NATIONAL COMPANY LAW TRIBUNAL
COURT NO. V, MUMBAI BENCH

CP (IB) No. 302/MB/2020

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

Mr. Haresh Patel
Sole Proprietor of M/s. Packaging Associates
A-1101, Yashvasin, Plot 38, Sector 27, Kharghar, Navi Mumbai-410210, Maharashtra, India.

… Petitioner/Operational Creditor

V/s

M/s. Mahindra Lifespace Developers Limited

Mahindra Towers, 5th Floor, Road No. 13, Worli, Mumbai-400018, Maharashtra, India

… Respondent/Corporate Debtor

Date of the order: 24.03.2023

Coram:
Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)
Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Video Conferencing):

For the Petitioner	:	Ms. Princi Jaiswal, Advocate
For the Corporate Debtor	:	Mr. Shyam Kapadia, Advocate.

Per: Anuradha Sanjay Bhatia, Member (Technical)

ORDER

1. This Company Petition is filed by **Mr. Haresh Patel, Sole Proprietor of M/s. Packaging Associates** (hereinafter called **"Petitioner"**) seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against **M/s. Mahindra Lifespace Developers Limited** (hereinafter called **"Corporate Debtor"**) alleging that the Corporate Debtor committed default to the extent of Rs. 3,16,07,464/-, inclusive of 18% per annum interest amounting to Rs. 78,93,745/-. This Petition has been filed 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.

2. The Petition reveals that the Petitioner is in the business of undertaking Works Contracts for supply of Doors, Windows, Sliding window, False Ceilings & other interior fitouts of flats/ offices for entire Building Projects. The Corporate Debtor on the other hand is in the business of Real Estate and Infrastructure Development, Construction of Residential & Commercial Buildings and other related businesses.

3. The Petitioner executed Work under Contracts (involving both supply of Goods and Provision of services) of providing & Fixing (Supply & Installation) of Composite Doors, UPVC windows, Sliding Folding windows/Doors, Glazed Railing, Toilet False Ceiling & Tempered Glass including delivery of material at site, custom/port clearance, unloading of material at port, as well as at site, inland transportation, inland transit insurance, storage of material, shifting the material to respective floors/flats, fixing the same as per approved drawings for various types of Flats for the Corporate Debtor, between the period from February, 2015 to November, 2016 and raised different Tax Invoices aggregating to Rs. 12,25,19,750/- to the Corporate Debtor.

4. The Corporate Debtor had paid Rs. 9,58,25,532/-, from 02/03/2015 to 04/08/2016, and deducted/ paid TDS of Rs. 11,06,486/- and paid Works

Contract Tax of Rs. 18,74,013/-. Further, the Corporate Debtor had made last payment of Rs. 1,72,205/- on 04/08/2016. However, The Corporate Debtor has made no further payments after 04.08.2016. Hence, The Corporate Debtor has defaulted on the payment of the balance principal amount of Debt of Rs. 2,37,13,719/-.

5. Since the outstanding amount remains unpaid till date, the Petitioner issued the Demand Notice to the Corporate Debtor on 11th June, 2018 as per the provisions of Section 8 of the Code, to which the Corporate Debtor had filed a reply, vide letter dated 23rd June 2018, mentioning the existence of dispute between the parties. Since, the Corporate Debtor was not able to pay the debts, taken in normal course of business, the Applicant has filed the present petition under Section 9 of the Code.

Reply of the Corporate Debtor:

6. The Corporate Debtor has filed its reply on 7th February 2020, opposing the admission of the present petition.

7. The Corporate Debtor states that the Petitioner has premised its alleged claim on the basis of the invoices, the last of the alleged invoice being dated 23rd November 2016. However, the last date by which payment of the alleged debts was to be made, is reflecting as 4th December 2016 and the captioned Petition is filed in January 2020. Thus, the alleged claim of the Petitioner is *ex facie,* and on a bare reading of the facts, alleged in the Petition itself, is barred by limitation.

8. The period of limitation prescribed under the provisions of the Limitation Act, 1963 for the present claim, is 3 (three) years from the date on which the amounts allegedly claimed is stated to have become “due”. In the present case, the Contract/Reference Contracts stood terminated on 27th September 2016. A right to sue in favour of the Petitioner has thus arisen thereupon. Three years from the aforesaid events have expired in September, 2019. Thus, the captioned Petition filed in January 2020,

seeking to raise a grievance, on the basis of a time barred debt, is not maintainable.

9. The Corporate Debtor further states that the Corporate Debtor was awarded a contract vide a Letter of Intent dated 2nd February, 2015. The total value of the said Contract/Reference Contracts was agreed at Rs. 16,20,88,138/-. The Petitioner was liable to issue bills and upon certification by the Corporate Debtor and upon receipt of materials on site, the payment was to be released. The Petitioner was also required to furnish a Performance Bank Guarantee to the extent of 5% of the aforesaid Contract value i.e. for a sum amounting Rs. 81,04,000/-. The said Project was to be completed on or before 31st October, 2017. Similarly, the Corporate Debtor issued Letter of Intent to the Petitioner for two more projects *viz* Project 'L' Arista' and Project 'Serenes' wherein the scope of work including the terms and conditions thereto for the aforesaid two projects were similar to the said Contract/Reference Contract.

10. The Corporate Debtor states that right from the inception and also while executing the said Contract/Reference Contract, there was delay in supply of material, there were quality issues and labour related issues on the part of the Petitioner. The Petitioner further defaulted in providing the Performance Bank Guarantee, within the time stipulated, under the said Contract/Reference Contracts.

11. The Corporate Debtor had time and again called upon the Petitioner to clarify the status of supplies as also the issues relating to the delay in executing the said Project. Mr. Tirthankar Chatterjee, representative of the Corporate Debtor, addressed an email dated 4th November 2015 to Mr. Haresh Patel, representative of the Petitioner *inter-alia* recording that:

    a) The Petitioner had not been replying to the queries raised by the Corporate Debtor;

b) the installation of windows, false ceiling and doors in Phase I was below the committed quality;
c) Labour strength at the project site is gradually decreasing;
d) There was an inordinate delay on part of the Petitioner in executing the said Project;
e) Delay and scarcity of the labour coupled with various other issue have caused serious financial impact on the Corporate Debtor.

12. Even after numerous communications, the Petitioner failed to adhere to the terms and standard of quality set out under the said Contract/Reference Contracts. In view of the aforesaid circumstances, the Corporate Debtor, *vide* the email dated 27th September, 2016, terminated the said Contract/Reference Contracts for Phase II and III of the Reference Projects. The balance work for Phase I of the said project along with Phase II and Phase III was completed by the Corporate Debtor, by employing third party contractors, which resulted into financial losses on account of costs escalations for executing such works.

13. Further, the Corporate Debtor submits that the Form 5 filed by the Petitioner is not in accordance with Section 9 of the Code. The Petitioner has not furnished any record with the Information Utility and on account of failure in filing Demand Notice with the information Utility, the present Petition is liable to be dismissed.

<u>Rejoinder on behalf of the Petitioner:</u>

14. The Petitioner has further filed their rejoinder, thereby denying each and every statement made by the Corporate Debtor in their reply.

15. The Petitioner submits that there is not one shred of evidence regarding any issues/disputes prior to the date of demand notice. The ledger of the Corporate Debtor in Petitioner's books of accounts shows the actual amount due to the Petitioner and it clearly indicates that there was no dispute. If there was any dispute, no payment would have been released by

the Corporate Debtor. Hence, there is no pre-existing dispute under Section 8 of the Code.

16. The Corporate Debtor cancelled Phase – II & III of the Project which were promised in the Purchase Order. Further, they unscrupulously revoked the Bank Guarantees given for the Phase II & III, while both the 2 new Phase work were never given to the Operational Creditor. The Bank Guarantees can be invoked in case of non-performance of contracts. But when the Contract itself was not there, the Bank Guarantee should have been allowed to be cancelled/withdrawn, rather than revoking it and encashing it.

17. Further, the goods and services were supplied to the Corporate Debtor as per the agreed terms of Work Contract and work was done to the full satisfaction, as per the Contract, and there was no dispute with respect to the supply, quality, and installation of windows and doors. The same is demonstrated by the following facts;
    i. 95% of the project was successfully completed and done before Certain planned emails by the employees of the Corporate Debtor, with certain ill-intended motive, started coming.
    ii. The Corporate Debtor has appreciated the Quality and workmanship of the products, speed/quality of installation of the products of the Operational Creditor, especially acknowledging that the quality of the goods imported from Turkey, had raised the standards and worth of the projects, by 'Mahindra'.
    iii. The termination of Project by the Corporate Debtor was done after the Completion of Phase – I.

18. Further, the Corporate Debtor intentionally forced the Petitioner to abandon the project, by not paying the dues after July, 2016. In view of the above facts, the Petitioner prays for the admission of this Petition.

FINDINGS:

19. Heard the Ld. Counsels appearing for the Petitioner and the Corporate Debtor and perused the material available on record.

20. It is an undisputed fact that the Petitioner had executed the Contract for the Corporate Debtor against which different invoices were issued aggregating to Rs. 12,25,19,750/-. Further, the Corporate Debtor made last payment for an amount of Rs. 1,75,205/- on 4th August, 2016 and there was no further payment made.

21. After hearing the submissions on behalf of both the parties, this Bench is of the considered view that the present Petition filed under Section 7 of the Code is barred by limitation as it has been filed after the lapse of three years of the purported default. The last payment made by the Corporate Debtor was on 4th August, 2016 and the debt became due on 3rd December, 2016, thereby the cause of action arose. The present petition was filed on 17th January, 2020 and the date of e-filing of the Petition is 21st July, 2020. From the above facts, it clearly shows that the present Petition has been filed 4 years after the default occurred. Thus, the present Company Petition is filed beyond the prescribed period of limitation i.e. 3 years as covered under Section 18 of the Limitation Act, 1963 and thus, is not maintainable.

22. Section 18 of Limitation Act, 1963 is reproduced as under:

> *"18. Effect of acknowledgment in writing.—(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*
> *(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*

Explanation.—For the purposes of this section,—
(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,
(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf, and
(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

23. Further, this Bench is of the view that with regard to the any other contentions of the Corporate Debtor, the same cannot be considered as the Petition is barred by Limitation and is not maintainable and hence deserves to be dismissed on this ground alone.

24. As a sequel to above observations, the Company Petition bearing No. 302 of 2020 under Section 9 of the Code is hereby **dismissed** with no cost.

SD/-
Anuradha Sanjay Bhatia
Member (Technical)

SD/-
Kuldip Kumar Kareer
Member (Judicial)