

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

CP. (IB) No. 01/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 09.09.2021**

Name of the Company: Surat Goods Transport Private Operational
Creditor

V/S

Pioneer Carbide Private Limited Corporate Debtor

Section: Under section 9(3) (b) of the Insolvency and Bankruptcy Code,
2016.

S.No. NAME (CAPITAL LETTERS) DESIGNATION REPRESENTATION SIGNATURE

1.	MS. R. SAHIN	Advocate	Petitioner	Present in video
2.	MR. MUKESH SHARMA	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, vide separate sheet.

Sd/-

**(Prasanta Kumar Mohanty)
Member (Technical) &
Adjudicating Authority**

Sd/-

**(H. V. Subba Rao)
Member (Judicial) &
Adjudicating Authority**

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ORDER

[Per se: Prasanta Kumar Mohanty, Member (T)]

1. The present petition has been preferred by the Operational Creditor i.e. Surat Goods Transport Private Limited under Section 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) against the Corporate Debtor Company, namely, Pioneer Carbide Private Limited.

2. The Petitioner/Operational Creditor namely Surat Goods Transport Private Ltd. with a Company Identification Number (CIN)- U99999MH1977PTC020049 is having its

Registered Office at Viraj Impex House,47, P.D. 'Mello Road' masjid East, Mumbai-400009, India.

3. The Respondent/ Corporate Debtor, namely Pioneer Carbide Private Limited, was incorporated on 9th March, 1999 with CIN- U27101ML1999PTC005692. The Registered Office of the Corporate Debtor is situated at: Upper Baliyan, Umtru Road, Ri-Bhoi, Byrnihat, Meghalaya-793101, India.

4. It is submitted by the Petitioner that a work order dated **19.04.2017** was made by and between the Operational Creditor and the Corporate Debtor, binding the Operational Creditor to transport various goods like as Ferro Silicon from Upper Baliyan, Umtru Road, Ri-Bhoi, Byrnihat, Meghalaya-793101 to the various parts of India. The Operational Creditor duly transported the said goods to the various parts of India.

5. It is further submitted that the Operational Creditor raised **6 (six)** bills upon the Corporate Debtor for the unpaid operational dues of Rs.4,13,950.00. The Corporate Debtor after receiving the bills/invoices did not raise any objection regarding in any manner whatsoever. The Corporate Debtor failed to make any payments of the bills dated- **16.02.2018; 03.03.2018; 06.03.2018; 20.03.2018; 29.05.2018** and **20.06.2018**. Subsequently, the Operational Creditor duly requested the Corporate Debtor in writing to pay the said dues vide letter dated **17th May, 2019**. However, after receiving the said letter dated 17.05.2019, the Corporate Debtor neither gave any reply thereto nor any amount in respect of the above 6 (nos.) invoices. The 6 invoices are annexed herewith and is available from **Page no. 59 to 64** of **Annexure A-3**.

Precisely, the payment against the following invoices raised have not been received:

Date	Bill No.	Amount of Debt Outstanding
16.02.2018	813/1718/00528	Rs.72450.00
03.03.2018	813/1718/00546	Rs.81250.00
06.03.2018	813/1718/00552	Rs.81250.00
20.03.2018	813/1718/00561	Rs.73200.00
20.06.2018	813/1819/00057	Rs.48300.00
29.05.2018	813/1819/00034	Rs.57500.00
Total		Rs.413,950.00

6. The Petitioner also states that the said invoices are still outstanding and have remained unpaid till date. That as on date, there is an outstanding amount of Rs.5,44,344.25.00 (Rupees Five Lakhs Forty-Four Thousand Three hundred and Forty-Four and Twenty-Five paisa only) (Principal amount of Rs.4,13,950 plus interest @18% per annum from 17th March 2018 to 31st December 2019 is Rs.1,30,394.25) along with further interest @ 18% per annum from 01.01.2020 till the date of actual realization which is due and defaulted and payable by the Corporate Debtor (CD). The date which the default occurred is 17th March, 2018.

7. The Petitioner submits that a **demand notice** under Sec. 8 of Insolvency and Bankruptcy Code, 2016, was issued by the Operational Creditor on **3rd January, 2020** under the provisions of Insolvency and Bankruptcy Code, 2016. The demand notice dated 3rd January, 2020 is annexed herewith and marked as **ANNEXURE A-1**.

8. The Petitioner further submits that vide letter no. PCPL/156/19-20/195 dated 28.05.2019 by the Corporate Debtor, the Operational Creditor was asked to send the Statement of Account and it was also mentioned in the letter about pilferage of material and lodging of alleged claim with the Insurance Company. The Operational Creditor replied vide notice No. SGTPL-22 (B) dated 22.07.2019 stating that since the Corporate Debtor has insured the consignment against the transit risk involved in road transportation and also have taken up claim with the Insurance Company, the Corporate Debtor is not legally justified in withholding the payment of freight charges of the Operational Creditor for the transportation services rendered by them for the period 24.07.2015 to 20.06.2018.

9. The Petitioner submits that that the Corporate Debtor replied to the notice dated 22.07.2019 vide letter dated 09.09.2019 stating that claims made by the Operational Creditor is not correct and concocted. The Letter stated that one consignment was sent to IISCO Steel Plant, Burnpur, under Invoice No. 0087 and material value of Rs.23,02,612.00 (Rupees Twenty

Three Lakhs and Two Thousand Six Hundred Twelve) through the OC , M/S Surat Goods Transport Pvt. Ltd. Builty No. 8130004700 dated 21.06.2017 and when the consignment reached its destination at IISCO Steel Plant, the consignment was rejected by the IISCO Steel Plant due to mixing of dust with the original material Ferro Silicon sent from the factory . Thereafter, a police case was registered on 05.07.2017 by the Pioneer Carbide Private Limited. i.e. the Corporate Debtor with Byrnihat PS, Meghalaya, against the Transporter, Truck Driver, Truck owner for Criminal Breach of Trust.

10. The Petitioner further submits that the Letter dated 09.09.2019 also mentions that the Corporate Debtor has undergone huge financial losses and the insurance company has also not settled any claim for the said consignment till date and the outstanding amount if any to the Operational Creditor shall be paid only after settlement of claim by the Insurance Company as per the work order issued by the Corporate Debtor.

11. It is submitted by the Petitioner that whenever approached for the payment, either through notice or letters, the Corporate Debtor in return deliberately, in order to evade from its liability, brought in new unrelated issues.

12. In light of the abovementioned facts and circumstances, the Applicant's prayer before this Adjudicating Authority is to initiate Corporate Insolvency Resolution Process ("CIRP" in short) in respect of the Corporate Debtor Company, namely, Pioneer Carbide Private Limited.

13. On the other hand, the Respondent has filed its reply vide affidavit dated 17.02.2021 and submits that the company petition is barred by law of limitation and on pecuniary jurisdiction. Also the Operational Creditor is under promissory estoppels and as such had no locus to initiate such application.

14. The Respondent submits that the averments made in the Company Application are not correct and misleading in nature and the deponent denies the same and in said connection submits that the applicant has failed to bring out any facts whereby it can be proved that the default has occurred as projected. The purported Company Application has been filed to mislead and suppress material facts and the deponent strongly disputes upon the same.

15. It is submitted by the Respondent that the Respondent Company, *M/s Pioneer Carbide Private Limited* is a company incorporated under the Companies Act, 1956, is engaged in manufacturing of Ferro Silicon and a registered Vendor of Steel Authority of India Limited since last 14 years and in this case is duly represented by its Director Mr. Shyam Sundar Agarwal. Copy of Company Resolution and ROC Master Data are attached herewith as **Annexure-1 and 2** of the reply-on-affidavit.

16. **The Respondent submits that the Operational Creditor was engaged by the Corporate Debtor for transportation of Ferro Silicon from the manufacturing unit of the Corporate Debtor to various plants of Steel Authority of India Limited situated in different parts of India and for that Work Order No. PCPL/156/17-18/145 dated 19.04.2017 was issued to Surat Goods Transport Pvt. Ltd. under clear acknowledgement and acceptance of Operational Creditor thereby amongst other as per Clause 4 of the said Work Order: *"In case of delay beyond delivery schedule, non- delivery police report should be made available to us with value of our consignment which shall be refunded to you after realization of our claim from the insurance company"*.**

Copy of the work order is attached herewith and marked as **Annexure- 3** of the reply-on-affidavit.

17. **The Respondent further submits that one consignment of Ferro Silicon was sent to SAIL IISCO Steel Plant on 21.06.2017 vide truck no. NL02L1644 under Invoice No. 0087, Consignment Note no. 8130004700 which was**

rejected on 29.06.2017 by IISCO Steel Plant due to replacement of original material in transit by the carrier. The formal intimation from IISCO Steel Plant was received on 04.07.2017 vide IISCO Steel Plant Letter No. RM/40/2017/750. Thereafter, FIR dated 05.07.2017 was duly lodged with Byrnihat Police Station against the applicant/Operational Creditor Transporter/Truck owner including its Truck driver. And in said regards an intimidation was given to the Operational Creditor vide letter no. PCPL/156/17-18/703 dated 10.07.2017 and to the Insurance Company "The Oriental Insurance Company Ltd" was also given on 13.07.2017 vide letter No. PCPL/OIC/2017-18/776.

Copy of Invoice No. 0087, copy of consignment Note no. 8130004700, Copy of IISCO Steel Plant letter no. RM/40/2017/750, Copy of an FIR dated 05.07.2017, Copy of letter no. PCPL/156/17-18/703 dated 10.07.2017 and copy of letter No. PCPL/OIC/2017-18/776 dated 13.07.2017 are attached herewith and marked as **Annexure-4, Annexure-5, Annexure-6, Annexure-7, Annexure-8 and Annexure-9** respectively.

18. The Respondent states that finding no other alternative, lastly the Corporate Debtor had initiated a notice dated 21.07.2017 under section 10 of Carriers Act for Recovery of a sum of Rs.23,02,612.00 (Rupees Twenty-Three Lakhs Two Thousand Six Hundred Twelve only) against contamination and theft of Ferro Silicon material quantity 28 MT (28 Bags X 1000 Kg) and till date the said amount has not been paid by the operational creditor.

Copy of notice dated 21.07.2017 under section 10 under Carriers Act is attached herewith and marked as **Annexure-11**.

19. The Respondent submits that the certificate of loss vide No. 17-18/5498 dated 19.12.2017 issued is a concrete proof of negligence and for that Operational Creditor shall be held responsible for the same and does not

deserve to demand any payment towards its freight till settlement of account as a whole.

Copy of certificate of loss vide NO. 17-18/5498 dated 19.12.2017 is attached herewith and marked as **Annexure-12**.

20. The Respondent further submits that a complaint was sent to the Director General of Police, Meghalaya vide letter dated 04.12.2018 to expedite the investigation by deputing a competent Police Officer to book the culprit to save Corporate Debtor's industry and enable it to supply its products to Steel Plants Govt. of India and now the matter was pending before Hon'ble Nongpoh Court, Ri-Bhoi District in Case No. 153(7)2017 U/S 120(B)/420/34.

Copy of complaint sent to the Director General of Police Meghalaya vide letter Dt. 04.12.2018 is attached herewith and marked as **Annexure-13** and a copy of an Order in case No. 153(7)2017 U/S 120(B)/420/34 is attached herewith and marked as **Annexure-14**.

21. The Respondent states that the Operational Creditor even after knowing fully well that the Corporate Debtor had made a counter demand vide notice dated 21.07.2017 under section 10 under Carriers Act to the tune of Rs.23,02,612.00 (Rupees Twenty Three Lakhs Two Thousand Six Hundred Twelve only) and without settling the same, have initiated a notice vide No. SGTPL/HO/Gwt/1705/19 dated 17.05.2019 for payment of Rs.5,58,781.00 (Rupees Five Lakhs Fifty Eight Thousand Seven Hundred only) and the said notice was duly replied by Corporate Debtor vide no. PCPL/156/19-20 dated 28.05.2019.

Copy of Notice vide No. SGTPL/HO/Gwt/1705/19 is attached herewith and marked as **Annexure-15** and a copy of reply by Corporate Debtor vide no. PCPL/156/19-20/195 dated 28.05.2019 is attached herewith and marked as **Annexure-16**.

22. The Respondent submits that the Operational Creditor again sent a Notice on **24.06.2019** through its legal department without signatory name which was duly replied by Corporate Debtor vide **reply No. PCPL/156/19-20/382 dated 08.07.2019** and the said was duly attached with notice from Byrnihat Police **dated 07.06.2019**.

23. The Respondent further submits that even after the position was made clear to Operational Creditor in reference to its claim, the Operational Creditor, knowing duly well that it had a liability under Carriers Act and had promissory estoppels as per contract, had once again initiated a legal notice dated **22.07.2019 vide No. SGTPL/22(B)** through its Advocate Ms. Kalyani G. Parmar Advocate, High Court, Mumbai and the said legal notice was completely based on incomplete facts and/or concocted story as build up by Operational Creditor and the said notice was duly replied on **09.09.2019** by Corporate Debtor through its advocate. Corporate Debtor is not liable under any situation and Operational Creditor with mala fide intention has filed this instant case wherein a default has yet not been arised and Operational Creditor has also tried to tarnishe the image of Corporate Debtor and for that the Corporate Debtor is in process to file appropriate suit before the competent court of law.

Copy of legal notice dated 22.07.2019 vide No. SGTPL/22(B) is attached herewith and marked as **Annexure-20**. And, Copy of Reply dated 09.09.2019 is attached herewith and marked as **Annexure-21**.

24. The Respondent submits that further a sum of **Rs.1,11,168.00 (Rupees One Lakhs Eleven Thousand One Hundred Sixty-Eight only)** was incurred on account of expenses for bringing back the rejected consignment by Byrnihat Police OC The same was directly attributable to Operational Creditor and the same was duly effected to the account of Operational Creditor in the books of corporate debtors.

Copy of statement is attached herewith and marked as **Annexure-22**.

25. The Respondent submits that in the instant case, the disputed amount as claimed by the Operational Creditor is a disputed one as per work order dated

19.04.2017 supported by notice dated **21.07.2017** of Corporate Debtor under Sec 10 of Carriers Act and various other notices and reply and further to state herein that application under Section 9 of the Code on the basis of the claims for entitlement of interest, is not maintainable.

26. The Respondent prays that in the light of submissions made, the impugned application may please be rejected/dismissed by rejecting all the contentions and statement made by the Operational Creditor in the Company Application.

27. The Respondent/Corporate Debtor has further submitted in its written arguments the following:

(i) That a perusal of the pleadings of the parties would reveal the existence of a pre-existing dispute. It is submitted that the applicant/ Operational Creditor was engaged by the Corporate Debtor for transportation of Ferro Silicon to various plants of steel authority of India limited vide order no. TCPL/156/1718/145 dated 19.04.2017 (**Annexure no.3 of affidavit in opposition at page no. 14**) and (**Annexure 2 of series of the application at Page No. 26**), which was clearly acknowledged by the Operational Creditor and amongst others it contained clause No. 4 that ***"In case of delay beyond delivery schedule, with value of our consignment which shall be refunded to you after realization of our claim from insurance company."***

(ii) **In this present case one consignment of Ferro Silicon meant to be sent to SAIL, IISCO steel plant on 21.06.2017 vide truck no. NL02I1644 under invoice No. 0087 (Annexure -4 of Reply affidavit at Page No. 15), Consignment Note No. 8130004700 (Annexure -5 of Reply affidavit at Page No. 16) was rejected on 04.07.2017 by Steel Authority of India Limited, IISCO Steel Plant due to replacement of original material in transit by the carrier i.e. Operational Creditor M/S**

Surat Good Transport Pvt. Ltd (Annexure-6 of Reply affidavit at Page No. 17). Thereafter a FIR dated 05.07.2017 (Annexure- 7 of Reply affidavit at Page No. 18) was lodged with Byrnihat Police Station against the Applicant/Operational Creditor including its Truck driver. And in said regards an intimation was given to the operational creditor vide letter no. PCPL/156/17-18/703 dated 10.07.2017 (Annexure -8 of Reply affidavit at Page No. 22, 24) and to the Insurance Company "The Oriental Insurance Company Ltd" on 13.07.2017 (Annexure-9 of Reply affidavit at Page No. 25-26). The said consignment was completely rejected by IISCO Steel Plant, Burnpur vide their mail dated 13.07.2017 (Annexure no. 10 at page no. 27-28 of Reply affidavit) and for the said loss of entire consignment of Rs. 23,02,612.00 (Rupees Twenty-Three Lakhs Two Thousand Six Hundred and Twelve), the Corporate Debtor had initiated notice dated 21/07/2017 at (Annexure no. 11 of Reply affidavit at Page No. 32) under Section 10 of the Carriers Act, and Corporate Debtor has not replied to the same, there by admitting its liability of Rs. 23,02,612.00 (Rupees Twenty-Three Lakhs Two Thousand Six Hundred and Twelve), towards theft of Ferro Silicon material and till date the said amount has not been paid by the Operational creditor.

(iii) The Operational Creditor in order to wrongful gain and bargain over the lawful demand of Corporate Debtor knowingly well that Corporate Debtor had already placed its demand of Rs.23,02,612.00 (Rupees Twenty-Three Lakhs Two Thousand Six Hundred and Twelve) (Annexure 11 of Reply affidavit at Page No.32) without replying to the said notice nor paying the demanded amount, has raised the claim of Rs. 5,58,781.00 (Rupees Five Lakhs Fifty Eight Thousand and Seventy Hundred Eight One Only) vide notice dated 17.05.2019 (Annexure 15 at page no. 44 of Reply affidavit) to which Corporate Debtor had replied

and demanded for verification of running account with demand settlement of losses of Corporate Debtor incurred on account of stolen goods arising due of the consignment code no. 8130004700 (Annexure No. 5 of Reply affidavit at Page No. 16) arising out of an invoice no. 0087 (Annexure No.4 of Reply affidavit at page no. 15). It is worth mentioning herein that till date the entire consignment in invoices no. 0087 dated 21.06.2017 is stuck up due to the rejection of said material by the IISCO plant vide their mail dated 13.07.2017 (Annexure no. 10 of Reply affidavit at page no. 27) and rejection of the claim by the insurance company on account of theft on 01.03.2021 (Annexure 2 of the counter reply of the Affidavit of corporate Debtor at Page 14).

28. That it is further submitted that the Operational Creditor has duly admitted in their counter reply to affidavit at paragraph no. 9, line no. 4 ***"that the applicant submits that there exists a dispute between the parties but the same relates to different transaction."***

29. **Therefore, from the entire records it is crystal clear that the Operational Creditor has acted under contract and had been maintaining a running account consisting of several transactions (Annexure 1 copy of ledger account of Counter reply of affidavit by the Corporate Debtor at page no. 7-13).**

30. It is submitted that it is no longer res-integra that once the operational creditor has filed an application which is otherwise complete ,the adjudicating authority has to reject the application under section 9 (5) (II) (d) of the IBC if there is a record of dispute. What is required is that the corporate debtor must bring to the notice of the Operational Creditor the existence of a dispute or the fact that a suit or arbitration proceeding relating to the dispute is pending between the parties. All that the adjudicating authority is required to see at this stage is whether there is a plausible contention which requires further investigation and the dispute is not a patently feeble legal argument or an assertion of facts unsupported by evidence. **It is now**

crystalized that so long as the dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has no other option but to reject the application. [Reference should be given to **Civil Appeal No. 1137 of 2019 *Kay Bouvet Engineering Ltd. V. Overseas Infrastructure Alliance (India) Pvt. Ltd.* decided by Supreme Court of India vide Judgement and Order dated 10.08.2021; *Mobilox Innovation Pvt. Ltd. V. Kirusa Software Pvt. Ltd.* Reported in (2008) 1 SCC 353 para and *Transmission Corporation of Andhra Pradesh V. Equipments Conductors and Cables Limited* reported in (2019) 12 SCC 697]**

31. That in the instant case the existence of a dispute is not only not denied and on the contrary has been admitted by the Operational creditor in their counter reply to the affidavit at paragraph 9, line 4 ***"that the applicant submits that there exists a dispute between the parties but the same relates to different transaction...."*** and as such in the face of such admission and the law holding the field as enumerated above this Hon'ble Tribunal has no option but to reject the instant application with costs to the Corporate debtor.

32. That the Corporate Debtor further submits that Operational Creditor has mentioned in its application at Part 4, that the amount has fallen due on from 17.03.2018 whereas the subject matter of the instant application (bill no. BL/813/1718/00561 is dated 20.03.2019, bill no. BL/813/1819/00034 dated 29.05.2018 and bill no. BL/813/1819/00057 dated 20.06.2018) which were raised after 17.03.2018 (date alleged to have fallen due) thus establishing the fact that pursuant to the agreement of the parties there existed a running account between the parties over which there existed a dispute and there were no separate transactions as alleged by the Operational Creditor. The malafide of the Operational Creditor in initiating the instant proceedings as a counter blast is further established by such act in as much as demand of an amount was sought to be made even before a bill/invoice was raised and the Operational Creditor is not even clear as to

against which bill they are raising their demands and only on that account the application is liable to be rejected with costs to the Corporate Debtor.

33. That it is submitted that the bills in respect of which the present proceedings have been initiated are dated 16.02.2018, 03.03.2018, 06.03.2018, 20.03.2018, 29.05.2018, 20.06.2018 at **Page 58 of the application** which totals to a sum of Rs. 4,13,990.00 (Rs. Four Lakhs Thirteen Thousand Nine Hundred Ninety Only) along with interest stands claimed at Rs.5,58,781.00 (Rupees Five Lakhs Fifty-Eight Thousand and Seventy Hundred Eight One Only).

34. **A perusal of the statement of account annexed to the application at page 69 would reveal that an amount of Rs. 8,09,431.00 (Rs. Eight Lakhs Nine Thousand Four Hundred Thirty-One Only) was paid on 09.05.2018 by the Corporate debtor to the Operational creditor and further an amount of Rs. 5,16,037.00 (Rs. Five Lakhs Sixteen Thousand and Thirty-Seven Only) was paid on 14.09.2018 by the Corporate debtor to the Operational creditor (at page 16 of Counter reply on affidavit) thereby totally to a sum of Rs. 13,23,468.00 (Rs Thirteen Lakhs Twenty-Three Thousand Four Hundred Sixty-Eight Only) which has been accepted by the Operational Creditor and as such the instant proceedings are nothing but an abuse of the process of law by the Operational Creditor to subvert their liability towards the Corporate Debtor in the maker of which there already exists a long pending dispute.**

35. That the authority of filing of this instant applicant is highly disputed as the Operational Creditor has failed to support the authority of filing by proper Board resolution hence the present application is liable to be dismissed.

36. That the Corporate debtor has categorically denied the receipts of Demand Notice dated 03.01.2020 at Page 14-25 of the application of Operational Creditor and without admitting but for the sake of submission to say herein that if it would have served then also the reply to the said would be in the manner that there exist pre-

existed dispute to pending settlement of corporate debtor in regards to invoice no. 8130004700 amount to Rs. 23,02,612.00 (Rupees Twenty-Three Lakhs Two Thousand Six Hundred and Two) to which the Corporate debtor has legally enforceable demand against Operational Creditor.

37. It is further submitted that the Hon'ble Supreme Court in the case of ***Innovative Industries V. ICICI bank limited reported in (2018) 1 SCC 407*** held that the scheme of the code is to ensure that when a default takes place, in the sense that the debts demand due and is not paid, the Insolvency Resolution process begins. In the present case and in the light of aforesaid discussion and in the light of Counter demand of the Corporate Debtor to the tune of Rs.47,45,506.77 (Rs. Forty-Seven Lakhs Forty-Five Thousand Five Hundred Six and Seventy-Seven Paise Only) there is default and hence the Insolvency Resolution process cannot be triggered against the Corporate Debtor.

38. The Corporate Debtor relied on and submitted judgments of the following authorities:

1. ***Mobilox Innovation Pvt Ltd V. Kirusa Software Pvt Ltd; (2008) 1 SCC***
2. ***Innovative Industries V. ICICI bank limited; (2018) 1 SCC 407.***
3. ***Transmission Corporation of Andhra Pradesh V. Equipment's Conductions and Cables limited; (2019) 12 SCC 697***
4. ***Kissan V. Vijay Nirman Pvt. Ltd; (2018) 17 SCC 662.***
5. ***Kay Bouvet Engineering Ltd V. Overseas Infrastructure Alliance(India) Private Ltd; Civil Appeal No. 1137 of 2019 at Supreme Court of India.***
6. ***Allied Silica Ltd V. Tata Chemical Ltd; (2021) 4 SCC 515.***

39. That the Corporate Debtor humbly submits that in view of the attending facts and circumstances of the instant case and the law as laid down by the Hon'ble Supreme Court of India, **the instant application filed by the Applicant/ Operational Creditor is liable to be dismissed with costs to the Corporate Debtor.**

40. The Petitioner has further submitted in its affidavit dated 14.07.2021 that:
- i. That the Respondent's claim that the Applicant has tried best to conceal/suppress material facts by not disclosing the facts relating to the FIR dated 05.07.2017, Complaint dated 04.12.2018 as well as the notice dated 21.07.2017 in our Company Petition is totally misleading in as much as the Applicant has neither concealed not suppressed any material fact since the said FIR, Complaints and the Notice relates to a different transactions not relating to the subject transaction, which shows that he Corporate Debtor has wrongly and deliberately trying to club the transactions and make out a wrongful claim, and in that view of the matter, the contentions of the Corporate Debtor being not sustainable the instant Counter is liable to be rejected with compensatory costs.
 - ii. That the Applicant has never tried to recover undue money from the Corporate Debtor. **The Applicant might on some occasions, issued consolidated bills** and the payment was also made on the consolidated bills, but that does not at all imply that the transactions are all inter-related. The matter of demanding loss from the Applicant for their alleged illegal activities cannot be a subject matter of the instant proceeding, and the Applicant has not made any vague, misleading and incorrect statement in the Company petition and the Corporate Debtor is put to the strictest proof thereon. The copies of Ledger Account/Balance Sheet which have been annexed as Annexures- 1,2 and 3 to the Counter will not come to its aid for the Corporate Debtor and the same ought not to be relied upon by this Hon'ble Tribunal.
 - iii. That while categorically denying the correctness of the averments made in the Paragraph 2(iii) of the Counter, Applicant reiterates what it has stated in this regard and further states that the Applicant has never made any vexatious, frivolous and cryptic statements in order to mislead this Hon'ble Court and the Corporate Debtor is put to the strictest proof thereon.

- iv. That the Applicant further submits that the citations of the Hon'ble Supreme Court will not come to its aid for the Corporate Debtor in as much as the Hon'ble Supreme Court has interpreted the expression existence of dispute in a different pretext not similar to that of the instant proceeding. The Applicant submits that there exists a dispute between the parties but the same relates to a different transaction, not at all related to the subject transactions as categorically reiterated by the Applicant. The amount relating to the subject transactions are all undisputed, and as such, the claims and contentions of the Corporate Debtor ought not be held sustainable and maintainable, the instant Counter is liable to be summarily dismissed with compensatory costs.
- v. That the instant Counter is an abuse of the process of the Court and is liable to be rejected.

41. The matter was taken up and heard on 06.01.2021; 23.02.2021; 03.05.2021; 22.06.2021 and 04.08.2021.

ORDER

1. Heard the Counsels of both the sides at length, perused the Documents, Affidavits filed. It is found the following from the Documents, Affidavits submitted by both the sides:

- i. A work order dated **19.04.2017** was made by and between the Operational Creditor and the Corporate Debtor, binding the Operational Creditor to transport various goods like as Ferro Silicon from Upper Baliyan, Umtru Road, Ri-Bhoi, Byrnihat, Meghalaya-793101 to the various parts of India.
- ii. The Operational Creditor was engaged by the Corporate Debtor for transportation of Ferro Silicon from the manufacturing unit of the Corporate Debtor to various plants of Steel Authority of India Limited situated in different parts of India and for that the Work Order No. PCPL/156/17-18/145 dated 19.04.2017 was issued to

Surat Goods Transport Pvt. Ltd. under clear acknowledgement and acceptance of Operational Creditor thereby amongst other as per Clause 4 of the said Work Order: **“In case of delay beyond delivery schedule, non- delivery police report should be made available to us with value of our consignment which shall be refunded to you after realization of our claim from the insurance company”**.

- iii. **In the present case, one consignment of Ferro Silicon sent to SAIL, IISCO steel plant through the Operational Creditor on 21.06.2017 vide truck no. NL0211644 under invoice No. 0087, Consignment Note No. 8130004700 was rejected on 04.07.2017 by Steel Authority of India Limited, IISCO Steel Plant due to mixing of dust with materials in transit. Thereafter a FIR dated 05.07.2017 has been lodged by the CD with the Byrnihat Police Station against the Applicant/Operational Creditor including its Truck driver. An intimation has been given by the CD to the operational creditor vide letter no. PCPL/156/17-18/703 dated 10.07.2017 and to the Insurance Company “The Oriental Insurance Company Ltd” on 13.07.2017. The said consignment has been completely rejected by IISCO Steel Plant, Burnpur vide their mail dated 13.07.2017 and for the said loss of entire consignment of Rs. 23,02,612.00 (Rupees Twenty-Three Lakhs Two Thousand Six Hundred and Twelve), the Corporate Debtor has sent notice dated 21/07/2017 to the OC under Section 10 of the Carriers Act.**
- iv. **It is observed that the entire consignment in invoices no. 0087 dated 21.06.2017 is stuck up due to the rejection of said material by the IISCO plant vide their mail dated**

13.07.2017 and rejection of the claim by the insurance company on account of theft on 01.03.2021

- v. On the Other hand, the Operational Creditor raised **6 (Six)** bills upon the Corporate Debtor. The Corporate Debtor after receiving the bills failed to make any payments of the bills dated- **16.02.2018; 03.03.2018; 06.03.2018; 20.03.2018; 29.05.2018** and **20.06.2018**. Subsequently, the Operational Creditor duly requested the Corporate Debtor in writing to pay the said dues vide letter dated **17th May, 2019**. However, after receiving the said letter dated 17.05.2019, the Corporate Debtor neither gave any reply thereto nor any amount in respect of the above 6 (nos.) invoices.
- vi. **The CD has filed its Bank statement (IOB) wherein, it is shown that the CD has paid Rs. 5,16,037.00 (Rupees Five Lakhs Sixteen Thousand Thirty-Seven Only) and Rs. 8,09,431.00 (Rupees Eight Lakhs Nine Thousand Four Hundred Thirty-One Only) to the OC on 14.09.2018 and 10.05.2018 respectively (Page No. 16 and 19 of the Reply Affidavit of the CD). These two payments have been made not only during the period of the six bills raised by the OC but also after the last bill dated 20.06.2018 raised by the OC. Hence, the contention of the CD that it is a running account, not paid on the basis of each invoice, is found to be correct.**
- vii. **The OC has admitted in its affidavit [counter reply to affidavit at paragraph no. 9, line no. 4] "that the applicant submits that there exists a dispute between the parties but the same relates to different transactions." On the other hand, the argument of the OC that, it is not a running account does not hold good as the payments are made by**

the CD in consolidated manner. It is also observed that the OC has filed its bank account (HDFC) for the period 01.05.2018 to 15.05.2018 (page 69 of the Application) but it has enclosed the entries of the account only up to 09.05.2018 just before the date of payment by the CD on 10.05.2018. Moreover, it has not filed its Bank Statement for the date of 14.09.2018, when the CD has paid Rs. 5,16,037.00 (Rupees Five Lakhs Sixteen Thousand Thirty-Seven Only). Had the OC filed the above bank statement, it could have been proved by OC itself that this is a running account.

- viii. It appears that the OC has not filed its bank statement of the relevant period deliberately to justify its claim that it is not a running account.**
- ix. Moreover, one main condition is found from the work order dated 19.04.2017 made between the OC and CD that "In case of delay delivery schedule, with value of our consignment which shall be refunded to you after realization of our claim from insurance company."**
- x. In this case the entire consignment is stuck up, FIR filed, finally, the insurance company rejected the claim on 01.03.2021. Hence, as per the condition of the work order, the OC is not entitled to get the payment as claimed.**

2. Considering the abovementioned facts, we are of considered view that there is an existence of dispute from 04.07.2017 i.e. well before the issuance of the demand notice by the OC on 17.05.2019. As per the provision of IBC 2016, an Application filed under Sec 9 Of IBC needs to be rejected if there is an existence of Disputes prior to the issue of Demand notice by the OC upon CD.

3. Hence, this application filed under section 9 of the IBC, 2016 is hereby rejected.

4. This Application is rejected with the aforesaid observations so as to no costs.

Sd/-
(Prasanta Kumar Mohanty)
Member (Technical) &
Adjudicating Authority
//R.M//D// 09.09.2021//

Sd/-
(H. V. Subba Rao)
Member (Judicial) &
Adjudicating Authority