IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I

CP (IB) 2864/MB/2019

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.

Srinivasa Fabrication and Engineering Works
[PAN NO.: BBKPS8522B] [STC: BBKPS8522BST001]
H. No. 1-150/P, Kistaipalli, (Vill), JINNARAM (M),
Sanga Reddy (Dist.), Telangana

…Operational Creditor/Petitioner

Versus

Arch Pharmalabs Limited
[CIN: U24231MH1993PLC150891]
H Wing, 4th Floor, Tex Centre, Off. Saki Vihar Road,
Chandivali, Andheri (East), Bandra Suburban,
Mumbai- 400 072, Maharashtra, India

…Corporate Debtor/Respondent

Order Pronounced on 31.03.2023

Coram:

Hon’ble Member (Judicial) : Mr. H. V. Subba Rao
Hon’ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. P.S. Thakre, PCS

For the Corporate Debtor : Mr. Pulkit Sharma, Advocate

ORDER

Per: Hon'ble Member (Judicial), SH. H. V. Subba Rao

1. The present petition is filed by **M/s Srinivasa Fabrication and Engineering Works** (hereinafter referred to as "the Operational Creditor") under Section 9 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Rule 6 Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 seeking initiation of Corporate Insolvency Resolution Process **("CIRP")** against **M/s Arch Pharmalabs Limited,** (hereinafter referred to as **"the Corporate Debtor"**).

2. The Corporate Debtor was incorporated on 02.04.1993 under Companies Act, 1956. Its registered office is situated at H Wing, 4th Floor, Tex Centre, Off. Saki Vihar Road, Chandivali, Andheri (East), Bandra Suburban, Mumbai- 400 072, Maharashtra, India. Hence, this Tribunal has the jurisdiction to entertain this petition.

3. The facts leading to the case in hand are as follows:

    a. The Operational Creditor herein is a proprietor concerned organization and is in business of fabrication works of engineering widely consists of dismantling, assembling, erection, commissioning and installation of engineering works, virtue of their business. The Operational Creditor had undertaken the engineering and fabrication works of Pharma manufacturing units situated around the Hyderabad as such had undertaken the works of Corporate Debtor.

b. The Corporate Debtor is in business of Manufacturing the Bulk drugs and Active Pharmaceutical Ingredients (API) and having its manufacturing units in Pan India. The Corporate Debtor is having manufacturing unit in Hyderabad, in which the Operational Creditor has undertaken the fabrication works during the period in 2007 to 2012, as per the terms and conditions of the purchase order.

c. The Operational Creditor has extended his services from 2007 to 2012. It is submitted that after the completion of the work, the Operational Creditor will raise the invoice with VAT and Service Tax. It is further submitted that the Corporate Debtor transfer the payments to Operational Creditor's Bank Account on the basis of on account and not against the invoice. The nature of work is to dismantling, installing, assembling and erection of engineering pipes, valves and metal lines between reactors to reactors other cooling and hot lines form boilers to reactors and connecting the lines with bends and all other metal works. Required material was to be supplied by the Company and work will be done under the supervision of Company Engineers.

d. It is submitted by the Operational Creditor that the Operational Creditor had done the job to the requirements ad to the fullest satisfaction of the Corporate Debtor. Hence, there will be no quality, quantity and the breach of a representation or warranty. After the Completion of work, the Operational Creditor is to submit the invoice for the payment and Corporate Debtor is used to transfer the amount on account basis and not on the basis of invoice. The Operational Creditor is to raise the invoice including the VAT, subsequently with *malafied* intention the Corporate Debtor is used to pay only VAT amount and asked the Corporate Debtor to remit it to department, to avail this VAT input against Corporate Debtor's VAT liability and not paid the actual amount of invoices. In this way, the Corporate Debtor has cleared the VAT portion of all invoices but not the actual amount. Since, the VAT is calculated on the basis of the actual and VAT is being paid by the Corporate Debtor, it is as good admitting the actual amount which amounts to Rs. 58,42,435/- as on 07.08.2012.

e. Operational Creditor submits that during the course of time, Corporate Debtor has paid an amount to the tune of Rs. 16,23,532/- and the pending amount was to the tune of Rs. 42,18,903/-. Operational Creditor further submits that after huge pressure, the Corporate Debtor has come with one proposal by admitting the outstanding amount of Rs. 42,18,903/- and has given assurance, *vide* its letter dt. 23.11.20145, thereby contending that the said amount will be cleared by end of December, 2016. Even after this, the Corporate Debtor has made partial payments in five times totaling to the tune of Rs. 21,39,288/- against the total amount due to the tune of Rs. 42,18,903/-. The remaining balance due to the Corporate Debtor was to the tune of Rs. 20,79,615/-. The Operational Creditor requested several times for pending payment and the same was dragged and delayed on the pretext of paucity of funds. It is also stated that whenever the amount is demanded there is no proper response from the Corporate Debtor and after some time they totally stopped responding to phone calls and letters of the Operational Creditor.

4. Corporate Debtor has filed and placed on record Affidavit in Reply thereby opposing the present Company Petition. Corporate Debtor submits that the Operational Creditor is not entitled to initiate CIRP under the IBC as the

Petition is filed by the proprietor firm whereas the Code does not envisage filing of Insolvency Application by proprietor firm. Section 6 of the Code provides for "persons" who can initiate CIRP against a Corporate Debtor which includes a Financial Creditor, an Operational Creditor or the Corporate Debtor itself.

5. Corporate Debtor further states that the present Company Petition is incomplete as it does not meet the requirements specified under Form 5. Part IV of Form 5, requires the amount claimed to be in default along with the date of default to be attached in tabular form. However, the Operational Creditor in the present case has only specified the amounts allegedly due but has failed to specify the date of default.

6. Corporate Debtor however submits that the Petition is not maintainable as the Demand Notice is not issued as per the mandatory requirement under the IBC. The Corporate Debtor submits that as per Rule 5(2)(a), the Operational Creditor was required to deliver Form 4 along with copies of invoices at the registered office of the Respondent by hand, registered post or speed post with acknowledgement due; however, the same is not delivered to the registered address of the Respondent.

7. Corporate Debtor submits that the present Company Petition is barred by limitation as the Operational Creditor has failed to specify a date of default in Part IV of the Petition, it is claimed in the pleadings that the alleged debt

is due for the invoices of 2011-2012. As per Section 238A of the Code, Article 137 of the Limitation Act, 1963, shall apply to Applications under the IBC. The Applicant has not has provided the exact date of default in the Petition and has merely stated that the debt is due from the years 2011-2012.

8. Corporate Debtor has also relied upon an alleged letter dt. 23.11.2015, in order to claim the amounts from the Corporate Debtor. Corporate Debtor submits that even if the said letter is considered valid, the period of limitation for the said dues came to an end in November, 2018, whereas the present Petition was filed on 30.07.2019.

9. Heard Mr. P.S. Thakre, PCS appearing for the Operational Creditor and Mr. Pulkit Sharma, Advocate appearing for the Corporate Debtor and perused the pleadings and the documents relied by both the sides. After hearing both sides and upon perusing materials available on record, the first and foremost issue that needs to be decided in the present Company Petition is

'Whether this present Company Petition is within limitation.'

It is the admitted case of the Petitioner that the present Company Petition is filed basing on number of invoices annexed at page 99 of the present Company Petition and the last invoice is of dated 18.07.2012. The present

Company Petition being filed on 30.07.2019 is beyond and is clearly barred by limitation.

10. Mr. P.S. Thakre, PCS appearing for the Operational Creditor relied on the letter dt. 23.11.2015, addressed by the Corporate Debtor to the Operational Creditor and a payment to the tune of Rs. 10,23,056/- made by the Corporate Debtor to the Operational Creditor on 28.04.2017 to explain the Limitation.

11. A plain reading of the above letter dated 23.11.2015, makes it very clear that the Corporate Debtor is merely called upon to sent the statement of account of the outstandings of the Operational Creditor for re-conciliation and there was no express admission on the part of the Corporate Debtor with regard to any liability.

12. Similarly, the so called payment dated 28.04.2017, was made admittedly after Three (3) years from the last invoices. This Bench is conscious that a time barred debt also can be acknowledged under Section 25(3) of the Indian Contract Act. However, in order to constitute an acknowledgement in respect of time barred debt, there shall be an unconditional promise in writing and duly signed by the promiser to pay the debt and in the absence of such an unconditional promise signed by the promiser, such document will not extend the period of limitation in respect of a time barred debt.

13. Therefore, this Bench has no hesitation in holding that the above two documents relied by the Operational Creditor for extending the period of limitation are not helpful to him and this Bench is left with no option except holding that the claim of the Operational Creditor is barred by limitation and the Company Petition is liable to be rejected. Accordingly, the present Company Petition is dismissed as the same is barred by limitation. Since, this Bench is dismissing the present Company Petition on the ground of limitation, the other pleas raised by the Corporate Debtor in the Affidavit in Reply need not to be dealt with.

14. For the aforesaid reasons the present Company Petition is dismissed. File be consigned to record.

Sd/- **Sd/-**

SHYAM BABU GAUTAM **H. V. SUBBA RAO**
Member (Technical) **Member (Judicial)**

31.03.2023
Vedant Kedare