

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, BENGALURU**
*(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)*
(Through web-based Video-Conferencing platform)

C.P. (IB) No.61/BB/2022
U/s 9 of I&B Code, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

M/s. Otsuka Pharmaceutical India Pvt. Ltd.

(Formerly known as 'Claris Otsuka Pvt. Ltd.')

Registered Office at

Village Vasana, Chacharwadi,

Tal.-Sanand,

Ahmedabad – 382 213.

... Petitioner/Operational Creditor

Versus

**M/s. Karnataka State Medical Supplies
Corporation Limited**

Registered Office at:

No.1, Dr. Siddaiah Puranik Road,

K.H.B. Colony, Magadi Road,

Basaveswaranagar,

Bengaluru – 560 079.

... Respondent/Corporate Debtor

Order delivered on: 04th July, 2023

Coram: 1. Hon'ble Ms. Bidisha Banerjee, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri Pranay Prakash, Adv.

For the Respondent : Ms. Sumana Baliga, Adv.

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The instant Petition has been filed on 07.01.2022 u/s 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter as 'IBC / Code') r/w Rule 6 of the

Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by M/s. Otsuka Pharmaceutical India Private Limited (hereinafter as 'Petitioner / Operational Creditor') with a prayer to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Karnataka State Medical Supplies Corporation Ltd. (hereinafter as 'Respondent / Corporate Debtor') for defaulting an amount of Rs.2,44,67,400/- due and payable by the Corporate Debtor.

2. The Corporate Debtor (CD) – M/s. Karnataka State Medical Supplies Corporation Ltd. is a Government Company converted from '*Karnataka State Drug Logistics & Warehousing Society*' and is registered under the provisions of Companies Act, 2013 with CIN: U85100KA2020SGC140139, incorporated on 23.10.2020, with its registered office in Bangalore. Hence, the jurisdiction lies with this Adjudicating Authority. Its Authorised Share Capital is Rs. 1,00,00,000/- and Paid-up Share Capital is Rs.5,00,000/-. The CD is *inter alia* involved in the human health activities.

3. Brief facts of the case as stated by the Petitioner are as under:

(a) The Operational Creditor (OC) is a renowned pharmaceutical company of India and is engaged in the business of manufacturing, marketing and trading of intravenous solutions, parenteral nutrition, etc. in India and overseas. The CD had floated tenders from time to time for procurement of medicines, surgical goods, medical equipment and insecticides for the health care institutions under the Government of Karnataka. Pursuant thereto, the OC had submitted their bids and six different tenders were awarded to the OC during September 2015 to July 2020.

(b) Details of the said six different tenders are as under:

- i. *KDL/E-TND/MED.ED/03/14-15 (IND-242) dated 16.05.2014 ('Tender 1')*
- ii. *KDL/E-TND/07-DRUGS/19/2014-15 (IND-262) dt.20.09.2014 ('Tender 2')*

- iii. KDL/AD/TND/DRUGS/22/2015-16 (IND-330) dated 21.12.2015 ('Tender 3')
 - iv. KDL/TND/AHD/9/D/16-17 (IND-388) dt.18.11.2016 ('Tender 4')
 - v. KDL/AD/TND/03-A/2017-18 (IND-448) dated 29.12.2017 ('Tender 5')
 - vi. KDL/TND/IV FLUIDS/20/2018-19 (IND 516) dated 07.01.2019 ('Tender 6').
- (c) Under the terms and conditions of each of the tenders, the CD was liable to make payments within a period of 30 to 45 days of raising of invoice, failing which the OC was entitled to claim interest @ 12% per annum.
- (d) The CD has even made partial payments against the said tenders during November 2016 to November 2019. Subsequently, no payments were made after repeated reminders. Therefore, *vide* emails dt.04.02.2021, 10.05.2021 and letter dated 03.06.2021, the OC again requested the CD to release the outstanding payment of Rs.1,43,84,324/- and Security Deposit of Rs.40,09,244/- along with Rs.27,681/- towards TDS. The CD has acknowledged the debt by receiving the said letter on 09.06.2021 without raising any kind of dispute.
- (e) It is stated that out of six tenders, under *Tender 1*, the OC has given security deposit of Rs.2,04,291/-. The OC has successfully fulfilled all its obligations, however, the CD failed to refund the deposit. Under *Tender 2*, an amount of Rs.9,12,642/- is outstanding from the CD. Under *Tender 3*, an amount of Rs.3,86,925/- and under *Tender 4*, an amount of Rs.85,85,888/- is outstanding and payable towards supplies made by the Operational Creditor. Under *Tender 5*, an amount of Rs.42,35,785/- is outstanding towards supplies made by the OC and an amount of Rs.24,59,005/- is liable to be refunded by the CD. Under *Tender 6*, an amount of Rs.2,63,084/- is payable towards supplies made by the OC and Security Deposit amount of Rs.13,45,948/- is liable to be refunded by the CD.

- (f) Thus, the CD is liable to pay an amount of Rs.1,83,93,568/- against these six tenders. Further, as per the terms and conditions, the OC was entitled to Rs.60,46,151/- towards interest. Hence, admittedly, the CD is liable to pay a total amount of Rs.2,44,67,400/- to the OC.
- (g) Therefore, on 22.09.2021, the OC issued a Demand Notice u/s 8 of the Code calling upon the Corporate Debtor to pay an aggregate amount of Rs.2,44,67,400/-. The said notice was duly received by the CD on 27.09.2021. Further, it is stated that on 23.09.2021, the OC has issued a legal notice upon the CD demanding the outstanding payment. The same was also received by the CD on 27.09.2021. In spite of several reminders, the Corporate Debtor neither replied nor made the payment. In support of its case, the OC relied upon the decision of Hon'ble Supreme Court in the case of *Hindustan Construction Company Ltd. & Anr. v. Union of India, (2019) SCC Online SC 1520*, wherein it is held that Section 3(7) of the Code includes Government Company (PSU's) within its ambit and insolvency petition is maintainable against a Government Company. Hence, the Petition.
- (h) In support of its case, the Petitioner *inter alia* filed the following:
- i. *Copy of the Board Resolution in favour of the Authorised Signatory;*
 - ii. *Copies of all the Tender agreements and/or Notification of Awards;*
 - iii. *Copies of all outstanding invoices raised by Operational Creditor and copy of the ledger account of the CD in the books of the OC;*
 - iv. *Copy of the Demand Notice dated 22.09.2021;*
 - v. *Copies of Legal Notice dated 23.09.2021;*
 - vi. *Bank Statements for the relevant period / Bank Certificate under Form 5A;*
 - vii. *Copy of the Certificate evidencing the change of name of the Operational Creditor;*

viii. Copy of the Government Order No. HFW 76 FPR 2019 Bengaluru, dated 21.10.2020 evidencing conversion of the Corporate Debtor from a Society to a Company.

4. Pursuant to the issue of notice, Respondent filed its statement of objections *vide* Diary No.130 dated 06.01.2023 by *inter alia* contending as under:

(a) The Respondent raised the maintainability of the present petition as the primary issue and also stated that the Petition is barred by limitation. As mentioned by the Petitioner that it had transactions with Karnataka State Drugs Logistics and Warehousing Society, which is registered under the Societies Act. **As on today, the said Society is not dissolved.** Further, the Respondent has not yet taken over the accounts and other stocks of the Karnataka State Drugs Logistics and Warehousing Society. As the Society is still in existence, the grievances if at all needs to be addressed by the Competent Authority and not before this Tribunal.

(b) It is further submitted that the Respondent herein is incorporated as Karnataka State Medical Supplies Corporation Limited on 23.10.2020 and a copy of Certificate of Incorporation is produced as Annexure-R1. In view of the same, it is clear that the Respondent is not a Corporate Debtor.

5. Subsequently, the Petitioner filed Rejoinder *vide* Diary No.1064 dated 23.02.2023, by *inter alia* stating as under:

(a) It is stated that the instant Petition is maintainable under the provisions of the I&B Code, 2016. The Petitioner is entitled to file present Petition within three years from the date of default as per Article 137 of Schedule-1 of Limitation Act. The Respondent used to place purchase order from time to time and upon supply of goods, Respondent used to make on payments. The Respondent has admittedly made last payment towards the outstanding sum on 09.10.2019 for Rs.2,08,779/-.

Therefore, Petitioner could have filed present Petition on or before 09.10.2022. The present Petition is filed in January, 2022 and hence the Petition is within the period of limitation.

- (b) Further, the Petitioner has relied upon the Judgment of the Hon'ble Supreme Court in the case of *In Re: Cognizance for Extension of Limitation, Suo Moto W.P. No.3 of 2020*. Therefore, Petitioner herein is entitled to file present Petition on or before 09.10.2022.
 - (c) Vide Government Order No. HFW 76 FPR 2019 Bengaluru dated 21.10.2020, Karnataka State Drugs Logistics and Warehousing Society which was incorporated under the Karnataka Societies Registration Act, 1960 was ordered to be converted to Karnataka State Medical Supplies Medical Corporation Ltd. Further, it was ordered to be incorporated as Company as per procedure laid down under Companies Act, 2013. Therefore, the Respondent comes within the ambit of Corporate Debtor under the Code. Vide said GO dated 21.10.2020, the said Society was converted into a Company under Companies Act, 2013 on 23.10.2020, and hence Petitioner is entitled to ventilate all its grievance against the Respondent.
- 6.** Pursuant to order dated 01.03.2023, Respondent *vide* Diary No.1600 dated 20.03.2023, filed legal submissions by *inter alia* further stating as under:
- (a) The Petitioner had admitted that it had a transaction with Karnataka State Drugs Logistics & Warehousing Society, which is registered under The Karnataka Societies Registration Act, 1960. Section 22 of the said Act provides for dissolution of Societies and adjustment of their affairs, wherein, it is provided that whenever the State Government is a Member of, or a contributor to, or otherwise interested in any Society registered under this Act, such society shall not be dissolved without the consent of the State Government.

- (b) In this particular case, the State Government has given the permission to dissolve but other provisions i.e., disposal and settlement of the property of the society, its claims and liabilities, according to the Rules of the said Society applicable thereto has not yet been completed. Therefore, just because the Government has issued an order, the Society does not get automatically dissolved, and it will be dissolved only following the procedure mentioned in Section 27 of the Karnataka Societies Registration Act, 1960. Thus, the Petition is not maintainable.
7. The Petitioner filed its written submissions *vide* Diary No.2233 dated 21.04.2023, by *inter alia* further stating as under:
- (a) The Petition is required to be admitted as there are no pre-existing disputes between the Parties. The said Government Order relating to conversion is neither modified or rescinded and is valid and subsisting as on date and thus cannot be contravened by CD and any act in derogation or in violation of the same by CD would be void ab initio. The CD cannot deny the same or cannot make any contradictory and vague submission without adducing any evidence pertaining to cancellation and/or modification of said order by Govt. of Karnataka.
- (b) The OC was serving notices upon the CD since its incorporation. At no point of time they have replied that the liability is of Society and not of the Corporate Debtor. The Society has been converted into a Company under Chapter XXI of Companies Act, 2013 and Section 368 of the Companies Act, 2013 makes it clear that all the properties including movable and immovable assets, actionable claims of the society, LLP, trust, as the case may be, shall vest on the new company at the date of its registration u/s 367 of Companies Act, 2013.
- (c) It is further stated that the formal dissolution of the Society, which has no real significance or bearing on the instant matter, is a mere

procedure that is allegedly pending at the instance of the Karnataka State Drugs Logistics & Warehousing Society. Delay in completing the procedure, cannot take away the right of the Operational Creditor.

(d) In support of its case, the Petitioner relied on following decisions:

- i. *Mobilox Innovations P. Ltd. v. Kirusa Software P. Ltd., (2017) 85 taxmann.com 292 (SC);*
- ii. *Hindustan Construction Company Ltd. & Anr. v. Union of India (2019) SCC Online SC 1520;*
- iii. *In Re: Cognizance for Extension of Limitation, Suo Moto Writ Petition No.03 of 2020 of Hon'ble Supreme Court.*

8. In support of its case, Respondent *vide* Diary No.2156 dated 19.04.2023, relied upon the decision of the Judgment dated 03.08.2021 rendered by the Hon'ble NCLAT in the matter of *Asset Reconstruction Company (India) Ltd. vs. Mohammadiya Educational Society* in Company Appeal (AT) (Ins.) No.495 of 2019.

9. Heard Shri Pranay Prakash, Ld. Counsel for the Petitioner and Ms. Sumana Baliga, Ld. Counsel for the Respondent and perused the pleadings.

10. It is seen that the instant Petition has been filed by the Operational Creditor M/s. Otsuka Pharmaceutical India Private Limited (*formerly known as 'Claris Otsuka Private Limited'*) seeking to initiate CIRP against the Corporate Debtor – M/s. Karnataka State Medical Supplies Corporation Limited (*converted from and formerly known as Karnataka State Drugs Logistics & Warehousing Society*) for defaulting to pay the outstanding debt. As seen from Part-IV of Form-5 of the Petition, the total amount claimed to be in default is Rs.2,44,67,400/-. This Petition has been filed by the Operational Creditor u/s 9 of the Code on 07.01.2022.

11. The Operational Creditor was awarded with six different Tenders and entered into respective Agreements with M/s. Karnataka State Drugs Logistics & Warehousing Society (R), during the period October, 2014 to

August, 2019 for supply of drugs, chemicals and miscellaneous items as specified in the respective Tender Documents. Copies of outstanding invoices raised by the Operational Creditor starting from 19.09.2016 till 12.10.2019 on M/s. Karnataka State Drug Logistics & Warehousing Society are at Annexure-F of the Petition.

- 12.** From the above, it is pertinent to mention that all these invoices were raised by the Operational Creditor on the aforesaid Society and not the Respondent in this case; which is a Company. It is stated that the aforesaid Society was ordered to be converted into Karnataka State Medical Supplies Corporation Limited *vide* Government Order No. HFW 76 FPR 2019 dated 21.10.2020. As per Master Data of MCA website, it is seen that the Respondent was incorporated on 23.10.2020 as *Karnataka State Medical Supplies Corporation Limited* under the provisions of Companies Act, 2013. However, Respondent contended that even though the Government has issued an order, the Society does not get automatically dissolved but will be dissolved only after following the procedure mentioned in Section 27 of The Karnataka Societies Registration Act, 1960; thus the Petition is not maintainable.
- 13.** At this juncture, it is apt to refer to the Judgment dated 03.08.2021 of the Hon'ble NCLAT in the matter of *Asset Reconstruction Company (India) Limited vs. Mohammadiya Educational Society [Company Appeal (AT) (Insolvency) No. 495 of 2019]* wherein at para 21, it is observed that "*Thus, reading Section 2 which prescribes the entities and individuals to which the 'I&B Code' applies when considered with definition of 'corporate person' under Section 3(7) of the 'I&B Code', the Respondents i.e. Societies cannot be said to be 'corporate persons' to whom the provisions of the Code applies.*"
- 14.** We are conscious of the fact that in the above case, the Respondent is a Society against which the case has been filed by the Petitioner therein.

However, in the instant case even though the Corporate Debtor as per MCA website is registered under the Companies Act, 2013, the outstanding debt of Rs.2,44,67,400/- which is claimed by the Operational Creditor to be in default pertains to Karnataka State Drug Logistics & Warehousing Society and invoices were also raised against such Society. Hence, such defaulted debt pertaining to the period of then Society cannot be considered against the Respondent-Corporate Debtor, in accordance with the provisions of Section 2 in conjunction with Section 3(7), 3(8), 3(11), 3(12) of the I&B Code, 2016.

- 15.** The Petition u/s 9 of the IBC, 2016 could not have been filed against the above-mentioned Society to whom the supplies were made by the Operational Creditor. Therefore, merely because the Society has been incorporated as a Company by the Government of Karnataka, does not enable entitlement of a right to file a Petition u/s 9 in favour of the Operational Creditor, when it did not exist at all in the first place. In view of the foregoing discussions, the instant Petition is liable to be dismissed.
- 16.** Accordingly, the instant **Petition bearing CP (IB) No.61/BB/2022** is hereby **dismissed**. However, this Order will not come in the way of the Petitioner to pursue other legal remedies under any other Law, if so advised.

Sd/-
MANOJ KUMAR DUBEY
MEMBER (TECHNICAL)

Sd/-
BIDISHA BANERJEE
MEMBER (JUDICIAL)

jsr