# IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI BENCH, COURT - II

C.P. (IB) 312/MB/2022

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 You Seung Sang Sa India Construction Private Limited

Having its registered office at Site No. 342/1, New No. 523, Anna Salai Nandanam, Chennai, Tamil Naidu- 600035

..... Petitioner/ Operational Creditor

Versus

M/s Hyosung India Private Limited

Having its registered office at Plot No. 1, Sector 11, Auric City, Shendra, Aurangabad, Maharashtra- 431007

..... Respondent/Corporate Debtor

Order Delivered on: - 19/06/2024

Coram:

Mr. Anil Raj Chellan Member (Technical) Mr. Kuldip Kumar Kareer Member (Judicial)

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## Appearances:

For the Operational Creditor: Adv. Varinder Chibbar

For the Corporate Debtor : Adv. Shyam Kapadia a/w Ahsan Allana

## <u>ORDER</u>

Per: Kuldip Kumar Kareer, Member (Judicial)

1. The present petition has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC") by M/s. You Seung Sang Sa India Construction Private Limited (hereinafter called Operational Creditor) praying inter-alia for initiation of Corporate Insolvency Resolution Process (CIRP) against M/s Hyosung India Private Limited (hereinafter called Corporate Debtor) by invoking the provisions of Section 9 of the Insolvency and Bankruptcy Code (hereinafter called " the Code") for resolution of an unresolved Operational Debt of Rs. 6,73,56,845/- (Rs. Six Crores Seventy-Three Lakhs Fifty-Six Thousand Eight Hundred Forty Five Only)

## The submissions of the Operational Creditor are as follows:

2. The Operational Creditor is a company registered under Companies Act, now undergoing CIRP process, hence the instant Petition has been filed through its Resolution Professional Shri Harsh Garg.

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- 3. The Operational Creditor is engaged in the business of providing construction services. The Corporate Debtor i.e. M/s Hyosung India Pvt. Ltd. had entered into a Contract Agreement dated 26.09.2018 vide which the Corporate Debtor had agreed to avail the services of the Operational Creditor for an amount of Rs. 61,00,00,000/-. During the contract period, the Operational Creditor raised an invoice dated 17.12.2019 of Rs. 6,73,56,845/- duly acknowledged by the Corporate Debtor. However, the Corporate Debtor failed to make the payment of the aforesaid amount without any valid reasons. It is further submitted that the amount was duly acknowledged by the Corporate Debtor in Civil Suit No. 222 of 2020 filed by it before the Civil Judge, Aurangabad against the Operational Creditor.
- 4. It is further submitted that since the Corporate Debtor did not pay the legitimate outstanding dues of the Operational Creditor, finding no other alternative it sent a Demand Notice dated 16.11.2021 demanding an amount of Rs. 6,73,56,845/- under Section 8 of the Insolvency and Bankruptcy Code, 2016.
- 5. It is submitted that after receiving the statutory demand notice dated 16.11.2021 under IBC, 2016, the Corporate Debtor raised a sham and misleading dispute vide reply dated 25.11.2021. In the light of aforesaid, the Operational Creditor resolved to file the present application before this Tribunal as the amount of default is over INR 1 crore for the initiation of Corporate Insolvency Resolutions Process as provided in the Insolvency and Bankruptcy Code, 2016 read with the relevant Rules. Hence the present Petition.

# Reply filed on behalf of the Corporate Debtor:-

- 6. In reply, the Corporate Debtor has denied all allegations and/or contentions and/or submissions made by the Petitioner in the Petition which are inconsistent with and/or contrary to what has been stated herein. Further, nothing shall be deemed to have been admitted for the reasons of non-traverse.
- 7. It is further submitted that the Petition ought to be rejected on account of preexisting disputes between the parties and the Operational Creditor's failure to discharge dues towards its employees, subcontractors and vendors and the resultant disruption in the Corporate Debtor's operations. It is further submitted that the Corporate Debtor was desirous of setting up of spandex manufacturing factory on Plot No. 1, Sector 11, AURIC, Shendra MIDC, Aurangabad which was allotted by Aurangabad Industrial Township Limited ("AITL") to the Corporate Debtor on 14.02.2018. For this purpose, the Corporate Debtor entered into a Contract Agreement for Construction of Hyosung India Spandex Manufacturing Factory Project (I-1 Project) dated 28th September 2018 (the "Contract") with the Operational Creditor for a fixed lump-sum Contract Price of Rs. 61,00,00,000 (excluding Goods and Services Tax ("GST"). Since the Contract was on a fixed lump-sum basis, the same was inclusive of any costs that the Operational Creditor would have to incur in the construction of the factory including towards building material and labour.
- 8. It is submitted that upon completion of the first phase of the factory, the Corporate Debtor commenced manufacturing activities and for this purpose, employed more than 250 employees. However, it transpired that the

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Operational Creditor had not paid several of its employees, subcontractors and vendors. These employees, subcontractors and vendors began hindering the operations of the Corporate Debtor. As a consequence of the Operational Creditor's failure to discharge its obligations towards such employees, subcontractors and vendors, the Corporate Debtor was unable to run its factory smoothly. In fact, these disgruntled employees, subcontractors and vendors began misbehaving with the Corporate Debtor's staff and threatening to cause damage to the Corporate Debtor's property. On account of the constant disruptions in its operations, the Corporate Debtor began facing heavy losses. The Corporate Debtor was, in these circumstances, constrained to file a police complaint dated 6th August 2019 against the Operational Creditor.

- 9. It is further submitted that the Corporate Debtor was further constrained to institute a Suit being Regular Suit No. 222 of 2020 before the Hon'ble Civil Judge, Senior Division at Aurangabad seeking, *inter alia*, a mandatory injunction against the Operational Creditor to discharge its contractual obligations towards its employees, subcontractors and vendors and a perpetual injunction restraining the officials of the Operational Creditor (many of who are Korean nationals) from leaving the city limits until the Operational Creditor has duly discharged its said contractual obligations.
- 10. In paragraph 14 of the said Suit, Corporate Debtor stated as follows:
  - "14. It is stated that the plaintiff has worked out the details of the payment made to the defendant till date and the amount remained to be paid, which the plaintiff is ready and willing to pay the defendant, however considering the past experience with the defendant, it should first pay the dues of the agencies employed by it from the

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payment towards the full and final contract price that would be paid by the plaintiff to the defendant."

- 11. The Corporate Debtor has expressly stated that it was entitled to withhold the Operational Creditor's payments until the Operational Creditor settled its dues towards its employees, subcontractors and vendors. The Operational Creditor now seeks to rely on the above paragraph in the suit as an admission of liability on the part of the Corporate Debtor. This is, however, completely misconceived.
- 12. What emerges from the facts set out above is that there are pre-existing disputes between the parties. It has always been the Corporate Debtor's case, as borne out from the police complaint and the Suit, that the Operational Creditor is dutybound to pay its employees, vendors and subcontractors from and out of the Contract Price and further that the Corporate Debtor is, until the Operational creditor discharges the said duty towards its employees, vendors and subcontractors is entitled to withhold any payments that might be due to it under the Contract. These disputes existed and were raised well prior to the Operational Creditor's demand notice dated 16<sup>th</sup> November 2021.
- 13. The Corporate Debtor has further submitted that the Operation Creditor has not only failed to pay its employees, vendors and subcontractors but has also committed offences against other parties with whom it has had dealings.
- 14. The Corporate Debtor has further stated that it received a notice dated 5<sup>th</sup> August 2021 from the Economic Offences Wings, Pune (the "EOW") in Case No. 4416 of 2021 under reference No. 181 of 2021. The EOW has, by

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the said notice, on account of the ongoing investigation being carried out against the Operational Creditor, directed the Corporate Debtor not to make any payments to the Operational Creditor without the confirmation of the EOW. In the premises, any payment made by the Corporate Debtor to the Operational Creditor without the EOW's confirmation would be contrary to the directions issued by the EOW by its letter dated 5<sup>th</sup> August 2021. Until the Operational Creditor addresses the matter ongoing before the EOW, the Corporate Debtor cannot make any payments to the Operational Creditor. This, it is submitted, also constitutes a pre-existing dispute and renders the present Petition liable to be dismissed.

- 15. The Corporate Debtor has also submitted that in addition to the fact that the Operational Creditor has failed in discharging its dues to its employees, vendors and subcontractors, the Operational Creditor has also failed to pay GST to the GSTN account of the Corporate Debtor. In view of the Operational Creditor's said failure, the Corporate Debtor is facing a GST disallowance of Rs. 1,58,65,892. The Corporate Debtor had, by its Advocates' letters dated 30<sup>th</sup> October 2021 (Annexure 12 to the Company Petition) and 25<sup>th</sup> November 2021 (Annexure 10 to the Company Petition), expressly reserved its right to claim the said amount from the Operational Creditor. This also amounts to a pre-existing dispute in relation to the alleged Operational Debt and renders the Petition liable to be rejected
- 16. In the end, the Corporate Debtor has prayed for the dismissal of the Petition.

# **Analysis and Findings:**

17. We have heard the Counsel for the parties and gone through the record.

- 18. During the course of arguments, Counsel for the Operational Creditor has argued that the present Petition under Section 9 of IB Code, 2016 has been filed by the Operational Creditor, which itself is undergoing CIRP, in respect of default of Rs. 6,73,56,845/- committed by the Corporate Debtor. Counsel for the Operational Creditor has further pointed out that the Corporate Debtor entered into a Contract Agreement dated 26.09.2018 with the Operational Creditor and under the said agreement, the Operational Creditor was to provide construction services for a total sum of Rs. 61,00,00,000/-. It has further been pointed out that the Operational Creditor raised an invoice dated 17.12.2019 of Rs. 6,73,56,845/- which was duly acknowledged by the Corporate Debtor but the payment thereof was not made. Counsel for the Operational Creditor has further argued that the factum of outstanding dues has been duly acknowledged by the Corporate Debtor in the Civil Suit No. 222 of 2020 filed by it against the Operational Creditor before the Hon'ble Civil Judge, Senior Division, Aurangabad. Therefore, according to the Counsel for the Operational Creditor, there is no quarrel with regard to the payment of outstanding dues and a demand notice dated 16.11.2021 was also served upon the Corporate Debtor. The disputes raised on behalf of the Corporate Debtor are sham and moonshine and, therefore, it is a fit case for admission under Section 9 of the IB Code, 2016.
- 19. On the other hand, Counsel for the Corporate Debtor has argued that as per the contract between the parties, the Operational Creditor had to incur the costs in relation to the construction of the factory including the cost of building material and labour. However, the Operational Creditor did not pay several of its vendors and sub-contractors whose services were availed by the Operational Creditor to undertake the construction work and due to non-

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payment of the dues by the Operational Creditor, such disgruntled employees, vendors and sub-contractors are hindering the operations of the Corporate Debtor and are continuously disrupting its work. In this regard, the Corporate Debtor has also lodged a complaint with the Commissioner of Police, Aurangabad that the Operational Creditor had not paid the dues of the vendors, suppliers and contractors to the tune of Rs. 12 crores and such vendors etc. were creating ruckus and commotion at the factory premises of the Corporate Debtor.

Counsel for the Corporate Debtor has further contended that the Corporate 20. Debtor has also filed a suit before the Hon'ble Civil Judge, Senior Division, Aurangabad seeking mandatory injunction against the Operational Creditor to discharge its contractual obligations against the vendors, suppliers and subcontractors etc. In this regard, it has further been pointed out by the Counsel for the Corporate Debtor that since the Operational Creditor has failed to make payment to M/s Erecon Spaces Private Limited and FIR No. 181 of 2021 has also been registered against the Operational Creditor and during the investigation of the said case, a notice dated 05.08.2021 was received by the Corporate Debtor from Economic Offences Wing (EOW) that no payments should be made to the Operational Creditor by the Corporate Debtor without the approval of the EOW. Therefore, the Corporate Debtor was not in a position to pay the said amount in defiance of the order of the EOW. Counsel for the Corporate Debtor has further contended that there are genuine preexisting disputes between the parties which have also been highlighted in the reply dated 25.11.2021 sent in response to the demand notice dated 16.11.2021 issued by the Operational Creditor. On account of the existence of a pre-existing disputes also, the present Petition under Section 9 of the IB Code, 2016 is liable to be dismissed.

- 21. Counsel for the Corporate Debtor has further argued that since the Operational Creditor has failed to discharge its dues to its vendors, suppliers and sub-contractors, it has also failed to pay GST to the GSTN Account of the Corporate Debtor and on that account, the Corporate Debtor is facing a GST disallowance of Rs. 1,58,65,892/- and this fact has admitted by the Operational Creditor in the rejoinder filed by the Petitioner. Besides, according to the Counsel for the Corporate Debtor, the Operational Creditor is misusing the present Petition as a recovery mechanism to extort monies from the Corporate Debtor which is not permissible under the law. In the end, the Corporate Debtor has prayed for the dismissal of the Company Petition.
- 22. We have weighed the contentions raised by the Counsel for the parties and have also carefully gone through the record.
- 23. In this case, it has not been disputed by the Corporate Debtor that there was a contract between the parties under which the Operational Creditor carried out construction work and raised an invoice of Rs. 6,73,56,845/-. In the affidavit of reply filed by the Corporate Debtor, this has not been specifically denied. Therefore, the factum of existence of operational debt of Rs. 6,73,56,845/- stands admitted and proved on record.
- 24. Primarily, the defence raised on behalf of the Corporate Debtor is on two counts. Firstly, the Operational Creditor has not paid the outstanding dues of its vendors, suppliers and sub-contractors, workers etc. who are creating ruckus and commotion in the factory premises of the Corporate Debtor and in this regard, a complaint was also lodged by the Corporate Debtor with the

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police and a Civil suit for mandatory injunction seeking directions against the Operational Creditor to pay its vendors, suppliers and sub-contractors has also been filed. In reply dated 25.11.2021 sent by the Corporate Debtor in response to the demand notice dated 16.11.2021 also, it has been claimed that the Corporate Debtor has filed a Civil Suit No. 222 of 2020 before the Hon'ble Civil Judge, Aurangabad seeking mandatory injunction against the Operational Creditor directing it to discharge their contractual obligations towards its vendors, suppliers and sub-contractors. It has also been mentioned in the reply dated 25.11.2021 that a complaint was also lodged with the Economic Offences Wing (EOW), Pune under Section 420 and 34 of IPC and the EOW, Pune has directed the Corporate Debtor not to transfer any money to the Operational Creditor without prior confirmation from them.

- 25. The third point raised in the reply is with regard to the non-payment of GST of Rs. 1,58,65,892/- in respect of which, the Corporate Debtor reserves its right to claim from the Operational Creditor.
- 26. Having thoughtfully considered the defences raised by the Corporate Debtor in respect of the pre-exiting disputes, we are of the considered view that the Corporate Debtor cannot withhold the outstanding dues payable to the Operational Creditor on the pretext that the latter has not paid its dues to its vendors, suppliers and sub-contractors. Here it needs to be observed that the Operational Creditor carried out construction work for the Corporate Debtor to the tune of Rs. 6,73,56,845/-. Until and unless, the Corporate Debtor pays its dues to the Operational Creditor in respect of the work done for it, how on earth, the Operational Creditor would pay its vendors, suppliers and sub-contractors, workers etc. Having carried out the construction work amounting to more than Rs. Six crores, the Operational Creditor cannot be

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expected to clear the due of its sub-contractors, vendors and workers as a precondition before it gets payment of its legitimate dues from the Corporate Debtor. Here, it is worthwhile to mention that the Corporate Debtor has not raised any dispute with regard to the quality of work done by the Operational Creditor under the contract. Under the circumstances, in our considered view, the Corporate Debtor has no right to withhold the payment when there is no dispute emanating from the contract between the parties. Therefore, this part of the defence raised by the Corporate Debtor is nothing but a fake and moonshine one.

27. Secondly, it has been contended on behalf of the Corporate Debtor that it has filed a complaint with the Economic Offences Wing (EOW), Pune against the Corporate Debtor regarding non-payment of dues to its vendors, suppliers and sub-contractors etc. and the EOW vide its order dated 05.08.2023 has directed the Corporate Debtor not to pay any dues to the Operational Creditor. Here, again the defence raised is nothing but specious and frivolous. Firstly, EOW has absolutely no authority or jurisdiction to pass an order restraining the Corporate Debtor from paying its outstanding dues to the Operational Creditor. We have also perused the said letter issued by the EOW, the translation of which has been placed on record by the Corporate Debtor and it is simply mentioned in the said letter that the amount in question should not be paid by Corporate Debtor without informing the EOW (Pune). Thus, even EOW has not restrained the Corporate Debtor from paying the dues. Even if, for the sake of argument, it may be presumed that EOW has issued any such directions, the same are liable to be treated as nullity and should not come in the way of the Corporate Debtor in making the payment of the outstanding dues which have been candidly admitted by them in Civil Suit No. 222 of 2020 where in para 14 of plaint filed in the Civil

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Suit, copy of which is placed on record as Annexure (V), whereby it is candidly admitted by the Corporate Debtor that it is ready and willing to pay to the Operational Creditor subject to the condition that the Operational Creditor should first pay the dues of the agencies employed by it. This condition being imposed by the Corporate Debtor is totally unreasonable and ex-facie unjustified.

- 28. The third part of the defence raised on behalf of the Corporate Debtor is that since the Operational Creditor has not discharged its dues to its vendors, suppliers, sub-contractors, the Corporate Debtor is facing a GST disallowance of Rs. 1,58,65,892/-. In this regard, it would suffice to say that even if the said amount of the GST is excluded from the total claim of Rs. 6,73,56,845/-, even then the default committed by the Corporate Debtor is much more than the threshold limit of Rs. 1 crore which should be sufficient to admit the Petition under Section 9 of the IB Code, 2016 against them.
- 29. No other points have been raised on behalf of the Corporate Debtor.
- 30. As a result of above discussions, we are of the considered view that in this case, the Operational Creditor has been able to establish the existence of operational debt and its default committed by the Corporate Debtor and further that the Petition has also been filed within the period of limitation. The defences raised in the shape of pre-existing disputes are not genuine but are rather moonshine and fake defences, as has been discussed in foregoing part of this order. Therefore, under the circumstances, we find it to be a fit case for admission under Section 9 of IB Code, 2016. It is ordered accordingly in the following terms:-

### **ORDER**

- a. The above Company Petition No. (IB) 312/(MB)/2022 is hereby admitted and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against M/s Hyosung India Private Limited.
- b. This Bench hereby appoints Mr. Nipan Bansal Registration No: IBBI/IPA-001/IP/P-00039/2016-2017/10100 as the Interim Resolution Professional having his address at H.No. 10-B, Udham Singh Nagar, Civil Lines, Ludhiana, Pin Code-141001; **Email** id:irp@parshotamandassociates.com, Mobile No:-**9876445400** to carry the functions out mentioned under the Insolvency & Bankruptcy Code, 2016.
- c. The Operational Creditor shall deposit an amount of **Rs. 3,00,000/-** (Rupees Three Lakhs Only) towards the **initial CIRP cost** 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 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 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 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 concerned Registrar of Companies, Mumbai for updating the Master Data of the Corporate Debtor.
- 31. Accordingly, this Petition is admitted.
- 32. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

Sd/ANIL RAJ CHELLAN
(MEMBER TECHNICAL)
Sushil

Sd/-KULDIP KUMAR KAREER (MEMBER JUDICIAL)