

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)**

**CA Nos. 458/2019, 769/2019,
892/2019 & IA No. 947/2020**

**In
CP (IB) No. 159/Chd/PB/2018
(admitted)**

Under Section 60(5) of IBC, 2016

In the matter of:

Oriental Bank of Commerce

....Petitioner-Financial Creditor

Versus

M/s. Millennium Wires Private Ltd.

....Respondent-Corporate Debtor

And in the matter of CA No. 769/2019:-

MMTC Ltd.
CORE -1, SCOPE Complex
7, Institutional Area, Lodhi Road
New Delhi -110003

...Applicant

vs.

Subhash Saini, Liquidator
of M/s. Millennium Wires Private Limited
having its registered address at
Flat No. 1405, Ground Floor, Sector 61,
Chandigarh-160036

...Respondent

AND

In the matter of CA No. 458/2019

Subhash Saini, Liquidator
of M/s. Millennium Wires Private Limited
having its registered address at
Flat No. 1405, Ground Floor, Sector 61,
Chandigarh-160036

...Applicant

vs.

MMTC Ltd.
CORE -1, SCOPE Complex

7, Institutional Area, Lodhi Road
New Delhi -110003

...Respondent

AND

In the matter of CA No. 892/2019:-

The Liquidator,
For M/s Millennium Wires Private Limited
Flat No. 1405, Ground Floor, Sector 61,
Chandigarh- 160 036
Email: shubhsaini1@gmail.com
Mobile: 98880 70049

.....Applicant/Liquidator

Versus

1. MMTC Limited,
Regd. Office: Core-1 Scope Complex 7, Institutional Area, Lodhi Road.
New Delhi -110003
Mail Id: mmtc@mmtclimited.com
Phone: 011-24362200

Also at:
Corporate Office: MMTC Limited
MMTC House, C-22,
E-Block, Bandra Kurla Complex.
Bandra (East), Mumbai- 400 051

2. Mr. Ved Prakash, Managing Director
MMTC Limited, Core-1 Scope Complex
7, Institutional Area Lodhi Road,
New Delhi -110003
3. Mrs. Sunita D. Parkar, Additional General Manager,
MMTC Limited
MMTC House, C-22,
E-Block, Bandra Kurla Complex, Bandra (East), Mumbai- 400 051

...Respondents

In the matter of IA No. 947/2020:-

State Trading Corporation of India Limited
having its registered address at
Jawahar Vyapar Bhawan,
Tolstoy Marg, New Delhi-110001.

...Appellant

vs.

Subhash Saini, Liquidator
of M/s. Millennium Wires Private Limited

having its registered address at
Flat No. 1405, Ground Floor, Sector 61,
Chandigarh-160036

...Respondent

Order delivered on: 28.08.2023

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

Present :

Applicant in
CA No. 458/2019 &
respondent in
CA No. 769/2019 &
IA No. 947/2023 : Mr. Anil Kumar Aggarwal, Advocate

For respondent in
CA No. 458/2019 &
respondent no. 1
in CA No. 892/2019. : Mr. A.S. Likhari, Advocate
: Ms. Mansa Shukla, Advocate

For applicant in
IA No. 947/2020 : Mr. Rohan Mittal, Advocate

Per: Subrata Kumar Dash, Member (Technical)

ORDER

CA No. 769/2019

This application has been filed by MMTC against the rejection of their claim by the liquidator.

2. The following submissions have been made in the application with a prayer to condone the delay of 92 days in filing its Claim Application for the Respondent's rejection of the Applicant's legally and validly enforceable claim under Form C.

- i. The Applicant learnt of the Corporate Debtor's liquidation on 15.04.2019 when the Respondent wrote to the Applicant. The Applicant thereafter, on 17.05.2019, filed a total claim of Rs.19.34 Crores (**'Claim'**) before the Respondent in FORM C under Regulation 17 of 1881 (Liquidation Process) Regulation. The Applicant's claim was rejected by the Respondent on 03.06.2019 on the ground that there was a delay of 34 days in filing the claim on 20.06.2019. The Applicant presented the cheques issued by the Corporate Debtor qua its legal dues, and on 21.06.2019, cheques were returned with the remarks "Account Closed" on 11.07.2019. The Applicant sought further information from its bankers on 16.07.2019, the Applicant issued a demand notice under Section 138 of the Negotiable Instruments Act, 1881. On 08.08.2019, the Applicant wrote to the Respondent explaining the legal dues owed by the Corporate Debtor to the Applicant.
 - ii. The Applicant in accordance with the terms of the Associate Agreement encashed the cheques dated 22.03.2019 issued to it by the Corporate Debtor but the cheques were returned as dishonored to the Applicant. The Applicant and the Corporate Debtor are embroiled in litigation before various forums in different parts of the country, and thus the delay was also attributable to the pending litigation in various courts against the Corporate Debtor as the Applicant had to verify the records filed in these litigations.
3. The respondent in its reply has stated that:-
- i. The corporate debtor by its letter dated 01.02.2012, requested the applicant to adjust the EMD amount plus interest accrued thereon as

per Clause 4 of the Associate Agreement against the 5th, 6th, and 7th lots and the balance was proposed to be paid in a phased manner.

“This has reference to the pending payment for the three lots (5th 6th & 7th). We confirm that we shall be making the payment of the pending three lots in the phased manner and accordingly request you that please work out the balance payable to you after adjusting the EMI and surplus arising out of making the payment of the buyers credit and interest accrued on the deposits with you. However, we request that you will fight out legally on our behalf for getting the DO for lifting the material. of course the costs to our

Further you are requested to please reject and return the documents for the 8th lot LC in light of the circumstances of non availability of the material. so that further complications may not cause financial problems to either of us.”

- ii. However, the applicant did not reply to this offer. Furthermore, it is submitted that the applicant, jointly with the corporate debtor, has filed Civil Suit No. 86 of 2012 in the District Courts at Ludhiana against Container Corporation of India & Ors, seeking directions to Maersk as well as Container Corporation of India for release of the said lots, which is pending before the ADJ/Commercial Court, Ludhiana.
- iii. It is further submitted that the applicant was at liberty under Clause 4.3 as well as under other clauses such as Clause 4.1, 4.2, 9.3.3 of the Associate Agreement to dispose of the material in the open market and claim the differential price only, if any, from the corporate debtor. The relevant parts of clause 9.3.3. is reproduced below:

“9.3.3. If during the period voyage and after the arrival of the shipment, for any reasons, ASSOCIATE BUYER fails to make financial arrangements and purchase the quantity indented for within a period of one week from the date of arrival of the vessel/ within free time allowed, whichever is earlier, SELLER after issuing notice for 3 days shall be at liberty to dispose off the CC rod in the open market at prices SELLER considers as reasonable. Any loss incurred by SELLER on account of difference in relevant market price and other expenses/charges incurred including duties and taxes shall be promptly made good by ASSOCIATE BUYER.”

(Emphasis Supplied)

- iv. It is also submitted that the claim raised by the applicant towards customs duties and interest etc. is arbitrary and illegal and is nothing but a consequence of its own neglect in not adhering to the aforesaid clauses 4.2, 4.3, 9.3.3 of the Associate Agreement. It is further stated that it was the duty of the applicant to mitigate the losses.
- v. Reliance has been placed in the matter of ***Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Anr.*** 1962 AIR SC 366, wherein it is held in para 9 as under:
- “9. The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such step.”*
- vi. It is further reiterated that the cheques dated 22.03.2019 which were deposited by the applicant in the bank have been fraudulently issued by the ex-director without the knowledge or consent of the liquidator. These cheques were issued after the liquidation order was passed on 14.03.2019. The ex-director of the corporate debtor was not authorized or competent to issue the cheques on behalf of the corporate debtor. It is further alleged that the applicant and the company's ex-directors have played fraud in collusion and connivance with one another and have obtained the aforementioned cheques fraudulently.
- vii. It was pointed out that the applicant did not file any claim before the IRP/RP but subsequently filed a claim on 17.05.2019 during the

liquidation process. The said claim has been considered and rightly rejected by the respondent-RP in his letter dated 03.06.2019.

4. In its rejoinder filed by the applicant, the applicant denied that it has played any claim in collusion with the ex-directors and the company to obtain these cheques. It is further submitted that the respondent has not taken any action against its own directors for the issuance of these cheques, establishing the fact that the cheques were issued with the knowledge and consent of the respondent.

5. In the short written submissions of the respondent-liquidator, it is stated that:-

- i. The applicant filed the claim on 17.05.2019 only after liquidation was initiated on 14.03.2019. Subsequently, criminal complaints were filed under Section 138 of the Negotiable Instruments Act, 1881, on 29.08.2019. It is further stated that MMTC filed an appeal dated 04.09.2019 under Section 42 of IBC, 2016, before this Tribunal. Reliance is placed on the decision of the Hon'ble Supreme Court in the matter of **Majji Sannemma Sanyasirao Versus Reddy Sridevi & Ors. in CIVIL APPEAL NO. 7996 of 2021** in its Judgement dated 16.12.2021 which held that: -

It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigours when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay by imposing conditions

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It is observed by this court that the court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The Courts help those who are vigilant and "do not slumber over their

rights".

- ii. Further, reliance is placed on the decision of the Hon'ble Supreme Court in the matter of ***S P Chengal Varaya Naidu Versus Jagannath*** 1995 (1) PLR 293 SC, wherein it was held that "*A person whose case is based on falsehood has no right to approach the Court*".
- iii. A further reference is made to the decision in ***Vijay Kumar Kathuria Versus State of Haryana*** (1983), which held that "*Misrepresentation made to the court will disentitle the applicant from getting any relief or assistance from the Court*".

6. In its written submission on behalf of the applicant-MMTC, it is submitted by the applicant stated that there was a total claim of Rs. 19.34 Crores before the respondent-liquidator and the same was filed in Form C under Regulation 17 of the IBBI (Liquidation Process) Regulation. Subsequently, on 20.06.2019, the applicant presented the cheque duly issued by the respondent and rejected by the bank. It is also submitted that the applicant and the corporate debtor are embroiled in litigation before various forums in different parts of the country, and this delayed the filing of the claim. It is thus submitted that reasonable apprehension that a fraud has been played upon by the corporate debtor.

7. The applicant-MMTC Ltd. filed its claim only after the initiation of liquidation which was rejected subsequently by the liquidator on the ground that the claim has been received on 17.05.2019 but the last date of submission of the claim to the liquidator was 13.04.2019 as per the public announcement under Regulation 12 (Liquidation Process) Regulation 2016.

The liquidator, therefore, held that the claim filed in Form C is time-barred, he

also pointed out that the applicant-MMTC failed to show any delivery of goods/ material to the corporate debtor as the claim in Form C was filed as an operational creditor. He also pointed out that the liability cannot be ascertained and the corporate debtor has already jointly with MMTC Ltd filed suit for recovery of material lying at the Ludhiana port. It was also pointed out that there are at least four suits in which the corporate debtor was a party and the same suit or pending before different Courts. Thus, the claim if any, was held to be unascertainable at that moment and the said was rejected.

8. We have heard the learned counsels and have gone through the records carefully.

9. In the present case, the transactions were carried out as per the stipulations in the Associate Agreement. The Associate Agreement was entered between the parties on 30.05.2011. The alleged liability of the respondent relates to the 3 lots, i.e., 5th, 6th & 7th out of the total of 8 lots which were agreed between the parties and have already been imported. It is noted that the parties have jointly filed a Civil suit against the Maersk Container Corporation of India for the release of these lots. We also note the fact that the respondent had issued cheques towards payment of these lots but the same were not honored by the bank. In this context, it is further noted that the import actually took place with regard to lots 5th, 6th, and 7th and the imported consignments of CC Rods are still lying in the custody of the port authorities. In the event of failure of the respondent to take delivery by making the necessary payments, the applicant was at liberty as per clause 9.3.3 of the Associate Agreement to clear these consignments from the port authorities and sell those in the open market, and claim the differentials from

the respondent. During the present proceedings, the respondent has not denied that their cheques for payment towards the consignment were not honored by the bank. To that extent, there is a default under the provisions of the Associate Agreement. The items were imported, and the payment for the same was guaranteed by issuing advance cheques by the respondent. The applicant-MMTC was at liberty to either sell the consignment in the open market subsequent to the failure of the respondent to pay or to realise the entire sum from the respondent by encashing the cheques issued by the respondent. In the event of Respondent's failure to pay, whether to encash the cheques or to sell the imported consignments in the open market and realize the value, is a business decision of the applicant. We are of the view that the respondent cannot challenge the same and insist that the applicant should have sold the consignments in the open market and charged the differentials to the account of the respondent.

10. In the present case, the CIRP was initiated on 30.08.2018, and subsequently, the liquidation was initiated on 14.03.2019. A claim was filed by the applicant on 17.05.2019 during the liquidation process. After the rejection of the said claim, criminal complaints were filed under Section 138 of the Negotiable Instrument Act, 1881 on 29.08.2019. Subsequently, the applicant-MMTC filed an appeal dated 04.09.2019 under Section 142 of the IBC, 2016, before this Tribunal against the rejection of the claim.

11. In the application at hand, the issue to be decided is when the respondent's liability to pay occurred. In this connection. In this context, a reference is made to the decision of the Hon'ble NCLT Principal Bench In the matter of ***Axis Bank Limited Vs. DBS Bank Limited in CP(IB) No.***

102(PB)/2017, wherein the Bench considered the question as to whether the applicant bank is entitled to make a claim by invoking the corporate guarantee after the date of commencement of the insolvency proceedings.

12. The definition of the expression 'debt' is as given in Section 3(11) of the Code,"Claim" is defined in Section 3(6), 'Corporate Debtor' is defined in Section 3(8), 'Creditor' is defined in Section 3(10) and 'Default' is defined in Section 3(12) of the Code.

13. After making a reference to the definition of expression of debt, the Bench observed:

"A co-joint reading of the aforesaid provisions would show that a claim would mean a right to payment whether reduced to any judgment etc. It also includes the right to remedy for breach of contract under any law for the time being in force. The 'Corporate Debtor' has been defined to mean a corporate person, who owes a debt to any person, and 'creditor' has been defined to whom a debt is owed and includes all types of creditors, like a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder. The emphasis appears to be on the expression 'payment and the debt, claim and the debt which is due from any person and includes financial debt and operational debt. Going by the aforesaid provisions, debt has not become due from the Corporate Debtor on the insolvency commencement date i.e. 27.06.2017. It became due only when the corporate guarantee was invoked by the Axis Bank Limited- the Corporate Debtor".

(Emphasis Supplied)

14. Applying the ratio of the aforementioned decision, i.e., **Axis Bank (Supra)** to the present case, the debt in the present case arose only when the bank dishonored the cheques issued by the corporate debtor, i.e., on 21.06.2019. Thus, there was no debt of the corporate debtor on the insolvency commencement date, i.e., 30.08.2018 and the debt has arisen during the moratorium period. In view of these facts, we are of the considered opinion that under the provisions of the IBC, the applicant cannot file the claim of

Rs.19.34 Crores as prayed for because there was no debt as on the date of initiation of CIRP.

15. We, however, recognize the fact that the debt of the corporate debtor has arisen after its cheques were dishonored by the bank on 21.06.2019. Section 139 of the Negotiable Instrument Act, 1881 makes a presumption in favour of the holder that "the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability., Further, a reference is made to the decision of the Hon'ble Apex Court in the case of **Sundaresh Bhatt, Liquidator of ABG Shipyard vs. Central Board of Indirect Taxes and Customs dated 26.08.2022**, where on similar facts of fresh claims arising during Liquidation of the Corporate Debtor, the Court directed that "*the Respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.*

16. In view of the aforementioned discussion, the prayer in the present application i.e. CA No. 769/2019 is not acceded to. The applicant, however, is at liberty to file an application, if so advised, for submitting its claim in terms of the procedure laid down in the Code within 30 days of this order before this Adjudicating Authority.

17. In the result, the application, i.e., IA No. 769/2019 is dismissed as above and disposed of accordingly.

CA No. 458/2019 & 892/2019

These applications, being based on the same facts and having similar prayers, are taken up together for discussion.

18. IA 458/2019 has been filed by the applicant-Liquidator against MMTC Ltd. with a prayer to issue directions to the respondent MMTC to refund to the corporate debtor in liquidation, the EMD amount of Rs. 5,45,12,508/- along with interest thereupon.

19. It is stated by the applicant that as per the Associate Agreement, the EMD aggregating to Rs.5,96,19,246/- was paid to the MMTC and was duly reflected in the audited balance sheet of the corporate debtor as on 31.03.2018. As the material contracted for was not delivered, the respondent-MMTC has no right to appropriate the EMD of Rs.5,96,19,246/-.

20. The following facts of the case have been stated by the applicant:-

- i. The Corporate Debtor and MMTC entered into an "Associate Agreement" on 30.05.2011 under which MMTC was to import CC rods from SIMS Malaysia/Singapore for sale on a 'back-to-back high seas sale' basis to the corporate debtor.
- ii. For importing CC rods, MMTC was to open LC in favor of SIMS, and the corporate debtor was to deposit margin money (EMD) of 25% of the total CIF value. The EMD deposited by the corporate debtor was to be kept by MMTC in a Fixed Deposit account, and interest thereupon was to be passed on to the corporate debtor as per Clause 4.1 of the Associate Agreement.

'4.1 ASSOCIATE BUYER shall deposit 25% Cash EMD of the total CIF value (Inclusive of tolerance) which may be considered for

keeping in FDR account and interest thereon to be passed on to the ASSOCIATE BUYER. SELLER has the right to utilize the said cash EMD at its sole discretion which is deposited by ASSOCIATE BUYER, in case, ASSOCIATE BUYER fails to perform any of its obligations as per this Agreement or to reimburse any loss or costs incurred by SELLER in the course of such import and sale of CC rod on 'back to back high seas sale' basis.'

- iii. Accordingly, MMTC entered into a purchase contract with SIMS and opened 8 Lacs in favor of SIMS for the total amount of USD 39,27,546.12/- and the date of arrival of the material was to be from 08.08.2011 to 02.09.2011.
- iv. As per the "Associate Agreement," the Corporate Debtor deposited a sum of Rs.4,96,19,246/- and Rs.1,00,00,000/- aggregating to Rs.5,96,19,246/- with MMTC towards 25% Earnest Money Deposit (EMD), which is duly reflected in the Audited Balance Sheet of the corporate debtor as at 31.03.2018 and also under the provisional balance sheet of the corporate debtor as at 31.08.2018 under the head 'Loans and Advances'.
- v. The CC rods were imported by MMTC under the first four lots, which were sold on high seas basis to the corporate debtor, and the sale invoices and shipping documents were handed over to the corporate debtor. The corporate debtor made full payment and received the material. Hence, there is no dispute under the first 4 Lots of material/CC rods.
- vi. MMTC further imported CC rods under 5th, 6th, and 7th lots, but it did not sell the material to the corporate debtor on a 'high seas sale basis'. No invoice or any other documents were issued by the MMTC in favor of

the corporate debtor as MMTC failed to get the DO (Delivery Order) for lifting the material from the Container Corporation of India.

- vii. The CC rods, which were to be imported under the 8th lot, turned out to be a fraud on the part of SIMS because, upon investigation carried out by MMTC, it was discovered that the consignment under the said lot had never been shipped by SIMS and hence SIMS had committed fraud upon MMTC. Admittedly the material under the 8th lot has not been shipped by SIMS, and the corporate debtor has not received this material. The corporate debtor is, therefore, not liable to pay for the material, which was never sold to the corporate debtor under the 8th lot. It is significant to point out that MMTC has filed a suit in this regard before the Hon'ble High Court of Bombay, which is pending as CS no. 786 of 2012.
- viii. The impugned imports took place in the year 2011. Since the corporate debtor was not liable to pay any amount to MMTC in the absence of supply of any material and no sale invoice(s) for these lots were raised by MMTC, no liability was reflected in the audited balance sheets of the corporate debtor. However, the EMD amount of Rs. 5,96,19,246/- was reflected as 'Loans and Advances' in the audited balance sheets of the corporate debtor, and it was recoverable from MMTC.
- ix. It is further mentioned that MMTC and the corporate debtor have jointly filed a Civil Suit bearing No. 86 of 2012 against the Container Corporation of India & Ors. in the District Courts at Ludhiana, which is still pending. It is submitted that the corporate debtor has not received

this material; hence there is no liability of the corporate debtor to pay to the MMTC any amount for these imports.

21. The gist of the reply filed by the respondent, i.e., MMTC, is as under:
- i. The Respondent entered into an agreement dated 30.05.2011 (**'Associate Agreement'**) with the Corporate Debtor for the import of CC copper wire rods from Mis Synergy Marketing Service SON BHD, Malaysia (**'SIMS'**).
 - ii. Under Clause 4.3 of the Associate Agreement, failure to pay the Respondent would result in forfeiture of EMD Pursuant to the Associate Agreement, the Respondent entered into a Purchase Contract dated 30.05.2011 with SIMS. The Respondent duly opened 8 Letters of Credit (on various dates) in favor of SIMS, Malaysia, for the import of CC copper wire rods (in eight individual lots) on the Corporate Debtor's Behalf. 1" four lots CC Copper wire rods were imported without a hitch and the financial transactions for the same also stood completed successfully. A total amount of USD 14,33,309/- was paid by the Respondent to SIMS, Malaysia on account of the invoices. However, the Corporate Debtor failed to pay monies which it was legally and contractually bound to pay. The Corporate Debtor's actions were in clear violation of Clauses 4.3, 8, 9.1,10 and 12 of the Associate Agreement. Due to the actions of the Corporate Debtor, the goods under the said lots are currently detained at ICD Ludhiana. On account of the actions of the Corporate Debtor, the following expenses, all due and payable along with interest to the Respondent:
 - i. Rs.3,37,69,399 (as on 13.05.2019) towards customs duty and

- interest.
- ii. Rs.2,65,00,140 (as on 04.05.2019) towards Container Freight Station Charge.
 - iii. Rs.3,94,16,959 (as on 13.04.2019) towards shipping line charges.
- iii. On 30.11.2011, six cheques were issued by the Corporate Debtor to the Respondent for a total of Rs.2,95,00,000 as EMD for the 8th lot. On 23.12.2011, the Corporate Debtor duly accepted the documents for the goods for the 8th lot, and the payment in relation to the 8th lot was transmitted by the Respondent's banker to SIMS. However, the 8th lot was admittedly never dispatched by SIMS, Malaysia, which was selected by the Corporate Debtor for the supply of CC Rods through the Respondent on a back-to-back basis.
- iv. Between 24.01.2012 to 27.01.2012, the Respondent duly asked its banker to stop payment. On 30.01.2012, IndusInd Bank refused to stop payment to SIMS, Malaysia in view of Regulation UCP 600. On 01.02.2012, the Corporate Debtor vide his letter acknowledged the due towards the consignment of the 5", 6" & 7" Lots and requested to adjust the EMD. On 31.01.2013, eight cheques for a total amount of Rs. 4,00,00,000/- were issued by the Corporate Debtor to the Respondent, which was dishonored for reasons of insufficient funds. On 01.07.2016, the Hon'ble Bombay High Court allowed the claim of SIMS, Malaysia, against IndusInd Bank to release the payment due for the 8th Lot of Rs. 3,47,87,865/ to Malayan Bank (Malaysia's Negotiating Bank). On 22.03.2019, the Corporate Debtor replaced the six cheques issued on 30.11.2011. On 21.06.2019, the said cheques were dishonored by the

bank with the remarks 'Account closed'. The Respondent has taken steps to file proceedings under Section 138 of the Negotiable Instruments Act, 1881, against the Corporate Debtor and its officials.

22. In the rejoinder filed, it is stated that the respondent has failed to act in accordance with Clause 9.3.3 of the Associate Agreement, which lays down that the respondent could have sold the consignment(s) after giving due notice to the applicant and claim only the difference if any from the applicant/corporate debtor.

23. We now summarise the pleadings of the related application IA No.892/2019 before taking up both these applications for adjudication.

IA No. 892/2019

24. This application has been filed by the liquidator of the corporate debtor with a prayer to penalize the respondent, including the employees of the respondent-MMTC Limited and ex-directors of the corporate debtor, for fraudulent issues and misuse of cheques of the corporate debtor and also to restrain the corporate debtor and from its employees from pursuing the criminal complaints under Section 138 of the Negotiable Instruments Act, 1881 initiated against the corporate debtor on 29.08.2019.

25. The submissions of the applicants are as under:

- a. Pursuant to the rejection of the claim of the respondent MMTC Ltd. by the liquidator on 03.06.2019, MMTC Ltd. presented six cheques dated 22.03.2019 aggregating Rs. 2.95 Crores for collection on 20.06.2019 with the bankers of the corporate debtor which were dishonored on 21.06.2019. The cheques were dishonored because the accounts were closed quite some time back. MMTC claims that these cheques were issued by the suspended

director Mr.Rakesh Khanna on 22.03.2019, which were drawn on Account No. 07604015001581 of the corporate debtor with Oriental Bank of Commerce. It is stated that These cheques were issued by the suspended director after the passing of the Liquidation order without any authority or competence. the said bank account no. 07604015001581 had been closed long back on 20.08.2016 i.e. more than 31 months before the impugned issue of cheques.

b. It is further stated that all these facts had been brought to the knowledge of MMTC and its officers by the liquidator vide his letter dated 30.07.2019, yet MMTC has filed criminal complaints under Section 138 of Negotiable Instruments Act, 1881 in the Court of Additional Metropolitan Magistrate, Bandra, Mumbai. In these criminal complaints, MMTC has impleaded the corporate debtor and the liquidator also as accused. The MMTC filed a criminal complaint under section 138 of the Negotiable Instruments Act, 1881, on 29.08.2019. Thereafter, MMTC filed an appeal dated 04.09.2019 under Section 42 of IBC, 2016, before this Hon'ble Tribunal.

c. It is alleged that the suspended directors concealed the factum of possession of the chequebook/cheques of the corporate debtor even after the liquidation period. They misused the cheques during the liquidation period, even though in their reply to the application filed by the then RP under Section 19(2) of IBC, 2016, the suspended directors had stated on affidavit that they have handed over all the documents and records of the corporate debtor to IRP/RP.

26. In its reply, respondent No. 1, has stated that upon the import of the fifth sixth, and seventh Lot of cc copper wire rods by respondent no. 1, the corporate debtor failed to pay the monies that, it was legally and contractually bound to pay to the said respondent for these lots. The corporate debtor also failed to make the necessary arrangements in relation to the payment of the duties, detention/ demurrage charges, etc. imposed upon it under the associate agreement. Resultantly, the goods under the said loads what detained by the carrier of goods(Maersk) and are still lying at inland container Depot Komal Ludhiana ('ICD Ludhiana') with the Container Corporation of India (CCI). The amounts payable under the said default aggregated to a sum of Rs. 19,34,30,456/-. It is also stated that the corporate debtor as early as 01.02.2012 through a letter acknowledged its liability towards the foregoing outstanding amount and also assured payment of the same to respondent No. 1 as well as expressly requested respondent No.1 to adjust the cash EMD and surplus on the buyer's credit (along with interest accrued thereon) deposited by it, towards the cost/ other charges borne by the respondent fourth fifth sixth and seventh lots. Subsequently, to meet its legally enforceable liability, the corporate debtor issued a cheque dated 31.01.2013.

27. It is further stated that if the cheques-in-question were issued in an unauthorized manner, it is for the applicant to explain as to how the issuance of the cheques took place without either his authorization/knowledge. It was pointed out that the applicant did not take any action against respondents numbers 4 and 5 despite its claim, that respondent Nos. 4&5 unauthorisedly retained a cheque-book belonging to the corporate debtor in July 2019.

28. In short reply by respondents Nos. 4 & 5 stated that as per the Associate Agreement dated 30.05.2011, it was agreed that MMTC would supply the material as per the agreed terms, and in lieu thereof, the corporate debtor would supply the security against the said material to be supplied by MMTC from the third-party. It is further stated that it was agreed between the parties that in respect of such import, the corporate debtor would pay 25% advance money by cheque/RTGS and 100% advance by way of security cheques. It is further stated that as per duly agreed terms of the said associate agreement, for each of the imports by MMTC, the corporate debtor submitted the security by way of checks and RTGS. In lieu of the 8th lot of goods to be imported by MMTC, deposited six cheques through letter dated 30.11.2011 and kept on renewing these security cheques at regular intervals. It is, thus, clarified that the cheques in question were issued prior to the initiation of CIRP. It is further stated that there is a typographical error in the forwarding letter, and the actual date being 22.03.2019, though the letter inadvertently indicates the date as 22.03.2018. The allegation that the letter and cheques have been issued after the passing of the admission order and appointment of RP is therefore stated to be incorrect.

29. In its rejoinder to the Reply of Respondent No. 1, the applicant/liquidator states that the liquidation order under Section 33 was passed on 14.03.2019. The Board of directors of the company was suspended, and the ex-directors were not entitled to issue any cheques on 22.03.2019 as claimed by respondent no. 1. Moreover, the cheques were unauthorisedly issued by Mr. Rakesh Khanna, ex-director of the corporate debtor on the bank account of the corporate debtor which had been closed on 20.08.2016. Such

unauthorized cheques are neither binding on the corporate debtor nor on the liquidator nor upon any of its stakeholders. The suspended directors handed over only some of the documents and records to the RP on 12.02.2019. Thereafter only some unused cheques of bank account no. 07604015001581 in OBC and some files relating to court cases and bank correspondence were handed over to the liquidator on 22.08.2019, i.e. only after the liquidator came to know of the dishonor of cheques from the demand notice dated 16.07.2019 under section 138 of Negotiable Instruments Act.

30. With regard to respondents No. 4 & 5, the respondents in their reply have admitted that they kept on renewing the six security cheques for the 8th lot of material on the assurance of respondent no. 1 that the material would be supplied by them to the corporate debtor. However, the material was never supplied to the corporate debtor, and litigation for fraud committed by the third party in the non-shipping of the material under the 8th lot is still pending before the Hon'ble Bombay High Court in Suit No. 786 of 2012. The respondents are trying to use a typographical mistake of the date of the cover letter. The correct date is 22.03.2019 and not 22.03.2018, as inadvertently mentioned and as is evident from the dates on the cheques. The cheques have been issued by the suspended directors after the liquidation order passed by this Hon'ble Bench on 14.03.2019, which is patently unauthorized, illegal, and void. The respondents never informed the RP/Liquidator about the cheques in question. The applicant /Liquidator came to know about the issuance of the cheques in question when he received the demand notice from MMTC under Section 138 of the Negotiable Instruments Act. The respondent has admitted that he has not issued any cheque after 30.08.2019. This shows that the

respondent had issued cheques before 30.08.2019, i.e. even after the admission of the petition under Section 7 IBC on 30.08.2018. The bank closed all other accounts of the corporate debtor, including the bank account in question, i.e. account No. 07604015001581 with OBC, Railway Road Branch, Jalandhar, which was closed on 20.08.2016.

31. We have heard the learned counsel for the parties in both these CAs and have gone through the relevant records carefully.

32. In the present case, the CIRP was initiated on 30.08.2018, and subsequently, the liquidation was initiated on 14.03.2019. The cases under Section 138 of the Negotiable Instrument Act were filed on 29.08.2019, i.e, after the initiation of liquidation

32.1 The petitioner has made the prayer for the release of the EMD forfeited by the MMTC and also to stop MMTC and others from pursuing the criminal proceedings under section 138 of the Negotiable Instrument Act, 1881. and also to stop MMTC and others from pursuing criminal proceedings under section 138 of the Negotiable Instrument Act, of 1881.

32.2 As regards the refund of the EMD amount of rupees Rs. 5,45,12,508/- along with interest thereon, we note that the transactions for importing CC Rods have been carried on as per the provisions of the associate agreement, and even the aforementioned EMD is paid under the payment terms para 4 of the Associate Agreement which is extracted below:

4. Payment Terms:-

4.1 ASSOCIATE BUYER shall deposit 25% Cash EMD of the total CIF value (Inclusive of tolerance) which may be considered for

keeping in the FDR account and interest thereon to be passed on to the ASSOCIATE BUYER. SELLER has the right to utilize the said cash EMD at its sole discretion which is deposited by ASSOCIATE BUYER, in case, ASSOCIATE BUYER fails to perform any of its obligations as per this Agreement or to reimburse any loss or costs incurred by SELLER in the course of such import and sale of CC rod on "back to back high seas sale basis.

32.3 The payment terms in the agreement and the condition for the refund of EMD in the said agreement are extracted below:

"4.6 ASSOCIATE BUYER shall submit a dated cheque for 100% value of each shipment indented (Inclusive of positive tolerance). These cheques shall be utilized if necessary at the sole discretion of the seller. ASSOCIATE BUYER hereby undertakes to honor the cheque when deposited by SELLER for recovery of its outstanding dues from ASSOCIATE BUYER.

4.7 EMD shall be refunded by SELLER to ASSOCIATE BUYER on successful completion of the transaction in all respects including reconciliation of accounts."

32.4 We also note that the transactions relating to the import of the 5th, 6th, and 7th lots of CC Rods could not be taken to its logical end because of the failure on the part of the applicant to make payments as per the aforementioned provisions of the associate agreement.

32.5 It is obvious that the conditions stipulated in the associate agreement have not been complied with by the corporate debtor, and he has not met the requirements for a refund of the EMD as outlined in para 4.7. As the applicant has failed to carry out its contractual obligations regarding payments under relevant clauses in the Associate Agreement, we are of the view that there is no case for the refund of the EMD of rupees Rs. 5,45,12,508/-to the applicant.

33. Now coming to the issue of initiation of criminal proceedings under section 138 of the Negotiable Instruments Act, 1881, a reference is made to the decision of **Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation of India Ltd. (15.03.2023 - SC)**, wherein it is stated that :

“There was no bar contained in any of the provisions of the IBC, and the NI Act from approaching the criminal court to seek penal action under Section 138 of the NI Act. [96] (iv) This court may draw final conclusions as under: (a) After passing of the resolution plan under Section 31 of the IBC by the adjudicating authority and in the light of the provisions of Section 32A of the IBC, the criminal proceedings under Section 138 of the NI Act will stand terminated only in relation to the corporate debtor if the same was taken over by a new management. (b) Section 138 proceedings in relation to the signatories/directors who are liable/covered by the two provisos to Section 32A(1) would continue in accordance with law.”

(Emphasis Supplied)

34. In the present case, the criminal proceedings under Section 138 of the Negotiable Instrument Act, 1881 were initiated on 29.08.2019, i.e., after the liquidation order dated 14.03.2019 in the case of the corporate debtor, the moratorium was in place as per the provisions of section 33(5) of the code. Such initiation of legal proceedings is barred under the relevant provisions of the code, which is extracted below :

“33. (1) Where the Adjudicating Authority, —

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.”

35. Keeping in view the ratio of the aforementioned decision of the Hon’ble Apex Court in the case of Ajay Kumar Radheyshyam Goenka (Supra), we direct the respondent not to pursue the criminal proceedings under section

138 of the Negotiable Instrument Act against the corporate debtor as the same is barred during the moratorium under section 33(5) of the code.

36. As regards prayer for initiating the penal action against the respondent Company and the erstwhile Directors of the Corporate Debtor,, we note that the applicant itself has not initiated any action against them, including the erstwhile Directors, for their alleged fraudulent act of issuing cheques after the initiation of liquidation proceedings. This issue is primarily in the jurisdiction of the Civil Court and if the applicant was serious about persecuting the respondents, it should have taken this matter before the competent civil court for any possible remedy. After going through the submissions made by the respondent, especially respondents Nos. 4 & 5, we hold that no clear case of fraudulent issuance of cheques after the date of initiation of liquidation has been made out by the applicant during the current proceedings. Accordingly, no direction for initiating action for the perpetrator of the alleged fraud can be issued by this authority based on the facts before us.f

37. To summarise, we do not accede to the request of the applicant-liquidator in IA No. 458/2019 for a refund of the EMD which is already adjusted by the respondent. However, in IA No. 892/2019, we hold that criminal proceedings against the corporate debtor cannot be initiated during the period of moratorium. We, however, did not find any sufficient evidence to direct the initiation of penal action against the respondents for alleged fraud.

38. In the result, IA No. 458/2019 is dismissed and IA No. 892/2019 is allowed as above and disposed of accordingly.

IA No. 947/2020

39. The present application has been filed by the State Trading Corporation of India Ltd. (herein referred to as STC Ltd.) against the order of the liquidator dated 26.05.2020, rejecting its claim submitted by the STC Ltd against the corporate debtor, i.e., Millennium Wires Private Limited which is a company under liquidation.

40. The facts of the case, as stated by the applicant, are:

- i. In the year 2011–12, the corporate debtor was introduced to STC, who identified as a leading manufacturer of super enameled copper wires and thereby expressed interest in routing their imports of Continuous Cast Copper Rods (herein referred to as **CCCR**) through STC Ltd. with a request to provide financial assistance by way of opening of letter of credit (herein referred to as **LoC**).
- ii. The corporate debtor requested STC for the import of 400 MTs of CCCR in lots of 50–70 MTs M/s Synergetic Industry and Marketing Service (herein referred to as SIMS) for a value of Rs.15.75 Crores approximately. Letters evidencing corporations approaching STC Ltd. for financial assistance for increasing its business are annexed as Annexure- A-3 of the application.
- iii. On 02.12.2011, STC entered into an Associate Agreement with the corporate debtor for the import of 400 MTs of CCCR from SIMS. The corporate debtor also executed corporate guarantees and four undertakings in favor of STC Ltd. for securing the repayment of the LOCs, which were subsequently issued in favor of SCC of the supplier of the corporate debtor, i.e., SIMS. The corporate debtor had undertaken

that it shall pay on demand all the claims arising out of the incidence of the import within 15 days of the issuance of the demand notice by STC Ltd. The copies of the corporate guarantee are attached as Annexure A-5 of the application.

- iv. Furthermore, as per the Associateship Agreement, the corporate debtor initially requested to open LCs of 50 MTs for which an earnest money deposit of Rs.50 lakhs each was made as an advance with STC Ltd for the opening of the LCs as per the agreement.
- v. On receipt of the earnest money, STC Ltd requested Allahabad Bank on 05.12.2011 and 07.12.2012 open LCs in favor of SIMS, and thereby, Allahabad Bank established LCs bearing Nos. 0189111 SLU000150 and 0189111 FLU000151 for a value of 371, 750USD; LoC No. 0189111SLS000154 dated 17.12.2011 for 371,750 USD; LoC No. 0189111FLU000159 dated 30.12.2011. (Annexures A7 and AA7 of the application).
- vi. Subsequent to these LOCs, shipping documents were received by STC through Allahabad Bank on the basis of the back-to-back acceptance of the corporate debtor. STC took up the issue with the overseas supplier with regard to the shipment not arriving within the normal transit period, and thereafter, the corporate debtor informed STC Ltd. officials that the containers carrying the goods were not traceable and were trying to contact the freight forwarders agency having their office in Ludhiana. On 23.01.2012, the corporate debtor informed that fraud had been committed on the corporate debtor by the freight forwarders agency as

no actual shipment had been made and documents had been forced to prove the export of goods.

- vii. The applicant wrote a letter to STC Ltd informing them about the fraudulent negotiation of documents. The aforesaid letter is attached as Annexure A-11 of the application. Furthermore, STC Ltd immediately informed Allahabad Bank of the stoppage on the release of any payment under the LOCs on the due date. Communication from STC Limited to Allahabad Bank is attached as Annexure A-12.
- viii. As per the corporate guarantees of the corporate debtor, a demand notice was issued on 12.12.2013. The corporate debtor then issued undertakings on 14.08.2013 and 24.09.2013 and issued cheques in favor of the applicant on 24.09.2013; cheque No. 40634, 4063441406345 drawn on Oriental Bank of Commerce amounting to Rs. 2.05 Crores. (Annexures A13 and A14 of the application). The aforementioned cheques issued in favor of the applicant what is dishonored via a memo dated 13.11.2013, attached as Annexure A-15 of the application. This led the applicant to file a complaint against the corporate debtor and its director under section 138 of the Negotiable Instruments Act, 1881, which was decided against the corporate debtor by the Chief Metropolitan Magistrate, Patiala House court, New Delhi in complaint case number 44330/2014 which is attached as annexed as Annexure A-16 of the application.
- ix. Cheques amounting to Rs. 6.09 Crores dated 14.08.2013, the undertaking given by the corporate debtor to STC Ltd., were dishonored by Oriental Bank of Commerce, Jalandhar Branch wide memo dated

13.11.2013. This led STC Ltd to file another complaint on 06.09.2016 before the Chief Metropolitan Magistrate, Patiala, House Court, New Delhi, against the corporate debtor and its director in complaint case number 573/2017. The order dated 16.05.2017 is attached as Annexure A-19 of the application.

- x. Subsequent to this, on 16.05.2015, Allahabad Bank demanded payments from the applicant for the onward dispatch to Malayan Bank as the supplier discounted all four LOCs with the Malayan Bank. Allahabad Bank has also debited STC's account with a sum of Rs.14, 97, 86, 049/- on 31.03.2019. (Annexure A-21 of the application)
- xi. The Hon'ble Delhi High Court in CS(OS) 745/2017. In a case titled **Malayan Bank, Berhad versus Allahabad Bank** decreed the suit in favor of Malayan Bank and had observed that the Allahabad Bank was bound to honor the terms and conditions of the letters of credit and therefore was required to pay Malayan Bank but had a sum of Rs.11,00,04,972.03/- along with *pendente lite* and future simple interest till it's the realization at the rate of 9% per annum with respect to the terms of section 34 of CPC.
- xii. Allahabad Bank challenged the aforementioned judgment dated 20.01.2017, and thereby the Hon'ble Delhi High Court in RFA (OS) 27/2017 paused the judgment for recovery of Rs.10, 79, 69, 518.02/- with *pendente lite* and future interest at the rate 9% against Allahabad Bank in favor of Malayan bank. (Annexure A23 of the application). Allahabad Bank thereby sent a demand notice on STC Limited dated 16.01.2022 for

Rs.16,21,60,914/- along with a cost of Rs.20,181,993/- along with future interest at the rate of 9.65%, per annum and future cost of payment.

- xiii. The application for initiation of CIRP was filed by the Oriental Bank of Commerce as a financial creditor under Section 7 of IBC, and this Adjudicating Authority admitted the same on 30.08.2018.
- xiv. It has been emphasized by the applicant that Oriental Bank of Commerce, on whose application the corporate debtor has gone into CIRP, extended similar financial assistance to the corporate debtor by opening LOCs for the corporate debtor and thereby has been considered as financial debt by this adjudicating authority stating that:-

"As per the latest documents of the year 2014, the Respondent-Corporate Debtor was granted the working capital term loan to the tune of Rs.6.53 Crores; Cash Credit (Hypothecation) Rs. 19.88 Crores (existing); Cash Credit (Hypothecation) Fresh Rs.2 Crores; Letter of Credit-I Rs.3.90 Crores; Letter of Credit-II Rs. 7 Crores; and FILT Rs.2.66 Crores, aggregating to Rs.41.97 Crores". Hon'ble NCLT has further declared the Oriental Bank as the Financial Creditor by stating the following "The petition, therefore, filed by the Oriental Bank of Commerce the Financial Creditor under Section 7 of the Code being complete is admitted and we declare the moratorium in terms of sub-section (1) of Section 14 of the Code..."

- xv. Subsequently, the initiation of liquidation proceedings vide order dated 14.03.2019, this adjudicating authority appointed Shri. Subhash Saini as the liquidator for the liquidation of the corporate debtor. The applicant filed its claim in Form C on 17.05.2019, amounting to a total claim of Rs.14, 97, 86, 094/- being the amount debited by Allahabad Bank from the applicant. whereas the claim of the applicant was rejected by the liquidator via email/letter dated 06,005.2019. (Annexure A-27 of the application) After various correspondence between the applicant and the

liquidator and the filing of fresh claims under form D dated 10.01.2020 and 17.02.2020, the claim of the applicant was rejected by the liquidator.

- xvi. The applicant challenges the decision of the respondent liquidator on the grounds that the respondent liquidator completely ignored the terms agreed upon under the associateship agreement.
- xvii. Furthermore, it has been averred by the applicant that the liquidator failed to place consideration on the judgment of the Hon'ble High Court of Delhi dated 19.03.2019 and 25.11.2019 in which the transactions between STC Ltd. and the corporate debtor have been discussed and upheld.
- xviii. The applicant places reliance on the law laid down by the Hon'ble NCLAT in ***“Axis Bank Ltd. versus Edu Smart Service Private Ltd”***.
- xix. In its reply, the following contentions have been placed:
 - a. It is clarified by the liquidator that as per the general procedure for the purchase of material by the corporate debtor through STC, the latter placed a purchase order with SIMS, opened the Letter of Credit (LC), and when the exporter SIMS Ships the material, Bill of Lading is prepared in the name of STC as importer/consignee of the material.
 - b. In the present case, STC failed to import the material because the exporter SIMS committed fraud and never shipped the material from Malaysia/Singapore. It is stated that there is no sale invoice raised by STC Limited to MWPL because no goods in any shipment were received by STC Limited from the Foreign Supplier M/s. SIMS, Singapore. Since no goods were received by STC Limited from the Foreign Supplier, STC Limited could not make the sale of MWPL, i.e., corporate debtor. The

applicant filed a complaint with the Central Bureau of Investigation, New Delhi (CBI) on 21.05.2019 for fraud and cheating in the above-said transaction, and the same is under investigation. Furthermore, it is stated that STC is not a financial creditor as defined under Sections 5(7) and 5 (8) (b), and (f) of IBC 2016.

c. In the present case, the STC did not extend any loan or credit facility to the corporate debtor, and neither did the corporate debtor avail of any credit facility from the STC. It is further stated that the corporate guarantee dated 06.11.2011, 02.12.2011, 13.12.2011, and 29.12.2011 on the basis of which STC is staking claim, have already expired after the lapse of one year from the date of the corporate guarantee. The corporate guarantee given by the corporate debtor to STC for its own liability was only a contract of indemnity covered under Section 124 of the Indian Contract Act 1872. It was not a contract of guarantee covered under Section 126 of the said Act. It is admitted that the corporate debtor issued nine cheques nos. 406309 to 406317 on 14.08.2013 for the aggregate amount of Rs. 6.09 Crores and cheques were subsequently dishonored. The STC has filed two complaints against the corporate debtor and its Directors under Section 138 of the Negotiable Instruments Act, 1881, in the Court of Chief Metropolitan Magistrate, Patiala House Court, New Delhi, i.e., 44330/2014 filed on 14.01.2016 and 573/2017 filed 06.09.2016. It is further stated that as per the balance sheet of the corporate debtor for the financial year 2017-18, no amount is outstanding for payment of STC.

d. In the rejoinder filed, it has been reiterated by the applicant that the general clause of the Associateship Agreement clearly shows that the request was a financial arrangement, as there was no need for the corporate debtor to engage STC for importing copper rods if there were no import restriction in Copper Rods prevailing at that time.

e. It is stated that the claim is based on a financial debt, which is independent of the corporate guarantee; therefore, the claim cannot fail merely on account of the lapse of the corporate guarantee. It is further stated that the applicant has made a reference to the decision of the Hon'ble NCLT in the matter of **Anuj Kumar Tiwari vs Debashis Nanda and ors**; CA No. 202/2019 in (IB)-1489/(nd)/2018, wherein it is held that the advance money paid by a creditor was a debt disbursed against the consideration of time value of money under sale agreement having the commercial effect of borrowing and RP had rightly treated the said creditor as a 'Financial Creditor'.

41. In the written submissions of the respondent, it is submitted by the respondent-liquidator that:-

a. The Tribunal by its order dated 20.09.2019 in CA No. 449 of 2019, appeal filed by STC against the rejection of its claim by the liquidator directed that *"In the circumstances, the CA is disposed of with liberty to the applicant to rectify the defects and also to submit fresh claims to the liquidator and on receipt of the same the liquidator shall reconsider the said claims and pass appropriate orders in accordance with the law."*

b. It is further pointed out that STC itself admitted that it had raised no invoices against the corporate debtor/MWPL because no goods in any

shipment were received by STC Ltd. from the Foreign Supplier M/s. SIMS Singapore. Since no goods were received by STC Ltd. from the Foreign Supplier, STC Ltd. could not make a sale to MWPL because there were no goods. The respondent further pointed out that the applicant has admitted the fraud played upon it and filed a complaint with the Central Bureau of Investigation, New Delhi (CBI) on 21.05.2019 for fraud which is under investigation.

c. It is further stated that STC Ltd. is not a financial creditor under Section 5(7), 5(8) (b), and (f) of IBC 2016 and this claim was made by the applicant STC when it found that it cannot justify its claim as an operational creditor because no goods or services have been served to it by the corporate debtor.

d. It is further pointed out that STC Ltd. did not extend any loan or credit facilities to the corporate debtor, and the corporate debtor does not owe any financial debt to STC Ltd. Furthermore, the corporate guarantees dated 06.11.2011, 02.12.2011, 13.12.2011, and 29.12.2011, on the basis of which STC is taking claim, have long expired as they were in force for one year from the date of the guarantee. It is further stated that the STC filed a criminal case under Section 138 of the Negotiable Instrument Act, 1881 before the Court of Chief Metropolitan Magistrate, Patiala House Court, New Delhi. These complaints bearing nos. 44330/2014 and 573/2017 are pending in that Court.

e. It is pointed out that if STC had any claim for recovery of the amount from the corporate debtor, it ought to have raised necessary invoices against the corporate debtor and ought to have filed a Civil Suit

for the recovery of such actions. However, the applicant has neither raised any invoice nor filed any suit for recovery to date. It is further pointed out that no amount is outstanding for payment to STC as per the financial statement of the corporate debtor. Reliance has been placed on the following decisions:

- The Hon'ble Apex Court in Civil Appeal No. 2222 of 2021 in the matter of ***New Okhla Industrial Development Authority vs. Ananad Sonbhadra***.
- The Hon'ble Apex Court in the matter of ***Pioneer Urban Land and Infrastructure Limited and Another vs. Union of India and Others***.
- The Hon'ble Apex Court in the matter of ***Union of India vs. Raman Iron Foundry*** [Union of India v. Raman Iron Foundry, (1974) 2 SCC 10 (2019) 8 SCC 416 150 231].

42. We have carefully considered the arguments by the learned counsel for the parties and have also gone through the relevant records.

43. The following dates of various events are relevant for the adjudication of these applications. In the present case, the CIRP was initiated on 30.08.2018 and subsequently, the liquidation was initiated on 14.03.2019. The applicant in IA No. 947/2020, i.e., STC, filed its claim on 12.04.2019 for a total amount of Rs.14.97 Crores, being the amount debited by Allahabad Bank from the applicant.

44. On the initial rejection of the claim by the liquidator on an application by the applicant in IA No. 947/2020, this bench directed the liquidator to reconsider the claim. During the subsequent processing of the claim, the liquidator sorts certain clarifications as to whether the impugned debt of the applicant falls under the definition of Sections 5 (7) and 5(8) of the IBC 2016. After going through the documents, the claim of the applicant-STC, which was filed in Form D was rejected by the liquidator.

45. In the present case, the CIRP was initiated on 30.08.2018 and subsequently, the liquidation was initiated on 14.03.2019. The cases under Section 138 of the Negotiable Instrument Act were filed before the Chief Metropolitan Magistrate, Patiala House, New Delhi by case No., 44330/2014 filed on 14.01.2016 and case No. 573/2017 filed 06.09.2016, i.e., before the initiation of CIRP.

46. In the present case, the issues to decide is whether there is a valid claim by STC against the corporate debtor arising out of the corporate debtor's cheques being dishonored by the bank; and whether such debt can be categorized as financial debt or not under Section 5(7), 5(8), (b) & (f) of IBC 2016.

47. To decide whether the applicant has a valid claim for recovery of debt, a reference is made to the above-referred decision in the case of **Axis Bank Ltd (supra)** discussed in a CA No. 769/2019 which held, inter alia, that '*debt has not become due from the Corporate Debtor on the insolvency commencement date. It became due only when the corporate guarantee was invoked by the 'Corporate Debtor'*' In the present case, the cheques were dishonored by the bank, giving rise to the liability of debt for the corporate debtor on 14.01.2016 and 06.09.2016, i.e., much before the initiation of CIRP on 30.08.2018.

- I. we also note that the Section 139 of the Negotiable Instruments Act, 1881 makes a presumption in favour of the holder that "the holder of a cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability. In this connection, we refer to the decision of the

Hon'ble Supreme Court in ***Sampelly Satyanarayana Rao v Indian Renewable Energy Development Agency Limited***, 2016 SCC 954, decided on September 19 2016 in which it was held that a dishonoured post-dated cheque for repayment of a loan instalment that was described as 'security' in the loan agreement was covered by the criminal liability set out in Section 138 of the Negotiable Instruments Act 1881. In the said decision, the Hon'ble Court referred to its judgment in *Indus Airways Private Limited v Magnum Aviation Private Limited*, in which the Supreme Court further observed that the crucial issue for consideration was whether the cheque represented a discharge of existing enforceable debt or liability or whether it represented advance payment without there being subsisting debt or liability. In the said case,, the Hon'ble Supreme Court also relied on several earlier judgments to hold that cheques issued towards partial repayment of fees under a loan agreement would be an existing enforceable debt and their dishonour would attract consequences under Section 138 of the act. Specifically, a reference was made to ***Rangappa v Sri Mohan***, 2010(11)SCC441, where it was held that once a cheque has been issued and signed, the presumption of legally enforceable debt in favour of the holder of the cheque arises and it is for the accused to rebut the argument.

48. For further clarification on the nature of this debt,a reference is made to the decision of the Hon'ble Apex Court in the case of ***Pioneer Land &***

Infrastructure Ltd versus Union of India, which analyzed in detail the scope of section 5(8) as well as 5 (8) (f) of IBC. The relevant para of the said decision is extracted below:

“64. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by paragraph (f) and that the precise scope of paragraph (f) is uncertain. Equally, paragraph (f) seems to be a "catch-all" provision that is really residuary in nature, and which would subsume within it transactions that do not, in fact, fall under any of the other sub-clauses of Section 5(8).

65. And now to the precise language of section 5(8)(f). First and foremost, the sub-clause does not appear to be a residuary provision that is "catch-all" in nature. This is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any other clauses, would amount to a financial debt if they had the commercial effect of borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows:

(33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor:

As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay installments at various stages of construction so that they themselves then fund the project either partially or completely."

(Emphasis Supplied)

49. Thus, in the present case, the cheques were dishonored on 14.08.2013 and subsequently, criminal proceedings under Section 138 were initiated much before the initiation of CIRP. Keeping in view the aforementioned judicial decisions, we hold that the debt in the present case arose much before the

initiation of the CIRP proceedings and, hence, the applicant had correctly filed its claim before the Resolution Professional after the initiation of CIRP. We further hold that the said debt is a financial debt as it had the commercial effect of borrowing. The Liquidator is therefore directed to re-consider the claim on merits of the applicant on merits as per the provisions of the Code and our observations made in the foregoing paragraphs.

50. In the result, the applicant's prayer is allowed and the IA No. 947/2020 is disposed of accordingly.

Sd/-

(Subrata Kumar Dash)
Member (Technical)

August 28, 2023
PB/JGS

Sd/-

(Harnam Singh Thakur)
Member (Judicial)