

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)
(Part Heard Bench)

IA. NO. 2750/ND/2022
IN
Company Petition No. (IB)-1243(ND)/2018

IN THE MATTER OF:

India SME Asset Reconstruction Company Limited

... Applicant/Financial Creditor

Versus

M/s Medirad Tech India Limited

... Respondent

AND IN THE MATTER OF IA. NO. 2750/ND/2022:

Hemalata Hospitals Limited

Through its Authorized Representative,
D-155, Sarita Vihar,
New Delhi – 110076

... Applicant

VERSUS

Sh. Siba Kumar Mohapatra

Resolution Professional of
Medirad Tech India Limited
Flat No. E/402, Baishnav Vihar,
Bomikhal, Near Durga Mandap,
Bhubaneswar - 751010

... Respondent

Order Delivered on: 09.08.2023

SECTION: Section 60(5) of IBC 2016

CORAM:

SH. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (J)

SH. L.N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Tishampati Sen, Adv. Shubhanshu Gupta,
Adv. Kartik Pant

For the Respondent : Adv. Meghna Rao

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

The present IA No. 2750 of 2022 has been filed by Hemalata Hospitals Limited (hereinafter referred to as, the '**Applicant**' or '**HHL**') under Section 60(5) of IBC, 2016, read with Rule 11 of NCLT Rules, 2016 seeking the following reliefs:

- "a) Allow the instant application*
- b) Set-aside the act of termination of the Service Agreement dated 01.09.2006, Lease Agreement dated 31.12.2013 along with Supplementary Agreement dated 01.01.2014 by the Resolution Professional;*
- c) Pass ad-interim directions restraining the Resolution Professional and the Committee of Creditors to act on the voting and decision relating Resolution Plans otherwise will make the instant Application infructuous;*
- d) Pass such other/further and other reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."*

2. To put the facts succinctly, the underlying main Petition CP (IB)-1243/ND/2018 was filed by M/s India SME Asset Reconstruction Company Limited against the Corporate Debtor namely, M/s Medirad Tech India Limited under Section 7 of IBC, 2016, which was admitted vide Order dated 08.12.2021 by this Adjudicating Authority and the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor was initiated. The Corporate Debtor at present is represented through its Resolution Professional (RP) Sh. Siba Kumar Mohapatra (**Respondent**).

3. It is stated by the Applicant that the Corporate Debtor is the absolute owner of a Speciality Hospital running in the name and style of “Hemalata Hospitals & Research Centre” (hereinafter referred to as **‘Hospital’**) set up by the Corporate Debtor at P/2, Jaydev Vihar, Nalco Square, Bhubaneswar, Odisha. The Corporate Debtor owns all the plant, Machinery, Equipment, furniture, fixture, building, land, and open space of the said Hospital. The Applicant has further stated the following:

3.1 For the purpose of running the said Hospital, a Service Agreement dated 01.09.2006 was entered into between the Corporate Debtor and the Applicant, wherein it was agreed that the Applicant shall manage and run the medical services in the Hospital owned by the Corporate Debtor.

3.2 Under the said Agreement, the Applicant was responsible for providing various services to the Hospital including patient care through its own doctors/consultants and nurse and other staff; deciding & fixing the tariff and implementation of pricing policy in the Hospital etc., more particularly as provided under Clause 2 of the said Agreement.

3.3 The Agreement provided for the revenue sharing as consideration whereby the revenue was shared in the ratio of 15% : 85% between the Applicant and the Corporate Debtor respectively. The Corporate Debtor was to furnish within 30 (thirty) days from the expiry of the respective year to the Applicant, the complete and accurate statements of the gross revenue of the Hospital for that year and all payments were to be reconciled and any excess or shortfall in payment was to be duly debited or credited to the respective account.

3.4 The tenure of the Agreement was 40 (Forty) years from the date of its execution with a provision of further renewal. Clause 6.2 specifically provided that the Agreement may be terminated by mutual consent of the parties expressed in writing. The termination clause is reproduced herein under:

“6. Termination

6.1 *Subject to the terms of this Agreement, this Agreement shall come into force effective from the date hereinabove first mentioned and remain valid for a period of 40 (Forty) years from the said date, unless terminated earlier in accordance with the provisions contained hereinafter.*

This Agreement may be renewed/modified for such further periods on such terms and conditions as may mutually be decided by the parties.

6.2 *This Agreement may be terminated by mutual consent of the Parties expressed in writing.*

6.3 *Notwithstanding anything contained above, on the termination of the Agreement, the clause on arbitration will continue to persist until such time that any dispute between the Parties has been resolved.”*

(Emphasis supplied)

3.5 The aforesaid clause clearly mandated termination of the Agreement by mutual consent and anything done contrary to the termination of the Service Agreement is contrary to the contractual obligations.

3.6 To strengthen the financial viability in the aforesaid Service Agreement, the parties decided to bring additional safeguards to the Agreement, and accordingly, on 31.12.2013, a Lease Agreement was entered into between the Corporate Debtor and Applicant wherein the Corporate Debtor agreed to lease the Hospital including the equipment, furniture & fixture at an annual rental of Rs.9,00,000/- to Applicant. The Applicant was also responsible for maintaining the facility along with the equipment, Plant and machinery,

furniture, and fixture in good working order, for running the day-to-day medical services and management of the Hospital. In case of any dispute between the two agreements, the terms of the Lease Agreement were to prevail.

3.7 The Lease Agreement was effective from 31.12.2013 and was binding for a period of 30 (thirty) years with a provision of further renewal. The Lease Agreement further provided that the same can be revoked on mutual consent by giving 30 days written notice to the other party and the acceptance of the same by the other party. The revocation clause is reproduced hereunder:

“2(d). The lease arrangement can be revoked on mutual consent by giving a 30 days written notice to the other party and the acceptance of the same by the other party”

3.8 A Supplementary Agreement dated 01.01.2014 was signed between the Corporate Debtor and the Applicant amending the Lease Agreement dated 31.12.2013 with respect to the payment obligations.

3.9 During the period of 2006-2021 the Corporate Debtor and the Applicant were both honoring the terms of the Agreements. There was no default in payment of expenses of any staff, or employee consultant. During the aforesaid period, there was steady growth and the overall business was profitable.

3.10 In the meantime, on adjudication of a Section 7 Application, CIR Process was initiated against the Corporate Debtor with effect from 08.12.2021, and Mr. Siba Kumar Mohapatra was appointed as the Interim Resolution Professional, who subsequently got confirmed as RP. The RP vide its letter dated 30.05.2022 abruptly and before the end of the tenure, terminated both the Agreements on illegal grounds. The RP, inter-alia stated that the

Agreements were creating hindrances in the Resolution of the Company, and at the request of the Prospective Resolution Applicants (PRAs), the said Agreements were terminated. Pertinently, the termination is illegal as the it is contrary to the provisions of the Agreements which provided for termination only by mutual consent or by 30 days' notice in case of the Lease Agreement.

3.11 The Applicant vide its letter dated 02.06.2022 duly replied to the illegal termination and the RP was requested to withdraw the termination letter within 48 hours and not to act on the said termination. The RP replied to the letter on 06.06.2022 reiterating the termination. The RP stated that the Lease Agreement dated 31.12.2013 was not registered and both agreements were inadequately stamped. The RP also informed that the PRAs have put forth a condition of terminating the Agreements.

3.12 The Hon'ble Supreme Court in the matter of **Gujarat Urja Vikas Nigam Limited vs. Amit Gupta & Ors (2021) 7 SCC 209** opined that the termination of an agreement which is the main source of revenue generation of the Corporate Debtor is against the objective of the Code which envisages that the Corporate Debtor should be preserved as a going concern. The termination of the Agreements was without any application of mind and without weighing the criticality of the service being provided by the Applicant to protect and preserve the value of the Corporate Debtor and to ensure the management of operations of the Corporate Debtor as a going concern.

3.13 In light of the aforesaid facts and position of law, it is submitted that the termination of the Agreements is bad in law and is liable to be set aside. Further, the RP and the CoC ought to be restrained from acting on the voting

and decision relating to Resolution Plans which otherwise will make the instant Application infructuous.

4. On issuance of a notice, the Respondent filed its reply and written submissions stating mainly the following:

4.1 It was the poor financial condition of the Corporate Debtor that led to default in payments to sundry creditors like medicine suppliers, and the Corporate Debtor incurred losses consistently from F.Y. 2016-2017 till F.Y. 2018-2019. Thus, the Corporate Debtor defaulted in repaying the loan amount to the Financial Creditors as a consequence of which the application for commencement of CIRP was admitted.

4.2 While further perusing the records of the Corporate Debtor, the RP observed that these transactions, i.e., the Service Agreement and the Lease Agreement were related party transactions, as per the Audited Financial Statements of the Corporate Debtor and the Applicant.

4.3 In response to the request, the Company Secretary of the Corporate Debtor furnished us a copy of the Lease agreement executed on 31.12.2013 between the Corporate Debtor and the Applicant. The copy of the Service Agreement dated 01.09.2006 was received at a much later date. The original copies of the Agreements were not available in the Company records and are not provided by the Suspended Board of Directors till date despite several reminders.

4.4 In fact, the Applicant had no restriction from the Respondent/RP whatsoever, in any manner for providing services to the Corporate Debtor until the Agreements were terminated on 30.05.2022.

4.5 It has been almost 6 months since the initiation of CIRP, and the Applicant did not initiate or have any discussion with the Respondent/RP regarding their plan for the operation and management of the hospital and providing service as mandated in the agreements.

4.6 Thus the allegation that the Respondent /RP is not experienced is absolutely false and baseless, as the responsibility to provide the services was of the Applicant. It is the Applicant's inability to provide services after the initiation of CIRP that led to a stoppage in the functioning of the Hospital.

4.7 It was only when there was the surreptitious removal of certain original land documents on the 15th of June 2022 from the Office files by 2 employees, including one suspended director, their entry was restricted.

4.8 Another reason for the restriction was the unauthorized entry to the premises of the CD by 2 outsiders (reportedly friends of Dr. A.K. Rath) on 23rd June 2022 and threatening staff of CD. Even there was a report of Physical assault and verbal abuse to security staff by the Suspended Director Dr A. K. Rath on 04th October 2022. The entry is still provided subject to approval from the Respondent.

4.10 Even after six months of CIRP, the Applicant/ Hemlata Hospital Limited (HHL) failed to provide the operation and management of the hospital and provide service as stipulated in the agreements. That it has been almost 6 months since the initiation of CIRP, but the Applicant did not initiate or have any discussion with the Respondent Resolution Professional regarding their plan for the operation and management of the hospital and providing service as mandated in the agreements.

4.11 The last part-time Doctor engaged on a regular basis by HHL was Dr M.K. Behera, who left the job on 18th November 2021 and his last service was on 29th November 21, which was much before initiation of CIRP.

4.12 The lease agreement had to be terminated for the successful resolution plan to take effect. The new Successful Resolution Applicant cannot be made to run from pillar to post to remove the Lessee.

4.13 Further, the Operational Creditors including the Government dues, and Workmen & Employees shall be paid 100% of the claim admitted by the Resolution Professional.

4.14 Even the unsuccessful Resolution Applicant had requested for termination of the above two related party agreements as a pre-condition for their offer.

4.15 Therefore, the Termination Notice dated 30.05.2022 served on the Applicant is legitimate in nature and is critical to maintain the viability of the Corporate Debtor as a going concern, maximize the value of its assets, and improve the likelihood of its insolvency resolution.

4.16 It is pertinent to note that the Lease Agreement dated 31.12.2013 between the Corporate Debtor and the Applicant is also not registered. As per Section 17 (1) (d) of the Indian Registration Act, 1908, the registration of lease of immovable property from year to year, or for any term exceeding one year is compulsory. Further, the Lease Agreement, as well as the Service Agreement, do not appear to be stamped adequately.

5. The Applicant has filed its rejoinder and stated that:

5.1 A bare perusal of the reply filed by the Respondent makes it clear that the actions of Resolution Professional in illegally initiating the termination of the Agreements under question being Service Agreement dated 01.09.2006, Lease Agreement dated 31.12.2013 along with Supplementary Agreement (hereinafter “Agreements”) are void and beyond the powers granted to it by the Insolvency and Bankruptcy Code, 2016. The RP has failed to provide any cogent reasons or any substantial provision of law to justify the illegal actions taken by it against the Applicant herein.

5.2 Even though there is no direction from this Adjudicating Authority of not to allow the Applicant or its staff to enter the Hospital premises, the RP has been illegally restricting the use of the premises. The expensive medical equipment owned by the Applicant are lying without any supervision and the Applicant is not being allowed to inspect or use the same.

5.3 Even the Applicant's vehicles are inside the Hospital premises and the RP is not allowing the Applicant's staff inside.

5.4 The computers belonging to the Applicant are now being used by the Corporate Debtor and restriction in access is hampering and delaying the statutory compliances to be undertaken by the Applicant.

5.5 The RP has placed on record the Financial Statements of the Corporate Debtor for FY 2016-17 till FY 2018-2019. As per the Statements, the Revenue of Corporate Debtor for various years is as follows:

Year ending on 31.03.2016	INR 5,74,76,844/-
Year ending on 31.03.2017	INR 5,93,57,753/-
Year ending on 31.03.2018	INR 5,76,84,308/-
Year ending on 31.03.2019	INR 5,29,49,139/-

The Corporate Debtor had a stable revenue over the years because of the continuation of the Agreements with the Applicants. The continuing revenue over the years clearly shows that the Agreements were never a loss-making arrangement. In fact, being the sole source of revenue for the Corporate Debtor, and also for the Applicant, the Agreements played a major role in repaying the principal and interest amounts to various Lenders during their respective terms.

5.6 Pertinently, on multiple occasions, the Applicant extended its support to the Corporate Debtor in payment of loan amount to Banks. The Applicant facilitated the payment of Rs.7.75 Crores against the principal amount of Rs. 8.4 Crores to Technology Development Board, one of the creditors between 2015 to 2017. In furtherance of the same, it is worthwhile to note that in the year 2010 when the SARFAESI proceedings were initiated against the Corporate Debtor by IDBI, the Applicant ensured the payment of Rs. 50 Lakhs to IDBI and further an amount of Rs. 75 Lakhs were deposited in the Hon'ble High Court of Odisha by the Applicant in the year 2012 for fulfilling the conditions imposed by the High Court for stay of the SARFAESI proceedings which allowed the continuation and sustenance of the operations of the Hospital. The Corporate Debtor did not have access to even Working Capital since 2005, and it was the Applicant who infused money to keep the Corporate Debtor as a going concern.

5.7 The equipment possesses complex and sophisticated machinery and without proper care will soon become unserviceable, thus causing irreparable

loss to the Applicant. More so, access to the Applicant to its own property is not being provided by the RP, which is a clear violation of statutory and constitutional rights leading to a complete financial and operational deterioration of the Applicant. The RP has provided no justification for not allowing the personnel of the Applicant to take care of these equipment. The medical equipment that are currently in use since 2007 onwards are all in the stock of the Applicant. All the purchases are done through the Applicant's account only. The Corporate Debtor's equipment is only those that were purchased before 2007. The RP has physically taken over the premises and the Applicant is not being allowed to inspect the equipment. The hospital today is running because of the equipment purchased through Hemalata.

5.8 The Applicant and the Corporate Debtor are related party is a known fact and the same is reflected in the Balance Sheets since the year 2006. The requirement of NoC from the creditors for the purpose of entering into a lease agreement never existed. The Service Agreement was entered into in the year 2006 and the Lease Agreement was executed in the year 2013. The Financial Creditors were very much aware of these agreements as it was the sole source of revenue and business for the Corporate Debtor. The Creditors were also aware that the loan amount repayment is being done through the revenue generated by the Applicant. The e-mail dated 23.05.2022 issued by the RP suggests that it was the RP who was adamant to terminate the agreements and the Financial Creditors had no role to play. The basis for terminating the Agreements in the said e-mail is the non-submission of the NOC. To the contrary, the original Petitioner i.e., ISARC which also holds the highest voting

rights in the CoC, in its e-mail dated 24.05.2022 left it to the RP to terminate the agreements. At this stage, there was no statement by the RP to the effect that the Agreements erode the financial credibility of the Corporate Debtor.

6. We heard the submissions of both parties and perused the documents and Written Submissions placed on record. After going through the pleadings, we observe that through the present application, the Applicant has challenged the termination of the Service Agreement dated 01.09.2006, the Lease Agreement dated 31.12.2013, and the Supplementary Agreement dated 01.01.2014.

7. On perusal of the record, it is observed that the Respondent/RP terminated the Lease Agreement vide its termination notice dated 30.05.2022. The Applicant has contended that the RP terminated the lease without the written consent of both parties in violation of Clause 6 of the Lease Agreement dated 31.12.2013.

8. Per Contra, the RP has contended that the Applicant is a Related Party of the Corporate Debtor. The same is also admitted by the Applicant in its Rejoinder. He has further contended that the PRAs made a condition that for submission of the Resolution Plan, such related party Agreements need to be terminated. Hence, in the interest of the Corporate Debtor, the Agreements under reference were terminated.

9. Against this backdrop, we would like to examine the submissions of both parties. Undisputedly, as admitted by the Applicant in its rejoinder, the Corporate Debtor and the Applicant in this IA are related parties to each other.

The relevant averment made by the Applicant in para 15 of the Rejoinder is reproduced below:

“15. That the Applicant and the Corporate Debtor are related party is a known fact and the same is reflected in the Balance Sheets since the year 2006. The requirement of NoC from the Creditors for the purpose of entering into a lease agreement never existed. The Service Agreement was entered into in the year 2006 and the Lease Agreement was executed in the year 2013.....”.

10. Hence, a question arises - **Could the RP during CIRP continue the operation of these “Agreements”, which are “related party transactions”?** In order to find an answer to this question, we refer to the duties of the RP as listed in Section 25 of IBC 2016, which reads thus:

25. Duties of resolution professional. -

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: -

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

¹[(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.]

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter

III, if any; and

(k) such other actions as may be specified by the Board.

On perusal of the contents of Section 25 of IBC 2016, we do not find any explicit provision in the duties of RP dealing with the related party transaction. Hence, we would now find out whether such transactions could be carried out with the approval of the CoC. Accordingly, we refer to Section 28 of IBC 2016, which is reproduced below:

28. Approval of committee of creditors for certain actions. -

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely: -

(a) raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) create any security interest over the assets of the corporate debtor;

(c) change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) record any change in the ownership interest of the corporate debtor;

(e) give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) undertake any related party transaction;

(g) amend any constitutional documents of the corporate debtor;

(h) delegate its authority to any other person;

(i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) make any change in the management of the corporate debtor or its subsidiary;

(k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions under sub-section (1).

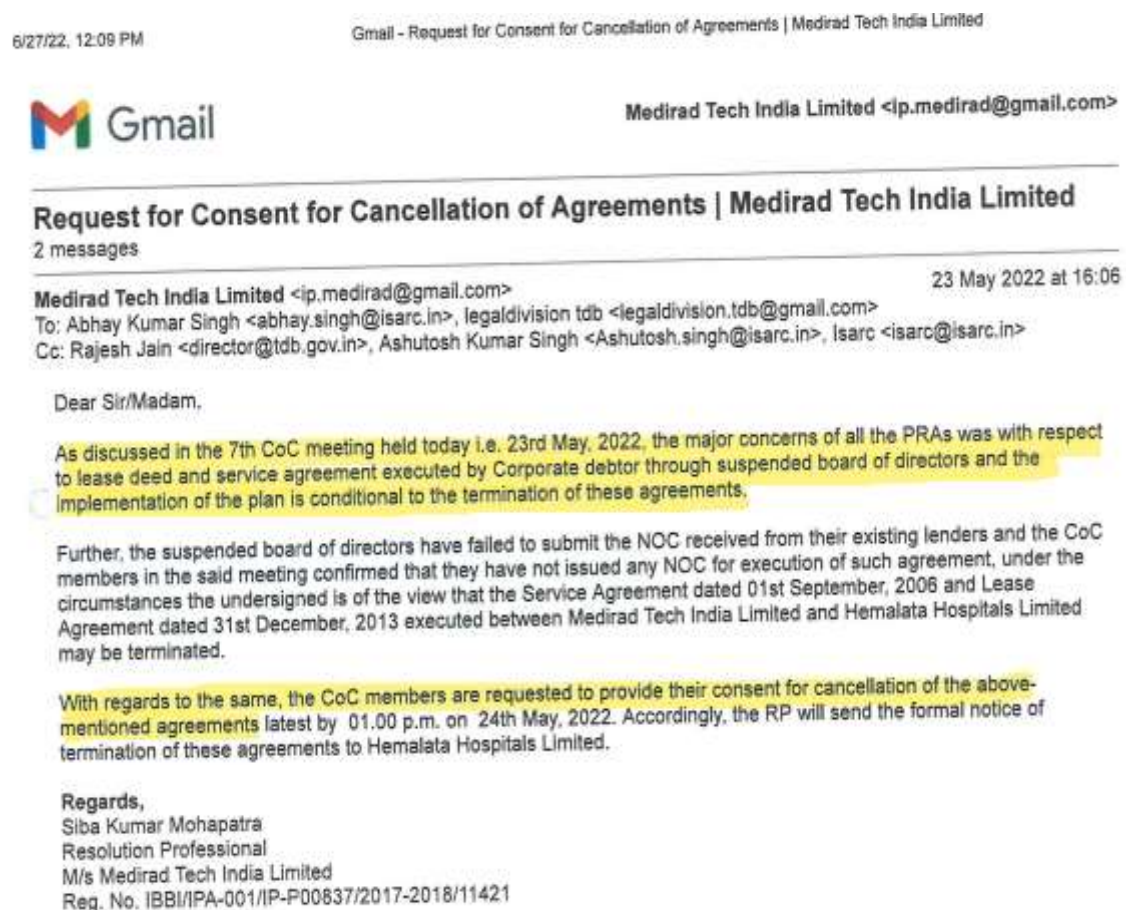
(3) No action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of ¹[sixty-six] per cent. of the voting shares.

(4) Where any action under sub-section (1) is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional under sub-section (4) to the Board for taking necessary actions against him under this Code.

On the bare perusal of the provision contained in Section 28(1)(f) read with the provision under Section 28(3) of IBC 2016, we find that the “related party transactions” cannot be undertaken or carried out by the RP during the period of CIRP without the knowledge and approval of CoC with 66% of the votes.

11. From the e-mail dated 23.05.2022 sent by RP to the members of the CoC (filed by RP as part of the reply to the instant IA), it is noticed that in the 7th CoC meeting held on 23.05.2022, a major concern of all the PRAs was with regard to the lease deed and service agreement executed by the CD through the suspended board of directors and implementation of the Resolution Plan being conditional to the termination of these agreements. Accordingly, the RP sought the consent of the CoC members for the cancellation of the above-mentioned agreements. The e-mail dated 23.05.2022 reads thus:



12. From the record, it is seen that both the CoC members had either issued expressed NOC or not objected to the termination of the aforesaid Agreements. The e-mail reply dated 24.05.2022 from ISARC (having 66.54% voting shares in the CoC) to the RP, conveys their no objection thus:

----- Forwarded message -----

From: **Abhay Kumar Singh** <abhay.singh@isarc.in>

Date: Tue, May 24, 2022 at 9:47 AM

Subject: Re: Request for Consent for Cancellation of Agreements | Medirad Tech India Limited

To: Medirad Tech India Limited <ip.medirad@gmail.com>

Cc: Rajesh Jain <director@tdb.gov.in>, Ashutosh Kumar Singh <Ashutosh.singh@isarc.in>, ISARC <isarc@isarc.in>, legaldivision tdb <legaldivision.tdb@gmail.com>

Dear Sir,

For your information we have not given any approval regarding the subject agreement. Hence its upon you being the RP where you want to terminate or keep alive.

As we have not given any approval, so we have no objection for termination.

Warm Regards,

Abhay Kumar Singh

Chief Manager

India SME Asset Reconstruction Company Ltd.

@SIDBI BO

Constantia Building Floor VIII, A - Wing,

11, Dr U N Brahmachary Street, Kolkata-700017.

Tel.No. 033-40445272 ,Mobile No.7980394478.

website : www.isarc.in

Further, the other member of the CoC i.e., TDB (having 33.46% voting shares in the CoC) had also responded vide its e-mail dated 26/25.05.2022 stating that they had not given any consent for either of the Agreements and hence, the termination/cancellation of the Agreements can be done by RP. The said e-mails read thus:



Medirad Tech India Limited <ip.medirad@gmail.com>

Fwd: Request for Consent for Cancellation of Agreements | Medirad Tech India Limited

1 message

Siba Mohapatra <sibmohapatra@yahoo.co.in>
To: ip.medirad@gmail.com

26 May 2022 at 20:42

Sent from my iPad

Begin forwarded message:

From: legaldivision tdb <legaldivision.tdb@gmail.com>
Date: 26 May 2022 at 19:42:31 IST
To: Siba Mohapatra <sibmohapatra@yahoo.co.in>
Subject: Fwd: Request for Consent for Cancellation of Agreements | Medirad Tech India Limited

Dear Sir,

Kindly find the inputs suggested by our Legal consultant.

This is forwarded to you for consideration and necessary action.

Regards,
T.K.SivaSankari.

----- Forwarded message -----

From: Banusri Velpandian <banusriv@gmail.com>
Date: Wed, 25 May 2022, 12:12
Subject: Re: Request for Consent for Cancellation of Agreements | Medirad Tech India Limited
To: legaldivision tdb <legaldivision.tdb@gmail.com>
Cc: Nalini Negi <assistantlawofficer1@tdb.gov.in>

Dear Ms Nalini,

As there is no specific NOC that has been issued by TDB to M/s Medirad for either services agreement or lease agreement with Hemlata hospitals, the following can be conveyed to the RP;

1. NOC has not been issued for either services agreement or lease agreement with Hemlata hospitals by TDB
2. Termination/ cancellation or any other form of discontinuation of the above stated agreements can be undertaken by the RP who has the statutory authority to govern the company's affairs keeping in view that such action is essential for the CIRP

Also since I have court appointed Mediation(s) on every Friday afternoons, the proposed CoC schedule has to be changed/postponed

Further, the arbitration proceedings of TDB matters also have been scheduled to be heard in the same time slot

RP to be requested for alternate date and time for the upcoming CoC

With best regards,

Banusri.

Dr.Banusri.V, FCI Arb, MICA
Advocate, PhD in Law

13. It is further noticed from the Minutes of the 8th CoC meeting held on 26.05.2022 under Agenda Item No. A-6: “To discuss on the revised Resolution Plans submitted by the Prospective Resolution Applicants (PRAs)”, the CoC had discussed the issue of the cancellation of the Lease Deed and the Service Agreement with the “related party of the CD” being central to the plans submitted by both the PRAs. The discussion and the consent of CoC members as recorded in the minutes reads thus:

The Chairperson submitted that the cancellation of Lease deed and the Service Agreement with the related party of the CD was central to the Plans being submitted by both the PRAs. The Chairperson advised CoC that both the members of CoC have confirmed that they have not given their approval/NOC for the above two agreements executed by MTIL with Hemalata Hospitals Limited. The Chairperson advised the CoC that the PRAs do not consider the above two agreements beneficial to the success of the CD and accordingly they have strongly requested for termination of the agreements. The Chairperson requested CoC members to convey their approval to RP for termination of the agreements. While ISARC agreed for termination of the agreements, TDB representative opined that termination/cancellation of the above stated agreements can be undertaken by the RP who has the Statutory authority to govern the Company’s affairs keeping in view that such action is essential for the CIRP.

The Chairperson noted the view of CoC members and advised them that he will take suitable steps accordingly.

In a nutshell, in terms of Section 28(1)(f) read with Section 28(3) of IBC 2016, the “related party transactions” cannot be undertaken by the RP without the approval of the CoC with 66% of the votes. In the instant case, the CoC instead of giving approval to continue with “the related party transactions in terms of Lease Deed and Service Agreements” has given its consent to terminate those related party agreements, in its commercial wisdom. **Hence, we find no illegality committed by the RP in terminating the Service Agreement dated 01.09.2006, the Lease Agreement dated 31.12.2013 along with Supplementary Agreement dated 01.01.2014.**

14. Even otherwise, on a perusal of Clause XIII of the Resolution Plan approved by the CoC, it is noticed that the Resolution Applicant has sought termination of the Lease and Service Agreements. The contents of the Concessions sought by the SRA are reproduced below for immediate reference:

XIII. REMEDIES / CONCESSIONS DEMANDED BY AIOPL:

AIOPL prays to the R.P and Committee of Creditors that the two below mentioned existing agreements between Medirad Tech India Limited (Corporate Debtor) and Hemlata Hospitals Limited need to be terminated before AIOPL makes any payment towards the Resolution and before taking hand over of the Hospital.

- a) Service Agreement entered on 1st day of September 2006 between Medirad Tech India Ltd and Hemalata Hospitals Ltd
- b) Lease Agreement 31st Day of December 2013 between Medirad Tech India Ltd and Hemalata Hospitals Ltd

15. Thus, the Resolution plan proposal made by the SRA is contingent upon the termination of the aforementioned Agreements. Hence, for a moment for the sake of argument, even if we agree to the contention of the Applicant that the agreements could have been set aside only by mutual consent of the parties or advance notice, the fact remains that the SRA has sought the termination of both the Service Agreement dated 01.09.2006 and Lease Agreement dated 31.12.2013 as a concession and condition under the Resolution Plan. Therefore, we would still like to examine **Whether, on approval of the Resolution Plan, the SRA is empowered to terminate the “related party contracts/Agreements”**.

16. It is in this background, we refer to Regulation 39(6) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which deals with the approval of the Resolution Plan and reads thus:

“39. Approval of resolution plan.

1..

2..

3..

4..

5..

6. A provision in a resolution plan which would otherwise require the **consent of the members** or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders’ agreement, **joint venture agreement or other document of a similar nature**, shall take effect notwithstanding that such consent has not been obtained.”

(Emphasis Supplied)

17. At this juncture, we refer to the Judgement dated 07.03.2023 in the matter of **“IDBI Bank Vs. Jaypee Infratech Limited”** in Company Petition No. (IB)-77/ALD/2017, wherein the following was observed with respect to the termination of the related party contracts:

*“124. On perusal of Regulation 39(6) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it is evident that inter alia, lack of consent of shareholders/members of JIL i.e., JAL (being the holding company) for joint venture agreement or other document of a similar nature cannot create any hindrance in approval of the Resolution plan. Therefore, we are of the view that the contracts/agreements, to which JAL is referring, will come under the ambit of Regulation 39(6). A similar observation was given by the Hon’ble NCLT Principal Bench in the matter of **State Bank of India Vs. Bhushan Steel Limited** dated, (2018) ibclaw.in 274 NCLT, dated 15.05.2018, which reads as under:*

“67. A perusal of Regulation 38 would clearly show that by virtue of mandatory contents of the resolution plan discussed under Section 30 and 31 of the Code the requirement of Regulation 38

stand fulfilled. However, the objections raised under Section 29A (a) and (d) of the Code which are discussed separately. Even the requirement of Regulation 39 stand fulfilled as the RP has submitted the resolution plan of H1 resolution applicant as approved by the CoC to this Tribunal with the certification that the contents of the resolution plan meet all requirements of the Code and the CIRP Regulations and that the resolution plan has been duly approved by the CoC. **There is no scope for argument left that shareholder, or parties to joint venture agreement or anyone holding similar document need to accord sanction in view of the provisions of Regulation 39(6) of the CIRP Regulations. Regulation 39 (6) clarifies that the resolution plan as approved by the CoC must take effect notwithstanding the requirement of consent of the members or partners of the Corporate Debtor under the terms of the constitutional documents of the Corporate Debtor, shareholders' agreement, joint venture agreement or other document of a similar nature.**”

(Emphasis Supplied)

The aforesaid judgment was upheld by the Hon'ble NCLAT passed in the matter of *Bhushan Energy Limited vs. State Bank of India and Ors.* in CA(AT)(I) 267 of 2018, dated 10.08.2018 and even the challenge to it before the Hon'ble Supreme Court was withdrawn [*M/s. Bhushan Energy Limited vs. State Bank of India in Civil Appeal No. 8517 of 2018, dated 10.01.2020*].

125. In view of the above findings, we find no illegality in the clause seeking termination of the related party contracts of JAL.”

18. In view of the Judgement in “IDBI Bank Vs. Jaypee Infratech Limited” (2023) ibclaw.in 91 NCLT and “State Bank of India Vs. Bhushan Steel Limited” dated, (2018) ibclaw.in 274 NCLT, dated 15.05.2018, it is evident that the Related Party Contract/Agreement can be sought to be terminated via the relevant Clauses in the Resolution Plan.

19. Hence, even if we consider the prayer of the Applicant for restoring the Agreements, then also they will stand terminated vide the provision made/sought by the SRA under the Resolution Plan duly approved by the Committee of Creditors (CoC).

20. In the instant case, the Respondent/RP has specifically stated in its written submissions and reiterated during the hearing that SRA has made a stipulation in its Resolution Plan to seek termination of the Related Party Contracts/Agreements.

21. To conclude, (a) In terms of Section 28(1)(f) read with Section 28(3) of IBC 2016, the “related party transactions” cannot be undertaken by the RP during the period of CIRP without the approval of the CoC with 66% of the votes. In the instant case, the CoC instead of giving approval to continue with “the related party transactions in terms of Lease Deed and Service Agreements” gave its consent to terminate or did not object to termination of those related party agreements, in its commercial wisdom; and (b) In view of the settled position, related party contracts can be sought to be terminated via the relevant Clauses in the Resolution Plan. **Therefore, we find no illegality committed by the RP in terminating the Service Agreement dated 01.09.2006, Lease Agreement dated 31.12.2013 along with Supplementary Agreement dated 01.01.2014.**

22. Hence, the application is Dismissed, being devoid of merits.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(BACHU VENKAT BALARAM DAS)
MEMBER (J)