

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB) NO. 1173 of 2022

Under Section 9 of the Insolvency and Bankruptcy
Code, 2016

UNISSI (INDIA) PRIVATE LIMITED

...Operational Creditor/Petitioner

Versus

**PARICHAY DEPARTMENT STORES
PRIVATE LIMITED**

CIN: U52190MH2005ULT154595

...Corporate Debtor

Order Delivered On : 22.12.2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Operational Creditor : Mr. Anuj Kumar Solanki, Advocate

For the Corporate Debtor : Mr. Nausher Kohli, Ms. Nidhi Singh,
Advocates

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Company Petition is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) by **UNISSI (INDIA) PRIVATE LIMITED (“Operational Creditor/Petitioner”)**, seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against **PARICHAY DEPARTMENT STORES PRIVATE LIMITED (“Corporate Debtor/ Respondent”)**.
2. The Respondent was incorporated on 08.07.2005 under the Companies Act, 1956. Its Corporate Identity Number (“**CIN**”) is U52190MH2005ULT154595. Its registered office is at Sh 1&2B, Ground & First Flr,719/A,719/B, Madhav Bldg Kasturba Park, Shimpoli, Borivali (West), Mumbai, Maharashtra, India, 400092.

Brief Facts of the case:

3. The Corporate Debtor, Parichay Department Store Private Limited is a Retail Store and the Operational Creditor is engaged in the business of manufacture, design, assembly, construction, production, installation, import and export of hospital and laboratory equipment, air separation, PSA-based equipment for the generation of oxygen, hydrogen and nitrogen and is also registered under the Micro, Small and Medium Enterprises Development Act, 2006 (“**MSME Act**”) vide its registration certificate dated 15.03.2022.
4. The Petitioner submits that on 08.06.2021, M/s. Highway Construction Co. (“**Principal Contractor**”) issued a Purchase Order No. HCC/011/2021-22 (“**PO**”) to the Petitioner for supply of PAS based Oxygen Generator Plants along with standard accessories. All material according to the PO was supplied to the Corporate Debtor at

different locations in Mumbai and tax invoices were raised for the supply of such goods.

5. The Petitioner submits that against the total supply of goods amounting to Rs. 22,96,85,987 (Rupees Twenty Two Crores, Ninety Six Lakhs, Eighty Five Thousand, Nine Hundred and Eighty Seven Only), the Corporate Debtor has made part payment of Rs. 18,90,96,067 (Rupees Eighteen Crores, Ninety Lakhs, Ninety Six Thousand and Sixty Seven Only) (including TDS of Rs. 96,067). The Corporate Debtor made payment without any objection until 18.09.2022 and thereafter stopped making payments.
6. The Petitioner submits that the total amount of debt claimed to be default is Rs. 4,53,93,987 (Rupees Four Crores, Fifty Three Lakhs, Ninety Three Thousand, Nine Hundred and Eighty Seven Only), including the outstanding principal amount of Rs.4,05,89,920 (Rupees Four Crores, Five Lakhs, Eighty Nine Thousand, Nine Hundred and Twenty Only) along with interest thereon calculated at the rate of 12% per annum up to 21.09.2022, i.e. Rs.48,04,067 (Rupees Forty Eight Lakhs, Four Thousand and Sixty Seven). The Unpaid Invoice Nos. 129 and 131 dated 12.08.2021 have been placed at Annexure-5 of the Petition.
7. The Petitioner in support of its claim has placed on record the following documents:-
 - i. Purchase Order No. HCC/011/2021-22 dated 08.06.2021
 - ii. Unpaid Invoice Nos. 129 and 131 dated 12.08.2021
 - iii. Copies of E-way Bills, Challans, Transporter's Receipts and Lorry Receipts.
 - iv. E-mail Correspondence
 - v. GST Forms
 - vi. Ledger Account
 - vii. Record of Default from NeSL

- viii. UDYAM Registration Certificate
 - ix. Bank Account Statements
8. The Petitioner made repeated requests to the Corporate Debtor regarding payment of outstanding debt via telephonic conversations, e-mails, personal meetings, etc. but the Corporate Debtor failed to make payments. The e-mail correspondence is placed on record as 'Annexure 7 of the Petition.
9. The Petitioner has stated the date of default to be 26.09.2021 in accordance with the unpaid invoices read with Sec. 15, 16 and 17 of the MSME Act.
10. The Petitioner on realising that Respondent was unable/incapable of paying to the Petitioner, served upon the Respondent Demand Notice dated 22.09.2022 in Form 4 under section 8 of the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by speed post and e-mail which was duly received by the Respondent.
11. The Petitioner submits that the goods were provided to the Respondent and the Respondent did not raise any dispute or demur and neither raised any grievance about the goods rendered in that regard to the Petitioner and has annexed an Affidavit u/s 9(3)(b) of the Code to that effect.
12. The Corporate Debtor in its reply dated 30.09.2022 to the Demand Notice raised the following contentions against the Petitioner:
- i. The MCGM had awarded a tender for installation and commissioning of PSA based Oxygen Generator Plants during the second wave of Covid-19 pandemic to M/s.Highway Constructions & Co. M/s.Highway Constructions & Co. had entered into an arrangement with the Petitioner, whereby

Petitioner was to supply the Oxygen Generator Plants. According to the arrangement, the Respondent is the Procuring agent for M/s.Highway Constructions & Co. The Purchase Order also stated that the billing details were routed through the Respondent, but the goods were shipped to the address of M/s.Highway Constructions & Co. The invoices also reflect M/s.Highway Constructions & Co. as the consignee. Therefore, there is no privity of contract between the Petitioner and the Respondent.

- ii. The Petitioner has also filed a Suit being CS(COMM) 324/2022 for recovery of the same purported amount against M/s. Highway Constructions & Co. before the Hon'ble Delhi High Court in relation to the same transaction and it is pending adjudication. The Petitioner is forum shopping.
- iii. M/s.Highway Constructions & Co. had difficulty appointing the Petitioner as the Original Equipment Manufacturer for this project due to the fact that the Petitioner has already been blacklisted in another project relating to SMS Hospital, Jaipur.
- iv. The Respondents had made a payment of Rs. 2,00,00,000/- (Rupees Two Crores Only) to the Petitioner on 17.05.2021, and a further sum of Rs.6,00,00,000/- (Rupees Six Crores Only) even before the issuance of letter of approval of MCGM in interest of timely completion of the project. However, the Petitioner delayed the work, failed to adhere to the delivery schedule, failed to supply 100% of the parts/materials at site and several parts of Plants malfunctioned at site. Consequently, the Respondent had to bear exorbitant costs towards procuring the parts from other vendors and suppliers and infuse additional funds towards installation and commissioning of the Plants. Consequently, M/s. Highway Constructions & Co. have paid heavy penalties

which were levied by MCGM, causing substantial monetary loss. M/s. Highway Constructions & Co. had to cure the defect liability period under the tender conditions owing to the Petitioner's breaches, defaults, failures and defective goods and services.

- v. M/s. Highway Constructions & Co. has not certified or acknowledged the commission of Plants by the Petitioner and it has been admitted by the Petitioner is the Suit pending before the Hon'ble Delhi High Court that commissioning of Plants were pending on behalf of the Petitioner.
13. The Petitioner submits that since the invoices for supply of goods were raised on the Corporate Debtor and the Corporate Debtor made part payment, it establishes a contractual relationship between the Corporate Debtor and the Operational Creditor, thereby establishing privity of contract.
14. The Petitioner further submits that the Corporate Debtor has availed GST input on the amount of total invoices, availed credit on TCS and deducted TDS on applicable invoices, establishing that the Corporate Debtor acted like a principal and not an agent.
15. The Petitioner further submits that the MCGM has imposed a penalty on all the tenders. The MCGM has also issued Handing Over & Taking Over Report with regard to all 18 Oxygen Generation Plants, wherein it is clearly stated that –

“The performance of the oxygen generation plants found satisfactory, hence the complete system is handed over to user department.”

The petitioner further submits that the Corporate Debtor has not raised any debit note after imposition of penalty by MCGM.

Findings

16. Heard the submissions of learned Counsel and perused the records.
17. It can be seen from the General Terms & Conditions of the Purchase Order that the bills were to be raised on the Corporate Debtor and also be paid by the Corporate Debtor thereby establishing privity of contract between the Petitioner and the Corporate Debtor. However, the NeSL Certificate placed on record certifies that the debt is disputed by the Corporate Debtor.
18. This Tribunal vide Order dated 07.09.2023 had directed the Corporate Debtor to bring on record the proof of penalty paid by the Principal Contractor. The Respondent has vide Additional Affidavit dated 11.10.2023 brought on record the Letter dated 14.10.2023 issued by Brihanmumbai Municipal Corporation to the Principal Contractor stating that the penalty amounting to Rs. 3,16,32,425/- (Rupees Three Crores, Sixteen Lakhs, Thirty Two Thousand, Four Hundred and Twenty Five Only) has been deducted from the final bill of the Principal Contractor.
19. The suit filed by the Petitioner before the Delhi High Court predates the filing of the present petition. The subject matter of the Suit is the same as the present petition. The fact that the suit is filed against M/s. Highway Constructions & Co. and the present petition is filed against Parichay Department Stores Private Limited does not negate the fact that the intent in both is recovery of amounts by the Petitioner.
20. We are of the considered view that the Petitioner has approached the Tribunal solely with the intent of recovery which is not the intent of the Code.
21. In light of the above, we are of the view that there is a pre-existing dispute between the parties involved, which requires adjudication and cannot be decided in proceedings under Sec. 9 of the Code.

22. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The Applicant is at liberty to seek remedy under the other applicable laws and the rights of the Petitioner shall not be prejudiced on the grounds of dismissal of the present Petition.
23. In the above circumstances, the Petition bearing CP(IB) No. 435 of 2023 filed by **UNISSI (INDIA) PRIVATE LIMITED**, the Operational Creditor, under section 9 of the IBC read with Rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **PARICHAY DEPARTMENT STORES PRIVATE LIMITED**, the Corporate Debtor, stands **rejected**.

Sd/-

Prabhat Kumar
Member (Technical)

/SP/

Sd/-

Justice V.G. Bisht
Member (Judicial)