

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

CP (IB) 3460/MB/2019

Under section 9 of the Insolvency and Bankruptcy
Code, 2016

Mr. KALPESH JAYSUKH SHAH
[PAN : ARUPS8693L]

Address for correspondence:
102, Maa Tulsi Vihar, Daulat Nagar,
Road 8, Borivali East,
Mumbai - 400066

...Operational Creditor/Petitioner

Versus

ARCH PHARMALABS LIMITED
[CIN: U24231MH1993PLC150891]
Reg. Office- Off No. 3rd Floor, Titanic Building,
Chandivali Farm Road, Nr. HDFC Bank,
Andheri (East), Mumbai – 400072.

... Corporate Debtor/Respondent

Order Delivered on:08.02.2023

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical): Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Sumit Khanna, Advocate

For the Corporate Debtor : Mr. Nausher Kohli, Advocate

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This Company Petition is filed under section 9 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **Mr. Kalpesh Jaysukh Shah (“the Operational Creditor”)**, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Arch Pharmed Labs Limited (“the Corporate Debtor”)**.
2. The Corporate Debtor was incorporated 02.04.1993 under the Companies Act, 1956 having its Registered Office at Off No. 3rd Floor, Titanic Building, Chandivali Farm Road, Nr. HDFC Bank, Andheri (East), Mumbai – 400072. Its Company Identification Number (CIN) is **U24231MH1993PLC150891**. Therefore, this Bench has jurisdiction to deal with this petition.
3. The present petition was filed on 23.09.2019 before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of INR 25,89,443/- (INR Twenty Five lakhs Eighty Nine Thousand Four Hundred Forty Three only) out of which Rs.13,14,091/- (Rupees Thirteen lakhs Fourteen thousand Ninety One only) is the principal outstanding non-payment of salary amount and Rs.12,75,352/- (Twelve lakhs Seventy-five thousand Three hundred and fifty-two only) is the interest @ 18% p.a. for a period from 06.04.2014 to 26.08.2019. The date of default is 06.04.2014.

Submissions made by Operational Creditor:

4. It is submitted that the Operational Creditor was an employee holding position of Deputy General Manager-SAP with Corporate Debtor, was in the employment of the Corporate Debtor from 19.05.2010 till 05.04.2014.
5. The present Application has been filed by the Petitioner on account of non-payment of salary for services rendered for the period of 01.08.2013 to 05.04.2014. The debt fell due at respective month-end because of non-payment of salary. The default on outstanding unpaid salary happened on 06.04.2014.
6. It is the case of the Petitioner that the dues in default were admitted/acknowledged on 11.12.2015 and 27.02.2018 by Corporate Debtor while making partial payment of TDS (Tax deducted at source) reflected in Form 26AS and on 28.12.2018 by its representative /director Mr. Rajendra Kaimal through telephonic call assuring that the operational debt will be paid very soon. The detailed computation of Operational Debt in default is annexed as Exhibit – B to the Petition at Page 17.
7. To prove the existence of operational debt, the Operational Creditor has annexed the following documents:
 - i. Employment contract dated 19.05.2019 is annexed to this Petition as **Exhibit – D (page 22-23)**.
 - ii. Resignation Acceptance letter dated 04.03.2014 is **annexed as Exhibit – E (pages 24-25)**.
 - iii. Copy of Relieving letter 05.04.2014 is annexed as **Exhibit – F (pages – 26)**.

- iv. Salary slips from August 2013 to March 2014 is annexed as **Exhibit – G (pages -27-34)**
 - v. **Form 26AS** admitting the salary and its TDS payment for FYs 2013-14 and 2014-15 annexed as **Exhibit – H (pages 35-42)**.
 - vi. Copies of Statement of Bank Accounts of Axis Bank from 01.12.2012 to 06.09.2019 and ICICI Bank from 15.10.2013 to 06.09.2019 is annexed as **Exhibit – I (colly) (pages 43-71)**. It is clarified that salary account was shifted from Axis Bank to ICICI Bank in 2013.
 - vii. Correspondences during the period between 01.08.2014 and 12.02.2019 annexed as **Exhibit – J (pages 72-87)**.
 - viii. Written submissions dated 29.07.2019 filed by Corporate Debtor in proceeding before Ld. Deputy Labour Commissioner, Bandra, Mumbai are annexed as **Exhibit – L (pages 92-98)**.
8. The Operational Creditor realising that the Corporate Debtor was unable/incapable of paying, through its advocate served upon the Corporate Debtor Demand Notice dated 27.08.2019 in Form 3 under section 8 form the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The Corporate Debtor has not replied to demand notice.
9. The Operational Creditor has filed the Affidavit in compliance of Section 9(3)(b) of the IBC, 2016.

Submissions made by the Counsel for Corporate Debtor by way of Affidavit in Reply:

10. The Learned Counsel for the Corporate Debtor has filed the Affidavit-in-reply on behalf of the Corporate Debtor on 08.02.2022.

11. At the outset the Corporate Debtor states that there is no debt payable by the Corporate Debtor as stated, therefore, the said Application is defective and not maintainable on this ground itself.
12. The Corporate Debtor submits that the pre-requisite of section 8 of the IBC, 2016 are not satisfied hence the Application under Sec.9 of the IBC, 2016 is incomplete and not maintainable and be dismissed on the following Grounds:
 - a) The Operational Creditor has failed to file an Affidavit declaring that no Notice of dispute is issued by the Corporate Debtor upon the Operational Creditor in relation to the claim of unpaid debt as required under Sec.9(3)(c).
 - b) Operational Creditor has not furnished certificate from the Financial Institution confirming that there is no payment of an unpaid operational debt by the Corporate Debtor under Sec.9(3)(d) of the IBC 2016.
 - c) Corporate Debtor further submits that the Operational Creditor in Part IV Clause No.2 has mentioned the date of default being 06.04.2014 which in the Exhibit has mentioned the date of default as August 2013. Hence the alleged date of default is incorrect.
 - d) The Corporate Debtor states that the Operational Creditor intentionally mentioned an incorrect date of default to bring in the alleged claim within the scope of the limitation. The Corporate Debtor submits that the claim of the Operational Creditor is barred by the Law of Limitation because of misrepresentation by not mentioning the correct date of default.

Therefore, the Petition filed by the Operational Creditor under Sec.9 of the IBC, 2016 be dismissed on the abovementioned grounds for want of satisfying the pre-requisite conditions of presenting the said Petition.

13. The learned Counsel for the Corporate Debtor states that the Operational Creditor has filed the Petition against the Corporate Debtor under Section 9 of the IBC, 2016 claiming that the Corporate Debtor has defaulted in payment of sum of Rs.25,89,443/- inclusive of interest claimed at the rate of 18% p.a. amounting to Rs.12,75,352 for the period of 06.04.2014 to 26.08.2019. Admittedly, no basis for arriving at the aforesaid inflated amount of interest, without any contract, is provided by the Operational Creditor.
14. The Corporate Debtor submits that the Operational Creditor joined the services with the Corporate Debtor on 19.05.2010 and resigned from the said service on 21.02.2014. The Operational Creditor was relieved from services on 05.04.2014, therefore, the period from 21.02.2014 to 05.04.2014 was the notice period of the Operational Creditor.
15. The Operational Creditor has relied upon Form 26AS i.e. payment of Tax Deducted at Source (TDS) on unpaid salaries claim that the Petition is within limitation from the date of default. The payment of TDS cannot provide extension of period of limitation. The Operational Creditor has filed the Company Petition in the year 2019 whereas, the salary last claimed by him appears to be as on 05.04.2014, the day on which the Operational Creditor was relieved from services, as per Article 137 of the Limitation Act, 1963, the period of limitation for filing a Company Petition under Sec.9 of the IBC, 2016. It is also submitted that payment of TDS by the employer cannot be considered as an acknowledgement of

debt for claiming limitation under IBC, 2016. The Operational Creditor has filed the Petition based on pay-slips of unpaid salaries for the months of August 2013 till March 2014. The Corporate Debtor submits that the Operational Creditor has claimed salary for the month of April 2014, however, no pay slip has been annexed to the Petition. Further submits that the Operational Creditor has relied upon the TDS paid by the Corporate Debtor to the Tax Authorities under Income-tax Act, 1961 on 11.12.2015, 12.01.2018 and 27.02.2018 to establish that the above Company Petition is filed within limitation. The payment of TDS does not constitute an admission of liability in-as-much-as TDS can be deducted even on the expectation of estimated liability.

16. The Corporate Debtor relied upon the judgement passed by Hon'ble NCLAT in the case of *P.M. Cold Store Pvt. Ltd. v Goouksheer Farm Fresh Pvt. Ltd. & Anr. (Company Appeal [AT] Insolvency No.615 of 2020)* has held that payment of TDS on the interest payable by the Corporate Debtor cannot be construed as an acknowledgement in writing of the liability by the Corporate Debtor. (Para Nos.10 and 20 of the judgement).

Also, in the matter of 'XYKno Capital Services Pvt. Ltd. v. Ratan Power India Limited, the Hon'ble NCLT, Bench at New Delhi (*Company Petition No.1464 of 2018*) in para 9 of its order dated 27.01.2022 has concluded that, *... so far payment of TDS is concerned, it is now settled that deduction of TDS does not amount to acknowledgement of debt. The Insolvency proceedings are not meant to be recovery proceedings....."*

17. The Corporate Debtor further submits that the Petition is barred by law of limitation even if the payment of TDS is considered for section 19 of Limitation Act.

(a) Section 19 of the Limitation Act, 1963 provides as under:

“Effect of payment on account of debt or of interest on legacy —

Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt the debt or legacy or by his agent duly Authorized in this behalf, a fresh period of limitation shall be computed from the time when payment was made:

Provided that, save in the case of payment of interest made before the 1st day of January 1928, an acknowledgement of the payment appears in the handwriting of, or in a writing signed by the person making the payment.

Explanation — for the purposes of this Section, —

(a) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment:

(b) “debt” does not include money payable under a decree or order of a court.”

18. According to the Operational Creditor, TDS was paid by the Corporate Debtor on the unpaid salaries on various dates therefore, such payment of TDS revived the period of limitation under section 19 of the Limitation Act, which already expired. Corporate Debtor states that, limitation once expired cannot be revived.

Sr. No.	Month	Salary (INR)	Exhibit in Petition Ex-G Page Nos.	Expiry of Limitation	TDS booked on	Exhibit H in Petition (Page Nos.)	Limitation after payment of TDS
1.	Aug-13	152890	27	Aug 2016	11-Dec 2015	35	11-Dec-18

2.	Sep-13	191373	28	Sept 2016	11-Dec 2015	35	11-Dec-18
3.	Oct-13	152790	29	Oct 2016	11-Dec 2015	35	11-Dec-18
4.	Nov-13	152890	30	Nov 2016	11-Dec 2015	35	11-Dec-18
5.	Dec-13	152890	31	Dec 2016	11-Dec 2015	35	11-Dec-18
6.	Jan-14	152890	32	Jan 2017	TDS not booked	35	Time barred
7.	Feb-14	152890	33	Feb 2017	27-Feb 2018	35	Time barred
8.	Mar-14	191373	34	Mar 2017	27-Feb 2018		Time barred
9	Apr-17	Pay slip not annexed		Apr 2017	12-Jan-18 and 27- Feb 2018	35 and 39	Time barred

The Corporate Debtor has stated that each salary gave rise to a distinct and separate cause of action/default

19. The Corporate Debtor submits that the limitation for claiming the alleged unpaid salaries for the month of February 2014 expired in February 2017, for March 2014, limitation expired in March 2017 and for April 2014 expired in April 2017. Considering the fact that the TDS has been paid for the said salaries on 12.01.2018 and 27.02.2018, still the claim under the said salaries are barred by law of limitation for the reason that the advantage under Sec.19 of the Limitation Act is not available to the Operational Creditor as Sec.19 of the Limitation Act is not clearly states that the part payment should be made *before the expiry of the prescribed period of limitation* so far as the limitation for the salaries of February, 2014 is concerned, the same expired in 2017, therefore, the payment of TDS in

the year 2018 could not extend the limitation for the particular salaries as stated above.

20. Furthermore, the Corporate Debtor states that the default in alleged non-payment of salaries do not give continuous cause of action as the same is a recurring cause of action and is distinct for each salary. Therefore, the assumption of the Operational Creditor that the payment of TDS for different salaries on 11.12.2015, 12.01.2018 and 27.02.2018 extends limitation is misconceived and not tenable in law, therefore, the Company Petition is required to be dismissed as time barred.

Findings:

21. We have heard the submissions of the Ld. Counsels for the parties and perused the record.
22. It is observed that the Captioned Company Petition has been filed by the Petitioner for unpaid salary dues to the tune of Rs.25,89,443/- for the period of 01.08.2013 to 05.04.2014. The Petition is filed on 23.09.2019.
23. The Petitioner submits that the Corporate Debtor has made TDS payments on 11.12.2015, 12.01.2018 and 27.02.2018 thereby acknowledging the debt.
24. It is pertinent to note that the Hon'ble NCLAT in the matter of ***P.M. Cold Store Pvt. Ltd. v Goouksheer Farm Fresh Pvt. Ltd. & Anr. (Company Appeal [AT] Insolvency No.615 of 2020)*** has held that:

“The fact that the corporate debtor has paid TDS on interest payable cannot be considered as acknowledgment in writing of the liability by the corporate debtor and therefore, such TDS payment will not have any effect of being an acknowledgment of said debt.”

25. Considering the ratio laid down in the abovementioned Judgement TDS payments do not amount to an acknowledgement of debt. Hence, the debt is time-barred.
26. In the above circumstances the petition bearing **CP (IB) 3640 /MB/C-I/2019** filed by **Kalpesh Shah**, the Operational Creditor, under section 9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **M/s Arch Pharmalabs Limited [CIN: U24231MH1993PLC150891]**, the Corporate Debtor, is **rejected**

Sd/-

SHYAM BABU GAUTAM
Member (Technical)
08.02.2023
Priyal/Jenny

Sd/-

JUSTICE P. N. DESHMUKH
Member (Judicial)