

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH-II, CHENNAI**

CP (IB)/276/(CHE)/2021

In the matter of **M S S Medical Equipments & Services Private Limited**

DRAEGER INDIA PRIVATE LIMITED

10th Floor, Commerz II,
International Business Park,
Oberoi Garden City,
Off Western Express Highway, Goregaon (East)
Mumbai – 400 063 ... Operational Creditor

-Vs-

M S S MEDICAL EQUIPMENTS SERVICES PRIVATE LIMITED

No. 282 E, Opp St. Joseph School,
Trichy Road, Ondipudur,
Coimbatore – 641 016 ... Corporate Debtor

Order Pronounced on 9th September **August, 2022**

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**JUSTICE TELAPROLU RAJANI, MEMBER (JUDICIAL)
SAMEER KAKAR, MEMBER (TECHNICAL)**

For Applicant : Manoj R Kathree, K.M. Anand
Arnab Ghosh, Advocates

For Respondent: Ex-Parte

ORDER

Under Consideration is an application filed by Mr. Deepak Labde, the Authorized Representative of **Draeger India Private Limited** (hereinafter referred to as 'Operational Creditor') 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 against M S S Medical

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[Signature]

Equipments & Services Private Limited (hereinafter referred to as 'Corporate Debtor') to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

2. From Part-I of the Application, it is seen that the Operational Creditor is a Private Limited Company incorporated on 14.01.2004 under the provisions of the Companies Act, 1956 bearing CIN: U51507MH2004FTC143991 and having its registered office at 10th Floor, Commerz II, International Business Park, Oberoi Garden City, Off Western Express Highway, Goregaon (East) Mumbai – 400 063. From Part-II of the Application, it is seen that Corporate Debtor is a Private Limited Company bearing CIN: U51507TZ2008PTC014630 incorporated on 11.07.2008 under the provisions of the Companies Act, 1956 and having its registered office at No. 282 E, Opp St. Joseph School, Trichy Road, Ondipudur, Coimbatore – 641 016.

3. From part-III of the Application, it is seen that the name on one Mr. S. Vasudevan bearing Reg. No. IBBI/IPA-002/IP-N00573/2017-2018/11740 is proposed by the Applicant to act as the Interim Resolution Professional whose written consent is also annexed in page no. 93 of the typed set of papers filed along with the application.

4. From Part-IV of the Application it is seen that the Operational Creditor claims Rs. 2,80,11,188.54 (Rupees Two crore eighty lakh

7/2/2021

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eleven thousand one hundred eighty eight and fifty four paise) comprising of principal to the tune of Rs. 1,73,26,378.93/- (Rupees One crore seventy three lakh twenty six thousand three hundred seventy eight and ninety three paise only) and interest calculated @ 18% per annum amounting to Rs. 1,06,84,809.61 (Rupees One crore six lakh eighty four thousand eight hundred nine and sixty one paise) which is due and payable by the Corporate Debtor. The date of default as mentioned in Part-IV of the application is 16.05.2018.

5. Part-V of the Application describes the particulars of the Operational debt, documents, records and evidence of default as follows,

- a) Copies of Outstanding Invoices, Annexure E (Pg. nos. 36-73)
- b) Copy of Demand Notice dated 23.04.2021 along with the copy of postal tracking report, Annexure G
- c) Copies of Return memo along with dishonoured cheques, Annexure F
- d) Balance Confirmation dated 10.01.2018
- e) Original Bank Certificate dated 13.08.2021 issue by NSBC Bank.

6. The Learned Counsel for the Applicant has averred that the Operational Creditor was supplying medical equipments to the Corporate Debtor. It is further averred that the Corporate Debtor had raised invoices as per the terms of the purchase orders issued by the Corporate Debtor. Moreover, there was a running account

7/Nov ✓

maintained between the Operational Creditor and the Corporate Debtor. Ad-hoc payments were been made by the Corporate Debtor.

7. The Learned Counsel for the Applicant has averred that the Operational Creditor had supplied the Goods as per the specification of the Corporate Debtor and all such goods was received and appropriated by the Corporate Debtor. The Operational Creditor vide their letter of balance confirmation dated 10.01.2018 had admitted their due to the tune of Rs. 1,24,35,212/- as on 30.11.2017. It is further averred that after the said balance confirmation and subsequent payments made the principal amount due and payable is to the tune of Rs. 1,73,26,378.93/-.

8. The Learned Counsel for the Applicant has averred that the Operational Creditor has issued a Demand Notice dated 23.04.2021 as stipulated under section 8 of IBC 2016 to the Corporate Debtor and the same has been delivered to the Corporate Debtor on 27.05.2021. Further, perusal of the Affidavit filed under Section 9(3)(b) of IBC, 2016 would shows that, neither the Corporate Debtor has paid the outstanding amount within the period of ten days from the date of receipt of the Demand Notice nor the Corporate Debtor has brought to the notice of the Operational Creditor any dispute regarding the amount which is





outstanding. Under the said circumstances, the Learned Counsel for the Operational Creditor prayed for the initiation of CIRP against the Corporate Debtor.

9. Despite sufficient opportunities given to the Corporate Debtor to contest their case, no appearance was made before this Adjudicating Authority. Notice was issued by the registry on 28.10.2021. Thereafter, the Applicant herein was directed to take private notice to the respondent and the same was sent on 29.11.2021, however, the same was returned. The Applicant has also sent an e-mail dated 10.12.2021 to the registered email id available at the MCA portal. The Affidavit of service showcasing the above fact was filed before the registry on 17.12.2021. The Respondent/ Corporate Debtor was set ex-parte vide order dated 31.03.2022. However, no application is filled till date to set aside the ex-parte order. At this juncture this Adjudicating Authority is constrained to proceed with the matter in the absence of the Corporate Debtor.

10. Further, it is also pertinent to note that the default arising in the instant application is much before to the timeline prescribed under section 10A of IBC, 2016. Under the said circumstances, this Adjudicating Authority is left with no other option that to proceed with the present application. Considering the fact that the date of default as averred in the application is 18.05.2018 and that the

 

instant Application was filed before this Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 on 19.10.2021 for which Article 137 of the Limitation Act provides a period of limitation for three years from "when the right to apply accrues read with Section 238A of the IBC,2016, on account of the same, the instant Application ought to have been filed on or before 18.05.2021. However the Hon'ble Supreme Court in a *suo motto* case **In re: Cognizance for extension of Limitation** suspended the limitation from 15.03.2020 till 28.02.2022 in light of the surge in COVID-19 cases in the country. Thus placing reliance upon the same and considering the fact that the applicant has filed the instant application well within the grace period of 90 days as specified in the above mentioned suo moto order by Hon'ble Supreme Court of India.

11. Heard submissions made by the Applicant and perused the documents placed on record. It is manifest from the record that the Corporate Debtor owes debt above 1 crore to the Operational Creditor excluding the interest as calculated by the applicant. And that the acknowledgment of debt by the Corporate Debtor would go on to show that there is an 'operational debt' and the return memo would show that the Corporate Debtor has committed 'default' in repayment of such 'operational debt' to the Operational Creditor. Further, it is also pertinent to note that the default



arising in the present Application is much prior to the advent of the Covid-19 pandemic and hence the Corporate Debtor cannot seek shelter also under Section 10A of IBC, 2016. Under the said circumstances, this Tribunal is left with no other option other than to proceed with the present case and initiate the Corporate Insolvency Resolution Process in relation to the Corporate Debtor.

12. Thus, taking into consideration the facts and circumstances of the case as well as the position of Law, we are of the view that the Petition filed by the Operational Creditor is required to be **Admitted** under Section 9(5) of the IBC, 2016. Since the Operational Creditor has named **Mr. S. VASUDEVAN** with **Reg. No. IBBI/IPA-002/IP-N00573/2017-2018/11740** as the "Interim Resolution Professional, this Adjudicating Authority upon verification of the AFA and the pending disciplinary status hereby appoints **Mr. S. VASUDEVAN** as the IRP. The IRP appointed shall take in this regard such other and further steps as are required under the Statute, more specifically in terms of Section 15,17,18 of the Code and file his report within 20 days before this Bench. The powers of the Board of Directors of the Corporate Debtor shall stand superseded as a consequence of the initiation of the CIRP in relation to the Corporate Debtor in terms of the provisions of IBC, 2016.

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13. As a consequence of the Application being admitted in terms of Section 9 (5) of the Code, the moratorium as envisaged under the provisions of Section 14(1) and as extracted hereunder shall follow in relation to the Corporate Debtor:

- a. The institution of suits or continuation of pending suits or proceedings against the respondent 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 respondent 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 respondent 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 respondent.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any

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other authority constituted under any other law for the time being in force, shall not be suspended or terminated 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 or a similar grant or right during moratorium period;

14. However, during the pendency of the moratorium period in terms of Section 14(2) (2A) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such Corporate Debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

7/10/21 ✓

- (a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
- (b) a surety in a contract of guarantee to a corporate debtor.

15. The duration of the period of moratorium shall be as provided in Section 14(4) of the Code and for ready reference reproduced as follows:

- (4) The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process:

Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the Resolution Plan under sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or Liquidation Order, as the case may be.

16. The Operational Creditor is directed to pay a sum of **Rs.2,00,000/-** (*Rupees Two Lakh Only*) to the Interim Resolution Professional upon the Interim Resolution Professional filing the necessary declaration form as required under the provisions of the

7/Nov ✓

Code to meet out the expenses to perform the functions assigned to her in accordance to Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

17. Based on the above terms, the Application stands **Admitted** in terms of Section 9(5) of IBC, 2016 and the moratorium shall come in to effect as of this date. A copy of the Order shall be communicated to the Operational Creditor as well as to the Corporate Debtor above named by the Registry. In addition, a copy of the Order shall also be forwarded to IBBI for its records. Further, the Interim Resolution Professional above named who is figuring in the list of Resolution Professionals forwarded by IBBI be also furnished with copy of this Order forthwith by the Registry, who will also communicate the initiation of the CIRP in relation to the Corporate Debtor to the Registrar of Companies concerned.

18. List the matter on ^{10/09}09.09.2022 for report of IRP.



SAMEER KAKAR
MEMBER (TECHNICAL)



JUSTICE TELAPROLU RAJANI
MEMBER (JUDICIAL)

Order Pronounced under Rule 151 of NCLT Rules, 2016 by Hon'ble Technical member Shri Sameer Kakar on behalf of the bench consisting of Justice (Retd.) T. Rajani & Shri. Sameer Kakar, member (Technical).