



**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**KOLKATA BENCH-I**

**KOLKATA**

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

*An application 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:*

India Medtronic Private Limited, having its registered office at 1241, Solitaire Corporate Park, Building Number 12, 4<sup>th</sup> Floor, Andheri-Ghatkopar Link Road, Andheri(E), Mumbai-400093.

*.... Operational Creditor*

*Versus*

Healthcare Associates Private Limited [CIN : U33119WB2004PTC098408], having its registered office at 3<sup>rd</sup> Floor, 13 Elgin Road, Gaza Park, Sreepally, Bhowanipore, Kolkata-700020.

*..... Corporate Debtor*

**Date of pronouncement: 23/03/2023**

*Appearances (via hybrid mode):*

1. Mr. Jishnu Saha, Sr. Advocate : *For Operational Creditor*

2. Mr. Shiv Ratan Kakrania, Advocate :

3. Mr. Rahul Ray, Advocate :

4. Mr. Divyanshu Sharma, Advocate :

5. Mr. Tanuj Kakrania, Advocate :

6. Mr. Karanjeet Sharma, Advocate :

1. Mr. Shaunak Mitra, Advocate : *For Corporate Debtor*

2. Mr. Debartha Chakraborty, Advocate :

3. Ms. P. Ganguly, Advocate :

4. Mr. S. Kar, Advocate :



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5. Ms. J. Sabbah, Advocate

:

*Coram:*

*Rohit Kapoor* : *Member (Judicial)*

*Balraj Joshi* : *Member (Techincal)*

**ORDER**

*Per Rohit Kapoor, Member (Judicial)*

- A. The Court convened *via* hybrid mode.
- B. This is a Company petition has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (*the Code*) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 on behalf of India Medtronic Private limited (*Operational Creditor*), by Mr. Sanjay Mitra duly authorised *vide* Board Resolution dated 25<sup>th</sup> August, 2020 for initiation of Corporate Insolvency Resolution Process (*'CIRP'*) against Healthcare Associates Private Limited (*'Corporate Debtor'*).
- C. This petition has been filed on 3<sup>rd</sup> February, 2021 before this Adjudicating Authority claiming an amount of Rs. 4,43,14,123.50 which comprises of Rs. 3,15,41,747.25 and an interest of Rs. 1,27,72,376.25 (upto 30.06.2020) as brought out in Part IV of Form 5, as provided in the IBBI regulations for Application to Adjudicating Authority. No specific date of default has though been mentioned, but it has been stated that the default started with the invoice dated 27.10.2017. There have been payments made by the Corporate Debtor albeit irregularly.

**Brief facts and submissions by operational creditor are summarised herein after:**

1. The Operational Creditor is a private limited company, incorporated in 1993 and is involved in the wholesale distribution of the surgical and other medical instruments, apparatus and equipment. The Corporate debtor is a public limited company incorporated in 2004 and specializes in business and market development for medical devices, equipment and



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disposables. The parties entered into a Non-exclusive distribution agreement effective from 25.04.2015 until 28.04.2017, whereby the Corporate Debtor was appointed as Non-exclusive distributor for sale of the Operational Creditor's products, in parts of Eastern and North Eastern India including inter-alia West Bengal, Orissa, Jharkhand and Bihar.

2. The Agreement is placed at Page 51 of the Petition. This was further amended and the agreement term was extended by one year i.e., till 27.04.2018.
3. The Corporate Debtor has not disputed the fact that the goods have been received. It has not questioned any of the unpaid invoices that were raised. Three cheques issued by the Corporate Debtor for the aggregate amount of Rs.3,21,20,236/- were dishonoured on presentation. The Corporate Debtor has not denied issuing the said cheques.
4. The demand notice issued by the Operational Creditor under Section 8 of the Code was replied by the Corporate Debtor by a letter dated 17.01.2020. It will appear therefrom that the Corporate Debtor has essentially contended that – (a) that the Operational Creditor decided not to renew the Distribution Agreement from April 2018 without any attributable cause; (b) The Operational Creditor had been directly dealing with the erstwhile customers of the Corporate Debtor; and (c) That there was an agreement subsequently entered into between the parties whereunder it was agreed that the Operational Creditor will assist the Corporate Debtor in recovering its dues to the erstwhile customers. Even while so contending the Corporate Debtor expressly admitted that “our company will liquidate the outstanding of your client from the amount thus recovered by our company with the help and assistance of your client,” Corporate Debtor has alleged.
5. On the issue of a Pre-existing dispute, the Corporate Debtor has relied upon the plaint filed by it, being Money Suit No.247 of 2020 filed by it



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(filed on 03.08.2020 – after issuance of the 1st and 2nd Demand Notice under Section 8 of the I&B Code on 04.01.2020 and 19.06.2020 respectively) against the Operational Creditor. Even in the said suit the Corporate Debtor has expressly admitted its debt to the Operational Creditor. This will, inter alia, be evident from paragraphs 15 and 19 of the Plaint. The Corporate Debtor has contended that it was unable to recover its dues from the market due to absence of employees poached by the Operational Creditor.

6. In this regard, the Corporate Debtor has attempted to rely on an undertaking given by it on 17.08.2018 in an attempt to contend that the same was an agreement whereunder the Operational Creditor had agreed to assist the Corporate Debtor in recovering its dues in exchange of the right to adjust 50% of the amount recovered from the market. Even while making such assertion the Corporate Debtor has, however, admitted that “----- plaintiff’s director had to execute an undertaking admitting the alleged dues”. The Corporate Debtor has contended that the Operational Creditor is not entitled to any claim in view of the claim of Rs.68,48,76,427/- made by the Corporate Debtor against it in the said Money Suit.
  
7. It will, however, appear from para 29 of the Plaint that such claims are entirely on account of alleged damages suffered by the Corporate Debtor, which on their very face, are in any event absurd. In paragraph 29 of the Plaint the Corporate Debtor has claimed random amounts on account of loss of business profit, loss of goodwill, loss of business and loss due to employees poached. The Corporate Debtor has thereby attempted to set off a specious claim for damages without any foundation whatsoever against a liquidated claim which it has clearly admitted. This notwithstanding the fact that Clauses 13.4.g and 14.1 of the Distribution Agreement clearly provides that in no event will the principal i.e., the Operational Creditor be liable to the distributor i.e., Corporate Debtor for exemplary, incidental, indirect, special or consequential damages of any kind.



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8. The Undertaking dated 17.08.2018 on which the Corporate Debtor has relied is clearly not an agreement and is only an undertaking and indemnity given by the Corporate Debtor to the Operational Creditor. The same cannot as such absolve the Corporate Debtor of its obligation to pay for the price of goods supplied to it by the Operational Creditor. This is, inter alia, evident from Clause 3 of the same:

*“I agree and acknowledge that an amount of Rs.33181042.00 (Rupees Three Crore Thirty-One Lakh Eighty-One Thousand and Forty-Two Only) continues to be due and payable by Healthcare Associates Pvt Ltd to India Medtronic Pvt. Ltd. under the distribution agreement”.*

Further, In Clause 4 of the said undertaking it has been recorded that:

*“The Parties agree that the Outstanding Amount is independent of any claim that the parties may have under the Distribution Agreement or otherwise.”*

9. Although various e-mails have been referred to by the Corporate Debtor in an attempt to allege breach of the undertaking by the Operational Creditor, it will appear therefrom that the principal allegation of the Corporate Debtor in the same is that it has been unable to realize moneys from the market because of poaching of its employees by the Operational Creditor. This clearly cannot be a defense to an admitted debt.
10. The Corporate Debtor has admitted to issuing the said cheques, which were later dishonoured on presentation. It is not the contention of the Corporate Debtor that the aggregate value of the cheques was in excess of the amounts outstanding by it to the



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Operational Creditor, which the Corporate Debtor has admitted in the undertaking to be Rs.3,31,81,042/-.

11. It is in any event the settled law that even blank cheque leaves, voluntarily signed and handed over, would attract the presumption under Section 139 of the Negotiable Instruments Act in the absence of any cogent evidence to show that the cheque was not issued in discharge of its debt. Reference may be made to the decision by the Hon'ble Supreme Court in "Bir Singh v. Mukesh Kumar" Learned Counsel appearing for the petitioner thus seeks admission of this petition.

**Submissions of the Ld. Counsel appearing on behalf of the Corporate Debtor are summarised as under:**

12. The petition is liable to be dismissed on the following grounds: -
  - a. Material and deliberate suppression of facts by the Operational Creditor evidencing existence of serious pre-existing disputes;
  - b. Breach of reciprocal obligation of Operational Creditor;
  - c. Manipulation and fabrication of blank cheques by the Operational Creditor to wrongfully invent alleged admission of dues by Corporate Debtor, resulting in offence covered by section 340 of Cr.P.C and consequences under Section 65 of the IBC.
13. After the extension of the agreement, the Operational Creditor with mala fide intentions taking advantage of the extension started poaching the Corporate Debtor's key managerial officers and began soliciting direct sales of the Products, at a much-reduced price, to various hospitals and physicians including the clients/customers of the Corporate Debtor. As a result, the Corporate Debtor became severely handicapped in its attempts to recover its substantial dues from the market.



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14. The Operational Creditor had interfered in the Corporate Debtor's operations and had resorted to poaching of Corporate Debtor's employees. Operational Creditor had unilaterally bypassed the Corporate Debtor and approached other distributors and had represented to the dealers and customers that they should not deal with the Corporate Debtor.

15. In this regard the Corporate Debtor had sent several emails to the Operational Creditor, which have not been disputed by the Operational Creditor. After much deliberations and discussions between the parties, the Operational Creditor had agreed that it would assist/co-operate with the Corporate Debtor in recovery of the dues on the condition that the Operational Creditor would receive 50% proceeds thereof against the dues of the Corporate Debtor and that the Corporate Debtor would execute an undertaking. However, despite such undertaking dated 17.8.2018 which contained reciprocal obligations and promises by Operational Creditor there has been no cooperation/ assistance from the Operational Creditor towards the Corporate Debtor in recovery of the dues of the Corporate Debtor from the market. The Operational Creditor stands in breach of its obligations.

16. The Operational Creditor has based its entire claim on an indemnity cum undertaking dated 17.8.2018 and on manipulated blank cheques (with figures inserted by Operational Creditor itself) as alleged admissions of liability by Corporate Debtor. However, this is totally mala fide and fraudulent as stated below.

17. There has been no admission/ acknowledgement of any liability by the Corporate Debtor towards the Operational Creditor. In fact, the Operational Creditor has fabricated false evidence and made false statements on oath which is dealt with in detail by the Corporate Debtor in I.A No. 430/KB/2021, which is an application for perjury.



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18. Despite a categorical agreement and understanding between the parties that Operational Creditor would deploy resources to assist the Corporate Debtor in recovering outstanding dues from the market, Operational Creditor acted in breach of such obligation.

19. Each and every one of the aforesaid facts has been captured in several emails issued by Corporate Debtor in the years 2017 and 2018 (more than 2 years before Section 8 notice was served). Notably, all these emails have been suppressed in the Company Petition. It is also important to note that none of these emails are denied and disputed and there is not a single contemporaneous denial by the Operational Creditor regarding what is stated by Corporate Debtor in these emails.

20. A brief summary of these pre-existing disputes as captured in the emails is given below and it was submitted that there was no denial of these mails nor were the contents disputed: -

i. Email dated 17.08.2017 issued by Corporate Debtor to Operational Creditor– It is recorded that Operational Creditor had interfered with Corporate Debtor’s setup and influenced/poached Corporate Debtor’s employees. It is also recorded that Operational Creditor would help the Corporate Debtor to recover outstanding payments from the market.

ii. Email dated 11.01.2018 issued by Corporate Debtor – It is stated by Corporate Debtor that customers were being serviced by Operational Creditor through other distributors and that the conduct of the Operational Creditor was not ethical and Operational Creditor was indulging in impropriety and acting in disregard to the agreement. It was also recorded that Operational Creditor had unilaterally decided to supply goods through other distributors without discussions on collecting outstanding of Rs.3.55 crores from the market which was owed to Corporate Debtor. It was also recorded that Corporate Debtor would have





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no responsibility going ahead because the Operational Creditor had chosen to act in a manner detrimental to its own interest and Operational Creditor had created a mess.

- iii. Email dated March 2, 2018 issued by Corporate Debtor – It is stated by Corporate Debtor that Operational Creditor was trying to actively poach employees from Corporate Debtor which was in gross violation of the spirit of the agreement. Reminder was also issued on March 12, 2018 (page 30 of reply)
- iv. Email dated January 9, 2018 issued by Corporate Debtor – It is stated by Corporate Debtor that it had invested huge efforts and resources to market and sell the Operational Creditor's products and instead of having support from Operational Creditor, Operational Creditor was acting in an improper manner which was damaging the Corporate Debtor's business and demoralizing the Corporate Debtor's employees and that all the issues were required to be resolved to move ahead.
- v. Email dated April 17, 2018 issued by Corporate Debtor –The Corporate Debtor's reputation and goodwill had been hugely damaged.

21. In spite of the Operational Creditor's unethical acts, Corporate Debtor had continued to work tirelessly for achieving sales and despite the fact that Operational Creditor had breached its promises and resorted to unfair and unethical acts.

22. It was also specifically stated by Corporate Debtor that on account of loss of business, reputation, goodwill etc. Corporate Debtor had suffered loss in excess of Rs.69 crores. Reminder was also issued on April 26, 2018.

23. It was submitted by the Ld. Counsel that these emails were issued more than 1½ (one and a half) years before the section 8 demand notice was



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first issued on 4<sup>th</sup> January, 2020, which has been duly replied by the Corporate Debtor on 17<sup>th</sup> January 2020 and as such qualify for being categorized as pre-existing dispute.

24. The Indemnity Undertaking relied on by Operational Creditor has not been executed by Corporate Debtor. He was out of station when his wife was coerced to sign this undertaking (Para xxvii at page 12).
  
25. The Indemnity Undertaking relied on by Operational Creditor contained reciprocal promise and obligations of Operational Creditor which has been breached by Operational Creditor. This is evidenced by the email dated August 16, 2018 issued by Operational Creditor i.e., forwarding the undertaking draft one day before the same was signed. In this email dated August 16, 2018, it is categorically recorded that Operational Creditor will assist Corporate Debtor in recovery of debtors by engaging manpower etc. and that Corporate Debtor would pay a certain percentage of such realization to Operational Creditor for discharge of dues and escrow account would be opened in this regard. Crucially, there is no denial of this fact in the reply email issued by Operational Creditor on 16<sup>th</sup> August, 2018.
  
26. The undertaking cum indemnity bond dated August 17, 2018 was in lieu of emails between the parties which clearly stated that repayment of any alleged debt would only be possible with the assistance and corporation of the Operational Creditor. However, the Operational Creditor did not take any step to assist the Corporate Debtor in recovery of its dues from the market, thereby breaching the purported undertaking. The Corporate Debtor had an understanding with the Operational Creditor that the alleged dues of the Operational Creditor would be paid back on the mutual assistance and efforts of the parties to recover the total dues of the Corporate Debtor from the market, whereby 50% of such recovery would be paid to the Operational Creditor. However, the Operational



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Creditor acted in breach of its obligations and cannot be permitted to take advantage of its own wrongs.

27. In the circumstances the Corporate Debtor was compelled to file a Civil Suit against the Operational Creditor in August, 2020 and the same is still pending.
28. The Respondent Company claiming to be alleged Operational Creditor (Operational Creditor), has filed C.P. No. 41/KB/2017 by giving false evidence related to three alleged cheques for the exact amount claimed in the Petition. On the basis of these three filled-in cheques, Operational Creditor has falsely claimed admission of liability by Corporate Debtor (Corporate Debtor). From the records it is conclusively established that the allegations regarding three cheques given by Corporate Debtor are false and that the blank security cheques (wrongfully filled in by Applicant) were not given by Corporate Debtor in 2018 or 2019 as alleged but much earlier in 2015 and 2017. Corporate Debtor has already filed Reply demonstrating falsity of claim and serious pre-existing disputes whereby the Operational Creditor/Respondent is making false statements on oath to suggest an alleged debt of Rs. 4,43,14,123.50 by Corporate Debtor.
29. The Ld. Counsel for the Corporate Debtor submits that the petition is liable to be dismissed on the following grounds: -
- a) Material and deliberate suppression of facts by the Operational Creditor evidencing existence of serious pre-existing disputes;
  - b) Breach of reciprocal obligation of Operational Creditor;
  - c) Manipulation and fabrication of blank cheques by the Operational Creditor to wrongfully invent alleged admission of dues by Corporate Debtor, resulting in offence covered by section 340 of Cr.P.C and consequences under Section 65 of the IBC.



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30. For all the aforesaid reasons, the petition is liable to be dismissed and this is a fit case for penalty being imposed under Section 65 of IBC and for prosecution to be initiated under Section 340 of Cr.PC.

*Analysis and Findings*

31. Heard the Learned Senior Counsels appearing for the parties and perused the records.

32. Adverting to the pleadings we note:

32.1 The Corporate debtor has taken a definite stand at page 19 of its reply affidavit that the 3 cheques referred to in paragraph 8 of the petition were never issued either between February 9, 2018 and April 5, 2018 or on February 7 2019 as alleged. It is a stand taken that these cheques were actually furnished much earlier.

32.2 It is further the specific stand taken by the corporate debtor is these blank cheques bearing number 002039 and 002033 were furnished to the Operational Creditor **in July 2015 and 3<sup>rd</sup> blank cheque bearing 003285 was furnished in May 2017.** Copies of recording slips in the cheque books of the corporate debtor have been marked as J. It is further contended and is a matter of record that cheques bearing serial numbers immediately preceding and following the serial numbers of the three cheques were given to Operational Creditor much earlier and even Operational Creditor has admitted to the same in emails issued by it.

32.3 Instances of other cheques of the same series issued to and encashed by other parties during 2015 to 2017 would be evident from cheque book entries and bank statements, copies of which are annexed as **Annexure K.**

32.4 It is the specific stand taken by Corporate Debtor that Operational Creditor has wrongfully sought to misuse and convert old blank cheques given by



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corporate debtor in 2015 and 2017 in order to engineer a debt in the year 2020.

- 32.5 It is further stated by the corporate debtor at page 20 a bare perusal of 3 cheques along with the return memo have been presented before Bank of America. It was found 3 cheques had been deposited in Bank of America Mumbai as BOFD Sort code mentioned in the return memos identifies the bank where cheques were presented as bank of America, Mumbai. Copies of these documents the cheques have been presented in Bank of America Bombay have been enclosed as L.
- 32.6 Corporate debtor and its officers are based in Calcutta. The allegation and suggestion at para 8 of petition that cheques were given on February 7, 2019 is falsified by the fact that cheques were purportedly presented for payment in Mumbai on the same very day February 7, 2019 which is impossible. It is stated the corporate debtor had not authorized any employee or any officer to provide any cheques to the Operational Creditor.
- 32.7 Amounts and dates therein have been filled up later and by a different person than person who had filled up the name of the payee while handing over the same. There were clear and stark differences in handwriting when comparing the writing of the payee's name and the writing for the amounts and dates.
- 32.8 The business dealing between parties came to an end in the year 2018 and after that there was never any admission of any liability by the corporate debtor.
- 32.9 In para 8 of petition, it is stated by the Operational Creditor that the Corporate Debtor in discharge of its partial liability issued 3 cheques dated 7<sup>th</sup> of February 2019 in favour of or Operational Creditor.
- 32.10 It was only October 2017; Corporate debtor became highly irregular in payment. (Para 6 of petition).



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33. From the above facts and record what emerges is summed up hereinafter:

- i. Period of distribution agreement: 25-04-2015 to 28-04-2017.  
Page 23 of petition.
- ii. Admittedly in view of timely payments by corporate debtor, the agreement was extended by one year up to 27-04-2018. (Para 5, page 24 of petition).
- iii. According to operational Creditor (Para 6), Corporate Debtor was making timely payments for the products supplied, however, became irregular after October 2017 and issued three cheques dated 7-02-2019 in partial discharge of his debt which were returned with memos ' ' Drawer's signature differ''.
- iv. Significant to note, no notice under Negotiable Instrument Act has been issued by Operational Creditor after three cheques dated 7-02-2019 returned with memos ' ' Drawer's signature differ''.
- v. Specific stand taken by corporate debtor on affidavit dated 09-April 2021 filed before this Adjudicating Authority that blank cheques bearing number 002039 and 002033 were furnished to the Operational Creditor in July 2015 and 3<sup>rd</sup> blank cheque bearing 003285 was furnished in May 2017 along with supporting documents have not been disputed or denied by operational creditor, therefore are deemed to be admitted as as held by Hon'ble Supreme Court in **M/s Gian Chand & Brothers & Another v. Rattan Lal @ Rattan Singh**, relevant paragraphs of which have been reproduced below:

*24. We have referred to the aforesaid Rules of pleading only to highlight that in the written statement, there was absolutely evasive denial. We are not proceeding to state*



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*whether there was admission or not, but where there is total evasive denial and an attempt has been made to make out a case in adducing the evidence that he was not aware whether the signatures were taken or not, it is not permissible. In this context, we may profitably refer to a two-Judge Bench decision in **Sushil Kumar v. Rakesh Kumar**<sup>1</sup> wherein, while dealing with the pleadings of election case, this Court has held thus: -*

*“73. In our opinion, the approach of the High Court was not correct. It failed to apply the legal principles as contained in Order 8 Rule 3 and 5 of the Code of Civil Procedure. The High Court had also not analysed the evidence adduced on behalf of the appellant in this behalf in detail but merely rejected the same summarily stating that vague statements had been made by some witnesses. Once it is held that the statements made in paragraph 18 of the election petition have not been specifically denied or disputed in the written statement, the allegations made therein would be deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid.”*

- vi. Therefore, the only conclusion that can be arrived at is, the three cheques relied on by the operational creditor were issued at a time when alleged debt was not due or payable by corporate debtor. It also significant to note, it is not the case of Operational creditor that these were post-dated cheques issued by Corporate Debtor. Therefore, the operational creditor fails to establish debt or

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<sup>1</sup> (2003) 8 SCC 673



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default on the basis three cheques relied in paragraph 8 of this petition.

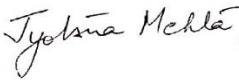

*(Emphasis supplied)*

34. Now looking at the undertaking dated 17<sup>th</sup> of August 2018 relied on by the operational creditor to establish the admission of debt by the corporate debtor, we have seen and examined it. Scanned copy is attached herein after:

**UNDERTAKING CUM INDEMNITY BOND**

I, Rakesh Mehta, aged 59, s/o, Jaswant Ray Mehta, residing at 8/10, Alipore Park Road Flat No-2, Alipore, Kolkata-700027, hereby state and, declare and undertake on 17-Aug-2018 [insert date], the following that:

- (1) I, am the partner and authorized signatory of Healthcare Associates located at 13 Elgin Road Kolkata ("Healthcare Associates").
- (2) India Medtronic Private Limited (hereinafter "India Medtronic") and Healthcare Associates had entered into a Distribution Agreement dated 25-04-2015 and amended on 30-04-2016 (hereinafter the "Distribution Agreement").
- (3) I agree and acknowledge that an amount of Rs 3,31,81,042.00 ( Three Crore Thirty One Lakhs Eighty One Thousand And Forty Two Only) continues to be due and payable by Healthcare Associates to India Medtronic under the Distribution Agreement (hereinafter the "Outstanding Amounts").

**CERTIFIED TRUE COPY**





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(4) I hereby agree and undertake that at request of Healthcare Associates, India Medtronic has allowed us to repay the Outstanding Amounts, that currently remains due and payable under the Distribution Agreement, through an arrangement of Escrow account, where all the funds received on account of sale of Medtronic products will be shared in the ratio Of 50:50 between India Medtronic and Healthcare Associates. The Parties undertake that an Escrow account will be created within 15 days from signing the Undertaking for the benefit of India Medtronic and Healthcare Associates. The Parties agree that the Outstanding Amount is independent of any claim that the Parties may have under the Distribution Agreement or otherwise.

(5) I further agree and acknowledge that the extension of the repayment period is being provided at the request of Healthcare Associates and we have requested India Medtronic not to encash Bank guarantee number 5561600210 Dated 21-Apr-2012 expiring on 17<sup>th</sup> August 2018. I further agree and acknowledge that the same is without reservation or prejudice to any of the rights that the Parties have under the Distribution Agreement.

(6) This Undertaking cum Indemnity Bond is not a waiver under the Distribution Agreement and is a continuing indemnity and shall survive until the repayment and discharge of all of the obligations of Healthcare Associates under the Distribution Agreement and shall not terminate or cease by efflux of time until expressly agreed by India Medtronic, in writing.

*Jyotsna Mehta*  
Name:



Designation:

On behalf of Healthcare Associates

*Rakesh Mehta*



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**Significant to note**, it mentions the name of one Rakesh Mehta making the declaration on 17 August 2018 as the authorized signatory of Healthcare Associates, although this undertaking on the face of it has been signed by one



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Jyotsana Mehta on both the pages of this document. Operational Creditor has not explained this anomaly. It is not understood how a different person could execute this undertaking when the authorized signatory is stated to be another person in this document. Corporate Debtor has specifically contended in his reply affidavit in para xxvii that this undertaking contains signatures of the wife Rakesh Mehta and Operational Creditor made his wife to sign it under coercion on a stamp paper of June 1, 2018. This plea of corporate debtor has not been controverted or denied by the operational creditor. Therefore, we have no hesitation to say that this undertaking on the face of it cannot be relied upon as acknowledgement of debt.

35. Under section 9, the Adjudicating Authority is required to see the existence of an operational debt, the default, and any pre-existing dispute, which must have been raised before the receipt of the Section 8 notice. Admittedly this has been done in the present case besides denying/disputing debt and default.

36. Whether dispute raised by Corporate Debtor regarding poaching in number of emails, admittedly spread over a period of 18 months before issuance of section 8 notice by operational creditor can qualify as pre-existing dispute, reference is made to the following:

- **Hon'ble Delhi High Court**

**Muthoot Finance Limited vs Shalini Kalra & Ors on 13 September, 2021.**

*Poaching of employees was an issue raised with one of the reliefs of decree for damages of Rs.2,00,01,000/- payable to the Plaintiff Company jointly and severally by all the Defendants together with interest thereon at the rate of 18% per annum till the date of payment.*

Hon'ble Delhi High Court granted certain interim reliefs.



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

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India Medtronic Pvt. Ltd. v. Healthcare Associates Pvt. Ltd.

● **Hon'ble Bombay High Court**

**Jet Airways (I) Ltd. vs Mr. Jan Peter Ravi Karnik on 17 April, 2000<sup>2</sup>**

Poaching was an issue. The Hon'ble High court observed:

*“Furthermore, the plaintiffs can be suitably compensated by award of damages in the event the suit is finally decreed against the defendants and in favour of the plaintiffs”.*

● **The Hon'ble High Court at Madras<sup>3</sup> has held:**

*It was alleged the Respondent had also facilitated the poaching / solicitation of other employees of the Applicant.*

37. In the reply affidavit, this allegation of poaching raised by Corporate Debtor remains un-rebutted. Admittedly in the present case Corporate Debtor has repeatedly and over a considerable period of time raised this issue with Operational Creditor after 2017 and even disputed the claim of Operational Creditor in its reply to Section 8 notice and has termed it as “Whimsical”.

38. From the above referred cases one thing is clear, poaching of employees can be an issue. Nature of relief in a suit or the grant thereof of course will depend upon case to case and upon facts of each case.

39. The Corporate Debtor has squarely blamed Operational Creditor causing business losses to it particularly due to the reason that its own trained manpower had been poached by the Operational Creditor with a malafide intentions and has claimed damages for an amount of Rs. 69.56 crores on five counts on 17-04-2018 whereas demand notice under section 8 was issued by Operational Creditor on 04-01-2020.

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<sup>2</sup> Equivalent citations: 2000 (4) Bom CR 487,

<sup>3</sup> Dated: 23/04/2012, O.A.Nos.321, 322 and 326 of 2012,



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40. However, calling it a pre-existing dispute as contended by corporate debtor may not fit the bill of the genuine dispute in terms of Mobilox Innovations Private Limited v. Kirusa Software Private Limited wherein it has been inter-alia held by the Hon'ble Supreme Court that:

*“33. The scheme under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing – i.e. it must exist before the receipt of the demand notice or invoice, as the case may be. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days send an attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that the operational creditor has encashed a cheque or otherwise received payment from the corporate debtor (Section 8(2)(b)). It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice*



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*of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2).”*

41. Since the Operational Creditor, on the basis of material before us and as mentioned and pointed out above, has not been able to establish debt or the default for the purpose of seeking insolvency of the Corporate Debtor under section 9 of IBC 2016, this petition is hereby **rejected**. However, the Operational Creditor is at liberty to pursue any other remedy that may be available to it under any other law.
42. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

**Balraj Joshi**  
**Member (Technical)**

**Rohit Kapoor**  
**Member (Judicial)**

The order is pronounced on the 23<sup>rd</sup> day of March, 2023

(FA, LRA)