IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH - V

C.P. (I.B) No. 533/MB/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Akshaya Engineering Works Pvt. Ltd.
Through its Authorised Representative Mr. Vikas Kawle, Managing Director

602 B, Vaibhav Giri, Siddhanchal Phase I, Off Pokhran Road, Near Vasant Vihar, Thane-400601
(Maharashtra)

......Petitioner/Operational Creditor

Vs

Pravin Electricals Pvt. Ltd.
Through its Authorised Representative Mr. Rahul Patil
E-S/2, First Floor, Highland Park, Jai Shastei Nagar, Mulund (W), Mumbai-400082, Maharashtra

.......Corporate Debtor

Order Delivered on: 17.10.2023

Quoram:

Mrs. Reeta Kohli, Hon'ble Member (Judicial)
Mr. Sanjiv Dutt, Hon'ble Member(Technical)

Appearances:

For the Petitioner: Adv. Gayatri Kumar i/b Manish Assarhar for Operational Creditor

For the Corporate Debtor: Adv. Prachi Rungta i/b APS Law Associates

Per: Reeta Kohli, Member (Judicial)

ORDER

This Company Petition is filed by **Akshaya Engineering Works Pvt. Ltd.** (hereinafter referred as "**the Petitioner/Operational Creditor**") on 16.03.2022 seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as **"CIRP"**) against **Pravin Electricals Pvt. Ltd.** (hereinafter called "**Corporate Debtor**") by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy code, 2016 (hereinafter called "**Code**") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs. 1,54,41,822.89/- (Rs. 1,14,95,055.47 on account of payment outstanding on the invoices raised plus Rs. 39,46,767.43 on account of interest on the aforementioned amount at an average rate of 16.74% till 14.12.2021).**

Brief Facts:-

1. Operational Creditor is a Micro, Small and Medium Enterprises duly registered under the Micro, Small and Medium Enterprises Development Act, 2006 under registration no. UDYAM-MH-33-0040951 dated 22.12.2020. The Corporate Debtor is the main contractor and the Operational Creditor is the sub-contractor. The Operational Creditor has furnished copies of Letters of Award Nos. PEPL/AEWPL/MSEDCL-DD-125/SA/153 dated 07.07.2018 and PEPL/ AEWPL/MSEDCL-DD-125/SA/154, dated 07.07.2018 issued by Corporate Debtor and Contract Agreements entered into on the same day [(collectively referred as ("Contract")], under which the Operational Creditor supplied and provided services for installation of electrical equipments at various premises of

Maharashtra State Electricity Distribution Company Ltd. [MSEDCL] ("End User") in the State of Maharashtra. The main contract was entered into between the Corporate Debtor and the End User on 07.03.2018.

2. The Operational Creditor provided the services and made the supplies as per the requirement of the Contract and the same were accepted by the Corporate Debtor and the End User without any demur and protest. The Operational Creditor has placed on record Extracts of Handing Over Certificates issued by Maharashtra State Electricity Distribution Company Ltd. to this effect.

3. The Operational Creditor submits that a total of 17 invoices were raised by it, the first one being dated 31.10.2018 and the last one being dated 18.10.2019 and as per clause 8.3 of the General Conditions of Contract (GCC), the payment was to be made by the Corporate Debtor within 21 days from the date of the receipt of the bills.

4. Thus, the first default occurred on 22.11.2018 and thereafter against each and every failure in making payments of the remaining invoices raised.

5. The Operational Creditor further submits that the liability was admitted by the Corporate Debtor through an email addressed by the latter to the former dated 02.05.2019 by forwarding the Ledger Statement of the Operational Creditor in the books of the Corporate Debtor which reestablishes the existence of the outstanding operational debt.

6. The Operational Creditor further submits that various follow up emails were sent to the Corporate Debtor for recovery of the outstanding amount which resulted in payment of partial amount

of Rs.3,28,29,703.36/- from the total outstanding invoices amount of Rs.4,43,24,758.83/-.

7. The Operational Creditor further affirms that there is no pre-existing dispute between the parties.

8. As no payments were forthcoming, the Operational Creditor sent a Demand Notice dated 14.02.2021 under section 8 in Form 3 under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 of the Code.

9. By its reply dated 25.02.2022, the Corporate Debtor for the first time denied its liability towards Operational Creditor. The Corporate Debtor stated that the main contract was awarded to it by End User and thereafter assignment of work was done by the Corporate Debtor to the Operational Creditor (as a subcontractor) by a Contract dated 07.07.2018. The terms and conditions of this contract (Appendix I) have been signed by the Operational Creditor which confirms the acceptance of the said terms and conditions by the Operational Creditor. These terms and conditions clearly stipulate that "payment terms are back to back" meaning thereby it is only supposed to pay to the Operational Creditor when it receives payment from the End User. The Corporate Debtor goes a step further to hold the poor quality and delayed execution of work by the Operational Creditor as the reasons of partial termination of the main contract between the Corporate Debtor and the End User which culminated into the non-receipt of the payment from the End User and consequential non-payment to the Operational Creditor. The Corporate Debtor, in the same reply, claims to have been penalized by the End User to the extent of Rs. 1.88 Crores and seeks to recover the same from the Operational Creditor failing which the former would be compelled to initiate legal proceedings against the latter.

10. The case of the Operational Creditor is that the default also occurred when Corporate Debtor failed to make payment against the Demand Notice dated 14.02.2021.

Submissions by the Corporate Debtor:

11. The Corporate Debtor completely disputes that the total outstanding amount of **Rs. 1,54,41,822.89/-** is due and payable.

12. The Corporate Debtor raised plea of a pre-existing dispute and submitted that on account of poor quality of work and delay in the execution of work by the Operational Creditor, the main contract of Rs. 42,34,22,891/- was reduced to Rs. 6,13,30,258.29/- (exclusive of GST at the rate of 18%) by virtue of the partial termination of the main contract on 09.01.2019 by the End User.

13. The Corporate Debtor further submitted that as per the contractual obligations, "payments were back to back" meaning thereby it is only supposed to pay to the Operational Creditor when it receives payment from the End User. As a corollary, the Corporate Debtor further submitted that the non-payment to Operational Creditor was on account of their inability to receive payments from the End User. Also this non-payment by the End User to the Corporate Debtor was on account of the partial termination of the main contract which was directly attributable to the poor quality and delayed execution of work by the Operational Creditor.

14. Thus, in pursuance of the practice of back to back payments, the Corporate Debtor further submitted that, in fact, an excess amount of Rs. 99,10,119/- had been paid to the Operational Creditor over and above the due amount and therefore, it was the Operational Creditor who was liable to refund this excess payment of Rs. 99,10,119/- to the Corporate Debtor.

15. Thus in light of the above submissions, the Respondent denied itself to be the Corporate Debtor and also denied the existence of

an Operational Debt and corresponding Default under the Code, and thus prayed for dismissal of the Petition.

Findings

16. Upon perusal of the Pleadings and after hearing both the parties, it is found that the present Petition is well within the Territorial and Pecuniary Jurisdiction of this Tribunal.

17. A perusal of Statement of Operational Creditor's Account Number Oxxxxxx2 maintained with Saraswat Bank (Vikhroli Branch) and Account Number 000xxxxxxxxxxx391with State Bank of India (Wagle Estate, Thane Branch) for the period 07.07.18 to 24.02.2022 clearly shows receipt of the amount of Rs. 3,28,29,703.36/- as claimed by the Operational Creditor.

18. A perusal of the 17 invoices clearly shows that the terms and conditions of the invoices mention a zero day credit period meaning thereby the Corporate Debtor was to make payment on the same date as the date of the respective bills. However, as per clause 8.3 of the General Conditions of Contract, the payment was to be made by the Corporate Debtor within 21 days from the date of receipt of the bills. It is an admitted position that payment has not been made by the Corporate Debtor within the stipulated period. Thus, the first default occurred on 22.11.2018 and thereafter against each and every failure in making payments of the invoices raised. The acceptance of liability by the Corporate Debtor through an email dated 02.05.2019 containing the Ledger Statement of the Operational Creditor in the books of the Corporate Debtor for an amount of Rs. 1,70,24,983.29/- and non-payment thereafter also proves default on the part of the Corporate Debtor. Thus, this present petition is well within the Limitation Period as the date of filing is 16.03.2022 and the Limitation Period expires on 01.05.2022 starting from the date of acceptance of liability, that is,

02.05.2019. The amount claimed through this present petition by the Operational Creditor is Rs. 1,54,41,822.89/-, which is well within the pecuniary jurisdiction of this Tribunal. The default also occurred when Corporate Debtor failed to make payment against the Demand Notice dated 14.02.2021 within ten days of its delivery.

19. Further, the case of Corporate Debtor is that the non-payment to Operational Creditor was on account of the non-receipt of the payment from the End User. The case of the Corporate Debtor is that he suffered partial termination of the main contract because of the poor quality and delayed execution of work by the Operational Creditor which resulted into non-payment from the End User and consequential non-payment to the Operational Creditor. However, on the other hand, the Operational Creditor submits that the withholding of the due payment on account of the above mentioned reasons is a completely frivolous contention. The Operational Creditor submits that the quality and time of work executed by it was perfect in nature and satisfied both the End User and the Corporate Debtor. This contention of the Operational Creditor is substantiated by the submission that there was no protest in any manner whatsoever by the Corporate Debtor at the time of acceptance of the 17 bills issued by the Operational Creditor. Furthermore, the Operational Creditor also placed on record documentary evidence consisting of the Handing Over Certificates issued by the End User on perusal of which it clearly emerges that there was absolutely no deficiency or disability on behalf of the Operational Creditor with respect to the quality or timely execution of work.

20. The contention of “Back to Back Payment” which is raised by the Corporate Debtor stating therein that the Corporate Debtor is liable to pay the due amount to the Operational Creditor only on receipt

of the same from the End user, has already been dealt by the Hon'ble Supreme Court and also by Hon'ble Delhi High Court in the following two judgments:-

- The Supreme Court in Zonal General Manager, IRCON International Ltd. Vs. Vinay Heavy Equipments [(2015) 13 SCC 680] held that the expression payment terms are back to back it would relate to the technical specifications, quality, quantum, manner and method of work and not to the payment obligations. The Contract entered into by the parties expressly provides for the expression "*Payment terms are back to back*" and not "*Payments are back to back*" and therefore the principle of pay when paid is not fit to be applied.
- The Delhi High Court in National Projects Construction Corporation Limited Vs. Harvinder Singh [LiveLaw (Del) 657] held that inability to receive payment under the main contract does not automatically give right to the main contractor to stop the making of payments obligated to be made under the sub-contract.

21. Thus, in view of the above stated facts and the settled law, we are of the considered opinion that the Respondent is very much a Corporate Debtor and the Petitioner has successfully demonstrated the existence of **"debt" and "default"** committed by the Corporate Debtor along with absence of any pre-existing dispute between the parties in consonance with the relevant provisions of the Code. Thus, it is concluded that the Company Petition satisfies all legal requirements for admission. Considering the above facts, we are of the considered view that this Petition deserves to be **admitted** under Section 9 of the Code.

ORDER

a. In view of the aforesaid findings, the above Company Petition No. 533/IBC/MB/2022 is hereby **admitted** and thereby initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against Pravin Electricals Pvt. Ltd.

b. Since there is no proposal for the name of Interim Resolution Professional by the Operational Creditor, Mr. Sagar Shah having Registration Number IBBI/IPA- 001/IP-P- 02775/2023-2024/14292 is appointed as the Interim Resolution Professional from this Tribunal's Panel.

c. The Operational Creditor shall deposit an amount of **Rs. 2 Lakhs** towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

d. That this Bench hereby prohibits 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; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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; 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. That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

f. That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

g. That the order of moratorium shall have effect from the date of pronouncement 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.

h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.

j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai for updating the Master Data of the Corporate Debtor.

k. Accordingly, CP 533 of 2022 is **admitted**.

Sd/-	**Sd/-**
SANJIV DUTT	**REETA KOHLI**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**