

NATIONAL COMPANY LAW TRIBUNAL

GUWAHATI BENCH

GUWAHATI

CP. (IB) No. 12/GB/2021

Coram: Hon'ble Shri H.V Subba Rao, Member (J)

: Hearing through

Hon'ble Shri Prasanta Kumar Mohanty, Member (T)

: Video Conferencing

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF THE NATIONAL COMPANY TRIBUNAL,
GUWAHATI BENCH ON 07/10/2021.**

Name of the Company: SREI Infrastructure Finance Ltd. Operational Creditor
V/S
Assam Electronics Development Corporation Ltd.
(AMTRON) Corporate Debtor

Section : Under section 8 & 9 of the Insolvency and Bankruptcy Code, 2016.

S.No.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	MR. S. BANERJEE	Advocate	Petitioner	Present in video
2.	NONE	Advocate	Respondent	Conference

ORDER

The Applicant is represented through respective Learned Counsel (s).

The case is fixed for pronouncement of order.

The Order is pronounced in the open court, Through Video Conferencing vide separate sheet.

Sd/-

**(PRASANTA KUMAR MOHANTY)
MEMBER (T) &
ADJUDICATING AUTHORITY**

Sd/-

**(H.V SUBBA RAO)
MEMBER (J) &
ADJUDICATING AUTHORITY**

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

CP (IB) No. 12/GB/2021

In the matter of:

SREI Infrastructure Finance Limited

Having Office at Vishwakarma, 86C, Topsia
Road (South), Kolkata and having Guwahati
Branch Office at House no. 4, Surjmukhi Path
RG Barua Road, Guwahati-781005

.... Operational Creditor

VERSUS

Assam Electronics Development Corporation Ltd.

(AMTRON) Having registered office at
Industrial Estate, Bamunimaidan
Guwahati-781021, Assam

.... Corporate Debtor

Order delivered on 07/10/2021

Coram: Hon'ble Mr. H. V SUBBA RAO, MEMBER (J)

Hon'ble Mr. PRASANTA KUMAR MOHANTY, MEMBER (T)

Dated: 07/10/2021

ORDER

[Per se: Hon'ble Shri Prasanta Kumar Mohanty, Member (T)]

1. The present petition has been preferred by the Applicant/Operational Creditor, SREI Infrastructure Finance Limited under Section 8 & 9 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as a "Code") seeking for initiation of Corporate Insolvency Resolution Process ("CIRP" in short) in respect of the Corporate Debtor Company, namely, Assam Electronics Development Corporation Limited (AMTRON).
2. The Petitioner/Operational Creditor namely SREI Infrastructure Finance Limited (CIN: L29219WB1985PLC055352) is having its Registered Office at Vishwakarma, 86C, Topsia Road (South), Kolkata-700046 and having Guwahati Branch Office at House no. 4, Surjmukhi Path, RG Barua Road, Guwahati-781005.
3. The Respondent/ Corporate Debtor, namely Assam Electronics Development Corporation Limited (AMTRON), was incorporated on 4th April, 1984 with CIN-U31909AS1984SGC002155. The Registered Office of the Corporate Debtor is situated at: Industrial Estate, Bamunimaidan, Guwahati-781021, Assam.
4. The Authorized Capital of the Corporate Debtor Company i.e. Assam Electronics Development Corporation Limited (AMTRON) is Rs. 10,00,00,000 (Rupees Ten Crores only) and the Paid-up capital is Rs. 9,46,48,000 (Rupees Nine Crore Forty Six Lakhs Forty Eight Thousand only).

5. It is submitted by the Petitioners that the Respondent/ Corporate Debtor is indebted to the Petitioners for **Rs. 164,08,46,620** (Rupees One Hundred and Sixty Four Crores Eight lakhs Forty Six Thousand and Six Hundred and Twenty Only) due and payable as on **30th November, 2020** including Principle dues of **Rs. 32,81,70,628** (Rupees Thirty Two Crores Eighty One Lakhs Seventy Thousand and Six Hundred and Twenty Eight Only) and Interest calculated as per SBI PLR thereupon against the outstanding Principal amount in respect of the various invoices raised.

6. That the Principal Amount is of **Rs.32,81,70,628** (Rupees Thirty Two Crores Eighty One Lakhs Seventy Thousand and Six Hundred and Twenty Eight Only) upon adjusting the last payment made by the Corporate Debtor vide cheque bearing number 567569 dated 31st December, 2018 for an amount of Rs. 5,01,52,872 (Rupees Five Crores One lakh Fifty Two Thousand Eight Hundred Seventy Two Only), which has been contemplated as the last date of payment, no further payments were made thereafter.

Hence, the last date of payment for the purpose of calculating the limitation starts to run on and from **31st December, 2018**.

7. It is submitted that SREI Infrastructure Finance Ltd. the Operational Creditor, got a mandate in response to Request For Proposal (RFP) from Assam Electronics Development Corporation Limited, the Corporate Debtor, herein, to be Service Centre Agency (hereinafter also referred to as "SCA"), vide letter dated 7th January, 2008 to rollout, implement, operationalize and manage 2833 Common Service Centres (hereinafter also referred to as "CSC") across two groups of districts in the State of Assam through Special Purpose Vehicle, E-Village Kendra Limited (formerly Sahaj E-Village Limited).

8. It is submitted that pursuant to the mandate, Master Service Agreement dated 14th March, 2008 was executed between the Corporate Debtor (a Govt. of Assam

undertaking) and the Financial Creditor. A copy of the Master Service Agreement dated 14th March, 2008 is annexed herewith and marked as **ANNEXURE-D**. The said agreement completed its validity in the year 2012.

9. It is submitted that a letter was sent to the Corporate Debtor dated 17th October, 2012 by the said company requesting the said company to extend the validity of the Master Service Agreement for a further period of 4 years and mentioning about the project completion as per the Master Service Agreement executed between the parties. A copy of the letter dated 17th October, 2012 is annexed herewith and marked as **ANNEXURE-E**.

10. Thereafter, Master Service Agreement was again executed dated 11th day of August, 2014. A copy of the Master Service Agreement dated 11th Day of August, 2014 is annexed herewith and marked as **ANNEXURE-F**.

11. It is submitted that the Operational Creditor was appointed as Service Centre Agency (hereinafter referred to as "SCA") for providing Government and Non-Government/Private services to the citizens of India residing in the rural territory of the State of Assam through CSC's.

2833 CSCs were mandated to be developed and SCA has made huge investment and rolled out CSCs on built-own-operate basis.

12. It is submitted that as agreed per the Master Service Agreement, the revenue support by the Corporate Debtor was to be Rs. 7500/- per month per CSCs located in Group-II districts and Rs. 7000/- per month for Common Service Centre in Group III. The list of districts in each of Group II and Group III is mentioned in the Bid document.

13. It is submitted that the Corporate Debtor could not make available Government to Customer (G2C) services through the CSCs till September, 2015. The Operational

Creditor, therefore could not pass on the same to the end customers leading to losses to the Operational Creditor.

The Operational Creditor inspite of all the hurdles was able to successfully roll out all the required CSCs by March, 2011.

14. It is submitted that in lieu of the services provided by the Operational Creditor and as per the Master Service Agreement, the said company raised invoices for Revenue support totaling Rs. 97,79,29,500/- (Rupees Ninety Seven Crores Seventy Nine lakhs Twenty Nine thousand and Five Hundred only) based on rollout of the mandated 2833 CSCs.
15. It is submitted that the Operational Creditor raised it's invoices in a timely manner as per clause 3.2 of the Master Services Agreement (MSA) but the said invoices were never settled in full and in a timely manner resulting in losses. The copies of the various invoices raised between the years 2009-2013 totalling Rs. 97,79,29,500/- (Rupees Ninety Seven Crores Seventy Nine Lakhs Twenty Nine Thousand and Five Hundred only) is annexed herewith and collectively marked as **ANNEXURE-G**.
16. It is submitted that out of the amount raised for Rs. 97,79,29,500/- (Rupees Ninety Seven Crores Seventy Nine lakhs Twenty Nine thousand and Five Hundred only) as per invoices detailed hereinabove, an amount of Rs. 64,97,58,872/- (Rupees Sixty Four Crores Ninety Seven lakhs Fifty Eight Thousand Eight Hundred and Seventy Two only) has been received and after receipt of the said amount, an amount of Rs. 32,81,70,628/- (Rupees Thirty Two Crores Eighty One Lakhs Seventy Thousand and Six Hundred and Twenty Eight Only) is the principal amount outstanding along with interest, still due and payable. A copy of the ledger account depicting the invoices raised, amount collected, their corresponding dates and the principal amount outstanding is annexed herewith and marked as **ANNEXURE-H**.

17. A copy of ICICI Bank Account Statements and relevant "Transaction Inquiry" sheet further evidencing the amount received from time to time and the corresponding dates since the year 2012 is annexed herewith and marked as **ANNEXURE-I**. A copy of the summary of the tabulation of Interest calculated as per SBI PLR & totaled for every year is annexed herewith and marked as **ANNEXURE-J**.
18. It is again submitted that in reference to the invoice dated 2nd May, 2017 for the period January, 2013 to March, 2016 raised by the said company, a letter addressed to the said company dated 1st September, 2018 was issued by the Corporate Debtor which was deemed as a full and final settlement of Revenue Support receivable for the CSC Project. A copy of the said letter dated 1st September, 2018 along with the tabulation sent is annexed herewith and marked as **ANNEXURE-K**.
19. It is submitted that in reply to the letter dated 1st September, 2018, the Operational Creditor through the Special Purpose Vehicle, vide a letter dated 25th January, 2019, expressed shock to receive a cheque bearing no. 567569 dated 31st December, 2018 for an amount of Rs. 5,01,52,872 (Rupees Five Crores One Lakh Fifty Two Thousand Eight Hundred Seventy Two Only) when the outstanding amount was in excess of Rs. 32,00,00,000/- (Rupees Thirty Two Crores Only). The principal outstanding will be evident from the invoices annexed hereto. A copy of the letter dated 25th January, 2019 is annexed herewith and marked as **ANNEXURE-L**. Calculation Sheet of the Total due and payable amount is annexed herewith and marked as **ANNEXURE-M**.
20. In view of the above, it is clear that the Corporate Debtor does not intend to make the requisite payment to the Operational Creditor despite completion of the roll out of the CSCs as per the terms and conditions of the Master Service Agreement entered into between the Operational Creditor and the Corporate Debtor mentioned hereinabove. Since, no further payments were made, the Operational

Creditor was compelled to issue a demand notice under Form 3 (Demand Notice) on behalf of SREI Infrastructure Finance Limited, upon the Corporate Debtor dated 9th February, 2021. A copy of the Demand Notice dated 9th February, 2021 along with the copy of the track report is annexed herewith and collectively marked as **ANNEXURE-N.**

21. That an affidavit in opposition on behalf of the Respondent dated 28.07.2021 was filed by Shri Mahendra Kumar Yadava, the Managing Director of Assam Electronics Development Corporation Limited (hereinafter referred to as AEDC) Bamunimaidam, Guwahati-781021. In the affidavit the following observations are made:-

4. That the present petition is not maintainable in law or facts. It is specifically stated that the Operational Creditor has wrongly construed facts and circumstances and misrepresented the facts. The Operational Creditor has suppressed very material facts of filing of an Arbitration Petition before the Hon'ble Gauhati High Court to invoke the Arbitration proceeding for settlement of its alleged claim of an amount of Rs. 36,24,48,303 (Rupees Thirty Six Crores Twenty Four Lakhs Forty Eight Thousand Three Hundred and Three) only arising out of the same issues for which the Operational Creditor has approached before this Hon'ble Tribunal. The aforesaid case has been numbered as Arbitration Petition no. 24/2019 and the same is pending for disposal before the Hon'ble Court.

It be mentioned that as per the representation dated 25.01.2019, annexed in the affidavit in opposition by the Operational Creditor in the Arbitration case, the claim amount has been mentioned as Rs. 32,81,70,628 (Rupees Thirty Two Crores Eighty One Lakhs Seventy Thousand Six Hundred and

Twenty Eight) only the alleged outstanding amount has been shown as Rs. 36,24,48,303 (Rupees Thirty Six Crore Twenty Four Lakhs Forty Eight Thousand Three Hundred and Three) only in the Arbitration Case where reference has been made of the same representation dated 25.01.2019.

Copy of the Arbitration Case no. 24/2019 is annexed with the affidavit in reply and marked as **Annexure-A**.

5. That, the answering Respondent states that the present petition is liable to be dismissed for the reason that when the Operational Creditor has already approached the Hon'ble Gauhati Court to refer the matter to the Arbitral proceeding by invoking clause 8.1 (c) of the MSA (Master Service Agreement) executed between the parties to settle the disputes between the parties, the present petition does not lie and as such liable to be dismissed. In this regard, the operational Creditor has also submitted representation dated 25.01.2019 whereby request was made to release the outstanding amount of Rs. 32,81,70,628 (Rupees Thirty Two Crores Eighty One Lakhs Seventy Thousand Six Hundred and Twenty Eight only) and on failure to release the amount, the operational creditor shall take the recourse to Section 8.1 (c) of the MSA (Master Service Agreement).

Copy of the letter dated 25.01.2019 is annexed with the affidavit in reply and marked as **Annexure-B**.

6. That, the Operational Creditor got a mandate in response to the Request for Proposal (RFP) from the answering respondent to roll out, implement 2833 Common Service Centre (CSC). The Common Service Centre (CSC) project was one of the core

Infrastructure project under the National e-Governance Program of Govt. of India which was implemented by the answering respondent as a nodal agency of IT Department of Govt. of Assam. The Government of India due to various reasons has extended the project period and accordingly, the answering Respondent renewed the MSA for another period of 4 years i.e. 2012-2016.

The Total agreed revenue support as per the MSA to be provided to the operational Creditor (SREI) was Rs. 98,31,60,000/-. Out of the total revenue support, an amount of Rs. 9,83,16,000/- was released in two Installments on 27.06.2008 and 31.03.2009. Further, payments of an amount of Rs. 30,72,81,000/- had also been made for the period 1st April, 2009 to March, 2012.

7. That the answering respondent states that as per the correspondences and meetings held by the authorities for successful implementation of the project, the authorities had shown its displeasure for poor performance by the operational creditor and advised to improve the performances to get the desired result as per the true intent of the schemes floated by the Government of India where the answering respondent is the nodal agency under IT Department under Government of Assam.
8. That, the answering respondent states that in spite of all these odds of poor performance, time to time payments have been made to the Operational Creditor/Petitioner within the ambit of the MSA.

As per Clause 3.2 (c) of the MSA," payment of the financial support was supposed to be made by Govt. of Assam/SDA to the SCA within 21 working days of the receipt of Invoice by the GOA subject to the adjustment of the liquidated damages and set of against revenue generated out of Government services through the CSC and surplus payments made, if any, during previous quarter"

Further, as per Clause 3.2 (d) reads as follows " The Govt. of Assam shall be entitled to delay or withhold payment of any invoice or part of it delivered by the SCA where the Govt. of Assam disputes such invoice or part of it provided that such dispute is bona fide. The withheld amount shall be limited to that which is in dispute. The dispute amount shall be settled in accordance with the escalation procedure as set out in the MSA.

The answering respondent has have already made final payments deducting the penalty amounts and others on 31st December, 2018. The answering respondent has nothing to pay arising out of the aforesaid contract.

9. That, the answering respondent states that as per the terms of the revised MSA, for the period of April, 2012 to December,2012,claims and settlements were made between the petitioner and the respondents and final payments of an amount of Rs. 9,40,09,000 (Rupees Nine Crore Forty lakhs Nine Thousand) only to the petitioner/Operational Creditor.That, the answering respondent states that for the subsequent period from January, 2013 to March, 2016, a bill for an amount of Rs. 26,41,35,500 was raised by the Petitioner against which an

advance amount of Rs. 10,00,00,000/- were released in two installments of Rs. 5,00,00,000/- each on 08.09.2017 and 26.09.2017.

Thereafter, the bill was examined against available proof of CSC transaction and OMT Status. OMT Uptime report was given for each of the 39 months only except for the period of August, 2015 to December, 2015 and January, 2016 to March, 2016. The petitioner/Operational Creditor could not provide the B2C service transaction for the said period, The OMT record of 39 months was certified by the CSC-SPV.

10. That, the answering respondent states that final payments of an amount of Rs. 5,11,76,400/- has been paid to the Operational Creditor/ Petitioner towards the full and final payments after adjusting the penalty amount and statutory deductions as per clause 4.1 of MSA executed between the parties. This has been communicated to the petitioner vide letter dated 01.09.2018 and final payments has also been made to the Operational Creditor on 31.12.2018.

Copy of the Letter dated 01.09.2018 is annexed with the affidavit in reply and marked as **ANNEXURE C.**

11. That, the answering respondent states that the Operational Creditor had failed in discharging its duty as per the terms of the MSA which also reflected as per the minutes of the meetings and correspondences, the petitioner/Operational Creditor was directed to install OMT Software within 20 days in all the CSC's which the petitioner miserably failed. Further, in the meeting held on 14th June, 2011, both the parties stressed on the fact

that there should be an option to show the VLE logged on to the OMT even they are doing offline. Moreover, in the minutes dated 6th July, 10th Empowered committee, it was clearly directed in point-2 of the guidelines that the states should provide revenue support only for the operational CSCs.

Copy of the minutes of Meetings and correspondence are enclosed herewith and Marked as **ANNEXURE-D Series**

12. That, the Respondent humbly submits that the petitioner/Operational Creditor has failed to make out a case for grant of any relief to him as prayed for and therefore the present petition is liable to be dismissed. The answering respondent has made all the payments to the Operational Creditor and there is nothing is to pay to the Operational Creditor. The answering deponent has made the final payments to the operational Creditor after adjusting the penalties etc.
22. In response to the affidavit in opposition submitted by the Corporate Debtor, the constituted attorney of the Operational Creditor i.e. Mr. Joydeep Datta Gupta have filed its reply dated 13/08/2021. The following observations were made in the said reply:-
3. With reference to the paragraphs 1,2,3,4 and 5 of the said affidavit, the Operational Creditor deny and dispute all allegations contained therein, save and except those which are matters of record before this Hon'ble Tribunal. It is denied and disputed that the petition lacks substance and is liable to be dismissed at the threshold, as alleged or at all. It is denied and disputed that the petition is not maintainable in law and in facts of the instant case, as alleged or at all. It is denied and disputed that the Operational Creditor (OC) has

wrongly construed any facts and circumstances and has misrepresented the facts, as alleged or at all. It is denied and disputed that the Operational Creditor has suppressed material facts at the time of filing of any arbitral proceedings before the Hon'ble Gauhati High Court invoking the arbitration clause for settlement of the claim for an amount of Rs. 36,24,48,303/- arising out of the same issues for which the Operational Creditor has approached before this Hon'ble Tribunal as alleged or at all. In law the Arbitration Petition No. 24/2019 is not an embargo for filing of an application under Section 9 of the Insolvency and Bankruptcy Code, 2015 before this Hon'ble Tribunal. The OC reserve the rights to make appropriate submissions with regard to the position of law with respect to these issues at the time of hearing of the application, if necessary. The OC deny and dispute that there is any relevance of the Arbitration Case No. 24 of 2019 with the present proceedings, as alleged or at all. The OC deny and dispute that the present petition is liable to be dismissed since the Operational Creditor had approached the Hon'ble Gauhati Court with respect to the Arbitration Petition No. 24 of 2019. as alleged or at all.

4. With reference to paragraph 6,7,8,9 and 10 of the said affidavit, the OC deny and dispute all allegations contained therein, save and except those which are matters of record before this Hon'ble Tribunal. The OC says that in fact from their own pleadings itself it is an admitted fact now that a sum in excess of Rs. 32,81,70,628/- is due and payable by the Corporate Debtor to the Operational Creditor as has been stated in the said petition before this Hon'ble Tribunal and therefore on such admission made by the Corporate Debtor the Operational Creditor is entitled to the reliefs as prayed for before this Hon'ble Tribunal. It is denied and disputed that there

has been any poor performance and/or any displeasure as far as the Operational Creditor is concerned, as alleged or at all. On the contrary, it is apparent that the Corporate Debtor was unable to provide the services under the MSA Agreement in view of which the business suffered a loss and the OC had to bear such loss until the claim of the OC was made before this Hon'ble Tribunal for recovery of the same. It is denied and disputed that there is any poor performance on the part of the Operational Creditor under the MSA Agreement. In fact, there is not a scrap of paper which indicates such allegations made by the Corporate Debtor. It is denied and disputed that time to time payment has been made under the MSA Agreement to the Operational Creditor by the Corporate Debtor, as alleged or at all. The OC say that on the contrary, in view of the non-payments being made by the CD and for non-performance on the part CD, the OC is entitled for a sum of Rs. 164,08,46,620/- and the reliefs as prayed for in the said petition pending before this Hon'ble Tribunal. It is denied and disputed that the answering respondent unilaterally could have made any final payments after deducting any alleged penalty amount and others as on 31st December, 2018, as alleged or at all. The OC says that on the contrary, there is not a scrap of paper demonstrating even before this Hon'ble Tribunal in the said affidavit which entitles the Corporate Debtors to any reliefs under Clause 3.2 (c) and Clause 3.2 (d) of the MSA Agreement. The OC say that therefore these allegations are baseless and has no foundation at all. It is denied and disputed that the answering respondent has nothing more to pay under the aforesaid MSA Agreement to the Operational Creditor, as alleged or at all. It is denied and disputed that there is any settlement reached at between the Operational Creditor and the Corporate Debtor and final payment of an amount of Rs. 9,40,09,000/- was only payable, as alleged or

at all. The OC say that there is no such settlement document demonstrated before this Hon'ble Tribunal by the Corporate Debtor and in absence of the same any allegations made by the Corporate Debtor does not have any legs to stand. It is denied and disputed that the Operational Creditor could not provide the B2C service transaction for the period of August, 2015 to January, 2016 and January, 2016 to March, 2016, as alleged or at all. The OC say that such allegation has been again made by the CD without any document whatsoever and has made no relevance at all. It is denied that the CD could have made a paltry payment of Rs. 5,11,76,400/- as full and final payment unilaterally after adjusting any alleged penalty and other statutory deductions as per Clause 4.1 of the MSA Agreement between the parties without raising any such dispute and/or allegation prior to the said OC as alleged or at all. The OC say that the letter dated 1st Sept, 2018 has been replied by the OC by its letter dated 25th January, 2019 wherein very categorically and clear by stating that the conduct of the Corporate Debtor was unilateral and contrary to the agreement between the parties. A copy of the letter dated 25th January, 2019 is annexed hereto and marked with letter "A". The OC say that further the CD has replied on certain letters but has suppressed to replies given to the said letters in respect of which no rejoinders were issued by the CD accepting the fact as stated by the OC in its reply to the aforesaid letter to be true and correct. The OC say that the purported letter dated 18th June, 2010 was replied by the OC by its letter dated 8th July, 2010 which has been purposefully suppressed by the CD before this Hon'ble Tribunal which clearly states that the statements made by the CD in its letter dated 18th June, 2010 are completely false and frivolous. Furthermore, the OC say that the letter dated 3rd September, 2010 as enclosed by the CD was replied by the OC by its letter dated 20th

September, 2010 and 21st September, 2010 which has been also suppressed by the Corporate Debtor to mislead this Hon'ble Tribunal of the correct facts. Further, the CD has also enclosed another letter dated 3rd August, 2012 but has suppressed their reply dated 17th October, 2012 issued by the OC which clearly shows further representations being made by the CD just to make up a purported defence before this Hon'ble Tribunal, which is not maintainable in law and in the facts of the instant case. Copies of the letter dated 8th July,2010; 20th September,2010; 21st September,2010 and 17th October, 2012 are enclosed hereto and collectively marked with letter "B", "C", "D" and "E" respectively.

5. With reference to Para 11 and 12 of the said affidavit, the OC deny and dispute all allegations contained therein, save and except those which are matters of record before this Hon'ble Tribunal. It is denied and disputed that the Operational Creditor has ever failed to discharge its duties as per the terms of the MSA Agreement and/or the same is any further reflected in the minutes of the meeting or the copies enclosed therein, as alleged or at all. The OC on the contrary says that, said minutes only discloses negligence and the non-cooperation and non-service on the part of the Corporate Debtor, which the OC wish to rely upon at the time of hearing of the instant application. It is denied and disputed that the Operational Creditor has failed to make out a case for grant of any reliefs as prayed by it before this Hon'ble Tribunal as alleged or at all. It is denied and disputed that the instant petition is liable to be dismissed, as alleged or at all. It is denied and disputed that the Corporate Debtor has made all the payments to the Operational Creditor and there is no amount any due and payable by the Corporate Debtor to the Operational Creditor as alleged or at all. It is denied and disputed

that the CD has made the final payment to the OC adjusting any alleged penalty etc., as alleged or at all. The OC on the contrary say that, the Corporate Debtor has miserably failed to pay under the terms and conditions of the MSA Agreement as they have not fulfilled the same and/or that the Operational Creditor has not been paid full and final payment under the MSA Agreement in terms of the work which they have executed under the aforesaid agreement. The OC further says that the Corporate Debtor has failed to disclose any scrap of document thereby demonstrating any settlement reached at between the parties in respect of such agreement between the parties whereby the OC has accepted the payment of Rs. 5,11,76,400/- as full and final payment under the aforesaid MSA Agreement. The OC says that in absence of any defence being established by the Corporate Debtor before this Hon'ble Tribunal the Operational Creditor is entitled to the reliefs as prayed in the said petition pending before this Hon'ble Tribunal in its favour.

23. That a written submission has been filed on behalf of the Corporate Debtor dated 28.09.2021 wherein the Corporate Debtor begs to state the below mentioned submissions:-

- 1) The Present case has been filed by the Operational Creditor/Petitioner against the Corporate Debtor/Respondent for initiation of Corporate Insolvency Resolution Process under Section 8 and 9 of the Insolvency and Bankruptcy Code, 2016 for realization of alleged outstanding amount of Rs. 164,08,46,620/-.
- 2) The Corporate Debtor/Respondent on receipt of notice appeared before the Hon'ble Tribunal and filed the Affidavit in Opposition challenging the maintainability of the petition on the ground that

Arbitration process has been initiated by the Operational Creditor/Petitioner itself and moreover, Operational Creditor/Petitioner is not entitled for any amount from the Corporate Debtor/Respondent since final payment had been made to the Operational Creditor/Petitioner on 31.12.2018.

- 3) That, Corporate Debtor/Respondent submits before your this Tribunal that Corporate Debtor/Respondent duly considered all the invoices and bills submitted by the Operational Creditor/Petitioner and accounts was settled which was duly communicated vide letter dated 01.09.2018 (**Annexure C of the Affidavit of Opposition**) and final payments was made as per the terms of Master Service Agreement entered between the Operational Creditor/Petitioner and Corporate Debtor/Respondent. The Operational Creditor/Petitioner did not responded to the letter dated 01.09.2018 communicated to them and duly received an amount of **Rs. 5,01,52,872/-** on 31.12.2018.
- 4) That, Corporate Debtor/Respondent submits that after receipt amount, vide letter dated 25.01.2019, the Operational Creditor/Petitioner raised the dispute regarding the outstanding dues and submit representation in terms of Section 8 and Schedule-4 of the Master Service Agreement. By the said letter dated 25.01.2019 for the first time, The Operational Creditor/Petitioner allegedly claimed an amount of Rs. 32,81,70,628/- is to be paid by the Corporate Debtor.
- 5) That, the Corporate Debtor/Respondent submits that raising the disputes over the amount, the Operational Creditor/Petitioner filed the Arbitration Petition before the Hon'ble Gauhati High Court to invoke the Arbitration proceeding for the settlement of its alleged

claim of an amount of **Rs. 32,81,70,628/- (Rupees Thirty Two Crores Eighty One Lakhs Seventy Thousand Six Hundred and Twenty Eight) only**. The aforesaid case was numbered as **Arbitration Petition no. 24/2019**.

- 6) That, the Corporate Debtor/Respondent submits that suppressing the aforesaid facts of filing of Arbitration petition before the Hon'ble High Court, the Operational Creditor/Petitioner filed the present petition which has been arisen out of the same contract. There is a plethora of decisions that when Arbitration proceeding has been invoked by the parties, other proceeding will not be maintainable.

In this regard, the Corporate Debtor/respondent placed reliance on Two of the Judgements of the **Hon'ble National Company Law Appellate Tribunal** where it has been taken note of the fact that where an Arbitration Clause Exists, **the Court has a mandatory duty to refer dispute arising between the Contracting Parties to Arbitration**.

A) Order dated 09.06.2020 passed in IA No. 3579/2019 in CP (IB) No. 3077/2019 by the Hon'ble NCLAT, Mumbai Bench-IV.

B) Order dated 04.07.2018 passed in Company Appeal (AT) (INSOLVENCY) No. 251 of 2017, New Delhi

- 7) That, the Corporate Debtor/Respondent further submits before this Tribunal that the Hon'ble Supreme Court in P. Anand Gajapathi Raju & others Vs. PVG Raju (Dead) & others, held that the

language of Section 8 of the Arbitration & Conciliation Act, 1996 is peremptory and the Court is under obligation to refer the parties to Arbitration.

8) That, the Corporate Debtor/Respondent submits before this Tribunal that the Hon'ble Supreme Court in P. Anand Gajapathi Raju & others Vs. PVG Raju (Dead) & others, held that the language of Section 8 of the Arbitration & Conciliation Act, 1996 is peremptory and the Court is under obligation to refer the parties to Arbitration.

9) That, the Corporate Debtor/Respondent submits before this Tribunal that Arbitration petition filed by the Operational Creditor/Petitioner before the Hon'ble High Court bearing Arbitration Petition No. 24/2019 has been disposed of vide Order dated 23.09.2021 and with the consent of the Parties- The Operational Creditor/Petitioner and Corporate Debtor/Respondent, Mr. P.C. Borpujari, Retired AJS and Retired District and Session Judge has been appointed as the Sole Arbitrator in terms of the Master Service Agreement.

Copy of the order dated 23.09.2021 passed in Arbitration Petition No. 24/2019 by the Hon'ble Gauhati High Court is annexed herewith.

In view of submission made above on behalf of the Corporate Debtor/Respondent, it is humbly submitted that the present petition filed by the Operational Creditor/Petitioner is not maintainable and liable to be dismissed with cost.

ORDER

24. Heard the Counsels of both the Petitioner and the Respondents at length and perused the documents submitted including the Affidavit filed by the Respondent on 28/09/2021.

25. It is observed from the documents made available that the Operational Creditor/Petitioner here has filed an Arbitration Petition No. 24/2019 before the Hon'ble High Court, Guwahati stating that the total amount of Revenue support released by the Respondent, has triggered a dispute among them and as the Master Service Agreement provides for an arbitral clause for settlement of disputes among the parties, the Petitioner has approached this Hon'ble High Court for appointment of Arbitrator as per the provisions of Section 11(4) of The Arbitration & Conciliation Act 1996 (as amended till date).

25.1) It is further stated by the Petitioner in the said Complaint that there is no other efficacious and alternative remedy available to the Petitioner for redressal of his grievances than to approach this Hon'ble High Court by preferring the instant petition for appointment of Ld. Arbitrator by this Hon'ble High Court.

25.2) It is therefore prayed by the Petitioner before the Hon'ble High Court that your Lordship may be graciously pleased to admit this arbitration petition, issue notice upon the Respondents calling upon them to show cause as to why a Ld. Arbitrator shall not be appointed to arbitrate and settle the disputes among the parties, and after hearing both the parties be pleased to appoint a Ld. Arbitrator by exercising its power vested upon it by virtue of Section 11(4) of The Arbitration & Conciliation Act, 1996 for arbitrating the disputes between the parties for the ends of justice, and/or pass any other order/orders your Lordships may deem fit and proper

26. The same Petition has been disposed of by the Hon'ble High Court on 23/09/2021 and appointed Mr. P.C Borpujari, Retired AJS & Retired District and Sessions Judge as the Sole Arbitrator with the consent of the parties.

27. Hence, it is clearly established that there is an existence of dispute prior to issuing of demand notice/filing of the application as the Applicant here itself has gone to Hon'ble High Court in the year 2019 and thereafter this Application has been filed by the Petitioner under Section 9 of the IBC before this Bench on 10/04/2021.

28. One of the main provisions under Section 9 of IBC is that, if there is an existence of dispute prior to issuing of demand notice by the OC, then the said Application needs to be rejected.

29. Considering the points mentioned above, this Application filed under Section 9 of IBC is hereby rejected.

30. However, we are making it clear that this application is rejected only under the Section 9 of IBC but the Applicant may proceed, if otherwise eligible, in accordance with the provisions of law before an appropriate forum.

31. An authentic copy of this order to be communicated by the Registry to the Operational Creditor as well as to the Corporate Debtor.

32. Hence, this Application filed under Section 9 of IBC is rejected so as to no cost.

Sd/-

**(PRASANTA KUMAR MOHANTY)
MEMBER (T) &
ADJUDICATING AUTHORITY**

Sd/-

**(H.V SUBBA RAO)
MEMBER (J) &
ADJUDICATING AUTHORITY**