

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKATA BENCH,
KOLKATA**

C.P (IB) No.911/KB/2020

In the matter of

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

And

In the matter of:

Jai Balaji Industries Limited, CIN: L27102WB1999PLC089755, having its office at 5, Bentricks Street, 1st Floor, Kolkata- 700001.

... Operational Creditor

Versus

In the matter of:

BST Infratech Limited, CIN: U27310WB2007PLC114311, having its office at 1, R.N.Mukherjee Road, Martin Burn House Building,2nd Floor, North Block, Room No. 231 & 232, Kolkata-700001, West Bengal.

...Corporate Debtor

And

Date of hearing : 09/09/2021

Order Pronounced on : 03 /11/2021

Coram:

Mr. Rajasekhar V.K., Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

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|--------------------------------|---------------------------------|
| 1. Mr. Abhrajit Mitra, Sr.Adv. | -- For the Operational Creditor |
| 2. Ms.Manju Bhuteria, Adv. | |
| 3. Mr.Rajshree Kajaria, Adv. | |
| 4. Ms.Sonia Sharma, Adv. | |

1. **Mr. Joy Saha, Sr. Adv.** - **For the Corporate Debtor**
2. **Mr. Yash Vardhan Deora, Adv.**
3. **Mr. K. Viswanathan, Adv.**

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under section 9 of the IBC has been filed by **Jai Balaji Industries Limited, CIN: L27102WB1999PLC089755**, a corporate entity, having its office at 1, R.N.Mukherjee Road, Martin Burn House Building, 2nd Floor, North Block, Room No. 231 & 232, Kolkata-700001, West Bengal. (hereinafter referred as the Operational Creditor) through Mr. Ajay Kumar Tantia, its Company Secretary, authorised by the resolution passed by the Board of Directors at its meeting held on 14th November, 2019, seeking initiation of corporate insolvency resolution process in respect of **BST Infratech Limited, CIN: U27310WB2007PLC114311**, another corporate entity, having its office at 1, R.N.Mukherjee Road, Martin Burn House Building, 2nd Floor, North Block, Room No. 231 & 232, Kolkata-700001, West Bengal (hereinafter referred as the Corporate Debtor).
3. The Operational Creditor has submitted in Part IV of Form-5 that the Operational Creditor and the Corporate Debtor are engaged, inter alia, in the sale and purchase of billets, M.S.Scrap etc. and as per the requirement, the Operational Creditor had placed orders upon the Corporate Debtor to supply materials, and on several occasions even the Corporate Debtor used to place orders upon the Operational Creditor for supply of materials. It is submitted that between 9th August, 2012 to 6th March, 2017, the Operational Creditor raised 1017 number of invoices for supplies made by the Operational Creditor to the Corporate Debtor. The Corporate Debtor made part payment in respect of the said invoices and failed and neglected to make payment of the balance amount of

Rs.25,34,86,791/- and the said sum remained due and payable by the Corporate Debtor to the Operational Creditor in respect of the invoices raised till 6th March, 2017.

4. It is further submitted that the Corporate Debtor had also supplied goods to the Operational Creditor and had raised invoices aggregating to Rs. 3,25,080/- and the last invoice was dated 4th November, 2015. It is further submitted that after giving adjustment to the sums payable by the Operational Creditor to the Corporate Debtor in respect of the supply made by the Corporate Debtor to the Operational Creditor, a sum of Rs. 25,31,61,711/- became due and payable by the Corporate Debtor to the Operational Creditor as on 6th March,2017.
5. It is submitted that as the Corporate Debtor failed and neglected to make the said balance outstanding dues, the Operational Creditor issued a notice dated 25th May, 2017 under section 8 of the IBC, 2016 in respect of the outstanding dues as on 6th March, 2017. Thereafter, the Operational Creditor filed an application being CP(IB) No. 431/KB/2017. The Corporate Debtor also filed its reply and the Operational Creditor filed its rejoinder in the said proceedings. It is further submitted that after the issuance of the Demand Notice dated 25th May, 2017, further transactions took place between the Operational Creditor and the Corporate Debtor and the last transaction took place on 5th October, 2017. In the reply filed by the Corporate Debtor in C.P. No. 431/KB/2017, the Corporate Debtor had admitted its liability. It is submitted that the Corporate Debtor made part payments to the Operational Creditor after issuance of the notice under section 8 of the IBC,2016 and during the pendency of CP 431/KB/2017. The Corporate Debtor, after giving adjustment to the payments made by the Corporate Debtor, after issuance of notice dated 25th May,2017 and after filing of the section 9 proceeding, admitted a sum of Rs. 20,47, 40,891/- as due and payable by the Corporate Debtor to Operational Creditor in its reply.

In the said reply the Corporate Debtor undertook to honour its undertakings made in paragraph 12 of the reply to pay a sum of Rs. 20,47,40,891/- within 180 days. However, the Corporate Debtor paid only a sum of Rs. 5 Crores between 30th November, 2017 to 25th May, 2018. It is further submitted that in the rejoinder, the Operational Creditor had given the details of the payments received after the issuance of the Demand Notice. Thereafter, when the matter was ready for hearing, the Corporate Debtor approached the Operational Creditor and expressed its desire to settle the matter. The Corporate Debtor represented to the Operational Creditor that the Corporate Debtor would make payment of a sum of Rs. 15,47,40,891/- in instalments and agreed to make payment on account of interest @ 24% p.a. if the Corporate Debtor fails to make payment in terms of the agreement. The Operational Creditor, believing the said representation to be true, agreed to settle the matter and a settlement agreement was signed between the parties. Copy of the Settlement Agreement dated 11th October, 2018 is annexed as Annexure-I-F. In terms of the settlement agreement, the Operational Creditor withdrew the petition vide copy of the order dated 12th October, 2018. It is submitted that in terms of the settlement agreement, the Corporate Debtor was to make payment in instalments but the Corporate Debtor failed and neglected to make payment of even a single instalment. Therefore, the Operational Creditor informed the Corporate Debtor by way of telephone call that the Operational Creditor would take steps in terms of the Settlement Agreement, which provided that if the Corporate Debtor failed to make payment in terms of the settlement agreement, the Operational Creditor would be at liberty to initiate a fresh proceeding under the IBC Code, 2016.

6. It is further submitted that as the Corporate Debtor failed and neglected to make the payment in terms of the aforesaid settlement agreement, the Operational Creditor issued a Demand Notice dated 3rd September, 2019 calling upon the Corporate Debtor to make payment in terms of the settlement agreement dated 11th October, 2018, failing which, the

Operational Creditor would take appropriate steps in accordance with law. The said notice was posted on 4th September, 2019 and it is evident from the track report of the said notice that on 5th September, 2019, the remark is “out for delivery”. On 5th September, 2019, remark is “item on hold door locked”. On 6th September 2019, again remark is “ item on hold door locked” and the delivery is being shown on 12th September, 2019 along with the postal receipts and the track report is annexed as Annexure-I-H. It is submitted that the Corporate Debtor replied to the said notice vide reply dated 21st September 2019, wherein it is alleged that the Corporate Debtor has already filed a suit. The contents of the said reply dated 21st September, 2019 are stated to be denied and disputed. It is submitted that in view of the admission of liability and terms of settlement agreement dated 11th October, 2018, the said suit cannot be treated as pre existence of dispute. In fact the Corporate Debtor with fraudulent and malicious intent has filed the said suit.

7. The Operational Creditor further submitted that the Corporate Debtor is bound by the terms of the Settlement Agreement dated 11th October 2018 on the basis of which, the earlier Company Petition had been withdrawn. It is alleged that the suit has been filed in abuse of the process of law. The said suit has been filed on 9th September, 2019 and that the Corporate Debtor had deliberately not accepted the service of the notice on 5th and 6th September, 2019 knowing fully well that it is a demand notice, and the demand notice was finally delivered on 12th September, 2019.
8. It is submitted that subsequent to the Settlement Agreement, no payment has been made by the Corporate Debtor and that the Corporate Debtor is liable to make payment of the said principal sum of Rs. 15,47,40,891/- along with a sum of Rs. 4,05,97,227/- on account of agreed interest calculated @ 24% per annum from 12th October 2018 to 14th November, 2019. It is submitted that the Operational Creditor is

also entitled to interest @ 24% per annum till payment is received in term of the agreement dated 11th October, 2018.

9. The Operational Creditor has mentioned the date of default as 12th October, 2018.
10. Thus, the total amount claimed by the Operational Creditor from the Corporate Debtor is Rs. 15,47,40,891/- along with interest @ 24% per annum from 12th October, 2018 to 14th November, 2019 totaling up to an amount of Rs. 19,53,38,118/-.
11. The Operational Creditor has enclosed all the relevant documents along with the petition.
12. The Operational Creditor has proposed the name of **Mr. Santosh Choraria**, to act as an IRP having Registration No. **IBBI/IPA-001/IP-P00549/2017-18/10979**, who has consented vide his affidavit and Form-2 submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.
13. In its reply affidavit dated 13/01/2021 filed by the Corporate Debtor through Mr. Keyur Mehta, authorised representative, it is submitted that the applicant is erroneously and wrongfully claiming to be an Operational Creditor. It is submitted that immediately after execution of the settlement agreement dated 11th October, 2018, the Corporate Debtor had written a letter to the Operational Creditor on 26th October, 2018 asserting that the settlement agreement entered into on 11th October, 2018 is erroneous as a whole at core and invalid and ineffective. It is submitted by the Corporate Debtor that in the letter

dated 26th October, 2018, the Corporate Debtor asserted that contrary to the claim made by the Operational Creditor, a sum of Rs. 15,47,40,891/- is due and payable by the Corporate Debtor, the correct position is that the Operational Creditor owed a sum of Rs. 8,08,518/- to the Corporate Debtor payment whereof was demanded by the Corporate Debtor. It is submitted in the reply affidavit that the Operational Creditor had issued a purported demand notice dated 3rd September, 2019, which was served on the Corporate Debtor only on 21st September, 2019 wherein the Operational Creditor had called upon the Corporate Debtor to pay a sum of Rs. 15,37,40,891/- along with interest within 15 days from receipt of the purported notice (R-1).

14. It is submitted that the Corporate Debtor vide its reply dated 21st September, 2019, in response to the said purported demand notice dated 03.09.2019, had called upon the Operational Creditor to recall, rescind, withdraw and cancel the said purported demand notice and refrain from initiating any legal action. The Corporate Debtor has further submitted that after receipt of the reply dated 21st September, 2019, the Financial Creditor did not initiate any further step of legal action and avoided even giving any reply to the said letter dated 21st September, 2019. It is submitted that the Operational Creditor issued another purported demand notice dated 15th November, 2019, inter alia, alleging that a sum of Rs. 19,53,37,118/- is an amount of debt, comprising the principal and the interest part. The Corporate Debtor further submitted that long before the service of the purported demand notice, the first one dated 03.09.2019 which was served on the Corporate Debtor on 21st September, 2019 and the second one dated 15.11.2019, the Corporate Debtor instituted on 09.09.2019, a Title Suit in the Court of the Learned Judge City Civil Court at Kolkata being Title Suit No. 132/2019. It is submitted that the settlement agreement is subject matter of the lis pending before the Court of City Civil Court at Kolkata. It is submitted that the purported debt as alleged in the said application is the core issue in pre existing lis, before the City Civil Court at Kolkata. Therefore,

in the facts and circumstances, no debt is due and payable by the alleged Corporate Debtor to the Operational Creditor as wrongly alleged or claimed by the Operational Creditor and that the issue is pending adjudication before the competent Civil Court.

15. The Corporate Debtor has thus submitted that this application is an abuse of the process of law and that the amount claimed is denied and disputed.
16. During the course of arguments, the Ld. Senior Counsel for the Corporate Debtor submitted that pursuant to the recording of the settlement agreement, the Operational Creditor had withdrawn C.P.(IB) No. 431/KB/2017 without obtaining leave to file fresh proceedings on the same cause of action. It is submitted that settlement agreement dated 11th October, 2018 contained default clause as under:-

“ With a condition that in the event of default in payment of any monthly instalments in the aforesaid manner, this settlement shall be terminated with immediate effect and the operational creditor shall be entitled to issue fresh notice and initiate fresh proceedings under the Insolvency and Bankruptcy Code, 2016 along with other remedies available under law for the entire outstanding together with interest @ 24% per after giving adjustment to the payment received.”

17. Ld. Senior Counsel for the Corporate Debtor has placed reliance on ***Halsbury’s Laws of England, Volume 37, 4th Edition at page 287*** which provides as follows:-

“391. Effect of settlement or compromise- Where the settlement or compromise in pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted;(2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether. A judgment or order

made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it acts, moreover, as an estoppel by record”.

18. The Ld. Senior Counsel referred to the order passed by this Adjudicating Authority on October 12, 2018, pursuant to execution of Settlement Agreement dated 11th October, 2018, which is as under:-

“ Ld. Counsel appearing for the operational creditor and the corporate debtor jointly submit that the matter was settled out of the Tribunal and Ld. Counsel for the operational creditor sought permission to withdraw the application. Permission is granted. CP(IB No. 431/KB/2017 is disposed of as withdrawn”.

19. It is thus submitted by the Ld. Counsel for the Corporate Debtor that the CP was withdrawn without leave to file the same afresh upon any default being committed. The Ld. Senior Counsel has further submitted that the present petition has not been instituted on the cause of action of CP9IB) No. 431/KB/2021 but is instead premised on the alleged default of the terms of the Settlement between the parties dated 11.10.2018.
20. It is submitted that the proceedings under section 7 and 9 of the IBC are not maintainable in respect of a claim arising out of a Settlement in that the creditor is neither a Financial nor an Operational Creditor within the meaning of sections 5(7) and 5(20) of the IBC. To buttress his arguments, the Ld. Senior Counsel has placed reliance on;

[M/s Brand Realty Services Ltd. vs. M/s Sir John Bakeries India Pvt. Ltd. C.P.(IB) No. 1677(ND)/2019 (Paragraphs 10-14)-NCLT, New Delhi Bench-V].

[M/s Delhi Control Devices Pvt. Ltd. v. M/s Fedders Electric Engineering Ltd.- Decided on 14.05.2019- 2019 SCC Online NCLT 8030 Para 9,12,- NCLT Allahabad Bench in C.P.(IB)No. 343/ALD/2018].

[Nitin Gupta V. International Land Developers Private Limited- C.P(IB) No. 507/ND/2020 Paras 9-12-NCLT, New Delhi].

[Trafigura India Private Limited v.TDT Copper Limited –C.P.(IB)

No. 2817/ND/2019- Paras 10-15-NCLT, New Delhi.]

21. As regards pre existing dispute, the Ld. Senior Counsel had relied on ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353, Paras 33,34,37,38,42-45,51*** and submitted that the dispute assailing the section 9 petition must be pre-existing. The expressions “genuine dispute” was held to be a plausible contention requiring investigation, and raises the same sort of considerations as the “serious questions to be tried” criterion which arises on an application. The Court does not need to be satisfied that the defence is likely to succeed. The court does not need at this stage to examine the merits of the dispute except to the extent whether a dispute is present and if the notice of the dispute is served upon the applicant. So long as the dispute exists in fact the Adjudicating Authority has to reject the application.
22. Ld. Senior Counsel has also relied on ***Transmission Corporation of Andhra Pradesh Limited v. Equipment Conductors and Cables Limited (2019) 12 SCC 697 Paras 14-21.***
23. Ld. Counsel for the Corporate Debtor cited further relied on the ***Sarguja Transport Service v. State Transport Appellate Tribunal (1987)1 SCC 5 Para 7-*** Where a petitioner withdraws a petition filed by him without permission to institute fresh petition, the remedy under law is deemed to be abandoned by the petitioner. It would not be open to him to file a fresh petition under the same cause of action. The law confers upon a man no right or benefit which he does not desire. Whoever waives, abandons, or disclaim a right, will lose it. In order to prevent a litigant from abusing the process of court by instituting lis on the same cause of action again and again without any good reason, leave ought to be sought at the time of withdrawing for filing a petition on the self-same cause of action.
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24. In reply to the judgements cited by the Operational Creditor, the Corporate Debtor sought to distinguish the judgments relied upon by the Operational Creditor as under:-

- a. **(Ashok Agarwal v. Amitex Polymers- Company Appeal (AT)(Insolvency No. 608 of 2020- NCLAT)**- This case proceeds on the basis of the definition of “Creditor” in section 3(10) of IBC which includes a “decree holder”. In the present case there is no decree and consequently the petitioner cannot be held to be a creditor within the meaning of Section 3(10) of the Code. On the contrary the said judgment repeatedly holds that a claim arising out of a Settlement or Agreement does not fall within the definition of Financial Creditor or Operational Creditor under section 5(8) and 5(21) of the Code. (Paras 2,49,53).
- b. **(Ramchandra Jivaji Kanago v. Laxman Shrinivas Naik- AIR 1945 Privy Council 54)** – The ratio of this decision is that the limitation begins to run from the time facts entitling the Plaintiff to have instrument cancelled or set aside become known to him. The Respondent does not take the point of limitation and since the petition has been filed for default occurred on 12th October, 2018 as stated in Form 5, upon default in honoring of the settlement agreement, this judgment is not applicable to the case in hand.(Para 5).
- c. **(Nathani Steels Ltd. v. Associated Constructions- 1995 (3) Supp SCC 324)**- The ratio of this judgment is that unless a settlement is set aside it cannot lie in the mouth of one of the parties to the settlement to spurn the same on the ground that it was a mistake and then proceed to invoke the arbitration clause. The judgment holds that a party cannot take the benefit under the settlement and then question the same on the ground of mistake. The said case is inapplicable both in law and in facts to the subject matter of the present case.
- d. **Jai Narain Parasrampuriah v. Pushpa Devi Saraf- 2006 (7) SCC**

756)- This judgment speaks of the issue of Estoppel that when a person makes a statement he is bound by it. In the said judgment it is held that estoppel ought to be pleaded specifically in the averment. However, mere averment does not create title or a right. The same has to be proved. Neither the averment of estoppel nor the assertion of a right to enforce the same has been made by the petitioner. Moreover, the question does not arise in the instant proceedings since estoppel cannot make what is not permitted under law permissible. The respondent at this juncture contends that the settlement agreement cannot be enforced under the IBC as the petitioner claiming under a settlement is neither a financial creditor nor an operational creditor.(Para 32-37).

- e. **Asha Sharma v. Sanimiya Vanijya P L Mandu/ DE/ 2029/2012-** In the said case a suit had been dismissed under the provisions of Order VII Rule 11 of the CPC. (Para 1). The said case relates to estoppel by pleadings. In paragraph 23, it is held that admissions made in documents or made orally can be explained by the maker of the statement and in that context previous admissions contained in documents cannot attract Order VII Rule 11 of the Code but admissions made in pleading stand on a different footing. The said case is inapplicable both in facts and in law and neither touches upon the principles of pre existing dispute and the definition of financial creditor and operational creditor under the Code.
- f. **(Naresh Sevantilal Shah v. Malharshanti Enterprise Comp. Appeal (AT)(Insolvency) No. 415/2020)-** This judgment postulates that the dispute must be pre-existing (Para 20 & 34). The said judgment supports the respondent inasmuch as the respondent by several letters and by instituting a suit prior to the issuance of the notice under section 8 has raised disputes.
- g. **(Tata Hitachi Construction Machinery Company P L v.**
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Universal Industrial Equipment and Technical Services P L C.P. (IB) No. 2541/MB/2019- In the said judgment the first CP was allowed to be withdrawn due to some technical error in the Board Resolution “ with liberty to file fresh application”(Para 5). In the present case no leave has been obtained to file afresh.

- h. **Ranjan Kumar Sovasaria M/s Hanusita & Sons V. Apeejay Tea Limited C.P.(IB) No. 1104/KB/2018**- In the said judgment, it was held that no dispute as stated in section 5(6) of the Code existed between the parties. The suit, which came up for consideration, did not dispute the claim of the operational creditor specifically but many personnel of the company had been made a party. The factum of the suit and the factum of the dispute therein were found to be drastically different. Hence, the petition was allowed. Herein, the suit of the respondent clearly and squarely assails the claim amount and dispute is in respect of the same transactions, on which the petitioner bases their claim on. Hence, the dispute is very much existence in contrast to the one in the judgment relied upon by the petitioner.

25. In the rejoinder however, the Learned Sr. Counsel for the Operational Creditor has denied and disputed the allegations and averments made in the reply affidavit. It is submitted that the letter dated 26th October, 2018 has not been received by the Operational Creditor and the stamp appearing at the second page of the letter dated 26th October, 2018 is not the stamp of the Operational Creditor. It is submitted that the said letter is manufactured as an afterthought to avoid payment of the legitimate dues of the Operational Creditor. It is submitted that the letter was never sent by the Corporate Debtor to the Operational Creditor nor was it received by the Operational Creditor. It is submitted that there is no signature of receipt in the said letter and the stamp appearing on the said letter is not of the Operational Creditor and is a forged stamp and that the Corporate Debtor has committed forgery and as such said stamps in this regard are being contemplated. The Operational Creditor

has further denied the allegation that the settlement agreement dated 11th October, 2018 is erroneous or invalid. It is denied in the rejoinder that any credit note for any sum of Rs. 15,30,49,409/- was to be issued by the Operational Creditor.

26. It is stated that if there had been any inflated bills, the Corporate Debtor would have raised debit notes. It is submitted that in paragraph 12 of the earlier reply filed by the Corporate Debtor to the petition filed by the Operational Creditor, the Corporate Debtor had undertaken to pay the principal sum of Rs. 20,47,40,891/- within a period of 180 days and had requested this Tribunal to keep the proceedings in abeyance. The Corporate Debtor further paid only a sum of Rs. 5 crore from 30th November, 2017 to 25th May 2018 and after giving adjustment to that amount the principal sum of Rs. 15,47,40,891/- is due and payable on account of principal. It is stated that Rs. 25,00,000/- that was paid by the Corporate Debtor on 14th September, 2018 was not a payment on account of outstanding for the price of goods sold or delivered but was an adhoc payment for the cost and expenses that has been incurred by the operational creditor in connection with the earlier proceedings initiated by the Operational Creditor in CP No.431/2017. Therefore, no payment has been received by the Operational Creditor against amount of outstanding from the Corporate Debtor. It is submitted by the Operational Creditor that the Corporate Debtor has failed and neglected to make the payment of even a single instalment. The Operational Creditor denied that the Demand Notice of 3rd September, 2019 was served on the Corporate Debtor on 12th September 2019. It is submitted that the demand notice dated 3rd September, 2019 was posted on 4th September, 2019 and from the track report of the said notice, it is clear that on 5th September, 2019, the remark is “ item on hold, door locked” and on 6th September, 2019 the remark is “item on hold door locked” and the delivery is shown on 12th September, 2019. in the reply dated 21st September, 2019, the Corporate Debtor alleged that the Corporate Debtor had already filed a suit on 9th September, 2019. It is, therefore,
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evident from the above that the Corporate Debtor did not accept the service of notice on 5-6th September, 2019 and received the said notice only on 12th September, 2019.

27. The Corporate Debtor was thus aware of the said notice on 6th September, 2019 itself and deliberately did not receive the same and received only on 12th September, 2019 with ulterior motive and mala fide intentions and filed the suit on 9th September, 2019. The said suit is not yet validly instituted because of non-payment of court fee. In the plaint, the corporate debtor alleged that the corporate debtor had received statement of account by speed post on 6th September, 2019. The Operational Creditor, however, denied that any statement of account was sent by the Operational Creditor to the Corporate Debtor by speed post. Only notice dated 3rd September, 2019 was sent and no statement of account was sent through messenger on 3rd September, 2019 as alleged. It is stated in the rejoinder that the Corporate Debtor intentionally did not receive the said notice on 6th September, 2019 and as an afterthought filed the suit on 9th September, 2019, which suit cannot be considered as pre existence of the disputes. The Operational Creditor has denied all the frivolous allegations made in the reply affidavit and submits that the Corporate Debtor had entered into the settlement agreement only to avoid admission of the earlier petition and had never intended to make payment of the admitted dues. Therefore, the Corporate Debtor entered into an agreement with the Operational Creditor and in view of the settlement agreement, the earlier petition was withdrawn. It is argued that the Corporate Debtor should not be allowed to deny its liability to pay. It is stated that the Corporate Debtor has acted fraudulently with mala fide intention and has filed the suit as an afterthought to avoid the payment of the legitimate dues of the Operational Creditor and that there is no dispute to the claim of the Operational Creditor.

28. During the course of the arguments, the Ld. Senior Counsel reinforced

his argument submitted that the settlement and agreement dated 11th October, 2018 was for repayment of the operational debt claimed by the Operational Debt in CP No. 431/2017, minus whatever has been repaid during the pendency of the said petition. It was an opportunity afforded to the Corporate Debtor to pay off the operational debt in certain installments because the Corporate Debtor had admitted debt in its reply affidavit filed therein. It is submitted that the default in payment of the installments under the settlement agreement dated 11th October, 2018 gave rise to the cause of action which commenced with the sale of goods by the Operational Creditor to the Corporate Debtor followed by raising of invoices and part payments of the sale price made by the Corporate Debtor which culminated into the Corporate Debtor's default in payment of the installments as per settlement agreement. It is submitted that the aforesaid settlement agreement is nothing but an admission in writing by the Corporate Debtor to repay the operational debt due to the Operational Creditor by way of installments. It is submitted that the present petition being CP (IB) No. 911/2020 is not merely for default under the settlement agreement in making payment but is continuation of CP No. 431/2017. It is submitted that the default in payment of the operational debt is subject matter of section 8(1) notice and the present petition.

29. It is submitted by Ld. Senior Counsel that in ***Ashok Agarwal vs. Amitex Polymers Private Limited reported in MANU /NL/0034/2021 in paras 23,25,39,40,43 to 48***, that the default in payment in terms of the settlement agreement recorded by way of a consent decree in a suit, it was held to be a default in payment of an operational debt. The Ld. Senior Counsel further referred to ***Naresh Sevantilal Shah vs. Malharshanti Enterprises & Anr. in para 36 and Tata Hitachi Construction Machinery Company Private Limited vs. Universal Industrial Equipment and Technical Services Private Limited at para 11*** and submitted that in these two cases cited by the Ld. Senior Counsel, the suit had been filed between the 1st Demand Notice under

section 8(1) of the IBC and second Demand Notice under section 8(1) of IBC as is the position in the present case. In both these cases, the first section 9 petition was withdrawn and the suit was filed thereafter, as is in the present case.

30. While dealing with the judgments cited by the Corporate Debtor also, the Ld. Senior Counsel submitted that in **Delhi Control Devices (P) Limited vs. Fedders Electric and Engineering Ltd. reported in 2019 SCC Online NCLT 8030**, the Demand Notice given for default of payment of the operational debt had been withdrawn as per clause in the settlement agreement and that after the default in payment as per the settlement agreement, no fresh demand notice was given under section 8(1), therefore, he submitted that this judgment is factually different and cannot be relied upon in the facts of the present case.
31. It is submitted that once in the reply notice dated 29th November, 2017, the Corporate Debtor had admitted the operational debt, the Corporate Debtor is estopped from now contending that there is nothing due and payable. The Corporate Debtor has admittedly paid Rs. 5 Crore out of the admitted sum of Rs. 20.47 crore, therefore, the Corporate Debtor cannot deny that there is no debt due to the Operational Creditor or that the debt is not an operational debt [**Jai Narain Parasrampuria (Dead) & Ors vs. Pushpa Devi Saraf & Ors. Reported in [(2006) 7 SCC 756], paras 32,33,36-41**]. The Ld. Senior Counsel further submitted that having admitted the execution of the settlement agreement, the Corporate Debtor cannot merely wish away the agreement by alleging that the same is erroneous, invalid and ineffective. It is submitted that even in the frivolous suit filed by the Corporate Debtor, there is no prayer for setting aside the said settlement agreement or for declaration to that effect. It is submitted that an agreement remains binding on the parties till such time as it is set aside by any order of the court of law. [**Nathani Steels Ltd. vs. Associated Constructions reported in 1995 Supp.(3) SCC 324 at 326(g)**]. It is submitted that the Ld. Senior

Counsel for the Corporate Debtor has not denied the settlement agreement. Therefore, he cannot deny the liability by carrying upon the said Civil Suit filed by the Corporate Debtor.

32. It is submitted that the Corporate Debtor has acted in a fraudulent and dishonest manner. Corporate Debtor first entered into the settlement agreement in the proceedings under section 9 of IBC, 2016 being CP (IB) No. 431 of 2017 which was withdrawn for reasons mentioned therein. After the proceeding was withdrawn, the Corporate Debtor with ulterior motive and mala fide intention did not make a single instalment as had been promised in the Agreement. After seeing the contents of the demand notice dated 3rd September, 2019, the Corporate Debtor intentionally did not receive the said letter on 5th September, 2019 and 6th September, 2019 and filed a suit on 9th September, 2019. The said suit cannot be considered as pre-existence of the dispute.
33. Having gone through the petition, reply and rejoinder including all the documents filed by the parties on record particularly the paper book relating to the previous C.P. (IB) No. 431/KB/2017 and the Settlement Agreement dated 11th October 2018, it is our considered view that even if specific permission has not been sought to re-file the proceedings on the cause of action having arisen in favour of the Operational Creditor, once the Corporate Debtor has failed to comply with the terms and conditions fixed in the settlement agreement, the right of the Operational Creditor still subsists and he has all the rights to file this petition for enforcing the settlement agreement dated 11th October 2018 having been entered into by the parties and admitted before this Adjudicating Authority.
34. It is no doubt true that the Settlement Agreement dated 11th October, 2018 has indeed been a clever handiwork of a draftsman, especially designed to take the Operational Creditor in its fold and avoid the imminent Court orders against the Corporate Debtor, without even

paying a penny after the settlement. It is surprising to notice Clause (2) which reads as follows:-

“ That upon execution of this Settlement Agreement, the operational creditor will withdraw the Application under the Insolvency and Bankruptcy Code, 2016 with a condition that in the event of default in payment of any monthly instalments in the aforesaid manner, this settlement shall be terminated with immediate effect and the operational creditor shall be entitled to issue fresh notice and initiate fresh proceedings under the Insolvency and Bankruptcy Code, 2016 along with other remedies available under law for the entire outstanding together with interest @ 24% per after giving adjustment to the payment received.”

Specific use of selected words “fresh notice” and “fresh proceedings” visibly and clearly expose the design of the Corporate Debtor intending to put the Operational Creditor on the long track and frustrate the claim/proceedings pending before this Adjudicating Authority, which however cannot be allowed to happen in these proceedings. We find that none of the Judgments cited by the Corporate Debtor help it in any way, either as regards its claim of pre-existing disputes or as regards seeking permission from the Adjudicating Authority for filing an application in case of failure of the Settlement, because it was not a “withdrawal simplicitor” but had been allowed on the joint request of counsel for the parties pursuant to the Settlement Agreement dated 11th October, 2018.

35. We are fully satisfied that the Operational Creditor has satisfied this Adjudicating Authority on all the issues raised in opposition by the Corporate Debtor. The failure of the Corporate Debtor to comply with the terms settled between the parties is a proved default on its part and its failure to pay the installments, the right to sue rightly accrued in favour of the Operational Creditor. The agreed debt forming part of the settlement agreement dated 11th October 2018 is an admitted operational debt which had to be paid off within the stipulated time but since the Corporate Debtor has failed to perform its obligation under the

aforesaid agreement, it is certainly a default which calls for an immediate action by this Adjudicating Authority. We, therefore, have no option but to admit this petition and order initiation of corporate insolvency resolution process against the Corporate Debtor in the following:

O R D E R S

- i) The application filed by the Operational Creditor under Section 9 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor, **BST Infratech Limited**, is hereby **admitted**.
 - ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
 - iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.
 - iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:
 - a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
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- c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.
- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) **Mr. Santosh Choraria** registered with Insolvency and Bankruptcy Board of India, having Registration No. **IBBI/IPA-001/IP-P00549/2017-18/10979**, E-mail ID: ca.schoraria@gmailcom, and holding AFA under Regulation 7-A of the IBBI (Insolvency

Professionals) Regulations, 2016, is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.

- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Operational Creditor/Applicant is directed to deposit **Rs.1,00,000/ (Rupees One Lac only)** with the IRP appointed hereinabove within three days from this order. IRP can claim the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

36. Registry is hereby directed to communicate the order to the Operational Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.

37. List the matter on 12/01/2022 for filing of **Progress Report**.

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

(Harish Chander Suri)
Member (Technical)

(Rajasekhar V.K.)
Member (Judicial)

Order signed on the 3rd day of November, 2021

PJ.