IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH -V

C.P. (I.B) No. 232/MB/2022

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Sunila Chhabra

Through her legal heirs Mr. Gaurav Kumar and Mr. Aditya Kumar

Both R/o C- 75, Mahendra Enclave,

New Delhi-110052

......Operational Creditor/Applicant

Vs

Leighton India Contractors Private Limited

Having its registered address at 6/7, Tower 3, Equinox Business Park, Off Bandra Kurla Complex, LBS Marg, Kurla (West), Mumbai- 400070, Maharashtra, India

.......Corporate Debtor/Respondent

Order Dated: 10.11.2023

Coram:

Ms. Reeta Kohli, Hon'ble Member (Judicial)

Ms. Madhu Sinha, Hon'ble Member(Technical)

Appearances (Physically):

For the Operational Creditor: Adv. Moinuddin for Operational Creditor

For the Corporate Debtor: Adv. Sunil Kumar Neelambaram

ORDER

Per: Reeta Kohli, Member (Judicial)

1. This Company Petition is filed by Sunila Chhabra (hereinafter referred as "**the Operational Creditor/Operational Creditor**") seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as **"CIRP"**) against **Leighton India Contractors Private Limited** (hereinafter called "**Corporate Debtor**") by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy code, 2016 (hereinafter called "**Code**") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs. 7,22,11,082/-**.

Brief Facts: -

1. The Petition reveals that vide email dated 16.03.2011, the Operational Creditor made an offer to the Corporate Debtor for execution and completion of supply and installation of temporary electrical work in north and south portal areas ("Works"), Subsequently, the Operational Creditor was awardesd the Works vide email dated 17.03.2011. Accordingly, the parties entered into a Sub Contract dated 23.03.2011, in connection with the Works to be performed for the purpose of fulfilment of the Main Contract.

2. It was agreed between the parties that the work assigned would be done for a fixed price of Rs. 6,85,50,782/- Further, the Sub-Contract, provided that at the time of delivery of equipment and cable, 50% of the equipment value would become payable against the receipt of material at site, whereas the balance 50% shall be

paid by the Corporate Debtor within 30 (thirty) days as aforesaid, subject to attachment of completion Certificate from the Contractor's Authorized site representative. The Operational Creditor had performed the supply and installation of "Temporary Electrical Work". Further, the Operational Creditor states that the Corporate Debtor gave an additional purchase order to the Operational Creditor, as per site instruction no. 11007-S1-0101 dated 22.04.2011 for electrical installations in SRG supplied cabins which amounted to Rs. 73,75,911/-

3. Pursuant to the above the Operational Creditor submits that it had repeatedly been requesting the release of the payments for the work done under the subcontract for the months of May and June 2011 which have been already certified by the Corporate Debtor.

4. The Corporate Debtor has submitted in its affidavit in reply that the Operational Creditor has failed to perform the obligations set out in the Sub-contract and abandoned the project site unilaterally without settling wages and salaries of their workers. The same was communicated to the Operational Creditor in various meetings between the parties. Subsequently, after considering various defaults/ breaches of the Operational Creditor, the Corporate Debtor was constrained to terminate the Sub-Contract vide letter dated 27.07.2011 mentioning the various breaches of the contract on the part of Operational Creditor.

5. The Operational Creditor while responding to Corporate Debtor's contention has submitted that the contract was terminated by the authorized representatives of the Corporate Debtor company before the conclusion of the contract and on date of termination, after adjusting the receipts, vouchers and credit notes, there was a

remaining amount of INR 2,15,78,964/- due on the invoices along with the liability towards the C-form amounting to INR 22,07,242/- and an amount of INR 16,95,037/- towards the retention amount making it a balance principal amount of INR 2,54,81,243/-

6. In response to the contention of the Operational Creditor, the Corporate Debtor further emphasized that the Operational Creditor also failed to fulfill the obligation as per clause 12 of the subcontract of paying wages to its employees/ work force. The Corporate Debtor vide its letter dated 1.08.2011 demanded the Operational Creditor to pay wages and provide evidence of compliance. The Operational Creditor failed to do so and thus Corporate Debtor was constrained to pay and settle the outstanding wages of the workers employed by the Operational Creditor. The Corporate Debtor also informed about this payment having been made by him to the Operational Creditor vide letter date 7.08.2011.

7. Thereafter, the Operational Creditor vide its legal notice dated 27.08.2011, called upon the Corporate Debtor to make payments of the amount due under the respective invoices issued by Operational Creditor and also subsequently another letter dated 22.09.2011 was sent.

8. The Corporate Debtor replied to the legal notice and also to the letter dated 22.09.2011 issued by Operational Creditor. Vide letter dated 13.10.2011 the Corporate Debtor in fact called upon the Operational Creditor to pay Rs. 3,48,48,514/- for restoration, loss and damages having been incurred due to delay caused on the part of Operational Creditor, under Sub-contract. Corporate Debtor also

appointed an authorized representative proposing to amicably resolve the issue as per clause 17 of the sub-contract.

9. Upon continuous follow ups with the Corporate Debtor by the Operational Creditor, the Corporate Debtor vide letters dated 05.12.2012 and 22.10.2014 though have specifically acknowledged the liability towards the Operational Creditor, but subsequently the Corporate Debtor in its affidavit of reply vide email dated 30.10.2014 made an attempt to wriggle out of the liability by stating that the acknowledgment of debt was an error by the Company and the Corporate Debtor does not owes any money to the Operational Creditor.

10. Pursuant to the above, The Operational Creditor by its Advocates issued winding up notices dated 23.10.2015 and 06.07.2016 calling upon the Corporate Debtor to make the payment of the said amount due. The Corporate Debtor vide its reply dated 10.11.2015 of the winding up notices denied all the claim of amount due to the Operational Creditor.

11. In furtherance to the response of the notice dated 10.11.2015 by the Corporate Debtor, a winding up petition 'CP/479/2016' (Winding up Petition') was filed by the Operational Creditor before the Hon'ble Bombay High Court on 05.12.2015 but the said Winding up Petition was subsequently withdrawn vide Order dated 01.08.2016, with a leave to file a fresh petition.

12. Even though the Operational Creditor sought the permission from the Hon'ble High Court to file a fresh Petition, but instead of filling the petition in Bombay High Court, the Operational Creditor, on 08.07.2017 issued a Demand Notice under section 8 the Insolvency and Bankruptcy Code, 2016, to the Corporate Debtor.

The Corporate Debtor responded to the said Demand Notice vide its letter dated 21.07.2017 stating that the claim is disputed and barred by limitation relying on the admission of the Operational Creditor in notice that the debt fell due on 22.02.2011 and that there is no unpaid debt owed.

13. Further, due to nonpayment of the dues by the Corporate Debtor, the Operational Creditor once again issued the Demand Notice under section 8 the Insolvency and Bankruptcy Code, 2016 to the Corporate Debtor on 19.09.2018. Thereafter, the Corporate Debtor issued a reply to the said Demand Notice vide its letter dated 28.09.2018. In this reply the Corporate Debtor in fact called upon the Operational Creditor to withdraw the notice stating that the alleged claimed debt felt due on 22.04.11. Thus, baring the claim by limitation. Hence the Present Petition by the Operational Creditor.

14. Further, the Corporate Debtor in its Affidavit in reply has also revealed that the Operational Creditor had filed an application for meditation dated 31.05.2022 under Section 12A of the Commercial Courts Act, 2015 and this act of filling an application in itself shows existence of dispute between the parties.

Findings/Conclusion

We have heard the arguments of the Learned Counsel for Operational Creditors and Corporate Debtor and have gone through the records.

15. It is observed that the invoices which is forming the basis of the Operational Creditors claim to the Petition pertains to year 2011 and this was admitted by the Operational Creditor in their demand notice dated 08.07.2017. Thus, the date of default as per

Operational Creditor himself is 22.04.2011 as submitted by himself. The present claim under Section 9 of the code is thus barred by the limitation and is not maintainable. Article 137 of the Limitation Act, 1963 prescribes a limitation of 3 years. Thus, if the period is calculated from the last date of invoice, the limitation in the present case expires on 28.07.2014 whereas when date of last payment is considered , the period would expire on 17.11.2015. The present petition is filed in 2022, thus the petition is not maintainable being barred by limitation. The Hon'ble Supreme Court in **B.K. Educational Services Private Limited v. Parag Gupta and Associated, AIR 2018 SC 5601 has held;**

"It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application".

16. It is also observed that the Operational Creditor being aware of the fact that the claim is barred by limitation has purposely evaded and omitted to furnish the date on which the debt fell due in their petition and instead at page 29 of their petition has stated that *"The amount is due from the date of first invoice raised by the Petitioner, bearing No. CEE/11-12/RI-19, for which payment has not been made by the Corporate Debtor".* This petition is therefore not proper as per the IBC due to want of material particulars as required, therefore not maintainable.

17. In addition, the present Section 9 petition is filed after an in ordinate delay of 5 years from the date of withdrawal of the winding up petition. The Operational Creditor has issued demand notice under the IBC on 08.07.2017 which was admittedly replied by the Corporate Debtor disputing the claim and reiterating its earlier stand on 21.09.2017. The purported second demand notice dated 19.09.2018 was also replied by the Corporate Debtor, denying and disputing liability on 28.09.2018. The Operational Creditor also filed an application for meditation under Section 12A of the Commercial Courts Act, 2015.

18. On basis of the pleaded case of the parties it is very evident that there is a pre-existing dispute between the parties. The sending of legal notice by the Operational Creditor to the Corporate Debtor. The reply of the Notice by Corporate Debtor to Operational Creditor. The filling of winding up petition and also the application for mediation under section 12A of the Commercial Court Act, 2015 by Operational Creditor are reasons enough to belief and prove that there is a pre-existing dispute between the parties. Thus, on this basis also, the present petition is not maintainable. In addition, the stated debt has also not been admitted by the Corporate Debtor, rather the Corporate Debtor has put a counter claim against the Operational Creditor vide letter dated 13.10.2011. Thus, there is no crystalized admitted debt in the present case.

19. The fact that there is no admitted debt on the part of the Corporate Debtor and in fact while denying the liability to pay and had made a counter claim of Rs.3,48,48,514 against the Operational Creditor.

20. In view of the foregoing, inter-alia including 'Time barred claim', 'Pre-existing disputes between the parties' and 'Absence of crystalized debt' the above petition merits no consideration. Hence dismissed.

SD/-	SD/-
MADHU SINHA	**REETA KOHLI**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**