

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-VI, MUMBAI**

CP (IB) No. 287/MB-VI/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:

AMOL DAIRY AND FOOD PRODUCTS PRIVATE LIMITED

(CIN-U15200PN2012PTC142469)

Registered Office: Gat No. 895/1, AT Post Khamgaon (BK),
Tal. Daund, Pune Solapur Road,
Dist. Pune, Maharashtra-412214

...Operational Creditor

versus

PHOENIX DAIRY TECH SOLUTIONS PRIVATE LIMITED

(CIN-U2925PN2012PTC143526)

Registered Office: S. No. 78/1/1,
Shivkamal Industrial Estate, AT Post Shivane,
Tal. Haveli, Pune, Maharashtra-411023

...Corporate Debtor

Order reserved on: 07.09.2023
Order pronounced on: 13.10.2023

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)

Appearances:

Operational Creditor: None

Corporate Debtor: Adv. Darshit K. Jain i/b Adv. Anirudh Jaltare

ORDER

[Per: SANJIV DUTT, MEMBER (TECHNICAL)]

1. Background

- 1.1. This is an Application bearing C.P.(IB) No.287/MB/2022 filed by Amol Dairy and Food Products Private Limited [Operational Creditor] under Section 9 of the Insolvency and Bankruptcy Code, 2016 [Code] on 21.12.2021 for initiating Corporate Insolvency Resolution Process [CIRP] in the case of Phoenix Dairy Tech Solutions Private Limited [the Corporate Debtor].
- 1.2. The Operational Creditor is engaged in the business of Dairy Products. The Corporate Debtor is carrying on the business of manufacturing, commissioning and installation of Milk Processing Plants and various types of Dairy equipment.
- 1.3. The Operational Creditor wanted to set up a Milk Processing Plant. For this purpose, the Corporate Debtor sent a detailed quotation dated 18.01.2012 for supply of Milk Processing Plant (10000 litres per day expandable to 20000 litres) to the Operational Creditor for an amount of Rs.1,20,63,000/ (Rupees One Crore Twenty Lakhs Sixty-Three Thousand only). After certain modifications, negotiations and confirmation from both parties, the cost of setting up the Milk Processing Plant was mutually agreed at Rs.1,27,00,000/- (Rupees One Crore and Twenty-Seven Lakhs only).
- 1.4. As per the agreed terms, 40% payment was to be made by the Operational Creditor as advance against order, further 55% was payable against progressive completion of the job and balance 5% was payable at the time of delivery before dispatch of equipment.

- 1.5. The delivery of various equipment was to be made within 16 to 18 weeks from the date of receipt of the order. The entire work was to be completed as per the specifications agreed upon by the parties.
- 1.6. The erection of equipment was to commence within 6 weeks after receipt of first consignment of the equipment at the site of the Operational Creditor and was to be completed within 4 to 6 weeks from the date of receipt of last consignment at site and completion of pre-requisites by the Operational Creditor like foundations, Service Bridge, arrangement of water supply and electrical supply, etc., In other words, all civil works like foundations, walls, grunting etc. related to the equipment were to be carried out by the Operational Creditor at its own cost.
- 1.7. The testing and commissioning of the equipment was to be completed within one week from the completion of final erection. Trials were to be given, over a period of 7 days (8 hours shift) for demonstrating performance.
- 1.8. The Operational Creditor approved the terms and conditions of the quotation dated 18.01.2012 and made payments through RTGS transfers aggregating Rs.1.27 crores to the Corporate Debtor. The Operational Creditor paid Rs.5 lakhs on 18.12.2012, Rs.2 lakhs on 21.12.2012, Rs.1 crore on 07.02.2103, Rs.10 lakhs on 04.05.2013 and balance Rs.10 lakhs on 03.07.2013 respectively.

2. Contentions of Operational Creditor

- 2.1 On the date of final hearing on 07.09.2023, the Operational Creditor was absent. However, as per the averments made by the Operational Creditor in the present Application, and based on the pleadings of the Corporate Debtor, we have proceeded with the matter. It is alleged by the Operational Creditor that the Corporate

Debtor delivered only some materials on site of the Operational Creditor costing approximately Rs.25 lakhs. The Operational Creditor kept on waiting for further materials/ equipment and its installation but the material was never supplied by the Corporate Debtor.

- 2.2 The Corporate Debtor had agreed to carry out the installation of the materials and equipment within 3 months from the date of delivery, but he failed to do so. The Corporate Debtor demanded “evasive unaccountable funds” from the Operational Creditor which the latter refused to pay. In these circumstances, the Operational Creditor asked the Corporate Debtor to cancel the work order as per the quotation and refund the amount. Despite various promises and assurances, the Corporate Debtor did not make any payment to the Operational Creditor.
- 2.3 Thereafter, the Operational Creditor issued a legal notice dated 15.09.2021 to the Corporate Debtor specifically mentioning that the work order as per the quotation stood cancelled as it had failed to supply and install the requisite materials and equipment. The Operational Creditor called upon the Corporate Debtor to pay the outstanding dues of Rs.1.27 crores to the former within 15 days from the date of receipt thereof failing which necessary action would be initiated against the latter in a competent court of law. However, the legal notice failed to evoke any response from the Corporate Debtor.
- 2.4 The Operational Creditor was thus constrained to send Demand Notice dated 18.10.2021 to the Corporate Debtor under Section 8 of the Code in respect of unpaid operational debt of Rs.1.27 crores due from the latter on account of its failure to supply, install and commission the dairy equipment and material at the site of the Operational Creditor.

- 2.5 The Corporate Debtor replied to the Demand Notice *vide* letter dated 02.11.2021 *inter alia* claiming that there were no dues payable by the Corporate Debtor to the Operational Creditor in respect of the work order dated 18.01.2012 or thereafter and thus the Demand Notice was wholly misconceived, bad in law and contrary to facts. The Corporate Debtor also stated that it had supplied the materials as per the order, completed the installation of the equipment and commissioned the project to the complete satisfaction of the Operational Creditor.
- 2.6 Pursuant to the Demand Notice dated 18.10.2021, the Operational Creditor filed the present Application under Section 9 of the Code for initiation of CIRP of the Corporate Debtor.
- 2.7 In Part-IV of its Application (Form 5), the Operational Creditor has claimed that an amount of Rs.1,27,00,000/- fell due from the Corporate Debtor as unpaid operational debt on account of its failure to supply, install and commission the project as per the work order. It is stated that the debt fell due on 15.09.2021 and is continuing till date. The amount claimed to be in default is shown at Rs.1,28,90,500/- including interest of Rs.1,90,500/- @ 18% from 15.09.2021 to 31.10.2021.

3. Contentions of Corporate Debtor

In its Affidavit in reply filed on 18.07.2023 the Corporate Debtor raised number of objections on the following grounds:-

- 3.1 The Application has been filed by a non-existent entity. It is stated that the name of the Operational Creditor has been struck off from the Register of Companies well before the date of filing of the Application on 21.12.2021. Once the Operational Creditor is dissolved, it ceases to operate as a company and the Certificate

of Incorporation is deemed to have been cancelled. The Operational Creditor could not have thus filed the Application. It is settled law that a proceeding initiated/ filed by a non-existent entity is a nullity and non-existent in the eyes of law. The above Application ought to be dismissed on this ground alone.

- 3.2 The Application is *ex-facie* barred by the law of limitation as it was filed beyond the limitation period. Last payment was made to the Corporate Debtor on 03.07.2013 as reflected in the bank statement of the Operational Creditor. The Operational Creditor sent legal notice to the Corporate Debtor after more than 8 years on 15.09.2021. Besides there is no explanation for the inordinate delay and the Application is thus not maintainable at all.
- 3.3 The Operational Creditor has suppressed various facts such as admitted receipt of goods worth Rs.25 lakhs in legal notice dated 15.09.2021 and Rs.5 lakhs in police notice dated 10.12.2021, cash payment by way of financial assistance of Rs.2 lakhs to Mr. Amol Dalvi, its Director and further payments of Rs.6 lakhs to the sub-contractors/ other parties made by the Corporate Debtor on behalf of the Operational Creditor which would bring the alleged claim below the threshold limit of Rs.1 crore as prescribed in Section 4 of the Code.
- 3.4 An incorrect statement has been made in the Application that the debt fell due on 15.09.2021 which is the date of issue of legal notice by the Operational Creditor to the Corporate Debtor. This is nothing but a false statement which is contrary to the facts on record. The date of legal notice cannot be termed as the date when the debt fell due. It is a settled law that sending an alleged legal notice cannot be the starting point of limitation.

- 3.5 The Application is deficient and incomplete. For example, the Operational Creditor has not annexed Form 2 i.e., Written Communication of Interim Resolution Professional to the above petition. The above Application ought to be dismissed on this ground alone. The above Application is not maintainable on the ground that the Demand Notice dated 18.10.2021 is not in accordance with the requirements of the Code and relevant Rules and/or Regulations. The Operational Creditor has not even annexed the invoices and other relevant documents. The record of default with the information utility is also not annexed to the above petition.
- 3.6 The Corporate Debtor had supplied all the goods and provided the requisite services. Thus, it is apparent that there is no default by the Corporate Debtor.
- 3.7 The Operational Creditor has not approached the Tribunal with clean hands and has deliberately suppressed various relevant and vital facts. It was the Operational Creditor which had failed, neglected and avoided to comply with its own obligations. The Corporate Debtor has placed on record two delivery challans bearing Nos. 1 and 2 dated 02.07.2013 and 05.07.2013 respectively, showing delivery of goods to the Operational Creditor costing approximately Rs.25,32,315/- and Rs.67,27,920/- respectively. The Corporate Debtor has also furnished copies of two letters addressed to the Operational Creditor dated 25.08.2013 and 05.10.2013 intimating poor power supply and voltage on the site, incomplete civil work on the site and the inconvenient approach road to the site and requesting for corrective action in order to “avoid further delay” in completion of the project.

- 3.8 During the completion of the project, the Operational Creditor had suggested some changes to be made to the scope and specifications of the project. This resulted in substantial increase in the cost of the project. The Corporate Debtor *vide* letter dated 21.02.2015 addressed to the Operational Creditor enclosed a separate sheet containing the cost difference of about Rs.1.34 crores. However, the Operational Creditor did not pay the balance dues to the Corporate Debtor despite repeated requests.
- 3.9 The Corporate Debtor had spent considerable amounts on procuring goods from vendors whereas the Operational Creditor had neither complied with its obligations nor took delivery of the ready materials nor made the payments. In the process, the Corporate Debtor had to suffer considerable loss and damage.
- 3.10 The conduct of Operational Creditor amounts to playing a fraud on the Tribunal and an abuse of process of this Tribunal. The Operational Creditor is trying to achieve some extraneous goal by misusing machinery of this Tribunal.

4. Analysis & Findings

Upon due consideration of the pleadings along with the materials placed on record by both the Operational Creditor and the Corporate Debtor and hearing the Counsel for the Corporate Debtor, we find as under:-

- 4.1 The instant Application has been filed in the name of the Operational Creditor which was a non-existent entity at the time of presenting the petition on 21.12.2021. A perusal of the Company Master Data of the Operational Debtor downloaded from the website of Ministry of Corporate Affairs (MCA) and enclosed with the Application clearly shows the Company Status as "struck off". From the data available in public domain, it is also seen that the

Operational Creditor in the instant case was one of 9930 companies' names of which were struck off the Register of Companies by the Registrar of Companies, Pune *vide* Public Notice No. ROCP/STK-7/ 248(5)/2017/PUB/1 dated 11.07.2017 and the said Companies were dissolved. It is observed that the name of the Operational Creditor appears at S.No.446 of the list of struck-off companies (Table 'A'). It is well-settled that the company is a separate legal entity distinct from its shareholder or promoter-Director. Once a company has been struck off the register of companies, it no longer exists as a legal entity. The verification certificate at the end of the Application (Form 5) having been signed by Shri Amol Ashok Dalvi as someone "authorised to act on behalf of the Operational Creditor" is thus found to be of no consequence. The Operational Creditor having been dissolved on 11.07.2017 itself, there is no entity/person who could have authorised anyone for filing of instant CP on 21.12.2021. There can be no question of ratification of an action which a non-existent entity could not have initiated in the first instance. The present Application could not have been filed unless the name of the Operational Creditor was first restored in the register of companies by following the procedure laid down in Section 252 of the Companies Act, 2013. In these circumstances, the present Application is lacking any legal validity and is not maintainable at all, thus, liable to be dismissed on this ground alone.

- 4.2 A perusal of bank statement of the Operational Creditor reveals that the last payment of Rs.10 lakhs was made by it to the Corporate Debtor through RTGS transfer on 03.07.2013. The Ledger Account of the Corporate Debtor in the books of the Operational Creditor shows a debit balance of Rs.1.27 crores as on 31.03.2014 whereas the Operational Creditor has mentioned the date of default of the said amount as 15.09.2021 in Part-IV of the Application. It is observed from the record that 15.09.2021 is

the date on which a legal notice was issued by the Operational Creditor to the Corporate Debtor. The Operational Creditor has not placed on record any contemporaneous evidence showing admission or acknowledgement of debt on part of the Corporate Debtor which could serve to extend the period of limitation during the intervening period in terms of Section 18 of the Limitation Act, 1963. In view of the above, we find merit in the contention raised on behalf of the Corporate Debtor that the petition is clearly barred by the law of limitation.

ORDER

As discussed above, the present Application bearing C.P.(IB) No.287/MB/2022 filed by Amol Dairy and Food Products Private Limited, the Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 on 21.12.2021 for initiating CIRP in case of Phoenix Dairy Tech Solutions Private Limited, the Corporate Debtor is, hence, **Rejected**.

However, the rejection of this Application shall not cause any prejudice to the right of the petitioner before any other judicial forum.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

// Akshata //