

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV**

Company Petition No. (IB)- 279/(ND)/2022

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.]

In the matter of:

M/s. Nancy Ispat Private Limited

.... Operational Creditor

Vs.

M/s. S.D. Engineers Tech Private Limited

.... Corporate Debtor

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)

Order Delivered on: 06.10.2022

ORDER

PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

The instant petition was filed by M/s. Nancy Ispat Private Limited (hereinafter referred as 'Applicant'/ 'Operational Creditor') incorporated under the provisions of the erstwhile Companies Act, 1956 and having CIN: U27100HR1991PTC031209 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to initiate Corporate Insolvency Resolution Process in respect of M/s. S.D. Engineers Tech Private Limited (hereinafter referred as 'Respondent Company' or 'Corporate Debtor').

2. The Respondent Company M/s. S.D. Engineers Tech Private Limited having CIN: U34102DL2010PTC211219 incorporated under the provisions of the provisions of the Companies Act, 1956 having its registered office situated at C-

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8, LGF II, East of Kailash New Delhi-110065 Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. The brief facts of the case leading to the filing of this petition as averred by the applicant are as follows:

- a) The applicant submits that the applicant is engaged in the business of sale and supply of materials such as M.S. Plates, Die Steel, Steel Alloy, Steel Rod, Steel Sheet, Steel Plates etc. The applicant further submits that the corporate debtor being satisfied with the quality of the goods supplied by the applicant, began placing regular orders for supply of goods with the Operational Creditor. The applicant adds that the applicant began maintaining a running account for the transactions between the applicant and the corporate debtor
- b) The applicant submits that that applicant raised invoices for the goods supplied in a systematic manner on a regular basis and the same were served upon the Corporate Debtor along with each supply made thereunder. The applicant further submits that the payments were released in an erratic manner by the corporate debtor in an untimely way, as a result of the same, the applicant was constrained to settle the erratic payments made by the Corporate Debtor on a FIFO/First-In First-Out basis. The applicant adds that against the supply of the said goods, invoices were duly issued by the applicant and duly received by the corporate debtor along with the supplies, without any dispute or demur.
- c) The applicant submits that the corporate debtor was never regular in making the payments and was inconsistent in disbursal of payments, due to which the applicant on multiple occasions had approached the officials of the Corporate Debtor regarding the issue of pending payments.
- d) The applicant submits that due to continuing default by the corporate debtor in payment, the applicant was constrained to stop the supplies and further issued a Demand Notice dated 09.10.2020 under Section 8 of the IBC. The applicant further submits that the said Demand Notice was issued for pending dues against the duly accepted invoices raised till 16.03.2020 only, amounting to the tune of Rs.5,60,46,493/- which included a principal outstanding of Rs.4,22,75,591/- and an interest amount of Rs.1,37,70,902/- as on 16.03.2020.
- e) The applicant submits that the corporate debtor on receiving the said Demand Notice, while admitting its liability towards the Operational

Creditor to the extent of the payments demanded under the said Demand Notice, made certain part payments amounting to Rs.2,00,00,000/- (Rupees Two Crores Only) by way of RTGS and cheques. The applicant further submits that the Corporate Debtor had also issued a total of eleven (11) post-dated cheques totaling to the tune of Rs.2,16,00,645/- (Rupees Two Crores Sixteen Lakhs Six Hundred and Forty-Five Only) in part satisfaction of its admitted remaining outstanding dues as aforementioned.

- f) The applicant submits that all the 11 postdated cheques issued by the corporate debtor got dishonored upon presentation on various dates from 09.04.2021 to 30.09.2021. The tabular representation of the postdated cheques along with the date of dishonor are detailed herein below:

Cheque Number	Date of Cheque	Amount	Date of Dishonour
687817	22-03-2021	1000000/-	09.04.2021
687819	28-03-2021	1000000/-	09.04.2021
672660	22-07-2021	1000000/-	06.09.2021
672661	28-07-2021	1000000/-	06.09.2021
672662	22-08-2021	1000000/-	06.09.2021
672663	28-08-2021	1000000/-	06.09.2021
515203	04-09-2021	500000/-	06.09.2021
515204	04-09-2021	500000/-	06.09.2021
672666	04-09-2021	12600645/-	06.09.2021
672664	22-09-2021	1000000/-	23.09.2021
672665	28-09-2021	1000000/-	30.09.2021

- g) The applicant submits that pursuant to the dishonor of the cheques, the applicant sent legal notices under Section 138 of the Negotiable Instruments Act, 1881 to the corporate debtor, against dishonour of some of the aforesaid cheques. The applicant adds that applicant had thereafter also initiated requisite proceedings in respect of such cheques, before the Criminal Courts at Faridabad, which are pending adjudication.
- h) The applicant submits that the total liability for the supplies made by the applicant to the corporate debtor under invoices lastly raised on 20.08.2020, including the admitted liability, of the Corporate Debtor towards the applicant stood at Rs.2,21,38,643/- as on 11.11.2021. The applicant adds that the corporate debtor was also liable to pay an interest of Rs.2,56,35,294/- to the applicant as per the mutually agreed terms of the invoices.
- i) The applicant submits that the applicant had issued Demand Notice dated 25.11.2021 calling upon the corporate debtor to pay its outstanding dues amounting to a total of Rs.4,77,73,937/- (Rupees Four Crores Seventy-Seven Lakhs Seventy-Three Thousand Nine Hundred and Thirty Seven Only) including Rs.2,21,38,643/- (Rupees Two Crores

Twenty-One Lakhs Thirty-Eight Thousand Six Hundred and Forty-Three Only) as principal outstanding as on 11.11.2021 and Rs.2,56,35,294/- (Rupees Two Crores Fifty Six Lakhs Thirty-Five Thousand Two Hundred and Ninety-Four Only) being the outstanding interest @24% p.a. as on 11.11.2021.

- j) The applicant submits that said demand notice dated 25.11.2021 was responded to on behalf of the Corporate Debtor by way of a frivolous and baseless Reply dated 10.12.2021. The applicant adds that vide the reply dated 10.12.2021 the Corporate Debtor for the very first time with a malafide intention and purely as an afterthought levelled false and baseless allegations against the applicant and laid down an absolutely fabricated version of events in the said reply to the demand notice.
- k) The applicant submits that the applicant under Section 9 of the IBC had filed petition i.e., IB/175/2022 pursuant to the Demand Notice dated 25.11.2021. The applicant further submits that the applicant had withdrawn the said petition on account of certain inadvertent errors. The applicant adds that this Adjudicating Authority vide its order dated 07.03.2022 had allowed the withdrawal of the IB/175/2022, with a leave to file afresh, as requested for by the applicant.

4. The corporate debtor had filed its reply and the averments of the corporate debtor in the reply are stated in brief as below:-

- a) The corporate debtor submits that in the month of June, 2020, the corporate debtor discovered that the applicant has been charging exorbitant rates against the material supplied to the corporate debtor by levying arbitrary charges like cartage charges, etc., without there being a specific agreement in this regard. The corporate debtor further submits that after discovery the corporate debtor got all the invoices checked and verified since 2010 in order to get doubly assured.
- b) The corporate debtor submits that the corporate debtor on comparing the charges with the other sellers in the market found that the applicant was actually charging exorbitant rates from the Corporate Debtor in complete violation of the bona-fide relations existing between the parties.
- c) The corporate debtor submits that after considering the discrepancies, the corporate debtor recalculated the amount due from financial year 2015-2020 which comes as Rs.2,21,46,557 and the same was duly intimated to the applicant for adjustment against the pending dues if any. The corporate debtor further submit that despite numerous telephonic conversations and personal visits between the parties, the applicant continued to dilly dally the said adjustment on one pretext or the other, while, continuing to supply such goods to the Corporate Debtor at the aforementioned exorbitant rates.

- d) The corporate debtor submits that considering the exorbitant and arbitrary pricing by applicant, the corporate debtor was forced to stop further dealing/ purchasing material with/from the applicant since September 2020. The corporate debtor adds that it is noteworthy that in the month of October 2020, the applicant again agreed to adjust the whole amount from outstanding amount due as of date 20.08.2020.
- e) The corporate debtor submits that the corporate debtor has paid the applicant all the outstanding amount in various installments after adjustment of the exorbitant rates charged by the applicant. The corporate debtor further submits that there is no outstanding amount in the accounts book of the Corporate Debtor as the Corporate Debtor has paid all outstanding/due amount to the Operational Creditor.
- f) The corporate debtor further submits that the applicant has relied upon invoices which do not even have any receiving from the corporate Debtor implying that those goods were never received by the Corporate Debtor
- g) The corporate debtor submits that the applicant has unilaterally levied an amount of Rs.2,56,35,294/- (Rupees Two Crore Fifty-Six Lacs Thirty-Five Thousand Two Hundred Ninety-Four Only) being alleged outstanding interest at a rate of interest of 24% as on 11.11.2022 as the said rate of interest was never explicitly agreed by the corporate debtor herein. To support its contention, the corporate debtor had placed reliance on citation **CBRE South Asia Pvt. Ltd. v M/s United Concepts and Solutions Pvt. Ltd. (CP-IB/797/ND/2021)**
5. We have heard Ld. Counsel for both the parties and perused the averments made in the petition and reply filed by the parties. The relevant documents annexed with the respective submissions and the citations relied upon by the parties have been examined in detail.
6. During the course of hearing, the Ld. Counsel for the corporate debtor submits that the instant petition filed by the applicant is based on the settlement arrived between the parties and therefore, the given debt does not fall under the definition of operational debt as defined under Section 5(21) of the Code, 2016. In support of this proposition, reliance was placed on the citations **Ahluwalia Contracts (India) Limited v. Logix Infratech Private Limited [C.P.(IB)/882/ND/2022; Judgement dated 03.06.2022]; Delhi Control Devices (P) Limited v. M/s. Fedders Electric and Engineering Limited [C.P.(IB)/343/ALD/2018; Judgement dated 14.05.2019]; Nitin**

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Gupta v. M/s. International Land Developers Private Limited
[C.P.(IB)/507/ND/2020; Judgement dated 25.06.2020].

7. Before going into the issue of pre-existing dispute between the parties as raised by the corporate debtor, this Adjudicating Authority in the interest of justice, deems it fit to consider the corporate debtor's submission regarding the nature of the debt as claimed by the applicant in the instant petition being a settlement debt, though the corporate debtor has not raised the issue in its reply.
8. We observed that the applicant in Part-IV of Form 5 of the petition had claimed outstanding debt amounting Rs.4,77,73,937/- including outstanding principal amounting Rs.2,21,38,643/- and interest amounting Rs.2,56,35,294/-. From the averments of the applicant, no doubt that the applicant had issued demand notice ('first demand notice') dated 09.10.2020 for the outstanding operational debt amounting Rs.5,60,46,493/- including Rs.4,22,75,591/- as outstanding principal amount and outstanding interest amounting Rs.1,37,70,902/- as on 16.03.2020, which was subsequently withdrawn by the applicant in view of the admission of the liability by the corporate debtor and part payment of Rs.2,00,00,000/- by way of RTGS and further issuing 11 post-dated cheques for an aggregate amount of Rs.2,16,00,465/- which were later dishonored at the time of presenting the cheques for encashment precisely during the period 09.04.2021 to 30.09.2021.
9. Further on a meticulous perusal of the ledger statements of the corporate debtor maintained in the books of the applicant and the invoices placed on record by the applicant, we observe that the applicant had supplied the goods to the corporate debtor during the financial year 2020 to 2021, precisely till 20.08.2020. The applicant had issued the demand notice dated 25.11.2021 (second demand notice) to the corporate debtor demanding aggregate amount of Rs.4,77,73,937/- including outstanding principal amount of Rs.2,21,13,643/- and interest @24% amounting Rs.2,56,35,294/-

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as on 11.11.2021. The applicant in pt.7 (List of Documents attached to this application in order to prove the existence of the operational debt and amount in default) of the said demand notice dated 25.11.2021 had relied on the ledger account maintained by the applicant, calculation chart and the invoices.

10. Thus, we are bound to emphasize that a presumption that second demand notice dated 25.11.2021 was drawn on the basis of breach of settlement terms between the parties, cannot be drawn merely on the basis that the first demand notice dated 09.10.2020 was withdrawn by the applicant on account of part payment and the post-dated cheques issued by the corporate debtor and subsequent to the dishonor of the post-dated cheques, applicant had issued second demand notice dated 25.11.2021. At this juncture, what is to be observed is the documents relied by the applicant on the basis of which the demand notice and the instant petition is filed. As evident the applicant in pt.7 of the second demand notice dated 25.11.2021 and Part-V of the instant petition had majorly relied on the copy of the pending invoices, account statements to prove the existence of debt. Further, neither the applicant nor the corporate debtor had placed on record any document or correspondence as to show that any settlement was arrived at between the parties and the second demand notice dated 25.11.2021 was issued subsequent to the breach of any settlement terms.
11. Further, we are of the earnest view that in the citations relied by the corporate debtor, the **ratio decidendi** is that “the breach of the terms and conditions of payment according to a settlement agreement does not come under the purview of the operational debt as defined under the IBC, 2016 and cannot be a ground to trigger the CIRP”, which is not the case in the matter before us for the aforementioned reasons. Accordingly the citations relied by the respondent are not helpful and the said contention of the corporate debtor is overruled.

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12. As regard to the corporate debtor's contention that the corporate debtor in the month of June, 2020 discovered the arbitrary and exorbitant charging by the applicant and their exists a pre-existing dispute, we observe that the corporate debtor continued placing orders and receiving the goods from the applicant even after June, 2020 i.e., after the alleged discovery of the levying of exorbitant charges, therefore, this very act of the corporate debtor estopped the corporate debtor from raising the contention of the pre-existing dispute with regard to the arbitrary and exorbitant rates being charged by the corporate debtor.
13. As regard to the corporate debtor's contention that some of the invoices do not have receiving of the corporate debtor and therefore, it is clear that the goods were never received by the corporate debtor, we observe that the invoices claimed by the corporate debtor on which no receiving was engraved, there are total of 19 alleged invoices, which relates from 21.02.2019 to 12.12.2021, pertinent to note that the same invoices were also claimed by the applicant in its first demand notice dated 09.10.2020, and the corporate debtor failed to bring on record any correspondence showing that the corporate debtor had raised dispute with regard to the invoices claimed by the applicant or any correspondence denying the receipt of the said invoices. Thus, in the absence of any document, correspondence placed on record corroborating the existence of a pre-existing dispute between the parties regarding the non-receipt of goods against the invoices raised claimed by the applicant before the issuance the issuance of the second demand notice dated 25.11.2021, we find no grounds in the corporate debtor's contention as to the existence of a pre-existing dispute between the parties.
14. At this juncture, it is relevant to refer the Hon'ble Supreme Court's judgement in **M/s. Innoventive Industries Limited v. ICICI Bank & Anr. [Civil Appeal No.s 8337-8338 of 2017]** wherein in para 29 it was held that:-

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“29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.”

15. Thus, from the aforesaid discussions and judgments cited supra, we are of the earnest view that the corporate debtor had failed to raise any plausible contention as to the existence of disputes prior to issuance of demand notice dated 25.11.2021 and the pre-existing dispute attempted to be raised by the corporate debtor is a feeble one, unsupported by any evidence, is a moonshine and nothing else.
16. As regard to the corporate debtor’s contention regarding the unilateral imposition of interest @ 24% p.a. amounting Rs.2,56,35,294/- as on 11.11.2021, we find that the covenants of the invoices explicitly contains the provision that Interest @24% p.a. will be charged if the payment is not made with in the stipulated time.
17. The Hon’ble NCLAT in **Pawan Enterprises v. Gammon India,[Hon’ble NCLAT in in para. 4 of its Judgement dated 27th July 2018 in Company Appeal No.148 of 2018]** held that *“If in terms of any agreement interest is payable to the Operational or Financial Creditor then the debt will include interest”*, Further the Hon’ble NCLAT in case **Prashat Agarwal v. Vikash Parasrampuria,[Company Appeal (AT) (Ins) No. 690 of 2022, judgement dated 15.07.2022]**, observed that *“it is clear from the facts that the total amount for maintainability of claim will include both principal debt amount as well as interest on delayed payment which was clearly stipulated in the invoice itself.”*

18. Therefore, we are of the earnest view that the applicant had claimed the interest @24% p.a. on the delayed payment on the as per the terms and conditions contained in the invoices raised by the applicant and duly accepted by the corporate debtor. Accordingly, the citation **CBRE South Asia Pvt. Ltd. v Mls United Concepts and Solutions Pvt. Ltd. (CP-IB/797/ND/2021)** relied by the corporate debtor will not be applicable in the present case and the contention of the corporate debtor is rebutted.

19. In this regard, the reliance is placed on the citation **Mobilox Innovations Pvt Ltd V. Kirusa Software Pvt Ltd, C.A. No.9405/2017 decided on 21/09/2017** at paragraph 25 it is observed as under:

“Adjudicating authority, when examining an application under Section 9 of the Act will have to determine:

*(i) Whether there is an “operational debt” as defined exceeding Rs.1 lakh?
(See Section 4 of the Act)*

(ii) Whether the documentary evidence furnished with the application shows that the aforesaid debt is due and payable and has not yet been paid? and

(iii) Whether there is existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt in relation to such dispute?

Apart from the above, the adjudicating authority must follow the mandate of Section 9, as outlined above, and in particular the mandate of Section 9(5) of the Act, and admit or reject the application, as the case may be, depending upon the factors mentioned in Section 9(5) of the Act.

20. In view of the foregoing averments and the discussions made, we are of the considered view that operational debt is above the pecuniary threshold limit of Rs. 1 crore as envisaged under Section 4 of the Code, 2016 which was due and there was default on the part of the corporate debtor in pursuance of invoices raised on behalf of the applicant. Further, keeping in view all the aforementioned reasons, this Adjudicating Authority is satisfied that there is an existence of ‘debt’ and ‘default’ as defined under the Code, 2016.

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21. Thus the present petition **(IB)-297/(ND)/2022** filed by the applicant under Section 9 of the Code, 2016 **stands admitted** in terms of Section 9(5) of the Code and **CIRP is hereby ordered to be initiated** against the Corporate Debtor i.e., M/s. S.D. Engineers Tech Private Limited.
22. The applicant has not proposed the name of an IRP, therefore, this bench appoints Mr. Pradeep Kumar, as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IRP being IBBI/IPA-001/IP-P02583/2021-2022/13981 and email id – pradeep35in@gmail.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rule, 2016, AFA and disclosures be made as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016 within a period of 3 days from the pronouncement of the order.
23. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Pradeep Kumar to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor
24. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:
- “(a)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;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.”

(e) The IB Code 2016 also prohibits *Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*”

25. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

26. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'.

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27. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders.
28. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.
29. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

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(DR.BINOD KUMAR SINHA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)