IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT-III

CP (IB) 214/(MB)/C-III/2023

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:

Novacare Healthcare Private Limited, a private limited company having its registered address at Ground Floor, C-12A/12B/12C, C-Building, Kantilal Maganlal Estate, L.B.S. Marg, Bhandup (W), Mumbai- 400078;

......Petitioner/Operational Creditor

Vs

Max Healthcare Institute Limited, a public limited company registered under the Companies Act, 1956, having its registered office at 401, 4th Floor, Man Excellenza, S.V. Road, Vile Parle (W), Mumbai- 400056;

......Respondent/Corporate Debtor

Coram:
Hon'ble Shri H.V.Subba Rao, Member (J)
Hon'ble Mrs. Madhu Sinha, Member (T)

Order delivered on: 22.11.2023

ORDER

[Per se: Shri H.V.Subba Rao, Member (J)]

1. The above Petition is filed by Operational Creditor with Identification No. U51900MH2018PTC309987, to Initiate CIRP claiming the following reliefs:

    i) *Pass an order admitting the present Petition in accordance with inter alia Section 9(5)(i) of the IBC, 2016;*

    ii) *Pass an order in accordance with prayer clause (1) hereiabove, then this Tribunal pass an order declaring the commencement of a CIRP in respect of Max Healthcare Institute Limited. ("the Respondent") in terms of inter alia Section 9(6) of the Code;*

    iii) *Pass an order in accordance with prayer clause (1) hereiabove, then this Tribunal declare a moratorium on the Respondent in terms of inter alia Section 13(1)(a) r/w Section 14 of the Code;*

    iv) *Pass an order in accordance with prayer clause (1) hereiabove, then this Tribunal pass an order appointing a legally fit and competent Insolvency Professional duly registered with IBBI as an IRP of the Respondent, in accordance with inter alia Section 13(1)(c) r/w Section 16 of the Code;*

    v) *Pass an order in accordance with prayer clause (4) hereiabove, then this Tribunal issue a direction to the IRP to cause a Public Announcement for the initiation of a CIRP of the Respondent in terms of inter alia Section 13(1)(b) r/w Section 15 of the Code r/w Regulation 6(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the CIRP*

Regulations) and Section 13(2) of the Code r/w Regulation 6(1) of the CIRP Regulations;

2. Brief facts behind filing the above application are as follows:

2.1 The Operational Creditor (OC) i.e. Novacare Healthcare Solutions Private Limited is one of the leading player in distribution of pharmaceutical and medical products in India to hospitals, institutions etc.

2.2 The Corporate Debtor (CD) i.e. Max Healthcare Institute Limited is a PAN India hospital chain based which owns, operates various hospitals and healthcare facilities at New Delhi either on its own i.e. at Okhla Industrial Area, Phase II, New Delhi-110020; and other hospital and healthcare facilities under the respective service agreements with management control under its brand i.e. "Max" and the revenue out of such hospitals being disclosed in its standalone financials which includes: (i) Max Super Specialty Hospital, Saket (Unit of Devki Devi Foundation) (ii) Max Super Specialty Hospital, Patparganj, (a unit of Balaji Medical and Diagnostic Research Centre) (MSSH); (iii) Max Smart Super Specialty, Saket, New Delhi (a unit of G.M. Hospital and Research Centre for Medical Science).

2.3 All the aforesaid hospitals are part of the CD's network of hospitals and they have centralized purchase department and common person. The CD is engaged in maintaining and running hospitals including purchasing pharmaceutical products and consumables for all its

hospitals. The CD, in fact, treats the sale of pharmaceutical supplies as part of its financial accounts.

2.4 The OC had supplied COVID-19 Products i.e. Casirivimab + Imdevimeb ("COVID Product") under the brand name- "Ronapreve" (brand name of Roche and exclusive marketing rights with Cipla Limited) and non-COVID-19 products ("Non-COVID Product") (and collectively "the Products") to the CD during the period 2nd June 2021 and 2nd April 2022.

2.5 The last payment received by the OC which was paid by the CD, was an amount of Rs.50,29,920.57 (Rupees Fifty Lakhs Twenty-Nine Thousand Nine Hundred Twenty and Fifty Seven Paise Only) on 12th August, 2022, without raising any grievances.

2.6 The CD has unpaid dues towards invoices issued from 2nd June 2021 till 2nd April 2022. Despite repeated follow ups by Operational Creditor, the CD has failed to pay the outstanding amount towards the invoices issued during the aforesaid period.

2.7 Owing to this, on 13th January 2023, the Petitioner issued the Demand Notice under *inter alia* Section 8 of the IBC, 2016 upon the Respondent seeking *inter alia* repayment of Rs. 1,02,20,129/-(Rupees One Crore Two Lakh Twenty Thousand One Hundred and Twenty-Nine Only) *i.e.*, "the Amount Claimed to be in Default".

2.8 As the Respondent has failed to make the outstanding payment, the Petitioner has filed the present Petition seeking appropriate reliefs.

3. In terms of the aforesaid, the Respondent submits as under:

3.1 The alleged claim amount by the OC has not met with threshold amount as specified by the Central Government:

3.1.1 All the hospitals mentioned in the Petition by the CD *i.e.*, Max Super Specialty Hospital, Saket *("Balaji Unit")*, Max Super Specialty Hospital, Patparganj *("Devki Unit")* and Max Smart Super Specialty, Saket *("GM Modi Trust")* hereinafter, collectively referred to as "said Other Hospitals", are separate legal entities and cannot be categorized as Unit/group entities/associate companies of CD. Further, each of the so mentioned hospitals separately placed Purchase Orders on the OC and in fact, the OC had also raised separate invoices on each of the hospitals.

3.1.2 Since, separate Purchase Orders were being issued by each of the above-mentioned hospitals and separate invoices were being raised by the OC on each of the above-mentioned hospitals, the payments were also made independently by each one of them. The CD used to issue Purchase Orders and make payments for medicines purchased only on behalf of the hospitals owned by the CD and not for any of the above-mentioned said Other Hospitals, which are being run either by different societies or trust. The CD has no role whatsoever in the purchase and/or payment of dues towards the purchase of medicines by the above- mentioned said Other Hospitals which are being run either by different societies or by a trust and it can only be

held liable towards default, if any, on behalf of Max Hospital, Saket for any payment due and payable.

3.1.3 Since, it is the case of the OC that the alleged dues payable by Max Hospital Saket to them towards purchase of medicines is Rs.58,25,042.07 (Rupees Fifty-Eight Lakhs Twenty-Five Thousand and Forty-Two and Seven Paisa Only) and not more than that, the instant Petition deserves to be dismissed at the very threshold as the said amount is less than the minimum amount of default specified by the Central Government in exercise of its powers conferred under proviso to Section 4 of Part II of the Insolvency and Bankruptcy Code, 2016 i.e. Rs. 1,00,00,000/-(Rupees One Crore Only) vide circular being no. F.No. 30/9/2020-Insolvency.

3.2 Non-maintainability on the grounds pre-existing dispute between the parties:

3.2.1 The OC entered into a business arrangement with the CD wherein it was agreed between the parties that the OC would supply medicines inter alia Ronapreve injection, which is an essential COVID drug, to the CD, whenever a Purchase Order would be placed upon them by the CD. The parties in question had at the time of 4 entering into a business arrangement for supply of medicines to Max Hospital Saket, mutually agreed that the purchase and supply of medicines will be governed by the terms and conditions of the Purchase Order issued by the CD to the OCand that, the same will be binding on both of

them. It is pertinent to note that the OChad in terms of the Purchase Orders issued by the CD to them, supplied medicines at the hospitals owned by the CD from time to time. The terms and conditions of all the Purchase Orders issued by the CD to the OCwere identical in all Purchase Orders. The relevant terms and conditions are reproduced hereinbelow for the case of reference:

19. All Expiry Breakage/ Non-Moving items to be taken back by the supplier within 15 days of intimation.

20. All such transactions to be sented by replacement credit note as per agreed terms within 45 days from the date of intimation of supplier"

Hence, it was obligatory for the OCto take back the items which were either expired or broken or non-moving within fifteen days of intimation. Further, such transactions were to be settled by the OC by either making replacement of medicines or issuance of credit note to the CD within 45 days from the date of intimation to them. The CD states that at the time of issuance of the Purchase Order, the OC did not raise any dispute on the terms of the Purchase Order and further supplied the goods as relinquished.

3.2.2 Since, the parties had mutually agreed that the business arrangement for supply and purchase of medicines by the OC to the CD will be governed by the terms and conditions of the Purchase Orders issued by the CD to the OC, the CD had telephonically requested the Creditor to pick up the stock of Ronapreve injections as the same was

not moving. However, in utter disregard and violation of the terms of the Purchase Order, the OC not only refused to pick up the stock of Ronapreve injections but also sent an email to the CD on 4th March, 2022 calling upon to clear the dues towards the supply of Ronapreve.

3.2.3 In response to the aforementioned email, the CD vide an email dated 4th March 2022 stated that the outstanding amount has to be reduced by returning the unused stocks of Ronapreve, request of which was communicated a long time ago. Further, the OC was called upon to make an arrangement for pick-up of the stocks of non-moving product *i.e.*, Ronapreve in terms of the purchase order pursuant to which the final amount will be paid after adjusting of return amounts of stock of Ronapreve injection.

3.2.4 Thereafter, the OC *vide* an email dated 4 March, 2022 replied stating that they should provide an approval from CIPLA, ie, the manufacturer of Ronapreve injection vide regards to return on the unused injections. Further, they questioned the number of unused vials of Ronapreve with the CD. The OC stated that since it's a Covid product, it was always sold to the hospitals on non-returnable basis. It was also mentioned that if CIPLA would give an approval to take the stock back, they would take it back else the CD would have to clear the dues towards the purchase of Ronapreve injection.

3.2.5 A similar business arrangement was also entered into between the OC and Max Super Speciality Hospital, Vaishali, which is a unit of Crosslay Remedies Ltd., a subsidiary of the CD (hereinafter referred to as "Max Hospital Vaishall, Crosslay Remedies Ltd."), for supply and purchase of medicines upon the issuance of Purchase Order by the above-mentioned hospital to the Operational Creditor. The CD states that terms of the Purchase Order issued by Max Hospital Vaishali, Crosslay Remedies Ltd. to the OC were similar to the ones which were issued by the CD to the Operational Creditor. In a similar situation, stock of Ronapreve injections was not moving at Max Hospital Vaishali, Crosslay Remedies Ltd., the OC was telephonically intimated about it and further, they were asked to pick up the non-moving stock of Ronapreve injection from the hospital. It is also relevant to mention here that the OC had, in terms of the Purchase Order, picked up stock worth Rs.10,99,399/- (Rupees Ten Lakhs Ninety-Nine Thousand Three Hundred and Ninety-Nine Only) of Ronapreve injection from Max Hospital Vaishali, Crosslay Remedies Ltd. and also issued two credit notes dated 2nd July, 2022 and 4th July, 2022 of Rs. 5,49,699/- (Rupees Five Lakhs Forty-Nine Thousand Six Hundred and Ninety-Nine Only) and Rs.5,49,700/- (Rupees Five Lakhs Forty-Nine Thousand Seven Hundred Only) respectively in favor of Max Super Specialty Hospital, Vaishali, against return of stock of Ronapreve injection.

3.2.6 The OChad abided by the terms of the Purchase Order issued by the Max Hospital Vaishali to them and had not only lifted the non-moving stock of Ronapreve injection worth Rs.10,99,399/-(Rupees Ten Lakhs Ninety-Nine Thousand Three Hundred and Ninety-Nine Only) from the above- mentioned hospital but also issued two credit notes in their favor, the OC ought not be allowed to re-probate from picking up the stock of non- moving stock of Ronapreve injection from Max Hospital Saket, a unit of the CD.

3.2.7 The CD states that all the purchase orders were raised by the CD. Since, the requisitioned medicine were extremely important, the same were directly delivered to the unit/ hospital/warehouse as intimated by the CD to the Operational Creditor. It is pertinent to note that at the time of delivery, the personnel on behalf of the OC along with the requisitioned medicines, handed over a copy of the invoice to the security personnel present at the desired unit/hospital. There mere responsibility of the security personnel was to acknowledge that the goods have been received from the Operational Creditor. It is pertinent to note that though the OC did not dispute the terms of the Purchase Order, however, at the time of delivery, it unilaterally without intimating and/or seeking consent from the CD, affixed the stamp of non-refundable product on all the invoices issued towards supply of the Ronapreve injections to the CD. It is further pertinent to note that every entity individually via their individual

bank accounts have cleared invoices raised by the OC upon them which clearly evidences that the same are separate legal entities. The CD craves leave to refer to reply and upon the bank statements of the hospitals as and when necessary.

3.2.8 Hence, the disputes between the parties had arisen on account of *ad idem* on the terms of purchase and sale of the Ronapreve injection. The OC has, whimsically, refused to pick up non-moving stock of Ronapreve injection and issue a credit note in lieu thereof from Max Hospital. The OC placing reliance on the terms of the invoices raised by them upon the CD for supplying the medicines wherein they have unilaterally, without intimating and/or seeking consent from the CD, affixed the stamp of non-returnable and non-refundable product on the all the invoices issued towards supply of the Ronapreve injections to the CD, refused to pick up the goods or issue credit notes in lieu thereof.

3.2.9 It is submitted that since a dispute arose between the parties as regards lifting of non-moving stock of Ronapreve injection, the OC initiated a pre- litigation mediation under the Commercial Courts Act, 2015 individually against Max Hospital, Saket, Balaji Unit, Devki Unit, GM Modi Unit and Max Hospital Vaishali, Crosslay Remedies Ltd. Hence, Mediation No. 56 of 2022 was lodged against Max Hospital, Saket. However, despite endeavoring to amicably resolve the dispute amongst themselves, the parties in question failed

to resolve the disputes, as a result of which, the mediation was closed on 22nd December, 2022.

3.2.10 Unlike under the present Petition, wherein the OC has connivingly combined claims of said Other Hospitals along with the CD, separate mediation applications were filed for Balaji Unit, Devki Unit, Max Hospital Saket, GM Modi Trust and Max Hospital Vaishali, Crosslay Remedies Ltd. which clearly demonstrates that each of the above are separate legal entities and the alleged claims thereunder can only be adjudicated separately. Further the OC initiated mediation under the Commercial Courts Act, 2015 which failed and clearly demonstrates serious disputes and differences between the parties.

3.2.11 The Hon'ble Supreme Court has, in matter titled as ***"Mobilox Innovations Private Limited Vs. Kirusa Software Pvt. Ltd."*** while interpreting the expression "existence of a dispute" under Section 8(2)(a) of the Insolvency and Bankruptcy Code, 2016 clearly held that breach of NDA was sufficient to construe the existence of a dispute to invalidate the CIRP application filed by the Operational Creditor, it is submitted that the Petition under reply also deserves to be dismissed at the threshold as in the instant also there is existence of dispute between the parties in terms of Section 8(2)(a) of the Insolvency and Bankruptcy Code because the OC has in total disregard and violation of the terms of the Purchase Order not picked

up stock of non-moving item i.e. Ronapreve injection supplied to the CD and instead preferred the Petition under reply against the CD. Relevant extracts of the above-mentioned judgment are reproduced as under:

51. It is clear therefore, that once the OC has filed an application which is otherwise complete, the Adjudicating Authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the OC or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the OC the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute it pending between the parties. Therefore, all that the Adjudicating Authority is to see at the stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is more blaster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious hypothetical or illusory, the adjudicating authority has to reject the application.

56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts supported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties,

which may or may not ultimately succeed and the Appellate Tribunal was wholly incorrect in characterizing the defense at vague, gut-up and motivated to evade liability."

In view of the aforementioned reasons, it is clear that the instant Petition deserves to be dismissed at the very threshold.

3.2.12 Further, it is a settled proposition of law that when there is no agreement between the parties which provides for payment of interest, the interest component cannot be clubbed with the alleged principal component of the debt to meet the threshold limit for filing a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016, and that, in the instant case also, there is no such agreement between the parties in question which provides for payment of interest by the CD, the Petition under reply deserves to be dismissed at the very threshold as the alleged principal amount of debt by the OC is less than Rs. 1,00,00,000/- (Rupees One Crore Only).

4. After hearing the Learned Counsel for the Applicant and the Respondent as well as perusing the record, contention by the CD that all the three associated companies of CD have three different CIN, separate assets and liabilities stands right. Similarly, the claims of OC against other entities of CD, Max Super Specialty Hospital, Max Smart Super Specialty and Max Super Specialty Hospital are situated at two different places, namely, Saket and Patparganj. The Petitioner has purposefully, in order to bring the company claim within threshold limit clubbed the claims against different entities of

the CD and filed the present company petition which is not maintainable in law.

5. In addition to the above, the OC had also initiated mediation under the Commercial Courts Act, 2015, the failure of which demonstrates serious disputes and differences between the parties. The Learned Counsel for the Respondent has relied on ***Mobilox Innovations Private Limited Vs. Kirusa Software Pvt. Ltd.*** *(2017) ibclaw.in 01 SC,* whereunder the Hon'ble Supreme Court determined the role of the Adjudicating Authority while examining an application under Section 9 of IBC, 2016 filed by Operational Creditors and interpreted the 'existence of a dispute' among other important interpretations. At this stage, this Tribunal shall not examine the merits of the dispute other than to the extent of existence of dispute between OC and CD, which in this particular matter, does truly exist, although that may or may not ultimately succeed. Therefore, the said application for initiating CIRP under Section 9, IBC, 2016 is liable to be rejected.
6. Hence, the present Petition, CP (IB) 214 (MB) of 2023 stands rejected and is dismissed.

Sd/-	Sd/-
Madhu Sinha	**H.V. Subba Rao**
Member (Technical)	**Member (Judicial)**