hence, cannot be relied upon.
14. On the perusal of records before us, it is observed that the 10 invoices dated 25.07.2016, 27.08.2016, 09.09.2016 and 02.02.2017 are barred by limitation because as contended by the Operational Creditor, the accounts maintained between the Operational Creditor and the Corporate Debtor is not a running account as there was invoice to invoice payments made by the Corporate Debtor. As per the ledger Account annexed as Annexure-6 in main application it can be concluded that the account maintained by the Operational Creditor and Corporate Debtor is a mutual and but not running account evidencing inter se sales and purchases of copper and

aluminum goods. The Corporate Debtor had made last payment of Rs. 71,61,378/- on 30.01.2019 which is particularly for Invoice 77. Further, if the account was a running account the amount of Rs. 71,61,378/- would be adjusted against the earlier invoices which were due for payment. We are persuaded with the contention of Corporate Debtor as substantiated by Bank Acknowledgement that the payment of Rs. 71,61,378/- was made against invoice no. 77, therefore we are of considered view that the account maintained by the parties are not running account. The relevant extract of bank acknowledgement as annexed by the Corporate Debtor is reproduced below.



15. The Hon'ble High Court of Bombay in **Wilson Jacobs Vs. Lucid Print and Others, 2018 SCC OnLine Bom 19982** deals with the issue of Running Account. The relevant extract of the said judgment for ready reference is as under;

“7. There is then an argument that between the parties there was a running account. The fact that there were continuous transactions does not make it a running account. Again, the concept of a running account in commercial practice is well-known. It must be demonstrated that there are debits and credits going on simultaneously or on a regular basis and that balances are struck with some periodicity; not that there are a number of invoices, some of which remain unpaid. Non-payment of invoices and payment

without specifying a particular invoice does not make the transactions a “running account”.

16. The Hon'ble Delhi High Court in **Modern Construction Company Delhi Vs. Hitech Enterprises, 2023 SCC OnLine 5185** relied on the definition of “running account” and the same is reproduced below for ready reference:

“an open unsettled account, as distinguished from a stated and liquidated account. Running accounts mean ‘mutual accounts’ and ‘reciprocal demands’ between the parties, which accounts and demands remain open and unsettled.”

17. The Corporate Debtor has denied that the payment for the invoices dated 25.07.2016, 27.08.2016, 09.09.2016, and 02.02.2017 is either due or in default. They have asserted that they transferred the due amount of Rs. 5,96,78,191.08/- to a third party, TDT Copper Ltd., based on a letter dated 13.06.2019. The Operational Creditor, however, contends that they did not authorize such a transfer to TDT Copper Ltd. The Corporate Debtor has presented a copy of the letter dated 13.06.2019, which states, *“with the consent of all the partners/directors/owners of both the companies, we hereby request you to kindly transfer this balance to the account of TDT Copper Ltd.”* Thus, the Operational Creditor did consent to the transfer. Furthermore, the email address 'copperpurchase@tdt.co.in,' used to send the letter on 13.06.2019, was also used to issue Invoice 77 of 2019. This indicates that both the Operational Creditor and TDT Copper Ltd. were aware of and acknowledged the transfer. Therefore, it is inferred that both parties were aware of and consented to the transfer and the claim for the invoices dated 25.07.2016, 27.08.2016, 09.09.2016, and 02.02.2017 has been paid by the Corporate Debtor.
18. The Corporate Debtor contended that there exists a pre-existing dispute between the Corporate Debtor and Operational Creditor with respect to delivery of 25MT Copper Cathodes for which only 14MT was delivered. However, this Adjudicating Authority is of the view that, to rely on the contention of Corporate Debtor, there must be a pre-existing dispute prior to issuance of Demand notice. The invoice dated 30.01.2019 for Rs.

75,38,292/- is placed on record wherein it is mentioned that the said invoice is particularly for supply of 14MT Copper Cathodes. The Corporate Debtor asserted that the delivery of 14MT of Copper Cathodes is pursuant to Purchase Order of 25MT of Copper Cathodes but only 14MT was delivered by the Operational Creditor. However, the Corporate Debtor has satisfied the payment with respect to invoice dated 30.01.2019 raised for 14MT to the extent of 95% and to substantiate the same the Corporate Debtor has placed on record the E-mail dated 30.01.2019 wherein it is mentioned that "*Further, pls make a note that the payment will be 95% of the invoices*" which was further acknowledged by the Operational Creditor *vide email dated 30.01.2019*. The Corporate Debtor in email dated 15.02.2019, which is placed on record as Annexure 4 *requested the delivery of remaining quantity of Copper Cathodes to complete the transaction*. It is stated that the balance would be paid on the delivery of remaining quantity of Copper Cathodes. Corporate Debtor has raised the dispute much prior to issuance of demand notice dated 18.10.2019 and 22.10.2019, thus, there exists a Pre-existing before the issuance of Demand Notice as per Section 8.

19. The Hon'ble Supreme Court of India in the matter of ***Innoventive Industries Limited vs. ICICI Bank, (2018) 1 SCC 407*** interpreted the word 'due' as "payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date." In the present case, the dues as to Invoice 77 is Rs. 75,38,292/- and the Corporate Debtor had paid Rs. 71,61,378/- to the tune of 95% of invoice. As per the Annexure 4 & Annexure 8 of the Application, the Operational Creditor has acknowledged the email dated 30.01.2019 wherein the Corporate Debtor has asserted that the payment would be 95% of the invoices and remaining would be paid at the delivery of remaining quantity of Copper Cathodes. Therefore, the contention of the Corporate Debtor stands substantiated, that the amount to the extent of 5% of the invoice 77 is not due and payable as the applicant has never delivered the remaining 11MT of the Copper Cathodes.

20. It is observed that the undated debit note referred by the Operational Creditor in the Part IV of the application is neither placed on record in the instant application nor produced before this Adjudicating Authority during the course of arguments. Therefore, the genuineness of alleged Debit Note is in question. It is trite law that mere averment in the absence of substantiating document is only contention and hence, cannot be acted upon.
21. In the light of the above observations, the instant application filed under Section 9 on the basis of Invoices dated 25.07.2016, 27.08.2016, 09.09.2016, 02.02.2017 and 30.01.2019 and an undated Debit Note, lacks merits, is not maintainable and is liable to be dismissed as such.
22. Accordingly, it is hereby ordered that the instant **COMPANY PETITION IB (IBC)/707(ND) 2020** filed by Ashoka Creations Limited, the Operational Creditor, under section 9 of the Code read with Rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against Lykos India Private Limited, the Corporate Debtor, **stands dismissed without costs.**

A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

Sd/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)