



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT-I
KOLKATA

IA(I.B.C)/430(KB)2021

C.P(IB) No. 41/KB/2021

*An application under Section 65 of the Insolvency and Bankruptcy Code, 2016 read with
rule 11 of the National Company Law Tribunal Rules, 2016*

In the matter of:

INDIA MEDTRONIC PRIVATE LIMITED

.....Operational Creditor

VERSUS

HEALTHCARE ASSOCIATES PRIVATE LIMITED

.....Corporate Debtor

And

In the matter of:

HEALTHCARE ASSOCIATES PRIVATE LIMITED

.....Applicant

VERSUS

INDIA MEDTRONIC PRIVATE LIMITED & ANR

.....Respondents

Date of Pronouncement: 23/03/2023

Appearances (through hybrid mode) :

- | | |
|----------------------------------|---------------------------|
| 1. Mr. Jishnu Saha, Sr. Adv. | }For Operational Creditor |
| 2. Mr. Shiv Ratan Kakrania, Adv. | } |
| 3. Mr. Rahul Ray, Adv. | } |
| 4. Mr. Divyanshu Sharma, Adv. | } |
| 5. Mr. Tanuj Kakrania, Adv. | } |
| 6. Mr. Karanjeet Sharma, Adv. | } |

- | | |
|-----------------------------------|-----------------------|
| 1. Mr. Shaunak Mitra, Adv. | }For Corporate Debtor |
| 2. Mr. Debartha Chakraborty, Adv. | } |



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3. Ms. P. Ganguly, Adv. }
4. Mr. S. Kar, Adv. }
5. Ms. J. Sabbah, Adv. }

Coram: Rohit Kapoor, Member (Judicial)
Balraj Joshi, Member (Technical)

ORDER

Per: Rohit Kapoor, Member (Judicial)

1. This application has been filed under Section 65 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016 by **Healthcare Associates Private Limited** (*Corporate Debtor/ Applicant*) against **India Medtronic Private Limited** (*Respondent No.1/Operational Creditor*), levelling charges of perjury on the respondent no. 2 herein namely **Sanjay Mitra** who is the Zonal Sales Manager of the Respondent No.1 and affirmed the affidavit in support of the Section 9 Application.

Brief facts of the matter:

2. The Applicant (*Corporate Debtor*) is a public limited company incorporated under the Companies Act, 1956. It specializes in business and market development for medical devices, equipments and disposables.
3. The Respondent No.1 (*Operational Creditor*) is a private limited company incorporated under the Companies Act, 1956. Its line of business includes the wholesale distribution of surgical and other medical instruments, apparatus and equipment.
4. In the year 2015, the Applicant and the Respondent No.1 entered into a Non-Exclusive Distribution Agreement, effective from 25.04.2015 until 28.04.2017 whereby the Respondent No.1 appointed the Applicant as its non-exclusive distributor for sale of its products. In the usual course of business, the Applicant placed orders with the Respondent No.1 and the Respondent No.1 duly supplied the same to the Applicant. The Respondent No.1 raised invoices from time to time and the Applicant accepted the same after receiving the supply of products.



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5. At the beginning, the Applicant made timely payments to the Respondent No.1, in order to build a good commercial relationship and accordingly, the Respondent No.1 made an amendment to the said Non-Exclusive Distribution Agreement and increased the tenure by one year. It is after October 2017, that the Applicant became highly irregular in making payments and started defaulting in making the outstanding payments.
6. In view of the abovementioned defaults, the Applicant furnished an Undertaking cum Indemnity Bond dated 17.08.2018 to the Respondent No.1 wherein it admitted and acknowledged that an amount of Rs.3,31,81,042/- (Rupees Three Crore Thirty-One Lakh Eighty-One Thousand and Forty-Two Only).
7. The Applicant, in partial discharge of its liability issued 3 (three) cheques dated between February 9, 2018 and April 5, 2018 for an amount of Rs.3,21,20,236/- (Rupees Three Crore Twenty-One Lakh Twenty Thousand Two Hundred and Thirty-Six Only).
8. It is stated in Part-IV the petition that an amount of Rs.4,43,14,123.50/- (Rupees Four Crore Forty Three Lakh Fourteen Thousand One Hundred Twenty Three and Fifty Paise Only) alongwith interest @ 18% per annum calculated upto 30.06.2020 has become due and payable on account of the products supplied by the Respondent No. 1.
9. The present application is filed in respect of certain false statements on oath made by the respondents in the Section 9 Application.
10. The Applicant states that in paragraph 8 at pages 27 and 28 of the Section 9 application, it is alleged by the respondents as follows: -

"That Corporate Debtor, in partial discharge of its liability, issued 3 (Three) cheques dated 07.02.2019 amounting to a sum of Rs.3,21,20,236/- (Rupees Three Crore Twenty-One Lakh Twenty Thousand Two Hundred and Thirty-Six Only) in favour of the Operational Creditor. These cheques were dated between February 9, 2018 and April 5, 2018. However, to the Operational Creditor's utter shock the same were dishonored and returned by the bank vide the return memos stating "Drawers signature differs" as the reason for dishonor.

11. The Applicant states that there is also an incongruous allegation made in para 8 of the



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petition that the cheques were dated between February 9, 2018 and April 5, 2018 whereas such allegation is contradictory to the first sentence of paragraph 8 which says that the cheques were dated February 7, 2019.

12. The Applicant states that the first two blank cheques bearing No. 002039 and 002033 were furnished in July, 2015 and the third blank cheque bearing No. 003285 was furnished in May, 2017 which can be proved from the recording slips in the cheque books of the Applicant.¹ It further states that the Respondents have wrongfully sought to misuse and convert old blank cheques given by the applicant in 2015 and 2017 respectively by filling in the figures and dates as an afterthought so as to manufacture and invent a purported admission liability of the Applicant.
13. The Applicant states that the amounts and dates mentioned in the cheques have been filled up later by some other person than the person who had filled the name of the payee while handing over the same and as such there are clear and stark differences between the handwritings.
14. The Applicant states that the alleged claims of the Respondent No.1 are highly disputed and that they have resorted to forgery, fabrication and fraud by misusing old blank cheques and making false statements on oath to wrongly portray that the Applicant had admitted its liability by issuing cheques for the specified amounts whereas such cheques were issued long back only for the purpose of security.
15. The Applicant states that the Applicant and its officers are based in Kolkata. In para 8 of the Petition, the Respondent No.1 has stated that the cheques were given to them on February 7, 2019 whereas from a bare perusal of the return memo of such cheques clearly depicts that the said cheques were presented before the Bank of America, Mumbai on February 7, 2019. The Applicant states that the entire facts stated by the Respondent No.1 is falsified as the Applicant had neither authorized any of its employee or officer to provide any cheque to the Respondent No.1 nor any representative of the Applicant was travelling to Mumbai to handover any cheques on February 7, 2019.
16. The Applicant further states that the respondents have made false statements on oath

¹ *Annexure-R-2 in the Application*



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before this Hon'ble Tribunal in the Section 9 application and in the purported affidavit affirmed by Mr. Sanjay Mitra (Respondent No. 2) in support thereof. Also, in the said affidavit, Mr. Sanjay Mitra has falsely alleged that the statements in paragraph 8 of Part-IV of the Petition are based on information and documents available and believed by him to be true and that no part thereof is false and nothing material has been concealed therefrom.

17. On the basis of the above contentions, the Applicant states that the Respondent No. 2 working for gain with the Respondent No. 1 is guilty of perjury and has committed offences under the provisions of the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973.
18. The Applicant states that the Respondent No. 2 was legally bound by oath to state the truth. However, the allegations made by the Respondent No. 1 and 2 in the pleadings and affidavits as referred above are false to their knowledge. Therefore, the Applicant has prayed before this Hon'ble Tribunal to pass appropriate orders under Section 340 of the Code of Criminal Procedure, 1973 and to prosecute the Respondent No. 2 as there is a prima facie case of deliberately giving false evidence on a matter of substance and there is reasonable foundation for such charge.

Analysis and Findings

19. At the outset we may refer to the judgment pronounced by the Hon'ble NCLAT in **M/s. KVR Industries Private Limited v. M/s. P. P. Bafna Ventures Private Limited**² and the relevant para is reproduced as under:

Para 11 “.....*It is also argued that to invoke Section 464 of Penal Code false document has to be made with a dishonest and fraudulent intention as was held in the matter of “Dr. Vimla Vs. Delhi Administration” by Hon'ble Supreme Court in Criminal Appeal No. 213 of 1960 decided on 29th November, 1962 (MANU/SC/0163/1962) (1963 SCR Supl. (2) 585). The Financial Creditor has submitted that to order prosecution of perjury there*

² Company Appeal (AT) (Insolvency) No.626 of 2020, decided on 18.12.2020



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must be prima facie case of deliberate falsehood and matter of substance and Court has to be satisfied that there is reasonable foundation for the charge. Mere inaccurate statement cannot be basis for charge of perjury. It is argued that I.A. Nos. 41 and 42 of 2020 were filed with bona fide intention to restore CP/204/2019 and to restore earlier order dated 2nd December, 2019. It is further argued that under Section 340 of Cr. P.C. Court is not bound to make a complaint regarding commission of offence referred in Section 195 (1) (b) (i) as the Section is conditioned by the words “Court is of opinion that it is expedient in the Interest of Justice” to initiate proceedings.”

Para 13 *“The Adjudicating Authority in the impugned Order observed that no order of prosecution of the person verifying the affidavit can be ordered by the Authority and it was outside the realm of jurisdiction of the Authority. For such reasoning, the Adjudicating Authority without going into the merits of I.A. No. 51 and 52 of 2020 proceeded to observe that the Corporate Debtor may approach the appropriate forum for redressal. It observed that, it would be venturing into jurisdiction of Criminal Court if it went into I.A. No. 51 and 52 of 2020. With regard to these observations and findings, reference needs to be made to Section 424 of the Companies Act, 2013 which was amended by Act 31 of 2016 w.e.f. 15.11.2016 and reference to IBC was inserted. Section 424 of the Companies Act, 2013 reads as under (amended Section 424):*

“424. Procedure Before Tribunal and Appellate Tribunal.- (1) *The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act [or of the Insolvency and Bankruptcy Code, 2016] and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.*

(2)The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act 1[or under the Insolvency and Bankruptcy Code, 2016], the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908.) while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;



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- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) dismissing a representation for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (h) any other matter which may be prescribed.

(3) Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

- (a) in the case of an order against a company, the registered office of the company is situate; or
- (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).”

(Emphasis Supplied)

Para 14 “Now **Section 195 of IPC** requires reference. The same reads as follows:

“(1) No Court shall take cognizance-

- (a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
- (ii) of any abetment of, or attempt to commit, such offence,
- or
- (iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;



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(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in subclause (i) or sub- clause (ii), 29[except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.]

(2) Where a complaint has been made by a public servant under clause (a) of sub- section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub- section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate: Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court



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according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.”

Para 16 *“As the Corporate Debtor is harping on Section 193 of Penal Code the same also be referred which is as under:*

“193. Punishment for false evidence. —Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 193 of Penal Code has three explanations which are not necessary to reproduce but can be kept in the view.”

Para 17 *“.....Under Section 340 of Cr. P.C. the Adjudicating Authority can hold preliminary inquiry if it is “of opinion that it is expedient in the Interest of Justice that an inquiry should be made” into the any offence referred in Clause ‘b’ of Sub-Section 1 of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, i.e.-Adjudicating Authority, here.”*

Para 18- *“The Learned Counsel for the Appellant/Corporate Debtor has argued that without Adjudicating Authority holding preliminary inquiry and going through the procedure as prescribed under Section 340, it is not possible for the Appellant to file private complaint before any Magistrate for the Act complained as there is bar created under Section 195 of Cr. P.C. and no Court will take cognizance. The Learned Counsel has relied on various Judgments. We do not think it is necessary to refer to the various Judgments as it is apparent to us that no Court can take cognizance of offence punishable under Sections as mentioned in Section 195(1)(b)(i) except on complaint in writing by the Court concerned. Reference to Judgment in the matter of “Narendra Kumar Srivastava Vs. State of Bihar” (2019) 3 SCC 318 itself makes the points clear which parties are raising against each other. In the matter of “Narendra Kumar Srivastava” Contempt case was dropped by High*



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Court on the basis of compliance shown by Respondents in show-cause affidavit. Appellant therein filed Private Complaint before Assistant Chief Judicial Magistrate alleging that because of the false and wrong statement made by Respondents in their show-cause affidavit, High Court dropped Contempt Case. Magistrate took cognizance but in Revision, High Court set aside the Order. Appeal was filed to Supreme Court. Hon'ble Supreme Court maintained Order of High Court inter alia observing: “

“17. Section 340 CrPC makes it clear that a prosecution under this section can be initiated only by the sanction of the court under whose proceedings an offence referred to in Section 195 (1) (b) has allegedly been committed. The object of this section is to ascertain whether any offence affecting administration of justice has been committed in relation to any document produced or given in evidence in court during the time when the document or evidence was in custodia legis and whether it is also expedient in the interest of justice to take such action. The court shall not only consider prima facie case but also see whether it is in or against public interest to allow a criminal proceeding to be instituted.

*18. This Court in **Chajoo Ram V. Radhey Shyam**⁶, held that the prosecution under Section 195 CrPC could be initiated only by the sanction of the court and only if the same appears to be deliberate and conscious. It emphatically held as under: (SCC p. 779, para 7)*

“7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily P a g e 26 | Company Appeal (AT) (Insolvency) No. 626 of 2020 and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There



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must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge.

19. In Santokh Singh V. Izhar Hussain⁷, this Court has held that every incorrect or false statement does not make it incumbent on the court to order prosecution. The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The court orders prosecution in the larger interest of the administration of justice and not to gratify the feelings or personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely that the court should direct prosecution.

6. (1971) 1 SCC 774 : 1971 SCC (Cri) 331

7. (1973) 2 SCC 406 : 1973 SCC (Cri) 828”

(Emphasis Supplied)”

In view of the law laid down as above we deem it proper, before passing an order on the plea of perjury, to have a detailed hearing on this issue.

20. Post this matter on 26.04.2023.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 23rd day of March, 2023

(FA,LRA)