IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH, KERALA

CP(IBC)/25/KOB/2021

(Under Section 9(6) of the Insolvency Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

Order delivered on: 21.12.2021.

Coram:

Hon'ble Mr. Ashok Kumar Borah, Member (Judicial)
Hon'ble Mr. Anil Kumar. B, Member (Technical)

In the matter of:

Korea Trade insurance Corporation,
14, Jong-ro, Jongno-gu, Seoul,
03187, South Korea. … Operational Creditor

Versus

Tenny Jose Limited,
Through its Mananging Director,
Registered Office at
Building No. VI/412 A,
Chembukkavu, Thrissur,
Kerala- 680 020.

Also, at Corporate Office:
3rd Floor, Avenue Tower,
R.No. 8/9- D1, D2,
Bishop Palace Road,
East Fort, Thrissur,
Kerala- 680 005. … Corporate Debtor.

Appearance (through video conferencing)

For Operational Creditor … Shri. Pramod Kumar, Advocate
For Corporate Debtor …Shri. Anil D. Nair, Advocate

Per: Ashok Kumar Borah, Member (Judicial)

This application has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for short to be referred hereinafter as the 'Code') by **M/s Korea Trade Insurance Corporation**, having registered office at 14, Jong-ro, Jongno-gu, Seoul, 03187, South Korea. (CIN No: 102-82-06816) (hereinafter referred to as 'Operational Creditor') through its Authorized Representative, Mr. Abhishek Aggarwal, Unit No. 605, Global Foyer, Golf Course Road, Sector 43, Gurgaon, Haryana 122 009 **M/s Tenny Jose Limited**, (hereinafter referred to as 'Corporate Debtor') for initiating insolvency resolution process. The registered Office of the Corporate Debtor is at, Building No. VI/412 A, Chembukkavu, Thrissur, Kerala- 680 020 and the matter falls within the territorial jurisdiction of this Tribunal.

1. The Operational Creditor is involved in the business of providing comprehensive support to global commercial transaction in the form of Insurance. The Operational Creditor has filed application in Form No. 5 as prescribed in Rule 6(1) of the Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016 furnishing necessary particulars. In the requisite form, under the head "Particulars of Operational Debt" the total amount of Debt is shown as **USD 2,162,701.26/- (Two Million and One Hundred Sixty- Two Thousand Seven Hundred and One Dollars and Twenty-Six Cents Only)** which is approximately **INR 15,99,31,758.18 (Rupees Fifteen Crores Ninety-Nine Lakhs Thirty-One Thousand Seven Hundred and Fifty-Eight Only)** as on 28.11.2020.

Submissions by the Operational Creditor:

2. The Operational Creditor stated that the Corporate Debtor is involved in the business of manufacture and supply of roofing structures and Construction materials, steel products, paper and paper products, etc. There is a Sales Contract between the Samsung C&T Corporation and Tenny Jose Limited for shipment of Pre- Galvanized Welded Steel Hollow Section (SHS-RHS), ASTM 500 Grade A, Z60-80. As per the Contact it was agreed between the parties that 1500 MT of Goods would be supplied to the Corporate Debtor provided they would pay 10% of the consideration in advance within 5 days from the date of contract i.e., on or before 12.10.2019,07.01.2020, 02.03.2020 and the balance consideration within 90 days of Bill of lading dated 24.12.2019 i.e., on or before 23.03.2020. It is stated that the unpaid Operational Debt was initially due for payment to Samsung C&T Corporation (the Insured). But the Corporate Debtor failed to pay the said Operational Debt to the Insured, and as a result, the Insured recovered the said Operational Debt amount from the Operational Creditor, which had insured the said transaction of the Insured, and also, assigned the Operational Creditor all the rights and claims, arising from the said transaction vide Letter of Assignment dated 08.09.2020. Thereafter, the Operational Creditor informed the Corporate Debtor about the said Letter of Assignment dated 08.09.2020, vide email dated 07.10.2020.

3. It is stated that in compliance with Section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the statutory Demand Notice dated 28.11.2020 was duly issued by the Operational Creditor to the Corporate Debtor both by e-mail and speed post-dated 28.11.2020, 01.12.2020, respectively which was delivered to its

Factory Address and to its Registered Office on 07.12.2020. The Corporate Debtor has sent a reply dated 07.12.2020 by e-mail and by Courier, whereunder, they did not dispute about their liability to pay the outstanding dues to the Operational Creditor. The Operational Creditor then issued a rejoinder to the Corporate Debtor's reply dated 07.12.2020, vide Speed Post dated 23.12.2020, which was delivered to the Corporate Debtor's Registered Office on 29.12.2020. Thereafter, the Operational Creditor has not received any payment of the outstanding dues or any correspondence from the Corporate Debtor, thereby, disputing the debt.

4. Therefore, the present application has been filed by the Operational Creditor to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

Submissions by the Corporate Debtor:

5. The Corporate Debtor submitted that the Sales Contracts were entered into between Samsung C&T Corporation and the Corporate Debtor herein whereunder Samsung was required to supply goods to the Corporate Debtor. It is also stated that a part of goods of value amounting to Rs. 41,01,174/- (Rupees Forty-One Lakh One Thousand One Hundred and Seventy-Four Only) supplied by Samsung were defective which was duly communicated to Samsung C&T Corporation vide the Respondent’s email dated 02.06.2020. The Corporate Debtor has also incurred Rs. 15,39,895/- (Rupees Fifteen Lakh Thirty-Nine Thousand Eight Hundred and Ninety-Five Only) by way of detention charges paid to Aissa Maritime Pvt. Ltd. owing to the defect in Goods supplied by Samsung C&T Corporation. The Applicant has claimed that

Samsung C&T Corporation has assigned all the right and claims arising from the transaction between Samsung C&T Corporation and the Corporate Debtor to the Applicant vide Letter of Assignment dated 08.09.2020. However, the respondent was not privy to this transaction and denied the transaction.

6. It is also stated that Section 5(20) of the Code defines Operational Creditor as a person to whom an operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred. Therefore, it is a pre-condition to qualify as an Operational Creditor in capacity of an assignee that the debt has to be legally assigned. It is further stated that the settled position of law is that where the conferment of a right or benefit is contingent upon, or coupled with, the discharge a burden or liability, such right or benefit cannot be transferred without the consent of the person to whom the co-extensive burden or liability is owed. The claim of Samsung C&T Corporation against the Corporate Debtor is coupled with its obligation to discharge a burden or liability, being deduction in respect of defective goods supplied and set off of detention charges incurred by the Corporate Debtor. Therefore, the amount payable by the Corporate Debtor to Samsung C&T Corporation could not have been assigned to Applicant without the prior express consent of the Corporate Debtor. It is also stated that the Letter of Assignment dated 08.09.2020 is not valid and, therefore, the Corporate Debtor cannot be held liable under an invalid instrument. The Letter of Assignment dated 08.09.2020 is not a legally enforceable document for non-fulfilment of legal requirements prescribed under Indian law and therefore no legal consequences can follow from such an instrument to the prejudice of the Corporate Debtor.

7. It is also stated that the claim does not qualify as an ‘Operational debt’ as defined under Section 5(21) of the Code. The disputed claim cannot form the basis of an application under Section 9 of the Code. 'Dispute' as defined in Section 5(6) of the Code includes dispute with respect to existence of the amount of debt or dispute as to quality of goods supplied. In this regard it is submitted that the Corporate Debtor had raised a dispute as to the quality of goods supplied under the Sales Contract vide its email on 02.06.2020. Furthermore, the Corporate Debtor had flagged the issue regarding detention charges incurred by it on behalf of Samsung and paid to Aissa Maritime Private Limited. The Corporate Debtor had issued a debit note to Samsung with regard to the detention charges on 02.06.2020. None of the aforesaid disputes arising under the Sales Contract have been settled between the parties. While there are pending disputes with respect to the transaction between the parties, the same is not seen reflected in the assignment. Therefore, in view of the debt being subject to prior dispute, the application under Section 9 of the Code is not maintainable.

8. It is also stated that the Applicant seeks to claim interest in the proceedings initiated under Section 9 of the Code. A claim of interest cannot be raised under the Code while initiating proceedings in the capacity of an operational debtor. In this regard, it is stated that in contrast to the definition of Financial Debt' under the Code, the definition of “Operational Debt” under the Code does not contemplate interest component.

9. The learned counsel for the Corporate Debtor stated that the issues were being informed to the Operational Creditor, from time to time. It is further

submitted that this matter was specifically informed to the Operational Creditor, and had raised a dispute as well. Hence, the demand for the amounts allegedly due in respect of the invoices raised on the supply of defective materials is a matter to be adjudicated upon by this bench. Therefore, the application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 is liable to be dismissed with costs.

FINDINGS:

10. We have heard the learned counsel for both the parties and perused the entire case records/documents. We have also gone through the evidences on record. The Operational Creditor has established that as per Section 5(20) of the Insolvency and Bankruptcy Code, 2016, *an "Operational Creditor" means a person whom an operational debt is owned and includes any person to whom such debt has been legally assigned or transferred*. In this matter, Samsung C&T Corporation (Insured) had legally assigned Operational Debt, that is due and payable by Corporate Debtor, to Korea Trade Insurance Corporation i.e., Operational Creditor, vide letter of Assignment dated 08.09.2020. Therefore, Korea Trade Insurance Corporation is deemed to be Operational Creditor by virtue of a valid Assignment.

11. The claim of the Corporate Debtor that the materials supplied are of inferior quality and could not be used by Corporate Debtor was not supported by any documentary evidence. The Corporate Debtor was not able to produce any evidence to show that there is a "pre-existing dispute" in the instant case. Considering these facts and circumstances, we are of the

opinion that the nature of the Debt is an 'Operational Debt' as defined under Section 5(21) of the Definitions under the Code. There is a "Default" as defined under Section 3(12) of the Code on the part of the Corporate Debtor.

12. The Operational Creditor has not proposed the name of any resolution professional to be appointed as Interim Resolution Professional.

13. The application made by the Operational Creditor is complete in all respects as required by law, and it clearly shows that the operational debt has not been paid by the Corporate Debtor.

O R D E R

14. In the given facts and circumstances, we are of the view that the present application is complete and the Operational Creditor is entitled to claim its dues, which remain unpaid by the Corporate Debtor. In the light of above facts and circumstances the present application is to be admitted for initiation of CIRP.

15. As a consequence, the **CP(IBC)/25/KOB/2021** is **admitted** in terms of Section 9(5) of IBC, 2016 and moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor prohibiting all of 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 off by the corporate debtor any of its assets or any legal right 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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.

16. It is further directed that the services to the corporate-debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period. The moratorium shall however not apply to such transactions as may be notified by the Central Government in consultation with any financial regulator and to a surety in a contract of guarantee to a corporate debtor.

a) The order of moratorium shall have effect from the date of this order till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under Sub-Section (1) of Section 31 or passes an order for liquidation of corporate debtor under Section 33 as the case may be.

b) That the public pronouncement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of IBC.

17. This Bench hereby appoints **Mr. Krishna Raj M.** having **Registration No. IBBI/IPA-001/IP-P02388/2021-2022/13668, e-mail: krishnarajm2018@gmail.com** residing at **Vembanatt House, Chembakassery Junction, Aluva, Ernakulam, Kerala - 683101** whose name appears in the Panel of Insolvency Professionals notified by IBBI for the period from 01.07.2021 to 31.12.2021 in respect of Kochi Bench of NCLT as an Interim Resolution Professional to carry out the functions as mentioned under IBC. The fee payable to IRP/RP shall comply with the IBBI Regulations/ Circulars/ Directions issued in this regard. The proposed IRP is directed to submit his consent along with copy of AFA issued to him in the prescribed format within 2 days from the date of receipt of this order.

18. We direct the Operational Creditor to deposit a sum of Rs. 2 lakhs with the Interim Resolution Professional within three days of receipt of this order, to meet out the initial expenses to perform the duties assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This amount, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Operational Creditor.

19. The Registry is directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional.

Dated this the 21st day of December, 2021

Sd/-	Sd/-
(Anil Kumar. B)	**(Ashok Kumar Borah)**
Member (Technical)	**Member (Judicial)**

Rajasree