IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

IB-595(ND)/2022

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

IN THE MATTER OF:

M/s. SUMARGSAI TECHNOLOGIES PRIVATE LIMITED

......Operational Creditor

VERSUS

M/s. ENERGY EFFICIENCY SERVICES LIMITED

......Corporate Debtor

Order Delivered On: 22.12.2023

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Samar Bansal, Mr. Sushant Mahajan, Ms. Debopriyo Moulik, Advs.

For the Respondent : Mr. Samdarshi Sanjay, Ms. Monika Sharma, Mr. Ashish Kumar Sharma, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application has been filed by M/s. Sumargsai Technologies Private Limited, the Applicant/Operational Creditor on 04.08.2022 before this Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency

Resolution Process ("CIRP"), against M/s. Energy Efficiency Services Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of Rs. 3,32,08,959/- (Rupees Three Crore Thirty Two Lakh Eighty Nine Thousand and Fifty Nine Only) and Rs. 1,81,34,666/- (Rupees One Crore Eighty One Lakh Thirty Four Thousand Six Hundred and Sixty Six Only) as interest @5.6% p.a., totalling to Rs. 5,13,43,625/- (Rupees Five Crore Thirteen Lakh Forty Three Thousand Six Hundred and Twenty Five Only).

2. **Submissions of the Operational Creditor:**

i. It is case of the Applicant/Operational Creditor that it had successfully participated in online bidding for Installation (Retrofit), Commissioning, Repair and maintenance of LED Streetlights for a period of 10 years and other related works in the state of Andhra Pradesh. Pursuant thereto, multiple Letter of Awards were issued by the Respondent/Corporate Debtor in favour of the Applicant/Operational Creditor.

ii. The Contract Agreement No. EESL/COA-1819171 was executed on 27.12.2019 between the Corporate Debtor (as an "Employer") and the Operational Creditor (as a "Contractor") for work as described above. As per the said Contract Agreement, the Contract price was of Rs. 2,52,34,744/-.

iii. After the completion of the entire work by the Operational Creditor, the Applicant/Operational Creditor had raised invoices to the Corporate Debtor, which have not been honoured by the Corporate Debtor till date.

iv. The Operational Creditor sent a Demand Notice dated 15.09.2021 under Section 8 of the IBC, 2016 to the Corporate Debtor demanding payment of the unpaid debt due of Rs. 7,24,55,844/-. Subsequently payment to the tune of Rs. 1,98,99,340/- was received by the Applicant/Operational Creditor from the Corporate Debtor. Further, the Applicant/Operational Creditor issued another demand notice dated 08.02.2022 under Section 8 of the IBC, 2016 to the Corporate Debtor demanding payment of the remaining debt to the tune of Rs. 5,25,56,504/-. The Corporate Debtor vide letter dated 23.02.2022 replied to the demand notice dated 08.02.2022 to the Operational Creditor and raised pre-existence of dispute prior to the issuance of the demand notice dated 15.09.2021.

3. **<u>Submissions of the Corporate Debtor:</u>**

i. The Corporate Debtor is a Joint Venture of 4 (Four) Central Public Sector Undertakings of Ministry of Power, Government of India namely NTPC Limited, Power Grid Corporation of India Limited, Power Finance Corporation Limited and Rural Electrification Corporation Limited and is the Nodal Agency for implementation of Street Light National Programme ("SLNP") throughout the country. SLNP is one of 8 National Mission under Prime Minister's National Action Plan on Climate Change, and the same was being taken and implemented through the Corporate Debtor for Gram Panchayats in the state of Andhra Pradesh.

ii. It is case of the Corporate Debtor that Andhra Pradesh Panchayati Raj & Rural Development Department, Government of Andhra Pradesh ("AP PR & RD-GoAP"), in order to replace the conventional lighting systems in Gram Panchayat's of Andhra Pradesh based on High Pressure Sodium Vapor lamps into Energy Efficient LED Street Lighting System for conservation of energy and for minimizing the maintenance expenditure incurred under Street Light Head in various Gram Panchayats of Andhra Pradesh entered into 2 (Two) Tripartite Agreements dated 17.07.2017 and 27.12.2018 ("TPA") in 2 phases for implementation of 21.90 Lakh LED Street Lighting Project in Gram Panchayats of 13 districts of Andhra Pradesh.

iii. The aforesaid work was assigned to the Corporate Debtor, who invited bids for execution of the aforesaid project, wherein Applicant *inter alia* was declared as successful bidder and Letter of Award (LoA) dated 23.10.2017, 22.06.2018, 24.10.2018 and 14.03.2019 was issued in favour of Applicant for implementation of the project in different Gram Panchayats of Andhra Pradesh.

iv. The Applicant committed breach/defaults on various occasions and the Corporate Debtor had thus sent numerous correspondence requiring Applicant to comply with terms of execution.

v. It is the case of the Corporate Debtor that the Applicant/ Operational Creditor has failed to carry out the implementation as per terms and conditions leading to directions given by AP PR & RD-GoAP vide letter dated 03.03.2021 to Corporate Debtor for handover/transfer of operations and Repair & Management of the Project to Village Secretariats. Corporate Debtor has further submitted that since, Applicant/Operational Creditor despite warning failed to improve upon their work and adhere to terms and conditions, the Corporate Debtor wrote an email dated 30.06.2021 to the Applicant requiring them to stop repair and maintenance work of LED Streetlights and handover the same to Corporate Debtor with all supporting project documents.

4. **Analysis and Findings:**

i. We have heard the Ld. Counsel appearing for both parties. We have also perused the documents on record.

ii. The Applicant/Operational Creditor has claimed the principal amount to the tune of Rs. 3,32,08,959/-, however invoices brought on record do not confirm the same. Hence, Applicant/Operational Creditor has failed to justify the aforesaid claim and also failed to substantiate the submission by any documentary evidence.

iii. The next issue to be examined in this Application is whether there exists a plausible pre-existing dispute between the parties.

iv. The Corporate Debtor has written numerous emails to the Applicant/Operational Creditor raising varied range of concerns/disputes with respect to the manner in which work awarded was being carried out by Applicant prior to the issuance of the demand notice dated 15.09.2021.

v. In an email dated 26.09.2018, written on behalf of the Corporate Debtor to the Applicant, a reminder was given to the Applicant, with respect to furnishing of rectification status on daily basis. The said reminder was followed up in another email dated 04.10.2018, wherein the Respondent is seen making same directions/reminder as to furnishing of daily rectification status/report along with other directions for 'Man Power Deputation' and '95% light maintenance in each Gram Panchayat'. Relevant part of an email dated 04.10.2018 is extracted below:

Dear sir,

Greetings for the day!!!

In reference to the trailing mail and review meeting on AP Gram Panchayat LED Street lighting project on dated 04.10.2018 at CPR&RD office, Vijayawada, it is mandatory to submit the rectification reports on daily basis and monthly basis as per the scope of work mentioned in section -4 RFP and LoA. **(Format is attached for your reference)**

As per the agenda of meeting it has been concluded to follow certain instructions of
1) Man power deputation
2) Complaint Recording and handling mechanism
3) Daily and monthly rectification reports submission
4) Spares maintaining and intimation
5) 95% light maintenance in each GP

Performance of the agency during repair & maintenance period will be strictly observed and any deviation necessary action will be taken as per LoA.

Please find the attached format of Rectification report and has to be shared on daily basis to the below mentioned email ID's

vi. The Corporate Debtor has further written another email dated 10.10.2018 with subject heading being "*Intimation Notice for Non-Performance of AP GP LED Street Lighting Project – Reg.*" intimating to the Applicant that any penalty imposed for non-rectification of light would be deducted form invoices of the Applicant. Relevant part of an email dated 04.10.2018 is extracted below:

Dear sir,

In continuation to the trailing mail, please find the attached Letter issued by AP PR&RD regarding penalty clause of non rectification of lights in specified timelines.

In this regard, any action/ penalty imposed by AP PR&RD on account of non rectification of LED Street Lights within the time lines (under your scope) at your awarded location, the same will be directly deducted from your running bills.

This mail Is for your information and record purpose.

vii. It is further seen from the records that Corporate Debtor has written another email dated 17.02.2020, warning against irregularities observed in filing daily rectification report by the Applicant, the relevant part of an email which is extracted below:

Dear sir,

As per LoA, Agency has to sent the Daily report and irregularity has been observed in sending the daily rectification reports.

The following daily report format has to be sent without fail by EOD of Maintenance and if the reports are not sent regularly the performance of the DIC agency will be captured and penalty will be imposed.

Sub: Daily Rectification Report - Division Name: Date

Dear sir,

Greetings for the day!!!

LED Street Light Daily rectification status of ________ Division is mentioned below:

viii. Email dated 25.09.2020 has been written by Respondent to the Applicant with subject heading being "No Work Progress_except mogaltur mandal in Narsauram division – Reg.", the relevant part of an email which is extracted below:

Greetings of the day.

With respect to the above subject it is to inform you that on 25.09.2020 and 26.09.2020 except in mogaltur mandal no other teams are working at site in West godavari district ,Hence it is requested to clear the issues and start the maintanance work atleast from second hour today 26.09.2020.

ix. Another email dated 10.02.2021 written by Respondent to Applicant, which fetched attention expressly conveys concerns and complaints raised by Respondent against Applicant for not maintaining safety standards. Relevant part of the said email is extracted below:

Dear sir,

Greetings for the day!!!

With reference to the present maintenance activity, it has been observed safety standards are not maintained. In this regard, it is requested to ensure to follow the safety standards & norms and safety PPE has to be mandatorily used while maintenance.

Please submit the undertaking letter of safety with the R&M monthly invoice.

x. Now, in addition to all these emails, Corporate Debtor has also placed on record a letter bearing no. Lr. No. 23/CPR & RD/LED/2018, dated

21.08.2020, sent by Government of Andhra Pradesh, Office of Commissioner, Panchayat Raj & Rural Development, which in view of unsatisfactory work, directs the Respondent to take immediate action for transfer of R&M of LED Street Lights. It is pertinent to extract here the relevant part of the aforesaid letter:

> The feedback obtained from the Public Representatives at Constituency level ,Local Public and District officials of PR&RD on the R&M of LED Street Lights is not Satisfactory and the existing Complaint Redressal Mechanism is not Concrete due to minimal manpower .As is the situation and taking into cognizance of the above facts, the Hon'ble Minister for PR&RD felt appropriate to revamp the existing system of R&M LED Street lights and decided to entrust the Operation, R&M of LED Street lights part of the project to Village Secretariats and instructed EESL to Transfer the R&M part of the Project , the same was communicated to EESL through minutes of the meeting vide ref(2) and unfortunately no development seen in accordance to the decision taken by the Hon'ble Minister for various reasons.
>
> In view of the above, EESL is requested to immediately take action for Transfer of R&M of LED Street lights to Village Secretariats by making necessary arrangements in all respects by withdrawing the existing system and for transfer of R&M to Village secretariats and also EESL shall Prepare a Technical Hand Book on Handling of LED Street lights complaints for imparting training to Energy Assistants.
>
> CEO/MD APSEEDCO shall arrange transfer of R&M of LED Street Lights to Govt from EESL by adapting a meticulous procedure duly coordinating with EESL, PR&RD, VS&WS and DISCOMS for smooth operation of LED Street Lighting Project.

xi. Pursuant to letter received from Government of Andhra Pradesh, Office of Commissioner, Panchayat Raj & Rural Development, the Respondent has sent letter dated 22.09.2020 to the Applicant apprising Applicant about dissatisfaction expressed by end consumer with respect to work being carried out by the Applicant and direction for transfer of work to Village Secretariats. It is pertinent to extract the relevant part of the aforesaid letter:

> Vide reference to the 7th cited, Hon'ble Minister for PR&RD, Principal Secretary and higher officials of PR&RD Dept. have noticed that the Non glowing Lights are being attended with an abnormal delay against the agreed response time of 72 Hours and the unresolved complaints are escalating day to day. As per the feedback received to PR&RD Dept. from the Local Public, Public representatives at constituency level, and District officials of PR&RD are not satisfied on the repair & maintenance activities by the DIC agencies which has impacted the fame of EESL and led to non-performance of EESL in repair & maintenance activity. In this regard, it has resulted PR&RD Department has taken resolution to take over the Repair & Maintenance and carry out R&M on their own through Village Secretariats.
>
> Accordingly, EESL has received instructions (7th cited) from PR&RD Dept. to handing over the Repair & Maintenance to the Village Secretariats and instructed APSEEDCO to work out on the modalities, roles and responsibilities of stake holders and complaint handling mechanism for transfer of R&M from EESL/ DIC Agencies to Village Secretariats. PR&RD Officials has informed that there will be short close of Repair & Maintenance scope in EESL agreement and accordingly EESL agreement will be amended as per Govt Orders. In this regard, there will be no further any scope of R&M activity in EESL agreement after the completion of handing over process and the same will be implacable to DIC Agencies. Further, it is to inform you that EESL has never linked with our receivables with the PR&RD Dept and paid all the eligible payments to the DIC agencies as per the LoA.
>
> In reference to RFP Documents & LoA Clause, EESL reserves the right to cancel the order completely or partial without any prejudice to the exercise of the actions and as per the above factors, M/s Sumargsai Technologies Pvt Ltd has to handover the Repair & Maintenance activity with all the necessary supporting project documents and support to M/s APSEEDCO, M/s EESL and PR&RD Dept. in handing over process. Handing over date will be intimated later and till the time, it is requested to maintain and carry out the repair & maintenance activities smoothly as per the current following procedures.
>
> This is for your information and necessary action please.
>
> Thanking you,

xii. Once again vide letter dated 03.03.2021, Government of Andhra Pradesh, Panchayat Raj & Rural Development, owing to the unsatisfactory mechanism adapted as to minimal man power directed Respondent to transfer operations and Repair & Maintenance part of

LED Street Lighting project to Village Secretariats headed by Panchayat Secretary. Pursuant to said letter, Respondent wrote an email dated 30.06.2021, requiring Applicant to cease operations in view of directions received from Government of Andhra Pradesh, Panchayat Raj & Rural Development. Relevant part of email is extracted below:

Dear M/s Sumargsai Technologies Pvt Ltd,

As you are well aware about AP PR&RD Dept. have noticed that the Non-glowing Lights are being attended with an abnormal delay against the agreed response time of 72 Hours and the unresolved complaints are escalating day to day. As per the feedback received to PR&RD Dept. from the Local Public, Public representatives at the constituency level, and District officials of PR&RD are not satisfied with the repair & maintenance activities by the DIC agencies which have impacted the fame of EESL and lead to non-performance of EESL in repair & maintenance activity. Because of that, it has resulted in PR&RD Department has taken a resolution to take over the Repair & Maintenance and carry out R&M on their own through Village Secretariats headed by Panchayat Secretary. The same issue was discussed with M/s Sumargsai Technologies Pvt Ltd and EESL has given an intimation notice on 22.09.2020 for the handover of the Repair & Maintenance activity.

It is to inform you that, in view of non-performance identified by the PR&RD Department on attending non-glowing lights (abnormal delay against the agreed response time of 72 Hours), EESL reserves the right to cancel the order completely or partially without any prejudice to the exercise of the actions as per Tender RFP & LoA Clause.

According to AP PR&RD G.O .MS.No.11 dated 03/03/3021 and letter received from Commissioner PR&RD dated 04/03/2021 to EESL, the PR&RD department has informed EESL to transfer of R&M work of LED street lights in Jagananna Palle Velugulu (AP GP LED Street lighting project) to Village secretariats headed by Panchayat Secretary and agreement of EESL will be amended without the scope of work of Repair & Maintenance work of LED Street Lights in Gram Panchayats of Andhra Pradesh.

In this regard, it is to inform you that to stop the Repair & Maintenance work of LED Street Lights in your respective allotted Divisions/Gram Panchayats of Andhra Pradesh and withdraw your field staff completely from Divisions/Gram Panchayats from 1st July 2021 onwards and hand over the Repair & Maintenance activity to EESL with all the necessary supporting project documents.

Further, it is requesting for the arrangement of working spares at divisional level godown and hand over to M/s APSEEDCO. Kindly ensure that while handing over spares, a handing over & taking over certificate should be duly signed by APSEEDCO, M/s Sumargsai Technologies Pvt Ltd representative & EESL District Incharge. (Format of hanging & taking over documents will be shared separately).

This is for your kind information and necessary action.

xiii. In view of the above analysis, we are of the considered view that the Applicant has not only failed to prove their claim but also has concealed material facts. Further, from perusal of all aforesaid correspondence and e-mails, there is no iota of doubt that the Respondent has multiple times raised plausible disputes which are certainly prior to date of Demand Notice i.e., 15.09.2021 raised by Applicant under Section 8 of the Code. In view of the law settled in ***Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd.*** reported in (2018) 1 Supreme Court Cases 353 that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument it would suffice for the Adjudicating Authority to reject the application filed under Section 9 of the Code.

5. In view of the above analysis and findings and the foregoing discussion, we are satisfied that the present application fails to fulfil the criteria laid down under Section 9 of the Code. It is accordingly ordered as follows:

   i. The Application bearing **IB-595(ND)/2022** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **dismissed.**

   ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

   No order as to costs.

Sd/-	Sd/-
(ATUL CHATURVEDI)	**(BACHU VENKAT BALARAM DAS)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**