

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No.75/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

Alcuris Healthcare Private Limited

[CIN: U74120MH2015PTC262611]

...Operational Creditor/Applicant

V/s

Abmay Health Ventures LLP

[LLPIN: AAE-4929]

...Corporate Debtor/Respondent

Order Dated: 15.03.2022

Coram:

Mr. Rajesh Sharma
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Farhan Dubash, Advocate
a/w Mr. Nitish Bangera, PCS.

For the Respondent(s) : Mr. Gopalkrishnan a/w
Mr. Ashish Dalal, Mr. Nilesh
Ghadge, and Mr. Bikram
Bhadra, Advocates.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an application being C.P. (IB) No. 75/MB/C-IV/2020 filed by Alcuris Healthcare Private Limited, the Operational

Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Abmay Health Ventures LLP, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

2. The Operational Creditor is a Company incorporated under the provisions of Companies Act, 2013. The Application is filed by Mr. Anuj Bhasin and Mrs. Sonika Bhasin, Directors of Operational Creditor vide its Board Resolution dated 02.12.2019, claiming total default of Rs.4,44,37,464/- (Rupees four crore forty-four lakh thirty-seven thousand four hundred only).
3. The Corporate Debtor is an entity incorporated on 03.08.2015 under the Limited Liability Partnership Act, 2008. with the Registrar of Companies, Maharashtra, Mumbai. Its LLP Identity Number (LLPIN) is AAE-4929. Its registered office is at 179-180, 1st Floor, Kamlacharan Building, Jawahar Nagar, Road 2, Goregoan (W), Mumbai, Maharashtra-400605. Therefore, this Bench has Jurisdiction to deal with the present petition.
4. The Date of Default as mentioned in the Petition is 16.01.2016. The Petition is filed on 06.01.2020.
5. The case of the Operational Creditor is as under:
 - a) The Operational Creditor is running a Hospital for Cathlab and Cardiac Patients. The Corporate Debtor operates the brand SRV Hospital and is in same business as the Operational Creditor.
 - b) On 21.10.2015, the Operational Creditor and Corporate Debtor entered into an Agreement for Profit Sharing for use of Cathlab equipment. On 26.04.2016, Certificate of Incorporation was issued

by RoC Mumbai for change of name of the Operational Creditor from 'Metro Heart Centre Private Limited' to 'Alcuris Healthcare Private Limited'.

- c) The Corporate Debtor issued bills from January, 2016 to March, 2018 to the patients using the Cathlab equipment and sent details of invoices to the Operational Creditor. The Corporate Debtor shared profit with the Operational Creditor in terms of the Profit-Sharing Agreement signed between the parties. The amount of share of profit for Operational Creditor aggregated to Rs.2,22,62,631/- (Rupees two crore twenty-two lakh sixty-two thousand six hundred thirty-one only).
- d) From April, 2018, the Corporate Debtor stopped sending the details of the bills generated on the patients, to the Operational Creditor and refused to share details. Despite continuous follow up by the Operational Creditor through phone calls, personal visits and emails, the Corporate Debtor refused to share the profit.
- e) The total amount billed by the Corporate Debtor aggregates to Rs.8,00,20,864/- (Rupees eight crore twenty thousand eight hundred sixty-four only). The actual share of is Rs.2,22,62,631/- (Rupees two crore twenty-two lakh sixty-two thousand six hundred thirty-one only) from January, 2016 to March, 2018. The Corporate Debtor in aggregate paid Rs.3,50,83,400/- (Rupees three crore fifty lakh eighty-three thousand four hundred only) out of which Rs.5,00,000/- (Rupees five lakh only) was paid on 30.11.2019 being the last payment received before issuance of Demand Notice.

-
- f) The Operational Creditor issued the Demand Notice in Form 3 to the Corporate Debtor on 07.12.2019. The Corporate Debtor on 16.12.2019 sent an interim reply to the Operational Creditor. On 31.12.2019 the Operational Creditor received final reply from the Corporate Debtor vide email dated 31.12.2019 through the Advocated of the Corporate Debtor.
- g) On 31.12.2019, i.e. after the Demand Notice, the Corporate Debtor without the knowledge of the Operational Creditor transferred Rs.5,00,000/- (Rupees five lakh only) into the Bank Account of the Operational Creditor. Due to transfer of the said amount the outstanding amount is reduced from 4,49,37,464/- (Rupees four crore forty-nine lakh thirty-seven thousand four hundred sixty-four only) to Rs.4,44,37,464/- (Rupees four crore forty-four lakh thirty-seven thousand four hundred only).
- h) The Operational Creditor submits that the Corporate Debtor has made default from 16th January, 2016 to November 2019.
6. The Corporate Debtor has filed Affidavit in Reply dated 20.02.2020 and submitted as under:
- a) Section 9 of the Code stipulates the existence of a trade debt, salary or wages. As per Section 9(2) that the Operational Creditor has to furnish the copy of an invoice demanding payment or a demand notice delivered by the Operational Creditor to the Corporate Debtor. There is no Operational Debt as defined in section 2(51) of the Code.
- b) The Corporate Debtor has admitted the Agreement for Profit-Sharing for use of Cathlab equipment as stated in the Petition.

- c) It is submitted that the provisions of the IBC cannot under any stretch of imagination decide on a dispute arising out of a Profit-Sharing Agreement. It is for a commercial court that has to go into detail on the issue namely, the Profit-Sharing Agreement in order to decide whether the profit sharing as agreed to has been adhered to or not.
- d) Even according to the admission of the alleged Operational Creditor from April 2018 till the date of filing the petition, the Corporate Debtor stopped to send the details of the bills so generated and therefore the alleged Operational Creditor was unable to get their share of profit. Further, it is submitted by the Corporate Debtor that there is no element of any kind of invoices or bills raised by the Operational Creditor at any point of time during the Profit-Sharing Agreement was entered into till date.
- e) the Operational Creditor further states contrary to what is stated in the Petition, the Operational Creditor has received a sum of Rs.3,50,83,400/- (Rupees Three Crores Fifty Lakhs Eighty-Three Thousand and Four Hundred Only) till 30.11.2019. Therefore, it is crystal clear that what is shared between the Operational Creditor and the Corporate Debtor is nothing but Profit Sharing and it has nothing to do with any services rendered or any goods supplied or any unpaid wages.
- f) The Agreement of Profit-Sharing stated as follows:

“The parties agree to the following

Abmay Health Ventures LLP” and “SRV Heart Centre of MHCPL” will both be the general profit sharing partners of the

Cathlab and Cardiac Surgery department of SRV Hospital. Whereas “SRV Hospital” agreed to outsource the Cathlab and Cardiac Surgery department to SRV Heart Centre Unit of MHPCL situated at Plot No. 3/178, Jawahar CHS Ltd., Jawahar Nagar, Road No.2, Kamala Charan Bldg., Plot no. 178, Near Railway Station, Goregaon (W), Mumbai – 400062 on the following terms and conditions”

- g) It is clear that the agreement between both the parties is to act as a general Profit-Sharing Partners with respect to Cathlab and Cardiac Surgery Department of SRV Hospital and agreed to outsource the cardiac Surgery Department to SRV Heart Unit of MHCPL. From the above it is clear that the relationship between both the Parties are independent and what is common between both is only a Profit Sharing as envisaged in the Agreement
- h) It is submitted by the Corporate Debtor that the independent nature of the agreement is further evidenced by stating following clauses of the Agreement:

"1. MHCPL (i.e. the alleged Operational Creditor) does not have any objection with any cardiologist not associated with MHCPL to practice at SRV Hospital. (i.e. the hospital operated by the Corporate Debtor)

2. The non MHCPL appointed cardiologist will need to pay MHCPL INR 60,000/- and INR 35,000 for every angioplasty. MHCPL will provide 1 balloon, 1 wire & 1 guiding as part of the package and no additional cost will be charged for the same. Similarly the hospital will include 1 day ICU stay and 1 day ward

stay as part of the package against the cost being charged to the cardiologist.

3. Any medico-legal issues, staff related issues who are working under Cardiology Centre (union formation, theft) will be complete responsibility of Metro.

4. All consumable will be bought from the in-house pharmacy.

5. The billing system for the SRV Heart Centre will be through hospital used software 21st Century. All settlements of payments from MHCPL to SRV Hospital or from SRV Hospital to MHCPL will be done on a weekly basis. Simultaneously, all settlements of pharmacy & pathology bills will be done on a weekly basis.

6. AC & LIGHTING along with earthing will be provided by hospital. CSSD Equipment to be provided by Metro. ETO to be provided by Metro.

7. All risk insurances in line with the hospital policies to be taken by Metro.

8. Any discounts to be given to patients from the agreed pricing as mentioned above will be on a case basis and will be needed to agreed upon by authorized personnel from both parties."

- i) It is further submitted that the said agreement clearly provides for an arbitration clause with regards to the compliance of each Party's independent function. The alleged Operational Creditor has invoked the Arbitration Clause vide an invocation notice dated 16.01.2020 issued by the Advocate of the alleged Operational Creditor and has even named the Arbitrator.

- j) The Corporate Debtor replied said Notices vide its letter dated 04.02.2020 suggesting that the matter be referred to the MCIA for Arbitration.
- k) It is submitted that the alleged claim of Rs. 4,44,37,464/- (Rupees four Crores forty-four lakhs thirty-seven thousand four hundred and sixty-four only) arises out of a Profit-Sharing Agreement and any disputes and differences arising out of the same has to be resolved by invoking the Arbitration Clause as provided in the Agreement or by approaching a Commercial Court having competent jurisdiction and not this Tribunal. The Operational Creditor has invoked the Arbitration Clause vide a Notice dated 31.01.2020 which does not come under the purview of Section 9 of the Code as made out by the Operational Creditor.
7. The Corporate Debtor has filed Additional Affidavit in Reply dated 09.09.2021 and submits as under:
- a) The Operational Creditor has approached the Hon'ble Bombay High Court for arbitration matter and appointment of an Arbitrator under the Arbitration and Conciliation Act, 1996. A notice dated 31.01.2020 was sent by Operational Creditor to Corporate Debtor suggesting name of the Sole Arbitrator to be appointed.
- b) An email was sent by Kosha Legal on behalf of Corporate Debtor to Operational Creditor on 04.02.2020 along with the Reply to the notice suggesting the name of the Sole Arbitrator to be appointed. On 05.02.2020, the Hon'ble Bombay High Court directed Corporate Debtor to retain the Cathlab machinery on

site in the form as depicted in photographs, i.e. as covered/
wrapped up.

- c) On 26.02.2020, the Arbitration Notice under Section 21 was served and the Hon'ble Bombay High Court appointed Ms. Ankita Singhania as the Sole Arbitrator to decide the disputes and differences between the parties
 - d) On 01.09.2020 wherein the Sole Arbitrator directed Operational Creditor to file its Statement of Claims on or before 15.09.2020 and Corporate Debtor was directed to file its Statement of Defence and Counter Claim on or before 09.10.2020 as well as to file their admission and denials. Sole Arbitrator on 22.12.2020 has framed the points of determination.
 - e) An Application under Section 11 of the Arbitration and Conciliation Act, 1996 was filed by Operational Creditor on 30.06.2021 which was dismissed with the liberty to file the same under Section 14 and 15 of the Act.
8. The Operational Creditor and Corporate Debtor have filed their written submissions and the same is taken on records.
9. The Operational Creditor has issued Demand Notice dated 07.12.2019 in Form-3 claiming amount in dues of Rs.4,49,37,464/- (Rupees four crore forty-nine lakh thirty-seven thousand four hundred sixty-four only). The said Demand Notice is at pp.57-60 of the Petition. The Corporate Debtor has relied to the said Demand Notice vide its interim reply Notice dated 16.12.2019 denying the amount claimed under the Demand Notice. The Corporate Debtor further sent the final reply to the Operational Creditor vide its letter dated 30.12.2019 and stated that the amount claimed in the Demand Notice is not Operational Debt as it

is outside the purview of the definition given under the provisions of Code. It was also contended in the reply that the Operational Creditor is not Operational Creditor as the Operational Creditor has not provided any goods or services to the Corporate Debtor. In fact, the Corporate Debtor entered into an agreement dated 02.12.2015 with the Operational Creditor for sharing income/profit and expenses arising out running of Cathlab and Cardiac Surgery Department in the premises situated at Plot no. 3/178, Jawahar C.H.S. Ltd., Jawahar Nagar, Road No. 2, Kamla Charan Building, Goregaon (W), Mumbai-400062 owned by the Corporate Debtor. Therefore, the alleged debt claimed under the Demand Notice is not Operational Debt under the Code. The Corporate Debtor also rejected the claimed amount under the Demand Notice. The final reply of the Corporate Debtor is pp. 135-141 of the Petition.

10. The Profit-Sharing Agreement is placed at pp.101-112 of the Petition. The Operational Creditor has submitted the Ledger Statement of Operational Creditor in the books of Corporate Debtor for the period of 01.04.2019 to 31.03.2019 which is at pp.113-116.
11. The Operational Creditor has also submitted Certificate of Form 26 AS issued under section 203A of the Income Tax Act, 1961 for F.Y. 2016-17, 2017-18 and 2018-19 which is at pp. 117-130.
12. The Operational Creditor has submitted Affidavit under section 9(3) (b) of the Code which is placed at pp 34-48 of the Petition.
13. The Operational Creditor has submitted the TDS Certificate (Form 26 AS) under issued under Income Tax Act, 1961 which is at pp. 117-130 of the Petition.

14. The Operational Creditor submitted the Bank Statement for the period of 01.11.2019 to 30.11.2019 and 01.12.2019 to 31.12.2019 showing the last payment of Rs.5,00,000/- (Rupees five lakh only) made by the Corporate Debtor before and after sending Demand Notice. The said Bank Statement is at pp. 143&144 of the Petition.

Findings:

15. We have heard the arguments of the Learned Counsel for both the parties and perused the records.
16. It is observed by the Bench that the Corporate Debtor has not denied the Agreement for Profit-Sharing for use of Cathlab equipment entered between the Operational Creditor and the Corporate Debtor. It is also observed that the Corporate Debtor has made payment of Rs.5,00,000/- (Rupees five lakh only) on 30.11.2019 before Demand Notice and on 31.12.2019 after Demand Notice. The said payment is reflected in the Bank Statement filed by the Operational Creditor.
17. As regards to the contentions of the Corporate Debtor that there is no Operational Debt as defined in section 2(51) of the Code. It is observed by the Bench that the Operational Creditor has provided the Cathlab equipment to the Corporate Debtor
18. After perusal of the material on record, this Bench is of considered view that there is no reason to deny the Petition under section 9 filed by the Operational Creditor to initiate the CIRP against the Corporate Debtor.
19. On perusal of the documents submitted by the Applicant, it is clear that financial debt amounting to more than Rs.1,00,000/- (Rupees One Lakh Only) is due and payable by the Corporate Debtor to the

Applicant. There is default by the Corporate Debtor in payment of debt amount. Therefore, we do not have any objection on record against the application filed for initiation of CIRP against the corporate debtor. Hence, the Application filed by the Operational Creditor is liable to be admitted.

20. The application is complete and has been filed under the proper form. The debt amount is more than Rupees One Crore and default of the Corporate Debtor has been established.
21. The Operational Creditor has not proposed the name of Interim Resolution Professional (IRP) in the matter.
22. It is, accordingly, hereby ordered as follows: -
 - (a) The petition bearing CP (IB) 75/MB-IV/2020 filed by Alcuris Healthcare Private Limited, the Operational Creditor, seeking to initiate Corporate Insolvency Resolution Process (CIRP) against Abmay Health Ventures LLP [LLPIN: AAE-4929], the Corporate Debtor, is **admitted**.
 - (b) There shall be a moratorium under section 14 of the IBC, in regard to the following:
 - (i) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (ii) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;

- (iii) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002;
 - (iv) The recovery of any property by an owner or lessor where such property is occupied by or in possession of the Corporate Debtor.
- (c) Notwithstanding the above, during the period of moratorium,-
- (i) The supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during the moratorium period;
 - (ii) That the provisions of sub-section (1) of section 14 of the IBC shall not apply to such transactions as may be notified by the Central Government in consultation with any sectoral regulator;
- (d) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Tribunal approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.
- (e) Public announcement of the CIRP shall be made immediately as specified under section 13 of the IBC read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

-
- (f) Mr. Sanjay Shrivastava, registration No. IBBI/IPA-001/IP-P01528/2018-19/12425; Contact: 9850349155; Email: casanjayshrivastava@gmail.com; is appointed as Interim Resolution Professional to carry the functions as mentioned under IBC, the fee payable to IRP/RP shall comply with the IBBI Regulations/Circulars/Directions issued in this regard. The IRP shall carry out functions as contemplated by Sections 15,17,18,19,20,21 of the IBC.
- (g) During the CIRP Period, the management of the Corporate Debtor shall vest in the IRP or, as the case may be, the RP in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.
- (h) The Operational Creditor shall deposit a sum of Rs.5,00,000/- (Rupees five lakh only) with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) The Registry is directed to communicate this Order to the Operational Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.
- (j) A copy of this Order be sent to the Registrar of Companies, Maharashtra, Mumbai, for updating the Master Data of the

Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court **within seven days** from the date of receipt of a copy of this order.

Sd/-
Kishore Vemulapalli
Member (Judicial)

15.03.2022

Sd/-
Rajesh Sharma
Member (Technical)