

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH

KOLKATA

C.P (IB) No.834/KB/2018

In the matter of

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

And

In the matter of:

HYTERA COMMUNICATIONS CORPORATION LIMITED, a company incorporated under the appropriate laws of China, having its registered office at Hytera Tower, Shenzhen High-Tech Industrial Park North, Beihuan Road, Nanshan District- Shenzhen, China and also at C/o Sandersons & Morgans, Solicitors and Advocates , Royal Insurance Building 5, Netaji Subhas Road, Kolkata- 700001, West Bengal.

... Operational Creditor

Versus

In the matter of:

SIMOCO TELECOMMUNICATIONS (SOUTH ASIA) LIMITED, CIN: U32109WB1979PLC031942 having its registered office at Godrej Genesis Building (2nd Floor), Block-EP, & GP, Sector-V, Salt Lake Electronics Complex, Kolkata, West Bengal- 700091.

...Corporate Debtor

Date of hearing :16/06/2022

Order Pronounced on : 12/07/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

- | | |
|------------------------------------|----------------------------|
| 1. Mr. Rahul Auddy, Adv. |] For Operational Creditor |
| 1. Mr. Joy Saha, Sr. Adv. |] For Corporate Debtor |
| 2. Mr. Siddhartha Chatterjee, Adv. |] |
| 3. Mr. Abir Lal Ghosh, Adv. |] |

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **HYTERA COMMUNICATIONS CORPORATION LIMITED**, through its Country Manager (India), Mr. J.P.Sharma, vide Board Resolution dated 20th March, 2018 (Annexure-2) (hereinafter referred as the Operational Creditor), seeking initiation of corporate insolvency resolution process in respect of **SIMOCO TELECOMMUNICATIONS (SOUTH ASIA) LIMITED**, CIN: U32109WB1979PLC031942, having its registered office at Godrej Genesis Building (2nd Floor), Block-EP, & GP, Sector-V, Salt Lake Electronics Complex, Kolkata, West Bengal- 700091, (hereinafter referred as the Corporate Debtor).
3. It is submitted in the petition that Corporate Debtor had approached the Operational Creditor and offered to purchase Digital Migration radio, intrinsically Safe Mission Critical Digital Radio, Tetra portable Terminal its system and application, Mobile Radio, Portable Radio Critical Surveillance & Dispatch System and wireless Video Transmission System and its Accessories (hereinafter referred to as “the said goods”) on credit.
4. Pursuant to the understanding, the Corporate Debtor placed several purchase on the Operational Creditor. The relevant purchase orders under which the operational debt has arisen are as follows:-

1. *Purchase Order bearing No. SA-INSIMOC0120426 dated 26th April, 2012.*
2. *Purchase Order bearing No. SA-INSIMOC0121206 dated 6th December, 2012.*
3. *Purchase Order bearing No. SA-INSIMOC130118-R dated 30th January, 2013 .*

Copies of the said three Purchase Orders are annexed as Annexure -A.

5. It is submitted that the terms of payment as per the aforesaid three purchase orders are through telegraphic Transfer 100% before Shipment to be provided by the Corporate Debtor to the Operational Creditor and the amount is payable after 60 days of the presentation of the documents.

6. It is submitted that the pursuant to the above purchase orders, the Operational Creditor sold, supplied and delivered the said goods to the Corporate Debtor as per agreed specifications and requirements of the Corporate Debtor and subsequently raised the following invoices which are unpaid and has resulted in the operational debt:-

- i. Invoice bearing No. SA INSIMOCO 121207/1 dated 7th December, 2012 for sum of USD 126,850.25.
- ii. Invoice bearing No. SA-INSIMOCO121207/2 dated 7th December, 2102 for sum of USD 123,308.00
- iii. Invoice bearing No.SA-INSIMOCO 121207/3 dated 19th December, 2101 for sum of USD 111, 450.00
- iv. Invoice bearing No. SA-INSIMOCO 121207/4 dated 25th December, 2012 for sum of USD 113,574.00
- v. Invoice bearing No. SA-INSIMOCO 121207/5 dated 18th January, 2013 for sum of USD 99,645.00
- vi. Invoice bearing No. SA-INSIMOCO 1303228 dated 28th February, 2013 for sum of USD 74,631.00
- vii. Invoice bearing No. SA-INSIMOCO 130307 dated 12th March,

2013 for sum of USD 24,072.00

viii. Invoice bearing No. SA-INSIMOCO130417 dated 24th April, 2013
for sum of USD 59,105.30

Copies of the said Invoices are annexed as Annexure-B.

7. It is submitted that in spite of receipt of all the invoices issued by the Operational Creditor under the several purchase orders for the several supplies done (not only restricted to the above 8 unpaid invoices), the Corporate Debtor failed and neglected to make full payment of the invoice values. The Corporate Debtor made certain part payments against the invoices which have been raised from time to time and after adjustment of such part payments, a sum of USD 1,441,490. 78 was still due and outstanding during the end of 2013. The Operational Creditor continuously followed up with the Corporate Debtor for making payment of the then outstanding dues, but in spite of repeated assurances of the Corporate Debtor, the Corporate Debtor failed and neglected to make payment of the same to the Operational Creditor.

8. It is submitted that after discussions and negotiations with the Operational Creditor, the Corporate Debtor issued a "Guarantee Letter" dated 31st December, 2013 to the Operational Creditor whereby the Corporate Debtor undertook and guaranteed to pay the then outstanding amount of USD 1,441,490.78 before April 15, 2014. However, the Corporate Debtor failed to adhere to their promise and only made few part payments. In this regard a copy of the Guarantee Letter of the Corporate Debtor dated 31st December, 2013 is annexed as Annexure-C.

9. It is submitted that being that the follow ups and the reminders were not yielding any result and that assurances given by the Corporate Debtor in the form of Guarantee letters were all false, the representatives of the Operational Creditor met with the representatives of the Corporate Debtor sometime in April, 2014 for resolving the issue of the payment of the

outstanding dues. During the said discussion, the Corporate Debtor agreed to resolve the issue of overdue payments and to pay all outstanding amounts from 7th April, 2014 and undertook to pay all the invoices due and outstanding against PO No. SA INSIMOCO 121206 and SAINSIMOCO 120426, which was USD 827, 199.00 as on that date, on before 15th August, 2014. The Corporate Debtor further provided a staggered payment schedule as regards invoices due against purchase order SA-INSIMOCO130118-R and undertook to pay off the entire outstanding invoices amounting to USD 425,538.00 as on that date from 8th April, 2014 till 12th June, 2014. In this regard, a copy of the minutes of the meeting held between the Corporate Debtor and the Operational Creditor on 4th and 5th of April 2014 is annexed as Annexure-D.

10. It is submitted that in spite of the new revised repayment schedule agreed between the Corporate Debtor and the Operational Creditor, the Corporate Debtor failed to adhere to the payment schedule and did not make the full payments to the Operational Creditor within the time periods proposed by the Corporate Debtor only save and except few small paltry part payments.

11. It is submitted that the Corporate Debtor thereafter vide its letter dated 29.09.2014 committed and declared to the Operational Creditor that they will release all the outstanding payments before 31.10.2014 to the Operational Creditor. However, as on all previous occasions, the Corporate Debtor failed and neglected to abide by its own admissions and assurances. In this regard a copy of the said letter dated 29th September, 2014 is annexed as Annexure-E.

12. It is submitted that the Corporate Debtor thereafter once again vide its letter dated 02.04.2015 assured and declared to the Operational Creditor that it would release all the pending outstanding payments on account of the supplies made by the Operational Creditor to the Corporate Debtor for execution of the order that the Corporate Debtor had obtained from Maharashtra Police. Copy of letter dated 2nd April, 2015 is annexed as Annexure-F.

13. It is submitted that however, as on all previous occasions, the Corporate Debtor once again failed and neglected to abide by its own admissions and assurances save and except certain part payments.

14. It is submitted that the Corporate Debtor again vide letter dated 17.09.2015 acknowledged the outstanding debt and assured the Operational Creditor that they will pay approximately an amount of USD 160,000,00 by the end of October, 2015 and also an amount of USD 200,000.00 to USD 250,000.00 during the month of November and December 2015 but however the Corporate Debtor failed and neglected to make any such payment to the Operational Creditor. In the said letter the Corporate Debtor has cited in details about the financial crunches that were being faced by them and also that they were at the verge of closing down during the first quarter of 2014 as business was virtually zero and there was no cash flow in the company and that the Corporate Debtor was in a bankrupt situation and that the management of the Corporate Debtor had no direction as to how to come out of that situation. The Corporate Debtor in the said letter further detailed the several reasons for its financial crunches and undertook the above repayment schedule. Copy of the letter dated 17.09.2015 of the Corporate Debtor is annexed as Annexure-G. (Colly.)

15. It is submitted that however, in spite of the said assurances, the Corporate Debtor did not pay the full outstanding invoice amounts and after adjustment of the part payments received from time to time, a sum of USD 621,348.05 was still due and outstanding from the Corporate Debtor against the goods supplied and utilized by the Corporate Debtor.

16. It is submitted that the Operational Creditor had no faith on the Corporate Debtor and it was evident that the assurances given by the Corporate Debtor to repay the dues were false and have been only aimed at buying time. The Corporate Debtor neither has the means nor the intension to

pay the due of the Operational Creditor. The Corporate Debtor is not in a position to either deny or dispute the unimpeachable claim of the Operational Creditor.

17. It is submitted that thereafter sometime in the beginning of August 2016, the Operational Creditor being assured that the Corporate Debtor will not make payment of any of the outstanding sums as they are in reality unable to pay its debts, internally decided to proceed for the winding up of the Corporate Debtor under the Companies Act, 1956 and instructed their advocates to proceed for winding up of the Corporate Debtor as per the provisions of the Companies Act, 1956.

18. It is submitted that the Operational Creditor through its advocates, Messrs. TCM & Associates, issued a statutory notice under sections 433, 434 and 439 of the Companies Act, 1956, vide their letter dated 26th August, 2016 inter- alia, demanding from the Corporate Debtor payment of the aforesaid amount of USD 621,348.05 along with interest calculated there on @ 12% per annum within 21 days from the receipt of the notice. A copy of the said statutory notice dated 26th August, 2016 is annexed as Annexure-H.

19. It is submitted that the Corporate Debtor responded to the above statutory notice vide its letter dated 17th September, 2016 and acknowledged its liability and stated that the Corporate Debtor shall reconcile their books and ascertain the exact claim due against the Operational Creditor. In addition, the Corporate Debtor stated that its financial situation is not well and even declared as NPA by banks. Further, the Corporate Debtor has also stated that they have the best intention to clear the payment due and prefer to settle the matter through conciliation. Along with the unequivocal admission of the Corporate Debtor, the Corporate Debtor for the very first time also attempted to raise a frivolous dispute by alleging that 2% of the invoice values were due and payable by the Operational Creditor to the Corporate Debtor as way of marketing activities and that the Operational Creditor was also supposed to provide spares worth 2% of the invoice values.

Copy of the said reply of the Corporate Debtor dated 17th September, 2016 is annexed as Annexure-I.

20. It is submitted that thereafter, on 24th October, 2016 the Operational Creditor replied to the reply sent by the Corporate Debtor to the Operational Creditor, vide its letter dated 24th October, 2016 wherein the Operational Creditor has denied the contents of the reply and stated that the contents as stated in the statutory notice are true and same are not reiterated and requested to pay the amount due against them. The Operational Creditor categorically denied that any charges equivalent to 2% of the invoice values on account of marketing activities were payable to the Corporate Debtor under the Purchase Order or any other arrangement. The Operational Creditor further categorically clarified that the spares equivalent to the 2% of the invoice values were duly supplied to the Corporate Debtor and the same was consumed by the Corporate Debtor. Copy of the reply of the Operational Creditor is annexed as Annexure-J.

21. It is submitted that the Corporate Debtor responded to the above reply of the Operational Creditor dated 24th October, 2016 vide their letter dated 03.12.2016 wherein the Corporate Debtor once again acknowledged its liability and again stated that the Corporate Debtor shall reconcile their books and ascertain the exact claim due against the Operational Creditor. The Corporate Debtor once again through their vague and baseless reply alleged the Operational Creditor for non payment of reimbursement of 2% of marketing cost of invoice value and commitment towards providing 2% value of invoices as spares. Further in the entire reply, the Corporate Debtor has sought to settle the matter with the Operational Creditor and thus admitting its absolute liability to the Operational Creditor. Thereafter, the Corporate vide letter dated 3rd February, 2017 issued a letter wherein they tried up to cover their impeachable admission of the outstanding debt under the guise of some typographical error. Copies of the said reply of the Corporate Debtor dated 3rd December, 2016 and 3rd February, 2017 is annexed as Annexure-K.

22. It is submitted that thereafter since in December,2016 the Insolvency and the Bankruptcy Code, 2016 was introduced, the Operational Creditor, through its Advocates, Sandersons and Morgans, issued a notice dated 15th February ,2017 under Section 8 of the Code to the Corporate Debtor claiming the outstanding amount of USD 621, 348.05. Copy of the said Notice dated 15th February,2017 is annexed as Annexure-L.

23. It is submitted that the Corporate Debtor responded to the said notice through their Advocates vide letter dated 28th February, 2017 wherein frivolous disputes have been raised once again with several of them for the first time. The Corporate Debtor once again contended that they were entitled to 2% of the entire invoice amount from 2003 as Marketing Charges. The Corporate Debtor for the first time in the said letter contended that there was delay in supply of the goods and also that since no technical support was coming from the Operational Creditor, the Corporate Debtor invested a lot of money for procuring additional materials to execute the orders of Maharashtra Police and also that the Corporate Debtor had to purchase essential spares to cover up warranty services and further that from 2003 till 2012, the Operational Creditor supplied large number of defective and substandard goods to the Corporate Debtor and the Corporate Debtor suffered loss and damage for the same and accordingly denied its liability to the Operational Creditor. Copy of the said reply letter dated 28th February, 2017 is annexed as Annexure-M.

24. It is submitted that the disputes raised by the Corporate Debtor are an absolute afterthought and a moonshine and the frivolity and baselessness of the contentions and the alleged attempted disputes can be well established from the fact that the same have been raised for the first time in the replies to the Statutory notice under sections 433,434 and 439 of the Companies Act, 1956 and in the reply to the Section 8 Notice. Quite contrary to the said allegations, in the several letters dated 31st December, 2013, 29th September,2014 , 2nd April, 2015 and 17th September, 2015 and in the

Minutes of the Meeting held on 4th and 5th April 2014, the Corporate Debtor has admitted the outstanding amounts and has on all occasions assured to repay the entire outstanding within to repay the entire outstanding within the dates proposed by the Corporate Debtor. The Operational Creditor submits that the clear unequivocal admission of the debts and the assurances to pay the outstanding amounts in 2013, 2014 and 2015 really establishes the frivolity of the alleged disputes. The Corporate Debtor has at no point of time notified the Operational Creditors about the defects in the goods or that it has to procure goods from the outside market due to the non-supply by the Operational Creditor but on the contrary at all times assured full payment of the outstanding invoices which they could not do due to extreme financial crunches.

25. It is submitted that the debt fell due after expiry of 90 days from the date of Invoices and therefore, the **debt fell due from 23rd July, 2013.**

26. The Operational Creditor has placed on the record all the purchase orders and invoices, warranty letter dated 31st December, 2013, minutes of the meeting dated **4/5th April, 2014**, letter dated 29th September, 2014, 2nd April, 2015 and letter dated 17th September, 2015 received from the Corporate Debtor.

27. It is submitted that the Operational Creditor served the Statutory Notice dated 26th August, 2016 claiming the outstanding operational debt as mentioned in Schedule -I. The Corporate Debtor also sent a reply dated 17th September, 2016 in response to the Statutory Notice and acknowledged the debt claimed by the Operational Creditor.

28. The Operational Creditor sent a rejoinder dated 24th October, 2016 to the said reply dated 17th September, 2016 which was again replied to by the Corporate Debtor vide letter dated 3rd December, 2016 followed by another letter dated 3rd February, 2017 of the Corporate Debtor.

29. It is submitted that the Demand Notice dated 15th February, 2017 under section 8 of the IBC was sent to the Corporate Debtor demanding the unpaid operational debt due against the Corporate Debtor and a reply thereto was sent on 28th February, 2017 issued by the Advocate of the Corporate Debtor. The Operational Creditor also filed an affidavit under section 9 (3)(b).

30. The total amount claimed by the Operational Creditor in **Part IV is USD 621,348.05 + interest @ 12%** per annum from the date of default till the date of realization. It is submitted that the debt originates from the transaction of supply of the aforesaid ordered goods.

31. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit.

32. **In reply to the petition**, the Corporate Debtor filed affidavit of Mr. Abhijit Datta Choudhury, the Senior executive (legal) of the Corporate Debtor. It is submitted by the Corporate Debtor that the Operational Creditor filed the present petition on 30th May, 2018 alleging non-payment of the dues aggregating a sum of USD 621,348.05 under the above purchase orders placed by the Corporate Debtor for import of various telecommunication products and accessories. Thereafter, the parties entered into a series of discussions, in pursuance whereof a Terms of Settlement/ Consent Terms were drawn up and executed between them on February 2nd February, 2019. (Annexure-B) and the said Settlement Agreement provided as under:-

Date of Payment	Amount
During 15.02.2019 to 14.03.2019	103,588.00
During 15.03.2019 to 14.04.2019	103,588.00
During 15.04.2019 to 14.05.2019	103,588.00
During 15.05.2019 to 14.06.2019	103,588.00
During 15.06.2019 to 14.07.2019	103,588.00
During 15.07.2019 to 14.08.2019	103,588.00

33. It is further submitted by the Corporate Debtor that, it was agreed that remittance will be made against different invoices and the amount vary marginally within a maximum limit of 5%. The net amount payable every month would be sent in multiple transactions based on different transactions.

34. It is submitted that based on the said settlement/consent terms, the corporate debtor through its letters March 13, 2019, and March 14, 2019, instructed its banker, Indian Overseas Bank having its branch office at Shreemani Market Branch, 204/1, Bidhan Sarani, Kolkata-700006, to remit a sum of USD 60000.00 and USD 43588.05 in favour of the operational creditor. Indian Overseas Bank through its letter dated March 15, 2019 bearing reference no. 275/2018-2019 informed the undersigned that it has been advised by its Central Foreign Exchange Department that since the Bill of Entry relates to 2012, approval of the Reserve Bank of India is required for making the payments and such payment can only be made once approval of the Regional Office of the Reserve Bank of India is obtained. (Annexure-D).

35. It is submitted that on or about March 19, 2019, the Corporate Debtor made an application before the General Manager, Reserve Bank of India, Foreign Exchange Department, 15, Netaji Subhas Road, B.B.D Bagh, Kolkata -700001, seeking Reserve Bank of India's approval for delayed remittance against import invoices as had been advised by its Banker. (Annexure-E).

36. It is submitted that the Reserve Bank of India by its letter dated April 02, 2019, a Photostat copy of whereof is enclosed ad Annexure-F, responded to the aforesaid letter advising the Corporate Debtor to route its request through its banker and returned the said application .Based thereon, the Corporate Debtor by its letter dated April 09, 2014, instructed its banker to pursue the issue with the Reserve Bank of India for obtaining necessary approvals to make the foreign remittances. All relevant documents as had been requested by Indian Overseas Bank over telephonic discussions as well

as in its letter dated Ma 31, 2019, were duly handed over, which has been recorded in the letters dated February 14, 2020, and March 16, 2020. (Annexure-G).

37. It is submitted that even after a lapse of a considerable period of time, approval from the Reserve Bank of India remained pending. Under such circumstances, on or about April 07, 2021, the undersigned once again wrote a letter to its banker requesting it to expedite the process of approval with the Reserve Bank of India. On the same day, another letter was addressed to the Reserve Bank of India requesting it to accord its approval to the delayed foreign remittance against import invoices. The aforesaid letters remain unanswered both by the banker and the Reserve Bank of India to this day. (Annexure-H).

38. It is submitted that since the Reserve Bank of India did not respond to the letters written by the corporate debtor nor accede to its request to grant necessary approval for the remittance of money in favour of the operational Creditor, the corporate debtor on or about August 05, 2021, has made a demand for justice before it. In the said letter the corporate debtor has elaborately explained the predicament faced by it at the hands of the operational creditor before this Adjudicating Authority. In addition, thereto, the corporate debtor has once again supplied all the relevant documents to the Reserve Bank of India and has undertaken to render necessary assistance to expedite the process of grant of approval. On the self-same day, the corporate debtor has sent another letter to its banker requesting it to simultaneously pursue the matter with the Reserve Bank of India.

39. On 14th February 2019, when the matter was listed before this Bench, Ld. Counsel for both the parties submitted that the matter had been settled between the parties and the Operational Creditor sought liberty to withdraw the petition. Permission was granted and the Terms of Settlement were filed on record and the matter was disposed of as withdrawn. The said Terms of Settlement are reproduced as under:-

“ 1. The petitioner has filed the present Company Petition under the Insolvency and Bankruptcy Code, 2016 seeking CIRP of the Respondent Company on account of financial incapability to pay the outstanding amount of USD 621,348.05 to the petitioner and the same is pending for adjudication before this Adjudicating Authority.

2. To settle the dispute between the parties, the Respondent Company admits that the entire outstanding dues of USD 621,438.05 is due and payable by the Respondent Company to the Petitioner and further agrees and undertakes to pay to the Petitioner the entire outstanding amount of USD 621,348.05 in the following manner to discharge its liability:

S.No.	DATE OF PAYMENT	AMOUNT (USD)
1.	During 15 th February to 14 th March, 2019	103,588.05
2.	During 15 th March to 14 th April, 2019	103,588.00
3.	During 15 th April to 14 th May, 2019	103,588.00
4.	During 15 th May to 14 th June, 2019	103,588.00
5.	During 15 th June to 14 th July, 2019	103,588.00
6.	During 15 th July to 14 th August, 2019	103,588.00

It is agreed that remittance will be made against different Invoices, amount may vary marginally month to month within a maximum limit of + 5% amount payable every month will be sent in multiple transactions based on different Invoices.

The Respondent Company shall make the aforesaid payments, by way of Telegraphic Transfer to the following Bank Account of the Petitioner:-

Beneficiary:- HYTERA COMMUNICATIONS CORPORATION LIMITED or HYTERA COMMUNICATIONS Corp. Ltd.

Bank Name: CHINA CONSTRUCTION BANK SHENZHEN BRANCH

Swift Code: PCBCCNBJSZX

Account Number: 4421 4800 8002 2010 2442

Bank Address: A Section, Rongchao Business Center, 6003 Yitian Road, Futian, District- Shenzhen, R.R.China.

3. The petitioner agrees that upon receipt of first two instalments from the Respondent on the dues dates as stated hereinabove, the Petitioner shall withdraw the instant Company Petition on the next date of the hearing.

4. That upon payment of the entire settlement amount of USD 621,348.05 by the Respondent to the Petitioner as per the aforementioned schedule, the petitioner shall not have any further claim of any kind whatsoever against the Respondent pertaining to the transaction that is the subject matter of this Company Petition.

5. *The Respondent undertakes to honour payment of each instalment on or before the aforesaid due date, and upon failure of payment of any instalment on or before the aforesaid due date, the entire balance amount shall immediately become due and payable by the Respondent.*

6. *The Respondent agrees and undertakes that, if it fails to make any of the aforementioned payments or part thereof or fails to do so within the due dates stated hereinabove, the petitioner is entitled to immediately seek appropriate remedies available to it in law to recover the balance settlement amount including without limitation, filing appropriate petitions for contempt of court and for reviving/filing proceedings for insolvency before the appropriate tribunal. If payment gets delayed for few days because of Bank Proceeding/Bank Holdings / Bank Strike, the same will not be treated as delay. However, this delay will not be more than 4 days from the cut of day.*

7. *Undertaking of Respondent Company is accepted.*

**For Hytera Communications
Corporation Limited**

(Petitioner)

**For Simoco
Telecommunications (South
Asia Limited**

(Respondent)”

40. Thereafter, M.A(IB)/48/KB/2020 was filed by the Operational Creditor and listed in Court on 8th January, 2020, when a notice was directed to be issued to the Corporate Debtor and the matter was again listed on 14th February, 2020.

41. Even on 30th August, 2021, the Ld. Counsel for the Corporate Debtor submitted that the Corporate Debtor was ready and willing to make the payment and, therefore, the following order was passed ;

“Ld. Counsel on both sides present.

It has been submitted across the Bar that the Corporate Debtor is ready and willing to make payment of USD 621348.05 which is due and payable to the Operational Creditor, subject to clearance from Reserve Bank of India which is being pursued by all available legal means. We record these submissions made by the Ld. Counsel for the Corporate Debtor, which is made upon specific instructions to this effect.

We feel that the interest of justice would be served if we direct the Corporate Debtor

to keep Indian rupee equivalent to this amount in fixed deposit and receipt in this regard to be handed over to the Registry of this Tribunal to establish bona fides of the Corporate Debtor. The tenure of the Fixed Deposit shall be for a period of six months in the first instance.

Ld. Counsel for the Corporate Debtor seeks three weeks to make deposit. At request and considering the circumstances and also the fact that the Corporate Debtor is stated to be an MSME, three weeks' time is granted. FDRs in this regard to be submitted to the Joint Registrar of this Tribunal on or before 30.09.2021.

This arrangement is acceptable to the Operational Creditor as submitted by the Ld. Counsel appearing on its behalf. List the matter on 05.10.2021”.

42. Thereafter, the matter was listed on various dates. The matter was finally heard and reserved for orders on 16/06/2022.

43. During the course of arguments, the Ld. Counsel for the **Operational Creditor** submitted that the Corporate Debtor had approached the Operational Creditor to purchase several electrical goods of large quantities. The Corporate Debtor had placed several purchase orders on the Operational Creditor and the three relevant purchase orders under which the operational debt arises are as follows:-

- a. Purchase order bearing no. SA-INSIMOC0120426 dated 26th April, 2012,
- b. Purchase Order bearing No. SA-INSIMOC0121206 dated 6th December, 2012.
- c. Purchase Order bearing No. SA-INSIMOC130118-R dated 30th January, 2013.

44. It is submitted that thereafter the Operational Creditor sold, supplied and delivered the Goods to the Corporate Debtor. The goods and invoices were duly received by the Corporate Debtor and the same is not in dispute. But the

Corporate Debtor failed to make payments and made few part payments and even after such part payments, a sum of USD 1,441,490.78 was still due and outstanding during the end of October, 2013.

45. It is submitted that after negotiations with the Operational Creditor, a guarantee letter was issued on 31st October, 2013 where the Corporate Debtor promised to pay the operational creditor the remaining outstanding amount of USD 1,441, 490.98 by April 15,2014. (Page 66 of the Petition).Thereafter, a joint discussion took place between the Operational Creditor and Corporate Debtor and during the said discussion, the Corporate Debtor agreed to resolve the issue of overdue payments and to pay all outstanding amounts from 7th April,2014 and undertook to pay all the invoices due and outstanding against PO no. SA-INSIMOCO12106 and SA-INSIMOCO120426, which was USD827,199.00 as on that date, on or before 15th August, 2014. The Corporate Debtor further provided a staggered payment schedule as regards invoices due against purchase order SA-INSIMOCO130118-R and undertook to pay off the entire outstanding invoices amounting to USD 425,338.00 as on that date from 8th April, 2014 till 12th June, 2014. (The minutes of the Meeting are at pages 67 -68 of the petition).

46. It is submitted that the Corporate Debtor thereafter vide its letter dated 29.09.2014 and 02.04.2015 committed and declared to the Operational Creditor that they will release all the outstanding payments.

47. It is submitted that the Corporate Debtor again vide letter dated 17.09.2015 acknowledged the outstanding debt and assured the Operational Creditor that they will pay approximately an amount of USD 160,000.00 by end of October,2015 and also an amount of USD 200.000.00 to USD 250,000.00 during the month of November and December, 2015.

48. It is submitted that the Corporate Debtor responded to the Companies Act, winding up statutory notice vide its letter dated 17th September, 2016 and acknowledged its liability and stated that the Corporate Debtor, shall reconcile their books and ascertain the exact claim due against the

Operational Creditor.

49. It is submitted that the Statutory Notice under section 8 of the Code was issued by the Operational Creditor on 15th February, 2017. Section 8 notice was responded to on 28th February, 2017 by the Corporate Debtor wherein frivolous disputes were raised once again, with several of them for the first time.

50. It is submitted that the Corporate Debtor had entered into a terms of settlement on 2nd February, 2019 wherein the entire amount of default of USD 621,348 has been admitted by the Corporate Debtor and the Corporate Debtor agreed to make payment of the entire default amount of USD 621.348 in 6 equal instalments in the following manner but failed and neglected to make any payment:-

- i. By 14th March, 2019- USD 1023558
- ii. By 14th April 2019- USD 103558
- iii. By 14th May 2019- USD 103558
- iv. By 14th June 2019- USD 103558
- v. By 14th July 2019- USD 103558

51. It is submitted that the Company Petition was disposed of on 14.02.2019 on the basis of the Terms of settlement but later revived on 14.02.2020 due to failure to pay as per the terms of settlement. The Corporate Debtor has not filed its reply affidavit in the matter since it admitted its dues and entered into a terms of settlement. Thus, there is no dispute raised by the Corporate Debtor, the claim is not barred by the laws of limitation and hence the Operational Creditor is praying for admission of the Company petition.

52. **During the course of arguments,** the Ld. Counsel for the Corporate Debtor submitted that where a statute does not permit transfer of money without necessary approval, such provision becomes an implied term in the contract. Sections 3(b) (Dealing in foreign exchange), 5 (Current account

transactions), 10(4)(Authorized persons), 11 (RBI's power to issue directions) and 13(1) (Penalties) of the Foreign Exchange Management Act, 1999 read with clauses B.1., B.2., B.5.1(i),B.5.1.(ii), B.5.4.(i) and B.5.4.(iii) Reserve Bank of India's Master Direction- Import of Goods and Services dated January 01, 2016, makes it mandatory for the Corporate Debtor to obtain RBI's (concerned regional office) approval for making delayed foreign remittance beyond a period of three years from the date of delivery of imported goods. Such statutory approval forms an implied term of the settlement agreement dated 02.02.2019 executed by Operational Creditor and Corporate Debtor and payments are prohibited from being made in the absence of such approval.

53. It is submitted by the Ld. Counsel for the Corporate Debtor that there exists no default on the part of the Corporate Debtor, pursuant to the settlement agreement and the terms implied therein, Corporate Debtor directed Indian Overseas Bank (IOB) to make payments on 13.03.2019 and 14.03.2019 (pages 15 to 17 of AR). IOB informed RBI's approval was required on 15.03.2019 (page 18 of AR). Application dated 19.03.2019 (pages 19 and 20 of AR) made to RBI by Corporate Debtor was returned advising Corporate Debtor to route its request through IOB on 02.03.2019 (pages 21 and 22 of AR). Since then several requests have been made to IOB and RBI (letters dated 09.04.2019, 16.03.2020, 07.04.2021 (2), 05.08.2021 (2) at pages 23,24, 27 and 29 to 41 of AR respectively). Owing to the inaction of RBI and IOB, a Writ Petition (filing no. 13669/21) had been filed before the Hon'ble High Court at Calcutta seeking necessary directions for grant of approval to make delayed foreign remittance.

54. The Corporate Debtor has performed its part of the contract and has taken all possible steps to obtain RBI's approval and to make payment to the Operational Creditor. However, due to pendency of such approval, the payment has been delayed. Corporate Debtor, is able, ready and willing to make the payments as soon as RBI's approval is obtained. Corporate Debtor does not appear to have committed any default under the settlement agreement and the instant CP alleging default cannot be proceeded with. The

order of revival of the company petition dated 14.05.2021, also mentions that it has been revived for certain technical purposes and not for non-adherence of the settlement terms.

55. It is submitted that the Corporate Debtor has acted in conformity with the settlement agreement. Non-payment is attributable to want of RBI's approval for which several letters and recently added petition has been filed. Corporate Debtor is a solvent company. The Operational Creditor has at all times been aware of the genuine difficulties faced by the Corporate Debtor and until the relationship between India and China deteriorated, the CD rendered its assistance and acted in a reasonable manner. Operational Creditor is attempting to trigger CIRP prematurely. It is always open for the Operational Creditor to obtain a decree against the Corporate Debtor based on the settlement terms from a civil court to satisfy its claim. However, the Corporate Debtor cannot make any payment without RBI's approval. It is submitted that even if this Adjudicating Authority passes an order triggering CIRP against the Corporate Debtor, the RP or the successful Resolution Applicant or in case of liquidation, the liquidator cannot make any payment to the Operational Creditor without obtaining necessary RBI approval for such purpose. The circumstances in the instant case are peculiar in nature and from the conduct of the Operational Creditor, it will be evident that it seeks to use this Adjudicating Authority as a recovery forum instead of awaiting the outcome of the writ petition to which it is a party. Once RBI approval is obtained, the Corporate Debtor will start making the payments contemplated under the settlement agreement.

56. It is submitted that this Adjudicating Authority in the exercise of its power under Rule 11 of the NCLT Rules read with the decision of the Hon'ble Supreme Court reported in (1993) 2 SCC 127 extend the time to make payment by Corporate Debtor. The Order dated 14.02.2019 was passed by this Adjudicating Authority pursuant to the settlement agreement. The settlement agreement merges with the order of this Adjudicating Authority and this Adjudicating Authority can assume jurisdiction to extend the time to

deposit the money to prevent manifest injustice in the peculiar circumstances of this case.

57. Having considered all the peculiar facts and circumstances and the law laid down by the Hon'ble Supreme Court and Hon'ble Appellate Tribunal, it will not be a practical approach to pass an order of CIRP in respect of the Corporate Debtor herein even though, the Corporate Debtor has acknowledged its debts and had made promises and undertakings to deposit the amount in Court. The main hurdle that is coming in the way of the Corporate Debtor in making payment of the outstanding debt is that it has to be paid in USD, subject to a clearance and NOC from the RBI, which has become necessary due to various circumstances beyond the control of the Corporate Debtor. The Corporate Debtor has submitted that it has tried its best to get the NOC from the Reserve Bank of India, for which repeated requests and reminders have been issued by the Corporate Debtor. The Corporate Debtor does not have any objection in making the payment immediately as soon as the Reserve Bank of India grants a permission to that effect. Another factor that goes in favour of the Corporate Debtor is that the Corporate Debtor had filed a writ petition being number as W.P.NO. 13669/2021, seeking directions upon the Reserve Bank of India for its inaction in granting the said permission and in spite of the directions passed by the Hon'ble High Court of Calcutta approval in making delayed foreign remittances has not been granted to the Corporate Debtor for making payment of the outstanding dues being claimed by the Operational Creditor in the present petition.

58. In the aforesaid circumstances, we have no other alternative but to hold that the Corporate Debtor has not committed any default and the failure of the Corporate Debtor in discharging the admitted outstanding debt has become a force majeure in this particular case. We clearly hold that this is an admitted and acknowledged outstanding debt owed to the Operational Creditor by the Corporate Debtor which has not been paid only because of

lack of the NOC/Permission to be issued by the RBI. We grant liberty to the Operational Creditor to claim the said amount which would be deposited by the CD in Indian rupees in the shape of an interest bearing deposit (FDR) within 60 days from today, and would remain lying with the Registry of this court, equivalent in US \$ outstanding, as and when the permission is granted by the Reserve Bank of India. The Operational Creditor can avail any legal remedy available to the Operational Creditor anywhere and anytime but the relief sought by the Operational Creditor in the present petition i.e. initiation of CIRP in respect of the CD, cannot be granted. It is also directed that the Corporate Debtor shall always cooperate and facilitate in obtaining the RBI Permission so that the payment can be withdrawn from the Registry as early as possible.

59. With the aforesaid directions, the present petition is disposed of.

60. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on the 12th day of July, 2022

PJ