

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH

CP 577/I&B/NCLT/MAH/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Credit Suisse AG

...Operational Creditor
v/s.

Crest Steel & Power Private Limited

...Corporate Debtor

Order dated 14.01.2019

Coram: Hon'ble Shri V.P. Singh, Member (Judicial)
Hon'ble Shri Ravikumar Duraisamy, Member (Technical)

For the Petitioner: Mr. Puneet Jindal, Senior Advocate, Ms. Kirtida Chandarana, Advocate, Ms. Sonali Mehta, Advocate i/b Mahernosh Humranwala.

For the Respondent: Mr. Atul Singh, Advocate a/w Mr. Salkit Kumar, Advocate i/b ANP Partners

Per V.P. Singh, Member (Judicial)

ORDER

1. It is a Petition filed u/s 9 of Insolvency & Bankruptcy Code, 2016 (IBC) filed by Credit Suisse AG, Operational Creditor or Petitioner, against Crest Steel & Power Private Limited (CSPPL), Corporate Debtor, to initiate Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor on the ground that the Corporate Debtor defaulted in making payment of \$1,453,228.40/- inclusive of interest as on 31.12.2018.
2. The Petitioner is a company registered under the laws of Switzerland and is engaged in the business of providing services such as Investment Banking, Private Banking, Asset Management etc. The Petitioner provided credit facility of upto \$20,000,000/- to Glints Global General Trading LLC (Glints) vide Credit Facility Agreement dated 12.03.2013. Pursuant to the said agreement, Glints, as a security, executed an Assignment of Claims Agreement

(Security Agreement) dated 12.03.2013 thereby assigning all present and future claims to the Petitioner.

3. On 30.01.2014, Glints entered into a sales transaction agreement with the Corporate Debtor for supply of 30,544 MTS of Carborough Downs Hard Coking Coal for a total value of \$5,039,760/-. The goods were shipped to the Corporate Debtor and the delivery is evidenced by Bills of Lading that are annexed to the Petition. Also annexed with the Petition are the certificate of Sampling and Analysis dated 20.01.2014, the certificate of Weight dated 20.01.2014, Certificate of Australian Origin dated 24.01.2014 and Supplementary Certificate of Sampling and Analysis dated 20.01.2014.
4. It is stated that the goods were supplied in accordance with the specifications set out in the Sales Contract and that the Corporate Debtor has received the goods without raising any objections with regard to the quality or quantity. Subsequently, an invoice dated 03.03.2014 was issued upon the Corporate Debtor by Glints. The Invoice was payable after 90 days from the date of the invoice. The invoice also mentioned the fact that the invoice amount was payable to the Petitioner being the assignee.
5. Another similar sales invoice was raised by Glints upon Topworth Steel & Power Private Limited (Topworth) dated 27.02.2014 for supply of some other goods with same conditions and disclosures as that of the Corporate Debtor. The Corporate Debtor is majority shareholder in the Topworth.
6. The Petitioner has sent a notice of claim dated 19.05.2014 to the Corporate Debtor demanding the due amount under the invoice raised by Glints, it being payable to the Petitioner in lieu of the Security Agreement. Again on 03.06.2014 the Petitioner sent a facsimile message (fax) to the Corporate Debtor requesting to confirm if they have made the payment. The Petitioner stated that

it did not receive any reply to any of its communications sent to the Corporate Debtor. Eventually, on 20.06.2014 the Petitioner sent a legal notice to the Corporate Debtor demanding payment of the due amount under the invoice.

7. The Corporate Debtor replied to the legal notice of the Petitioner stating that they were not aware of the fact that the goods were financed by the Petitioner or that the invoices were due on 03.06.2014. The Corporate Debtor has stated:

"As there were quality issue in the material supplied, the payments from our customer will get delayed by 2 to 3 months, which we have already informed to Glints Global in the past. So we will try & settle this bill on/or before 31/08/2014. In the mean time if any realisation is received from the customers, it will be remitted to you.

As explained above in the current situation, we need to have at least 2 months from now for payment of the liability fallen due on 03/06/2014 for amount of \$5,039,760/- and we will ensure that payment is made by 31/08/2014."

8. In reply to the letter of the Corporate Debtor, the Petitioner sent a letter dated 09.07.2014 acknowledging the receipt of its undated reply on 28.06.2014. The Petitioner in its letter wrote that it has noted Corporate Debtor's acceptance that it owes full amount under the invoice to the Petitioner. In the e-mail dated 21.07.2014 the Corporate Debtor has assured that it will pay today i.e. 21.07.2014 and similar assurance was made on 23.07.2014.
9. In another letter addressed to the Petitioner dated 28.07.2014 the Corporate Debtor has stated that it has requested for deferment of payment as there were quality issues in the material supplied

which was not unusual in the nature of trade. The Petitioner on 21.08.2014 received a letter from Topworth stating that it will make the payment for the invoice amount due from Corporate Debtor on or before 31.08.2014.

10. Eventually on 29.08.2014, the Petitioner sent an e-mail acknowledging the \$1,000,000/- received from the Corporate Debtor and demanding the balance remaining.
11. On 01.09.2014 the Corporate Debtor sought another four-day deferment, till 09.09.2014, for payment of the balance amount of \$4,039,795/- in lieu of holidays for festival of Lord Ganesha.
12. On 02.09.2014 the Petitioner sent a notice objecting to the further deferment sought by the Corporate Debtor and levied interest at 18% p.a. from 03.06.2014.
13. The Corporate Debtor on 19.09.2014 issued a letter to the Petitioner again raising the issue of poor quality of material supplied and it being not as per terms of the order. It also informed the Petitioner that Mr. Manoj Garg of Glints has advised to dispose off the material & assured to compensate at \$25/MT. Then on 02.12.2014 the Corporate Debtor in its letter stated that it has not made the payment because the Petitioner has not reduced its claim by \$25/MT, the assured compensation in lieu of the loss suffered due to poor quality of the goods supplied.
14. On 23.03.2015 the Petitioner, the Corporate Debtor and Topworth agreed upon settlement terms along with payment schedule. Eventually on 06.08.2015 the Petitioner sent a notice to the Corporate Debtor stating that it has received \$249,965/-, \$49,930/- and \$499,950/- respectively on 12.05.2015, 18.06.2015 and 26.06.2015 as per settlement agreement. It is stated in the notice that the Petitioner has adjusted these amount against the Corporate Debtor's invoice. However, since no further

payments were made as per the settlement agreement and time was essence of the settlement, the Petitioner has withdrawn the settlement terms and the original amounts are immediately due and payable.

15. The Petitioner sent a Demand Notice dated 20.12.2017 in form-3 along with form-4 to the Corporate Debtor demanding \$1,431,388.29/- inclusive of principal and interest amount. The acknowledgment shows that the notice was received by the Corporate Debtor on 26.12.2017.
16. The Corporate Debtor sent a reply dated 04.01.2018 to the Demand Notice disputing the amount claimed on account of the Petitioner not acknowledging the 10% advance paid by the Petitioner and the agreed deduction of \$25/MT as the compensation in lieu of the loss suffered due to poor quality of the goods supplied.
17. The Corporate Debtor in its Affidavit in Reply has stated that the petition should not be admitted because it has disputed both the quantum as well as right of the Petitioner to claim the amount. The dispute regarding the quantum is in lieu of firstly, the refusal of the Petitioner to deduct 10% advance paid to the Glints. Secondly, the Petitioner has not deducted \$25/MT from the invoice amount which was agreed to be deducted on account of poor quality of the goods supplied by Glints. It is stated that the quality issue with the goods supplied was communicated to the Petitioner in September 2014.
18. The Petitioner has filed Affidavit in Rejoinder stating that the Corporate Debtor has specifically acknowledged its liability to pay to the Petitioner against the sales invoice in the settlement agreement dated 23.03.2014. It is stated that the Corporate Debtor made three instalments under the settlement agreement however failed to make any further payment as per the settlement terms and thus as per the terms is liable to pay the entire invoice

amount and the settlement agreement was withdrawn. The Petitioner submits that since the Corporate Debtor has unconditionally and unequivocally admitted its liability under the settlement agreement it cannot raise any objection with regard to the same. It is submitted that the Corporate Debtor vide its various letters and emails dated from July 2014 to August 2014 has admitted the liability. It is stated that the Corporate Debtor had the knowledge of the shipment being financed by the Petitioner as the invoice bears as endorsement that the amount are duly assigned to the Petitioner.

19. The Petitioner has stated that, it was only after September 2014 that the Corporate Debtor referred to certain deductions that were assured by Glints on account of the goods supplied being of poor quality. It is contended that the partial payment by the Corporate Debtor and empty assurances without any subsequent payment of the balance amount makes the petition fit for admission.
20. With regard to the advance paid by the Corporate Debtor, the Petitioner contends that there is no mention of such an advance either in the Sales Contract dated 30.01.2014 or in the Commercial Invoice dated 03.03.2014 thus no deduction as claimed can be done.
21. Further, since the invoice itself mentions the fact of assignment of the invoice amount to the Petitioner, it was duty of the Corporate Debtor to pay the advance, if any, to the Petitioner and not to Glints. The Petitioner has also denied to any deductions agreed or allowed by Glints as the documents annexed to the petition would sufficiently prove that the quality and quantity of the goods supplied are in accordance with the Sales Contract and any dispute regarding the quality of the goods is not maintainable.
22. It is also contended that the Petitioner, being the assignee of Glints, is not concerned with any alleged issues with regard to the

quality of goods and all such issues, if exists, are between Glints and the Corporate Debtor and ought to be resolved between them.

23. We have heard the arguments of the Advocates appearing for both the sides and perused the documents submitted.
24. The Petitioner has filed this petition as Operational Creditor under section 9 of IBC. As per section 5 (20) of IBC the definition of Operational Creditor includes any person to whom such debt has been legally assigned. Under the Assignment of Claims Agreement dated 12.03.2013 Glints has assigned all its present and future claims to the Petitioner including the present relevant invoice dated 03.03.2013.
25. As per IBC, the Petitioner sent Demand Notice along with the invoice under section 8 of IBC dated 20.12.2017 in form-3 along with form-4 to the Corporate Debtor demanding \$1,431,388.29/- inclusive of principal and interest amount. The acknowledgment receipt shows that the notice was duly received by the Corporate Debtor on 26.12.2017.
26. In reply to the Demand Notice dated 04.01.2018, the Corporate Debtor has disputed the amount claimed on account of the Petitioner not acknowledging the 10% advance paid by the Petitioner and the agreed deduction of \$25/MT as the compensation in lieu of the loss suffered due to poor quality of the goods supplied.
27. It is pertinent to note here that the law regarding petitions under section 9 of IBC is well settled by the Hon'ble Supreme Court in its judgment in Mobilox Innovations Private Limited vs. Kirusa Software Private Limited, (2018) 1 SCC 353 and K. Kishan vs. M/S Vijay Nirman Company Pvt. Ltd., Civil Appeal No. 21824 Of 2017 order dated 14.08.2018. The Adjudicating Authority has only to see whether the said debt can be said to be disputed and that the

dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence without examining the merits of the dispute. If the Adjudicating Authority is of the opinion that there exists a dispute to the extent as aforesaid then it has to reject the petition.

28. In the present petition, the Corporate Debtor has communicated the issue of poor quality of goods to the Petitioner on 28.06.2014. The issue of poor quality of goods supplied was again raised by the Corporate Debtor in its letter dated 28.07.2014. In the letter of the Corporate Debtor dated 19.09.2014 it has again communicated its inability to pay the outstanding amount due to the poor quality of the goods supplied and that it was assured a compensatory deduction of \$25/MT by Glints in lieu of the loss caused. It has demanded the deduction of 10% advance that it has paid from the total outstanding amount. The same were repeatedly communicated to the Petitioner by the Corporate Debtor vide its letter dated 19.11.2014, 02.12.2014 and in its reply to the Demand Notice dated 04.01.2018.
29. Further, the letter of the Petitioner dated 23.03.2015 communicating the settlement terms to the Corporate Debtor clearly mentions that it has note of the continuous denial by the Corporate Debtor of any obligation towards the Petitioner against the sale invoice.
30. The Petitioner has filed this petition as Operational Creditor under section 9 of IBC and has argued that since it is an assignee of the operational debt hence it has stepped in the shoes of the operational creditor. Thus the argument of the Petitioner that it is not concerned with any alleged issues with regard to the quality of goods and all such issues, if exists, are between Glints and the Corporate Debtor and ought to be resolved between them is not tenable.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

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31. In the light of the aforementioned judgments and the facts we are of the opinion that there exists a dispute with regard to the alleged unpaid operational debt which is supported by documents and the operational creditor had notice of the same before the date of the Demand Notice.
32. For the reasons mentioned above, we hereby reject this petition as under section 9(5)(2)(d).
33. The Registry is hereby directed to immediately communicate this order to the Operational Creditor and the Corporate Debtor even by way of email or whatsapp.

**Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)**

14th January, 2019

**Sd/-
V.P. SINGH
Member (Judicial)**