IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. (IB) 2541/MB/2019

Under Section 8 &9 of the IBC, 2016

In the matter of

Tata Hitachi Construction Machinery Company Private Limited

45, Jubilee Building, Museum Road, Bangalore- 560025

.... Petitioner

v/s.

Universal Industrial Equipment and Technical Services Private Limited

Plot No. C-72, MIDC Industrial Area, Hingna Road, Nagpur - 440028

…. Corporate Debtor

Order Delivered on 18.12.2019

Coram: Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri V. Nallasenapathy, Member (Technical)

For the Petitioner: Adv. Rita Yadav
For the Corporate Debtor: Adv. Harsh Keharia, Adv. Kapil Hinani

Per: V. Nallasenapathy, Member (J)

ORDER

1. This Company Petition is filed by Tata Hitachi Construction Machinery Company Pvt. Ltd. (hereinafter called "Petitioner") seeking to set in motion the Corporate Insolvency Resolution Process (CIRP) against Universal Industrial Equipment and Technical Services Private Limited (hereinafter called "Corporate Debtor") alleging that Corporate Debtor committed default in making payment of ₹33,57,68,751/- including interest at the rate of 16% per annum on the delayed payment from the date of default, i.e., 30.12.2017 till realization, by invoking the provisions of Section 8 and 9 of the Insolvency & Bankruptcy Code (hereinafter called "Code") read with Rule 5 and 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The Petition reveals that the Corporate Debtor approached the Petitioner for dealership of machines, equipment and spare parts manufactured by the Petitioner and a dealership agreement was

executed between them on 23.12.2008. Since then, the Petitioner was supplying various machines and its parts to the Corporate Debtor. In furtherance to the said agreement, the Corporate Debtor had signed an undertaking agreeing to comply with the 'General Conditions' applicable to the dealers.

3. The Counsel for the Petitioner submits that after execution of the above agreement and acceptance of the General Conditions, the Petitioner appointed the Corporate Debtor as dealer for the territory of Maharashtra, Chhattisgarh and Madhya Pradesh and specifically for certain districts mentioned in the agreement.

4. The Petitioner supplied various machines and the same were accepted by the Corporate Debtor without any dispute. The Corporate Debtor failed to make any payment, thus the Petitioner initiated Arbitration Proceedings against Corporate Debtor as per underlying agreement. An award was passed by the Learned Arbitrator Ms. Priya Darshini Arora on 29.11.2017 which is unchallenged till date. No appeal is pending in any court of law against the said award.

5. The Counsel for the Petitioner submits that, previously, a CIRP (CP No. 2426 of 2018) petition was filed before the National Company Law Tribunal, Mumbai Bench, against the Corporate Debtor on 25.06.2018 and the same was withdrawn on 07.02.2019 by the Petitioner due to some technical error in Board Resolution, with liberty to file fresh application. A copy of the said order is annexed to the Petition at Annexure IV.

6. The Petitioner issued demand notice dated 29.02.2019 in Form 3, under Section 8 of the I&B Code, 2016 to the Corporate Debtor demanding payment of ₹33,57,68,751/-including interest at the rate of 16% per annum on the delayed payment from the date of default, i.e., 30.12.2017 till realization of the payment.

7. The Corporate Debtor through its reply to the demand notice dated 09.03.2019inter-alia among other things raised the following contentions:

   a) It is submitted that a civil suit was filed by the Corporate Debtor on 18.02.2019 by a filing number 851 of 2019 on the file of the Hon'ble Civil Judge Senior Division, Nagpur. Hence, it is contended that there exists a pending suit making the provisions of the Code non-applicable.

   b) The arbitration award dated 29.11.2017 passed against the Corporate Debtor is an ex-parte award.

c) The alleged claim is subject to the Limitation Act, 1963 which makes the claim untenable.

8. The Corporate Debtor filed Reply to the Petition and written submission wherein the following are the contentions:

a. The Petitioner is guilty of suppressio veri and suggestio falsi which disentitles the Petitioner for any relief.

b. The outstanding due pertains to past many years since the commencement of dealership way back in 1997 and an account of slow-moving goods which were forced upon the Corporate Debtor by the Petitioner with an intention of meeting sales targets despite there being no demand for the products.

c. On the insistence of the Petitioner, the Corporate Debtor provided services to some of its clients, despite they are being poor pay masters and that has also contributed for the loss to the Corporate Debtor.

d. The Petitioner's selfish, manipulated and high-handed behavior is evident from the fact that one of its ex-dealers has filed a counterclaim against the Petitioner.

e. The Petitioner arranged finance to the Corporate Debtor through its acquaintances and because of this the Corporate Debtor incurred a loss of ₹2,25,00,000

f. Despite recession in the business, the Petitioner dumped the goods on the Corporate Debtor which resulted in blocking in working capital of the Corporate Debtor.

g. The petitioner by following and ethical business practices started dealing with the customers of the corporate debtor by offering prices lower than that of the price quoted by the Corporate Debtor.

h. The Petitioner issued notice on 02.06.2016 demanding the outstanding payment of ₹29,42,04,909 along with interest at 18% per annum, initiated arbitration proceedings on 09.06.2016, obtained an award for ₹33,57,68,751 and initiated this proceeding instead of enforcing the award as per the provisions of law.

i. Previously, the Petitioner filed Company Petition No. 2426 of 2018 (first petition) under section 9 of the Code in June 2018 after issuing the first demand notice on 16-3-2018. Since the entire process of the first Petition and first demand notice was without any authority of the Petitioner, the Petition was withdrawn. The first Petition including the first demand notice

was without any legal sanction and the same are *nonest* in the eyes of law and reliance was placed on the judgement of Hon'ble NCLAT in *Palogix Infrastructure Private Limited vs. ICICI Bank Limited.* Hence the first Petition and first demand notice cannot be relied upon for any purpose including but not limited to the fact of pre-existing dispute.

j. Since there are several disputes existed between the parties on account of dumping of goods, loss on payment towards false assurances of arranging finance through acquaintances, Petitioner's direct dealing with the customers of the Corporate Debtor, etc., the corporate debtor filed a civil suit being RCS number 417 of 2019 against the petitioner on the file of civil Judge, senior division, Nagpur on 18.02.2019. It is submitted that the said suit was filed before the issue of 2nd demand notice on 09.03.2019 and hence there is a pre-existing dispute making the provisions of the court nonapplicable to the present Petition.

k. The Corporate Debtor relying on the judgement of the Hon'ble Supreme Court in the case of *B.K. Educational services Private Limited Vs Parag Gupta and Associates,* submits that the claim is barred by limitation, referring to the memorandum of statement of claim in the arbitration proceedings against the corporate debtor wherein the award was passed on 29-11-17.

9. Let us examine the contentions of the Corporate Debtor in the reply to the demand notice and in their reply to the Petition*:*

a. The Corporate Debtor has filed the suit on 18.02.2019 which is subsequent to the issue of the first demand notice by the Petitioner on 15.03.2018 and before the issue of 2nd demand notice on 29.02.2019. The Corporate Debtor contends that the civil suit was filed before the issue of 2nd demand notice and hence the same is a dispute. However, the said contention cannot be accepted in view of the fact that the Corporate Debtor was served with the demand notice before the filing of the Petition and more importantly this claim is based on arbitration award which was never challenged by the Corporate Debtor. The first demand notice dated 16.03.2018 was issued in Form No. 3, which was signed by an Advocate. The first Petition filed by the Petitioner was dismissed as withdrawn on 07.02.2019, with liberty to file a fresh Petition. Since the first demand notice was issued in Form No. 3 with required details, the consequences and seriousness of which were understood by the Corporate Debtor and it is an

admitted fact that the Corporate Debtor has not raised any issue before the issue of the first demand notice, the contention of the Corporate Debtor that the filing of the suit after the first demand notice and before the second demand notice will not fall within the purview of dispute as defined in the Code. Further, it is to be noted that the Hon'ble Supreme Court in the case of *Macquaire Bank Limited vs. Shilpi Cable Technologies Limited (2018 2 SCC 674)* held that notice sent by an operational creditor through an advocate is a valid notice under Section 8 of the Code, the first demand notice sent by an advocate for and behalf of the Petitioner herein, is a valid notice and hence the contention of the Corporate Debtor that the first demand notice is non est in law does not hold water.

A beneficial reference can be made to the decision of the Hon'ble NCLAT in the case of *Praxis Corporate Services Pvt. Ltd. vs. Powai Cubicals Pvt. Ltd. 2019 (SCC OnLine NCLAT 482)* wherein it was held in a similar case that the dispute should have been raised before the issue of first demand notice and the dispute raised after the issue of first demand notice but before the issue of 2nd demand notice, is not a dispute within the purview of the Code. The Corporate Debtor in its written submissions endeavored to differentiate this judgement saying that the facts in the case on hand is different from the case cited supra, but we find that in both the cases the facts are similar.

b. The Corporate Debtor admits that there is an arbitration award operating against them wherein a sum of ₹33,57,68,751 was awarded on 29.11.2017, in favor of the Petitioner, which has become final but contends that the said award is an ex parte award. The award has become final in view of the fact that there is no appeal against the arbitration award by the Corporate Debtor. The claim based on the said award is an operational debt as envisaged in Section 5(21) of the Code and the claim in the Petition is in order.

c. The contention of the Corporate Debtor that the claim is barred by limitation cannot be accepted in view of the fact that the arbitration award was passed on 29-11-17 and the first Petition was filed in June 2018, thereafter, after withdrawal of the first Petition, 2nd Petition was filed on 16.04.2019, which are well within the period of limitation. The reliance of the Corporate Debtor on the judgement of the Hon'ble Supreme Court in the

case of *B.K. Educational services Private Limited Vs Parag Gupta and Associates* is of no avail to it.

d. The other issues raised by the Corporate Debtor are not relevant for deciding this Petition.

10. The judgements referred by the Corporate Debtor are distinguishable and they don't have any bearings to the facts of the present case except the judgement in *Praxis Corporate Services Pvt. Ltd. vs. Powai Cubicals Pvt. Ltd.,* cited supra, which is against the points canvassed by the Corporate Debtor.

11. It is to be noted from the averments of the corporate debtor that the Corporate Debtor was indolent right from the initiation of arbitration proceedings by the Petitioner on 09.06.2016 till the filing of the first CIRP Petition by the Petitioner. The Corporate Debtor has not contested the arbitration proceedings initiated by the Petitioner and an ex-parte award came to be passed on 29.11.2017. When the Petitioner filed the Petition for initiating CIRP, after withdrawal of the first CIRP petition, the Corporate Debtor filed a suit after withdrawal of the first CIRP Petition and claimed that the suit filed in between the issue of 1st and 2nd demand notice has to be considered as a dispute within the meaning of Section 5(6) of the Code. The suit filed by the Corporate Debtor just before the issue of 2nd demand notice is clearly with an intention to derail the process of CIRP and the same cannot be accepted as a dispute.

12. Once it is established that there is a debt and default on the part of the Corporate Debtor and the dispute raised does not fall within the purview of Section 5(6) of the Code, the Petition deserves admission.

13. This Bench having been satisfied with the Petition filed by the Operational Creditor which is in compliance of provisions of Section 8 & 9 of the Insolvency & Bankruptcy Code admits this petition declaring Moratorium with the directions as mentioned below:

(a) that this bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgement, decree or other in any court of law; 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.

(b) 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.

(c) 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.

(d) that the order of moratorium shall have effect from 18.12.2019 till the completion of the CIRP 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.

(e) that the public announcement of the CIRP shall be made immediately as specified under Section 13 of the Code.

(f) that this Bench hereby appoints Mrs. Megha Agrawal, having office at 001, Shivranjini Apartments, in Circle of Congress Nagar Garden, Congress Nagar, Nagpur- 440012, having email address megs9june@yahoo.com, having Registration No. IBBI/IPA-001/IP-P-01456/2018-19/12272 as Interim Resolution Professional to carry the functions as mentioned under the Code.

14. The Registry is hereby directed to communicate this order to both the parties and to the Interim Resolution Professional immediately.

SD/-
V. Nallasenapathy
Member (Technical)

SD/-
Suchitra Kanuparthi
Member (Judicial)