
(2024) 02 NCLT CK 0023

In the National Company Law Tribunal

Case No : INVP. 44 Of 2023 INVP. 46 Of 2023 In CP (IB) No.1309/MB-IV/2022

Shivam Mahendra Sharma Vs Shree Dhanvantari Pharmaceuticals ?

Date of Decision : 07-02-2024

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(8), 7, 60(5), 238A
Indian Partnership Act, 1932 — Section 4

Citation : (2024) 02 NCLT CK 0023

Hon'ble Judges : Kishore Vemulapalli, Member (J); Anu Jagmohan Singh, Member (T)

Bench : Division Bench

Advocate : Amey Hadwale, Jack Thalakathor

Final Decision : Dismissed

Judgement

1. This is a Company Petition filed under section 7 of the Insolvency & Bankruptcy Code, 2016 (IBC) by Shree Dhanvantari Pharmaceuticals ("Financial Creditor"), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of Konkan Ayur Pharma Private Limited., the Corporate Debtor.

1.1 The petition is filed on 22.08.2022 and the total outstanding amount of debt granted is Rs. 2,26,45,568/- (Rupees Two Crores Twenty-Six Lakhs Forty-Five Thousand Five Hundred and Sixty-Eight Only) in default alongwith interest of Rs. 1,29,09,332/- thereon till 30.06.2022. The date of default is not Specified in Part IV of the main petition.

Submissions of the Financial Creditor:

2. The Corporate Debtor is a registered private limited company formed under the aegis of Central Government and Ministry of Health and Family Welfare, Department of Ayush. The Corporate Debtor is in the business, to develop, produce, sell, purchase, deal, import, export and to act as agents, distributors and suppliers of Ayurvedic medicines by extractions of plant products and chemicals used for manufacture of pharmaceuticals and to undertake, identify formulate, etc. and maintenance of various common facility projects related to

the AYUSH i.e. Ayurvedic drugs.

2.1 On request made by the Corporate Debtor, the Financial Creditor agreed to provide financial credit as and when it was possible with a mutual understanding between them that this financial assistance will be returned back at earliest possible. From time to time, funds were lent as financial credit to the Corporate Debtor and/or expenses incurred on behalf the Corporate Debtor, records reflected in the Bank Statements and Account Ledgers of Financial Creditors. The total Principal dues as of today stand at Rs. 2,26,45,568/- (Rupees Two Crores Twenty-Six Lakhs Forty- Five Thousand Five Hundred and Sixty-Eight Only). Additionally, the Financial Creditor also hereby claims Interest.

2.2 Financial Creditor being one of the members of cluster, had devoted contribution in the establishment of Corporate Debtor. However, the Corporate Debtor has continuously failed to respect the position of the Financial Creditor and has not settled the aforementioned dues till date.

2.3 The Financial Creditor submits that it is in financial trouble in its business due to the continuous default from the side of the Corporate Debtor. Total amount lent/ expenses incurred on behalf of the Corporate Debtor by the Financial Creditor amounts to Rs. 5,84,04,956/- since 2015 against which Rs. 3,57,59,388/- is received and balance payment amounting to Rs. 2,26,45,568/- remains unpaid till date. The Last payment / expense incurred by the Financial Creditor on behalf of the Corporate Debtor is on 31st March 2019, therefore that is considered as Default date for the purpose of this case.

2.4 The Financial Creditor submits that pursuant to section 238A of the Insolvency and Bankruptcy Code, 2016 read with 1. No. 137 at schedule to the Limitation Act, 1963, the limitation period shall be three years and the limitation period would have expired on 31 March 2022. However, as per order of Hon'ble Supreme Court wherein relaxation is provided vide MISCELLANEOUS APPLICATION NO. 21 OF 2022 (earlier MISCELLANEOUS APPLICATION NO. 665 OF 2021 and SUO MOTU WRIT PETITION (C) NO. 3 OF 2020), it is provided that, "The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings. "Thus, this application is within limitation period as prescribed under the Limitation Act, 1963.

3. The Financial Creditor have sent a demand letter to Corporate Debtor on 17.05.2022, demanding the entire amount within a period of 10 (Ten) days from the date of issuance of the letter and the same is delivered to the Corporate Debtor on 19.05.2022. The Financial Creditor has received no response from the Corporate Debtor.

Submissions of the Corporate Debtor:

4. The Corporate Debtor vide its Affidavit in Reply filed on 04.07.2023 have denied each and every contention raised by the Applicant in the present Application.

4.1 The Corporate debtor submits that no request was made to the Financial Creditor by the Corporate debtor. The Corporate debtor further submits that there exists no financial agreement between both the parties and there exists no agreed term and conditions including the repayment schedule of the amounts so advance, period of the advance, interest to be charged etc.

4.2 The Financial Creditor has not claimed any interest even in its demand notice dated 14.05.2022. Further, the amount payable to Shree Dhanvantari Pharmaceuticals has been disclosed as Sundry Creditors in the Audited Financial Statement of the Corporate debtor. Such a disclosure made in the Financial statement for year 2015-2016 and 2016-2017, bears the signature of the Applicants who were the directors of the Corporate debtor.

4.3 The Corporate debtor submits that the financial assistance extended by the Financial Creditor was not in the nature of the loan and neither there was an agreement on the return of the money paid or to charge any interest thereon. Further, the debt claimed in part IV of the present application does not match the amount demanded in the Demand Notice. Also, the financial assistance provided without any return date held for more than a decade and not bearing any interest or requiring to provide any additional benefit cannot be claimed as Financial debt.

4.4 The Corporate Debtor has neither any liability nor any obligation towards the Financial Creditor with respect to any purported claim as alleged by the Financial Creditor. Consequently, in the absence of existence of debt there is no question of default by the Corporate Debtor as a default is committed only when there is a debt due and payable by the Corporate Debtor.

4.5 Further the Financial Creditor has failed to produce any document on record in support of the alleged default nor has it made a case in support of being a Financial Creditor. The Ledger statements provided by the Financial Creditor has no merit as has not been acknowledged or signed by the Corporate Debtor.

4.6 The Financial Creditor has stated the date of default as 31.03.2019 in its Demand Notice dated 14.05.2022 but has failed to show how such date has been arrived at by the Financial Creditor.

Submissions of the Intervener in INVP. 44 OF 2023 and INVP. 46 OF 2023:

5. That the applicant herein is a partnership in the name and style of M/s. Shree Dhanvantari Pharmaceuticals. There are four partners of the firm, all holding $\frac{1}{4}$ share each in the partnership firm. Wherein, the Financial Creditor is a shareholder and co-promoter of the Corporate Debtor and was incorporated to promote Ayurvedic medicine in India.

6. The Financial Creditor and the Corporate Debtor are related parties. The understanding between the partners was that the transaction was a form of quasi-capital and the conduct of the firm for more than a decade was in line with this understanding. An application came to be filed u/s 7 of the Code against the Corporate Debtor vide Company Petition CP(IB) No. 1309/(MB) of 2022 without the other partners being made aware or being intimated or any agreement.

7. The partners of the Financial Creditor have not so far agreed to demand the repayment of Financial Assistance provided to the Corporate Debtor which has been advanced over more than a decade and sudden demand for repayment was sure to put the Corporate Debtor in serious financial trouble which is not in the interest of the Financial Creditor at this stage being a co-promoter of the Corporate Debtor.

8. Shri Nandkishore Jaynarayan Jethale, one of the Partner was a Director and directly in control of the affairs of the Corporate Debtor & the Applicant Firm since inception and most of the existence of the Corporate Debtor till his disqualification as a director of the company, was responsible for the present financial condition of both the entities.

9. Further, the Financials of the Financial Creditor (FY 2020 and FY 2021) in the application are also disputed and denied as the same has not been circulated and/or agreed upon and/or in the knowledge of the other partners of the firm of M/s. Shree Dhanvantari Pharmaceuticals in terms of the partnership deed dated 14th July 1992. Further, the appointment of Mr Dinesh Gopal Mundada having registration number IBBI/IPA-001/IP-P00286/2017-18/10530 as the Interim Resolution Professional has not been approved by all the partners of the firm M/s. Shree Dhanvantari Pharmaceuticals.

Reply of the Respondent in INVP. 44 OF 2023 and INVP. 46 OF 2023:

10. The Respondent submits that he neither holds the position of the promoter nor possesses any shareholding in the Corporate debtor. Further, every partner of the firm has an authority to act as a representative for all other partners in all firm related transactions and actions taken by a partner/partners, whether individually or collectively are legally binding upon all partners.

11. The Respondent also submits that the present Company Petition has been initiated jointly by two partners, who collectively constitute the majority of the partners. Therefore, the contention of intervener that authorisation from majority of partners was not obtained is false. Further, the Financials of the financial creditor for FY 2020 and FY 2021 were signed by two partners of the firm and as per clause 12 of the Partnership Agreement of the M/s. Shree Dhanvantari Pharmaceuticals it states that if any partner refuses to affix his signatures and refused to adopt the accounts without assigning any valid reason, the same shall be deemed to have been signed and adopted by him.

Findings:

12. This bench has gone through the documents and pleadings available on record and considered the arguments of both the Parties.

13. As per the material on record, this bench finds that the date of default is not specified under Part IV of the main petition. However, on perusal of the order dated 13.07.2023 it is observed that the Financial creditor was given an opportunity to amend Part IV, if desired.

14. Based on the documents placed on record, it is observed that as per additional affidavit filed by the Financial Creditor, the date of default is specified as 30.05.2022, whereas in the main petition the Financial creditor has on his own contended that, "the last payment/ expense incurred by the Financial Creditor on behalf of the Corporate debtor is on 31.03.2019, therefore that is considered as default date for the purpose of this case".

15. This Bench finds that there is no written agreement or otherwise to explain the nature of transaction or the event of default.

16. The Bench also takes note of the Demand notice dated 14.05.2022, in which the Financial Creditor has again stated that the Last transaction happened in March 2019 and has also stated the date of default as 31.03.2019. The Bench observes that there is no clarity on the date of default and neither the Applicant could explain the same.

17. Further, it is observed that one of the Partner of the firm himself is a Director and directly in control of the affairs of the Corporate Debtor & the Applicant Firm since inception. However, Shri Nandkishore Jaynarayan Jethale, the Partner of the Financial Creditor is the sole director totally in control of the affairs of the Corporate debtor. All the documents produced as evidences from both Financial Creditor and Corporate debtor are signed by the same person themselves putting a question on their reliability.

18. However, without prejudice to the above and without going into the merits of the case on whether the said transaction is covered u/s. 5(8) or the lack of clarity in the date of default as discussed supra this Bench observes that the present case is in the nature of a Partnership dispute as the present Financial Creditor is Partnership concern. It is observed that Intervention applications are filed by the other two partners of the Financial creditor opposing the present Petition under Section 7 of the Code stating that the present application u/s. 7 of the code was filed without the knowledge of other partners and without any authorisation letter. There are on-going disputes between the partners of the Financial Creditors over the demand made by the Applicant for repayment of proposed Financial Assistance extended to the Corporate Debtor. Further, as submitted by the Applicant, that the present Application has been filed and signed by two partners of the Financial Creditor, however on perusal of the Company petition it can be observed that there are only signatures of Shri Nandkishore Jaynarayan Jethale i.e. the Applicant. Therefore, the present Application is filed without the authorisation of the majority of partners as per

the requirement of the Partnership deed dated 14.07.1992.

19. As per the material on record, this Bench takes notes of various case laws relied by the Interveners i.e. in "Purshottam Umedbhai and Co. and Manilal and Sons AIR 1961 SC 325" and in "Bombay Trading Co, Mumbai vs. Jai Santoshi Maa Enterprises 2012(6) Mh.L.J". The relevant paragraph is reproduced herein:

Section 4 of the Indian Partnership Act, 1932, hereinafter referred to as the Act, states that:

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually 'partners' and collectively 'a firm' and the name under which their business is carried on is called the 'firm name' It is clear from this provision of the Act that the word "firm" or the "firm name" is merely a compendious description of all the partners collectively. It follows, therefore, that where a suit is filed in the name of a firm it is still a suit Order by all the partners of the firm unless it is proved that all the partners had not authorized the suit."

Further, the relevant section 12 and section 19 of the Partnership Act of 1932 is reproduced herein:

Section 12- The conduct of the business.—

Subject to contract between the partners, - (c)any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion, before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners; and(d).....

20. On perusal of the Partnership deed of the Financial Creditor dated 14.07.1992 placed on record, clause no. 29 states that, "All the question affecting the partnership business in so far as there is no contrary provisions in this Deed, shall, as far as possible, be decided unanimously, upon failing to obtain such unanimity, each partner shall have one vote and the question shall be decided by majority". Therefore, the present petition u/s.7 of the code is in violation of clause 29 of the said Partnership deed because the filing of the present petition is done without the unanimous decision of the partners and was neither decided by majority as two of the partners of the Financial creditors are not in favour of the present petition and are opposing the same.

21. Whereas clause no. 31 of the said Partnership deed states that, "All disputes, differences and questions whatsoever which shall either during the continuance of the partnership or thereafter arises between the partners or their representative and/or any other partner touching these presents or the construction or application thereof or any clause or thing therein contained/ account, valuation/division of the assets and payment of debts/liabilities to be

made hereunder to any act, deed or omission made by the party or as to any matter in any way relating to the partnership business or the affairs or the rights, duty or liabilities of any person under these presents shall be referred to single arbitrator in case the parties agree upon one, or otherwise to more than one arbitrator, as the case may be, one to be appointed by each of the party to the dispute and to an umpire in case of disagreement between the arbitrators. THIS REFERENCE shall be subject to the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof for the time being in force”.

22. This Bench is of the view that the present case is a dispute between the partners in a Partnership firm in violation of Clause 29 and Clause 31 of Partnership deed of the Financial Creditor which provides that disputes between partners of the Partnership firm shall be referred to the arbitrator subject to the provisions of the Indian Arbitration Act, 1940. This Bench is of the considered view that this Tribunal cannot adjudicate upon the disputes pertaining to Partnership Act.

23. Considering the facts placed before us, this bench is of the view that, the present petition is not maintainable because it is filed without the requisite authority and this is a Partnership dispute. Therefore, in view of the above we find that the present case deserves to be dismissed under Section 7 of the Insolvency and Bankruptcy Code, 2016.

ORDER

24. The Petition bearing CP (IB) No.1309/MB-IV/2022 filed by SHREE DHANVANTARI PHARMACEUTICALS (“Financial Creditor”), seeking initiation of Corporate Insolvency Resolution Process (CIRP) in the matter of KONKAN AYUR PHARMA PRIVATE LIMITED., the Corporate Debtor and the INVP. 44 OF 2023 and INVP. 46 OF 2023 is Rejected.

25. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The rights of the petitioner before any other judicial forums shall not be prejudiced on the grounds of dismissal of the present petition.