SL No.121

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

Video Conference

CORAM: HON'BLE BHASKARA PANTULA MOHAN–MEMBER JUDICIAL
HON'BLE DR. BINOD KUMAR SINHA- MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 04.02.2022 AT 10:30 AM THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/34/2021
NAME OF THE COMPANY	Eswari Exports Pvt Ltd
NAME OF THE PETITIONER(S)	Turk Eximbank
NAME OF THE RESPONDENT(S)	Eswari Exports Pvt Ltd
UNDER SECTION	9 of IBC

ORDER

Learned Counsel for Corporate Debtor appeared via video conference.

Orders pronounced vide separate order.

This Company Petition IB/34/2021 U/s 9 is admitted vide separate orders.

MEMBER (T) **MEMBER (J)**

Nilesh

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

CP (IB) No.34/9/HDB/2021
Under section 9 of the IB Code, 2016
Under rule 6 of the Insolvency and Bankruptcy
(Application Adjudicating Authority) Rules, 2016.

In the matter of
M/S. ESWARI EXPORTS PRIVATE LIMITED

Between:

M/s. Turk Eximbank, Export Credit Bank of Turkey
Incorporated under the Laws of Turkey,
Having one of its offices at:
Saray Mah. Ahmet Tevfik Ileri Cad. No: 19 34768
Umraniye / Istanbul.

...Petitioner/
Operational Creditor

And

M/s. Eswari Exports Private Limited,
Having its registered office at:
H.No.6-3-1099/1/14 & 15,
Flat No: 301, Lake Melody Apartment,
Near Katriya Hotel, Raj Bhavan Road,
Somajiguda, Hyderabad,
Telangana – 500082.

...Respondent/
Corporate Debtor

Date of Order: 04.02.2022

Coram: Shri Bhaskara Pantula Mohan, Member Judicial
Dr. Binod Kumar Sinha, Member Technical

Parties/Counsels present:

For the Operational Creditor: Ms. K. Annapurna Reddy, Counsel

For the Corporate Debtor: Mr. Y. Suryanarayana, Counsel

Per: Bench

ORDER

1. Under consideration is a Company Petition filed by M/s. Turk Eximbank, Export Credit Bank of Turkey (in short "*Petitioner/Operational Creditor*") under section 9 of the Insolvency and Bankruptcy Code, 2016 (in short IB Code, 2016) read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for initiation of Corporate Insolvency Resolution Process

(CIRP) against M/s. Eswari Exports Private Limited. (in short, *"Respondent/ Corporate Debtor"*).

2. Brief facts of the case as submitted by the Operational Creditor are as follows:

a) The Operational Creditor has filed the present Company application as the Corporate Debtor has deliberately failed and neglected to pay USD 155,520.00 (United States Dollar One Hundred Fifty Five Thousand five Hundred and Twenty only) (Equivalent to Rs.1,13,54,748.48 (Rupees One Crore Thirteen Lakh fifty Four Thousand Seven Hundred Forty Eight and Forty Eight Paisa only) calculated @ 1 USD = 73.01115 as on 04.01.2021 along with interest from the date of default till the date of payment/realization against the Corporate Debtor for purchase and supply of the goods by Kaleseramik Canakkale Kalebodur Seramik Sanayi A.S., Turkey (hereinafter refer to as the "Supplier")

b) That the supplier is a leading ceramic manufacturer. That the Corporate Debtor approached the supplier and requested to purchase ceramic floor tiles on credit basis.

c) That pursuant to the agreed terms the supplier issued the aforesaid invoice to the Corporate Debtor and delivered the said Goods by way of following bill of lading:

Bill of lading bearing no. SDB60S05292 dated 24.12.2017.

d) However, Corporate Debtor despite accepting delivery of the said Goods, without any protest and demure, failed to make payment against the following invoice:

S.No.	**Commercial Invoice**	**Dated**	**Amount (USD)**
1.	KSX2017000001789	21.12.2017	155,520.00
INVOICE AMOUNT (USD)			155,520.00

e) Thereafter, the supplier tried to reach the Corporate Debtor for payment of outstanding amount, however, Corporate Debtor failed to respond to the supplier.

f) That accordingly the supplier indemnified vide letter of assignment dated 28.06.2019 the entire outstanding amount of USD 155,520.00 to Turk Exim Bank, Export Credit Bank of Turkey and thus, the supplier irrevocably assigned and transferred the receivable amount of USD 155,520.00 with all the rights including taking legal action to Turk Exim Bank, Export Credit Bank of Turkey. That the intimation of the assignment was duly conveyed to the corporate debtor by the operational creditor vide letter of intimation dated 28th June 2019.

g) That thereafter the operational creditor tried to reach the corporate debtor for payment of their outstanding dues but corporate debtor failed to revert to any of the communications and hence the Operational Creditor was constrained to issue a demand notice dated 09.03.2020 under Section 8(1) of the code seeking payment of the Operational Debt of USD 155,520.00 along with interest from the date of default till the date of realization. That the said demand notice was delivered on the registered office address of the corporate debtor through courier on 16.03.2020 and through registered post also on 16.03.2020 but till date no reply has been received from the Corporate Debtor to the demand notice.

h) Instant Application is filed seeking a claim of USD 155,520.00 Equivalent to Rs.1,13,54,748.48/-.

Reiterating the above, learned counsel for the Operational Creditor prayed to admit the instant Application.

3. Learned counsel for the Respondent filed counter inter-alia stating that the allegations made by the Operational Creditor are denied except those that are specifically admitted hereunder:

a) That M/s. Kalesermik Canakkale Kalebodur Seramik Sanayi A.S., Turkey ("The Supplier") vide Letter of Assignment dated 28.06.2019 stated that the Supplier had indemnified the impugned outstanding amount of USD 155,520 with the Petitioner herein and therefore vide the said letter, the impugned debt amount was assigned to Turkish Exim Bank i.e., the Petitioner herein.

b) That the Corporate Debtor had entered into an Agreement dated 14.07.2017 with M/s. GV Facades, LLC, a limited liability company incorporated in the state of Texas, USA. GV Façade is engaged in the business of exterior construction, broadly known as facades, elevation etc., for the supply of quality ceramic tiles for façade structures of 50x300 size tiles NEO LIGHT LQ1, LQ2 and LQ3. Further to the agreement, a PO #1109 dated 14.07.2017 was issued by GV Façade to the Corporate Debtor detailing the terms and conditions for the supply of the ceramic tiles.

c) That the Corporate Debtor has been buying the said materials from the supplier since January 2017. All the transactions between the Corporate Debtor and the Supplier was covered with a stand by letter of credit (SBLC) issued by the Corporate Debtor for an amount of USD 500,000. SBLC is a legal document that guarantees a bank's commitment of payment to a seller in the event that the buyer or the bank's credit-defaults on the agreement. SBLC is a rotating credit and the existing SBLC was expiring on 14.12.2017.

d) That in continuation of the purchases made by the Corporate Debtor from the supplier, the corporate debtor further placed an order with the supplier for supply of the ceramic materials to honor the purchase order issued by GV Façade. The supplier agreed to supply the said material to the Corporate Debtor under the existing SBLC only. Pursuant to the said order, the Supplier issued a proforma invoice vide No.P11700175 dated 10.07.2017. The said proforma invoice mentions the time for completion of the shipment. i.e., "Shipment will be made as four containers every 2 weeks."

e) That as per the agreement between the Corporate Debtor and the Supplier, the goods were required to be supplied within six weeks from the date of proforma invoice dated 10/7/2017 which is approx. 27/8/2017 which is well before the date of expiry of the SBLC i.e., 14/12/2017.

f) That out of 12 containers, the supplier had supplied 8 containers of goods vide commercial invoice no. KSX2017000000857 dated 28/09/2017 vide Bill of Landing dated 02/10/2017 bearing document number SDB60S051214. The actual agreed date of supply of 8 containers by the supplier was 28/07/217. However, the same was supplied on 02/10/2017. Despite being delay of one and a half months in supply of the 8 containers, the Corporate Debtor accepted the goods.

g) That the due date for the supply of 12 containers to GV Façade is 12/10/2017. Out of the 12 containers, the Supplier had supplied only 8 containers on 02/10/2017, and the balance four containers were supplied after a huge delay of around over 4 months that too after the expiry of the SBLC. There was no information to the corporate debtor on this supply of 4 containers till they reached port in USA. Due to this delay, GV Façade incurred a huge loss as GV Façade had to procure similar material from another supplier locally and had to complete its work. The Corporate Debtor who had entered into an Agreement with GV Façade also suffered a massive loss due to the delay, they had lost the assignment from GV Façade. There was never a delay by the Corporate Debtor in completing the transaction between the Corporate Debtor and GV Facades but due to the said huge delay by the supplier, the Corporate Debtor faced substantial financial loss along with severe embarrassment and humiliation. As per the Agreement, the Corporate Debtor was required to receive USD 171,120/- from GV Façade, but due to the said delay by the supplier, the financial commitments and the financial cycle of the Corporate Debtor was highly disrupted and disturbed.

h) That the Supplier supplied the balance four containers shipped on 24/12/2017 vice commercial invoice no. KZX2017000001789 dated 21/12/2017 and bill of lading dated 24/12/2017, and document bearing number SDB60S052592. Since the said balance of four containers was supplied after the expiry of the last date for the supply of the goods, the same was not collected by GV Façade and was lying idle in the USA Port till 19-02-2018. However, since the container cannot be held at the port for a long period, GV Façade had to collect the goods, and the same is kept in the Godown of GV Façade, and the same is still lying there.

i) That as stated supra, the SBLC was to expire on 14/12/2017 and the balance four containers were delivered by the Supplier on 24/12/2017 i.e., after the expiry of the SBLC. The Supplier was well aware of the fact that the goods were required to be supplied before the expiry of the SBLC and that after the expiry of the SBLC, the Corporate Debtor will not be liable to pay any amounts. It is further submitted that before supplying the balance four containers, the Supplier neither sought permission from the Corporate Debtor nor informed the Corporate Debtor about the said supply.

j) That the Corporate Debtor was not aware of the said supply of goods to USA port until the delivery of the goods at USA Port. Before seeking confirmation from the Corporate Debtor and without even intimating the Corporate Debtor to supply the goods in the delayed period, the supplier supplied the goods. The Supplier did not even inform the Corporate Debtor before the supply of the goods at a delayed period.

k) That the Corporate Debtor had informed about the above-stated facts to the Petitioner through various calls. Therefore, it is evident that there exists a pre-existing dispute between the Corporate Debtor and the Petitioner herein which was already brought to the knowledge of the Petitioner.

l) That the Corporate Debtor had received the demand notice from the Petitioner on 16-03-2020. However, due to the lack of legal guidance and the pandemic situation due to the COVID-19 situation, the Corporate Debtor could not reply to the demand notice informing the Petitioner about the existing dispute between the Corporate Debtor and the Operational Creditor. That the delay in informing the dispute was solely due to the lack of legal and professional guidance and the same was without any mala-fide intention and ill motive. That the said delay shall not be considered as the reason for admitting the claims of the Petitioner in the instant Company Petition.

m) That there exists pre-existing dispute between the Corporate Debtor and the Operational Creditor and the instant Petition is filed based on false and misleading averments and claims.

n) That in view of the aforestated facts and circumstances of the case, arguments rendered and arguments to be made at the time of hearing of the application, it is prayed that the Adjudicating Authority may be pleased to dismiss the instant application due to the said pre-existing dispute.

4. Learned counsel for the Petitioner filed Rejoinder inter-alia stating that the allegations made by the Respondent are denied and further prayed to allow the application.

5. Heard and perused the record.

6. It is the case of the Applicant that one M/s. Kaleseramik Canakkale Kalebodur Seramik Sanayi A.S., Turkey supplied various goods to the Corporate Debtor herein and upon failure of payment by the Corporate Debtor, the supplier vide letter of assignment dated 28.06.2019 indemnified the entire outstanding amount of USD 155,520.00 to Turk Exim Bank, Export Credit Bank of Turkey. Now that the Applicant herein, basing upon the said Assignment has filed instant Application

for CIRP of the Corporate Debtor for a claim of USD 155,520.00 equivalent to Rs.1,13,54,748.48/-.

7. Per contra the Corporate Debtor in its counter has, *inter-alia,* sought to dismiss the instant application on the grounds of non-supply of goods on time leading to pre-existing dispute between the parties.

8. On perusal of record, it is seen that Respondent has neither issued any reply to statutory demand notice served u/s 8 of the Code nor has placed any documentary evidence on record which reflects the existence of dispute of any sort between the parties. No evidence to establish the pre-existing dispute between the parties has been placed on record except making an unverifiable statement that the issue of delayed delivery of goods was raised through telephone calls. It is quite impossible that any genuine dispute regarding the impugned transactions having international ramifications will have no correspondence/exchange of emails between parties. It appears to us that the contention regarding pre-existing dispute is raised for the very first time as an afterthought. Thus we are of the opinion that the contentions regarding pre-existing dispute raised by the Corporate Debtor are not borne out of record and therefore do not form any tenable grounds for rejection of the instant Application.

9. It is also seen that there has been a valid assignment of debt which is legally permitted under law by virtue of Section 5(20) of the I B Code,2016 which reads as under:

"(20) "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

10. We are of the view that in the instant case there is an operational debt, which has been legally assigned to applicant herein and there has been a default in repayment of the same and that this Adjudicating Authority is satisfied that the Operational Creditor has proved its case by placing evidence that default has occurred for which the Corporate Debtor was liable to pay. Hence, the contentions of the Corporate Debtor are overruled.

11. The Operational Creditor has fulfilled all the stipulations as required under the provisions of the IB Code, 2016 for the purpose of initiating Corporate Insolvency Resolution Process. In these circumstances, this Adjudicating Authority is inclined to admit the instant Application.

12. Accordingly, the instant application is hereby admitted and this Adjudicating Authority orders the commencement of the Corporate

Insolvency Resolution Process (CIRP) which shall ordinarily be completed within the timelines stipulated in the IB Code, 2016 (as amended), reckoning from the day of this order is passed.

13. The Operational Creditor has not proposed the name of any Interim Resolution Professional, therefore, this Adjudicating Authority hereby appoints Mr. Ahalada Rao Vummenthala, having Registration No. IBBI/IPA-002/IP-N00074/2017-2018/10172, e-mail id: rp.ahaladarao@gmail.com as Interim Resolution Professional from the list of Insolvency Professionals as issued by IBBI. The IRP is directed to file his written consent in Form 2 along with Authorization for Assignment within three days from the date of this order.

14. The IRP is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under section 15 of the IB Code, 2016 within three days from the date the copy of this order is received, and call for submissions of claim in the manner as prescribed.

15. We direct the Operational Creditor/Petitioner to pay sum of Rs.2,00,000/- towards the advance fee of IRP and expenses towards CIRP, which shall be ratified and reimbursed later on by CoC.

16. The moratorium is hereby declared which shall have effect from the date of this order till the completion of CIRP. For the purposes referred to in section 14 of the IB Code, 2016, it is hereby ordered to prohibit all of the following namely:-

    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 or 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 rights or beneficial interest therein;*
    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 Securitization 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.*
    e. *Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license,*

permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

17. The supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period. Furthermore, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, agreements. or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.
18. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The Directors, Promoters or any other person associated with the management of Corporate Debtor are directed to extend all assistance and co-operation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016.
19. The Petitioner/Operational Creditor as well as the Registry is directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this Order as per the provisions of I&B Code, 2016.
20. The Registry is directed to communicate this Order to the Operational Creditor and the Corporate Debtor.
21. The Registry shall also communicate this Order to the ROC, Hyderabad for updating the status of the Corporate Debtor in the MCA website.
22. Accordingly, this Application is admitted.

Dr. Binod Kumar Sinha
Member Technical

Bhaskara Pantula Mohan
Member Judicial

Santi/SKRathi