IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-I

CP (IB) 2212/MB/C-I/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016

In the matter of

Alumilite Architecturals Limited

[CIN: U28910MH1982PLC028034]

Dhiraj Chambers, 5th Floor, Hazarimal Somani Marg, Mumbai- 400001.

… Operational Creditor/Applicant

Versus

Sheth Developers Private Limited

[CIN: U45200MH1993PTC070335]

Ground Floor and 3rd Floor, Prius Infinity, Paranjape B Scheme, Subhash Road, Vile Parle (East), Mumbai – 400057.

…Corporate Debtor/Respondent

Order Delivered on 27.06.2022

Coram:

Hon'ble Member (Judicial)	:	Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Kapal Kumar Vohra

Appearances:

For the Operational Creditor	:	Mr. Nimay Dave, Counsel.
For the Corporate Debtor	:	Mr. Vikramaditya Deshmukh, Counsel.

ORDER

Per: Justice P. N. Deshmukh, Member (Judicial)

1. This is a Company Petition filed under section 9 ("**the Petition"**) of the Insolvency and Bankruptcy Code, 2016 **(IBC)** by Mr. Sanjib Chakraborty, Director of **Alumilite Architectural Limited ("the Operational Creditor/Petioner")**, duly authorized vide board resolution dated 03.10.2018 seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Sheth Developers Pvt. Ltd. ("the Corporate Debtor/Respondent")**.

2. The Corporate Debtor was incorporated 06.01.1993 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is U45200MH1993PTC070335. Its registered office is at Dhiraj Chambers, 5th Floor, Hazarimal Somani Marg, Mumbai- 400001.

3. The present Petition was filed on 12.06.2019 before this Adjudicating Authority. The total amount claimed in default is Rs.45,91,751/- (Rupees Forty-Five Lakh Ninety-One Thousand Seven Hundred and Fifty One Only).

<u>Submissions made by the Ld. Counsel on behalf of the Operational Creditor:</u>

4. The Corporate Debtor approached the Operational Creditor around the year 2008 for availing its services inter alia installing and fixation of aluminium for various projects of the Corporate Debtor. Thereafter, the Corporate Debtor issued 24 work orders to the Operational Creditor on terms and conditions more particularly detailed therein. Tabular list of

the work orders and the work orders are marked at "Annexure B" and Annexure "C-colly" respectively.

5. Subsequently, as agreed between parties, the Operational Creditor rendered services with respect to fixation and installing aluminium windows at the Project sites. Thus, the Operational Creditor raised 217 Tax Invoices amounting to Rs.13,67,93,863/- (Rupees Thirteen Crore Sixty Seven Lakh Ninety Three Thousand Eight Hundred and Sixty Three Only) against which part payment of Rs.13,45,45,076/- (Rupees Thirteen Crore Forty Five Lakh Forty Five Thousand and Seventy Six Only) was received from the Corporate Debtor.

6. The Operational Creditor states that the Corporate Debtor was liable to clear the balance invoices within reasonable time from the date of certificate of Bills/Invoices. However, the outstanding amount remains unpaid till date.

7. The Operational Creditor submits that 5% of the total invoice amount aggregating to Rs.69,34,717/- (Rupees Sixty Nine Lakh Thirty Four Thousand Seven Hundred and Seventeen Only) has been retained by the Corporate Debtor for a period of 12 months from the date of completion. The Corporate Debtor has made part payment amounting to Rs.23,42,966/- (Rupees Twenty Three Lakh Forty Two Thousand Nine Hundred and Sixty Six Only) in four tranches on 06.09.2016, 09.12.2016, 11.09.2017 and 17.03.2017.

8. Therefore, an amount of Rs.45,91,751/- (Rupees Forty-Five Lakh Ninety One Thousand Seven Hundred and Fifty One Only) continues to remain due and payable towards the retention amount.

9. The Corporate Debtor vide letter dated 29.01.2018 expressly admitted that an amount of Rs.45,91,751/- (Rupees Forty-Five Lakh Ninety One Thousand Seven Hundred and Fifty One Only) is due and payable to the Operational Creditor. However, on failure of the Corporate Debtor to clear the retention amount several reminders were sent to the Corporate Debtor. Regardless of the follow ups the said amount stood due and payable. (Annexure E at Page 207 of the Petition)

10. The Operational Creditor realising that the Corporate Debtor was unable/incapable of paying, through its advocate served upon the Corporate Debtor Demand Notice dated 28.05.2019 in Form 3 under section 8 form the Code read with Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which was duly received by the Corporate Debtor on 29.05.2019. The Corporate Debtor vide interim reply dated 07.06.2019 replied to demand notice.

<u>Submissions made by the Ld. Counsel on behalf of the Corporate Debtor</u>

11. At the outset, the Corporate Debtor submits that the Operational Creditor has suppressed the email dated 20.01.2018 wherein Operational Creditor has stated that it was expecting retention amount of Rs.69,34,716/- (Rupees Sixty-Nine Lakh Thirty Four Thousand Seven Hundred and Sixteen only) with respect to purported claim. Further, the Corporate Debtor states that the claim of the Operational Creditor is time barred. (Exhibit B at page 12 of the Reply)

12. The Corporate Debtor states that the Operational Creditor has failed to mention the date on which the debt fell due. The debt claimed by the Operational Creditor is of 2009 and hence the claim is barred by limitation.

13. The Retention amount claimed by the Operational Creditor becomes payable on issuance of completion certificate. The Corporate Debtor has not issued completion certificate as the work done by the Operational Creditor was not as per terms of the Work Order and there were defects and deficiency in service provided by the Operational Creditor.

14. The Corporate Debtor made a part payment to the tune of Rs. 23,42,965/- (Rupees Twenty Three Lakh Forty Two Thousand Nine Hundred and Sixty Six Only) towards retention amount as a good will gesture. The Corporate Debtor did not pay the balance amount of Rs.45,91,751/- (Rupees Forty-Five Lakh Ninety One Thousand Seven Hundred and Fifty One Only) owing to the defect in services provided by the Operational Creditor.

15. Lastly, it is the contention of the Corporate Debtor that the acknowledgement of debt must be within the period of limitation.

Submissions made by the Ld. Counsel on behalf of the Operational Creditor via Affidavit in Rejoinder:

16. The Operational Creditor states that the email dated 20.01.2018 was merely a reminder email addressed to the Corporate Debtor to remit the balance payment. Further, the Corporate Debtor vide email dated 29.01.2018 has acknowledged that the debt is due and payable.

17. The Corporate Debtor has admitted the entire debt and has not raised any grievance in the letter dated 29.01.2018. Therefore, the contention of the Corporate Debtor that there is a pre-existing dispute is an after thought to evade liability. Further, the Operational Creditor states that the Corporate Debtor has made a part payment of the retention amount and has not raised objections for defects as alleged by the Corporate

Debtor. Moreover, the Corporate Debtor has not placed on record any evidence to substantiate its contention of existence of dispute.

Findings

18. We have heard the submissions of the parties and perused the records.

19. The Petitioner in support of his claim as an Operational Creditor has not annexed invoices raised. However, computation of claim is placed on record.

20. The date of default is not indicated by the Petitioner in Part IV of the Petition. In order to establish default, the date of such default is the decisive point which comes into play. It is on the said date that the cause of actions arises because the right to sue occurs only when the default occurs.

21. Nonetheless, even if we consider the last invoice raised by the Operational Creditor is dated 03.11.2013 and the retention amount becomes due on 03.11.2014 i.e. 12 months after the date of invoice raised according to the terms of payment of the work order. Therefore, the limitation period to file the Petition as per Article 137 of Limitation Act, would end on 03.11.2017. The acknowledgement of debt, if any must be made by the debtor before the expiry of period of limitation. In the present case the Corporate Debtor vide letter dated 29.01.2018 has acknowledged the debt.

22. The Hon'ble NCLAT in Hussain Kadri vs Edelweiss Asset Reconstruction Co. Ltd. Company Appeal (AT)(Ins.) No. 1073 of 2019 held as under:

> *"7. The effect of Section 18 of the Limitation Act, 1963 is that an acknowledgment of liability in respect of a right made in writing and signed by the debtor before expiration of prescribed period for a suit or an application would result in a fresh period of limitation being computed from the time when acknowledgment was so signed. It is abundantly clear that such acknowledgment of liability must be made 9 Company Appeal (AT) (Insolvency) No. 1073 of 2019 by the debtor in writing and signed by him before the expiration of prescribed period of limitation…."*

23. Therefore, we are of the view that the Operational Creditor's contention that the Corporate Debtor acknowledged the liability vide letter dated 29.01.2018 does not lie owing to the fact that the debt was already time barred on 03.11.2017.

24. In the above circumstances the petition bearing **CP (IB) 2212/MB/C-I/2019** filed by **Alumilite Architecturals Limited,** 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 **Sheth Developers Private Limited [CIN: U45200MH1993PTC070335],** the Corporate Debtor, is **rejected**.

Sd/-	**Sd/-**
KAPAL KUMAR VOHRA	**JUSTICE P.N. DESHMUKH**
Member (Technical)	**Member (Judicial)**

27.06.2022
Priyal