

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT - IV**

CP No.: IB 327(ND)/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:

M/s HEALTHIANS RESEARCH CENTRE PVT LTD.

...Operational Creditor / Applicant

VERSUS

M/s NAYATI HEALTHCARE & RESEARCH NCR PVT LTD.

...Corporate Debtor / Respondent

Pronounced on: 05.07.2024

CORAM:

**SHRI MANNI SANKARIAH SHANMUGA SUNDARAM, HON'BLE
MEMBER (JUDICIAL)**

DR. SANJEEV RANJAN, HON'BLE MEMBER (TECHNICAL)

Present:

For Applicant : Adv. Shubhangi Tiwari

For Respondent : Adv. Giriraj Subramaniam, Adv. Siddhant Juyal

ORDER

PER: MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (JUDICIAL)

1. This instant application is filed by M/s. Healthians Research Centre Pvt. Ltd. (hereinafter referred to as '**Applicant**' / '**Operational Creditor**'), under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity '**the Code**') with a prayer to initiate Corporate Insolvency Resolution Process in

respect of M/s Nayati Healthcare & Research NCR Pvt. Ltd. (hereinafter referred as '**Respondent**' or '**Corporate Debtor**').

2. The Corporate Debtor having CIN: U24233DL2007PTC171542 was incorporated on 17.12.2007 under the provisions of the Companies Act, 1956 having its registered office situated at A-7, Khasra No. 882, Kharak Rewara Satbari Village, South Delhi, Delhi - 110074. Since the registered office of the Respondent/Corporate Debtor is in New Delhi, this Adjudicating Authority having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of Respondent Corporate Debtor.
3. The present petition was filed on 03.05.2023 before this Adjudicating Authority by Mr. Akshat Yadav, authorized vide Board Resolution dated 01.11.2022. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor has failed to make payment of a sum of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs Only). The Demand Notice sent by the Operational Creditor to the Corporate Debtor is annexed to the Petition as Annexure – A.
4. Ld. Counsel for the Petitioner has raised the following contentions:
 - a. The Operational Creditor provided services to the Corporate Debtor (in furtherance of the service agreement dated 07.04.2022 [*attached to the Petition as Annexure E, Pg.56*] entered into by the Petitioner and Vimhans Nayati Super Speciality Hospital (hereinafter referred to as '**Vimhans Niyati**'/'**Hospital**'), which was portrayed to the Operational Creditor as related and connected concern of the Corporate Debtor.

- b. Over a period of time, numerous invoices were raised by the Operational Creditor on the Corporate Debtor for the services provided by the Operational Creditor and in lieu of the same, a running account was maintained between the parties.
- c. It is pertinent to mention that the Operational Creditor, to show that the payments were being made by the Corporate Debtor pursuant to the Service Agreement dated 07.04.2022, has placed on record the copy of the initial invoices dated 18.04.2022 *[attached to the Rejoinder as Annexure R-3, Pg 108-109]* raised on the Corporate Debtor, having GSTIN of the Corporate Debtor, which have been paid to the bank accounts of the Operational Creditor. The said invoices are for the sum of Rs. 2,80,123/- and Rs. 1,16,977/- and the said payments are reflected in the Ledger Account Statement of the Operational Creditor *[attached to the Petition at Pg 149]*.
- d. The Invoices raised by the Operational Creditor include the details of the Buyer, which is the Corporate Debtor. It is further submitted that the said GST has been filed by Operational Creditor against the GSTIN number provided by the Corporate Debtor *[Rejoinder, Annexure R-3, Pg 108-109 and 110]*.
- e. After some time, there were defaults in payment, the amount due was to the tune of Rs. 1,80,44,000/- (Rupees One Crore Eighty Lakhs Forty Four Thousand only). To discharge the said liability, initially the Corporate Debtor issued 27 post-dated cheques for the total payable of Rs 1,80,44,000/- (Rupees One Crore Eighty Lakhs Forty-Four Thousand only) in favour of the Operational Creditor. However, all of them returned dishonoured on account of insufficiency of funds.
- f. On assurance of the Corporate Debtor, a closure of the service agreement dated 31.08.2022 was entered into, inter alia terminating the

- service agreement and for a settlement amount of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs only), including taxes, payable by the Corporate Debtor to the Operational Creditor and in lieu of which the Corporate Debtor issued 7 (seven) post-dated cheques [*Application, Pg. 61*]. The closure agreement is on the letter head of the Corporate Debtor.
- g. However, 5 of the said cheques were dishonoured again and therefore the Corporate Debtor is liable to make a payment of Rs. 1,25,00,000/- (Rupees One Crore Twenty- Five Lakhs only) excluding TDS, which has been defaulted. It is pertinent to highlight here that, out of the 7 cheques, the payment as regards the amounts of only the first two cheques of Rs. 11,25,000/- each [*Application, Pg. 61*] was later credited via RTGS by the Corporate Debtor on 02.09.2022 and 14.09.2022 [*Application, Pg. 158-159*]. The Corporate Debtor had partly performed the closure agreement.
- h. It is being portrayed that the Corporate Debtor is a total stranger to the service agreement and nothing to do with “Vimhans Niyati”. The Operational Creditor has placed on record the chain of documents [*Rejoinder, Pg. 9-16*] about the commercial relations between Vimhans Niyati (*Vidya Sagar Kaushalya Devi Memorial Health Centre*) and the Corporate Debtor (*earlier name OSL Healthcare Private Limited-Rejoinder, Pg. 107*) since the year 2015 onwards.
- i. The Corporate Debtor has concealed the agreements by and between the Corporate Debtor, erstwhile name OSL Healthcare Private Limited and Vimhans Hospital. It is further submitted that the Corporate Debtor at the time of signing of the agreement had represented itself as the sister concern/connected entity of the Hospital.
- j. That when the Corporate Debtor defaulted in honouring the closure agreement and the 5 cheques issued pursuant to the same, the

Operational Creditor had no option but to invoke the provisions of the IBC and knock the doors of this Adjudicating Authority. Merely because the Operational Creditor has invoked the remedy under the Negotiable Instruments Act, 1881 that would not debar the Operational Creditor from availing the civil remedies. **(Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel, (2023) 1 SCC 578).**

- k. The very act of issuing cheques in order to discharge the liability of the Operational Creditor, the Corporate Debtor has acknowledged the very existence of this debt-which needs to be discharged by the Corporate Debtor. **(Hon'ble High Court of Delhi in the matter of Ashok Kumar v Kartar Singh 2017 SCC OnLine Del 9024)**

'5.(ii) Since in the present case loan was repayable after five months from 23.9.2010 i.e. on 23.2.2011, hence the cheque given on 02.12.2013 is within three years of 23.2.2011 and therefore the dishonored cheque had the effect of acknowledgment of the liability under Section 18 of the Limitation Act.'

1. Other Judgments relied upon by the Operational Creditor are as follows:

**Hindustan Apparel Industries v Fair Deal Corporation, New Delhi
AIR 2000 Guj 261**

**Hotel Diplomat v. Folio Holdings India (P) Ltd., 2012 SCC OnLine Del
4436**

5. In reply to the contentions raised by the Petitioner, the Ld. Counsel for the Respondent has put forth the following:

- a. The Operational Creditor seeks to rely upon two alleged agreements executed between the Operational Creditor and another entity, Vimhans

Niyati, to somehow prove its claim that a debt is owed by the Corporate Debtor herein to the Operational Creditor which was not a party to the said agreements. The two alleged agreements are:

- i. Service Agreement dated 07.05.2022
 - ii. Closure of Service Agreement dated 31.08.2022
- b. Service Agreement dated 07.04.2022 as well as the Closure Agreement dated 31.08.2022 has been executed between the Operational Creditor and one entity, namely M/s. Vimhans Niyati, registered at Vimhans Niyati Super Speciality Hospital, Nehru Nagar, New Delhi 110065, India. However, the Operational Creditor has filed the present petition under Section 9 of the Code against the Corporate Debtor herein who is neither a party to the said agreement nor had M/s Vimhans Niyati entered into such agreement on its behalf. Thus, there being no 'privity of contract' between the Operational Creditor and the Corporate Debtor, the present Section 9 application ought to be dismissed as being non maintainable.
- c. Further, with regards to the agreement / arrangement between the Respondent and Vimhans Niyati, the only logical conclusion of the said agreements can be that the Corporate Debtor and Vimhans Niyati are two distinct entities who executed some agreements to participate together in a common activity/ assignment but in no way can lead to the conclusion that the entities are one and the same.
- d. Further, the Operational Creditor in order to demonstrate that the Corporate Debtor and Vimhans Niyati are the same entity, has also relied upon the fact that the said agreement(s) was signed on the letter head of the Corporate Debtor and that one of the directors of the Corporate Debtor was witness to the said agreement(s). A profitable reference in this context can be made to the judgment of the Hon'ble

Supreme Court in the case of “**Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Ors.**”, AIR 2010 SC 1793, wherein the Hon’ble Court clearly delineated that two companies having common shareholder or common board of directors will not make the two companies a single entity.

- e. Furthermore, the Operational Creditor itself affirms in its rejoinder that the Corporate Debtor was only ‘responsible’ for making the payment on behalf of Vimhans Niyati.
- f. The Operational Creditor further seeks to rely upon the cheques issued by the Corporate Debtor to disburse the liability owed by Vimhans Niyati to the Operational Creditor as an admission of debt by the Corporate Debtor. It is a well settled principle of law that mere issuance of a cheque does not amount to an admitted debt.
- g. Further, an Application under Section 9 of the Code, requires a strict proof of ‘debt’ and ‘default’ since the proceedings under the Code are summary in character and a trial is not conducted, like that of Civil matter, before the Civil Court. In the present case there is no question of a debt or default being due since the Operational Creditor has relied upon an alleged service with an entity, namely M/s Vimhans Niyati, which is a completely different entity from the Corporate Debtor herein.
- h. Thus, the Operational Creditor at best has a claim under Section 138 of the Negotiable Instruments Act, 1881 against the Corporate Debtor for failing to pay the dues owed by Vimhans Niyati, which is already being pursued by the Operational Creditor.
- i. The Operational Creditor is pursuing its claim against the wrong entity and is somehow trying to prove that the debts owed by Vimhans Niyati are debts owed by the Corporate Debtor herein.

Findings & Analysis:

6. We have heard the Ld. Counsel for both the Operational Creditor and the Corporate Debtor and have carefully perused the documents submitted by them. Upon consideration of the submissions made and the documents placed on record, we observe that the invoices for the services rendered bear the GSTIN of the Corporate Debtor. Verification of this GSTIN on the GST portal corroborates that it pertains to the Corporate Debtor [*Rejoinder Annexure R-4, Pg 110-114*] It is crucial to note that the Corporate Debtor never refuted or even corrected the Invoices.
7. Further, two agreements were signed between the Operational Creditor and Vimhans Niyati namely Service Agreement dated 07.05.2022 and Closure Agreement dated 31.08.2022. As per the closure agreement dated 31.08.2022, the Corporate Debtor was to discharge a fiscal responsibility worth Rs. 1,35,00,000/- (Rupees One Crore Thirty Five Lakhs only) + TDS i.e total of Rs. 1,50,00,000/- (Rupees One Crore Fifty Lakhs only). In this furtherance, cheques were issued by the Corporate Debtor.
8. Pertinently, in order to fulfill the settlement amount stipulated in the Closure Agreement, the Corporate Debtor issued seven cheques, of which five were dishonored. These dishonored cheques were dated 30.09.2022, 31.10.2022, 30.11.2022, 31.12.2022, and 31.01.2023 [*Petition, Annexure G, Pgs 65-69*], with their corresponding return memos dated 06.10.2022, 02.11.2022, 19.12.2022, 16.01.2023, and 14.02.2023 [*Petition, Annexure H, Pgs 70-74*]. It is noteworthy that all these cheques were drawn in the name of 'Nayati Healthcare Research NCR Private Limited', the Corporate Debtor.
9. The question that now arises is that 'Whether the payment by cheque which is dishonoured amounts to acknowledgement of a debt and a liability?'. We are supported by the Judgment passed by the Hon'ble Gujrat High Court

in the matter of **Hindustan Apparel Industries v Fair Deal Corporation**, **New Delhi AIR 2000 Guj 261**. The relevant paragraph is extracted below:

‘7. [...] In this view of the position of law reflecting upon issuance of a cheque, it has to be stated that a cheque would prima facie amount to an admission of debt unless a contrary intention has been expressed by the person issuing the cheque. Such an admission of payment of debt is to be determined with reference to the point of time at which the purported admission was made, that is to say, when the cheque was issued. Merely because subsequently such a cheque is dishonoured and the admission is retracted the admission or the acknowledgement can hardly be said to cease as an admission/acknowledgement of liability. To hold otherwise would be contrary to fair play between the parties, and justice and equity. With profound respect to the Bench in Chintaman's case (AIR 1956 Bom 553) (supra), we are unable to endorse the view expressed on the question in the said decision. We endorse the view expressed by the Patna High Court in Rajpatiprasad's case (AIR 1981 Patna 187) (supra), which is recent in point of time in so far as decisions referred to on behalf of the plaintiff are concerned. The view expressed by the learned single Judge in the referring judgment also merits acceptance.’

10. Further in the case of **Hotel Diplomat v. Folio Holdings India (P) Ltd.**, **2012 SCC OnLine Del 4436**, the aforementioned stance was re-iterated which stated:

‘14. It is by now settled proposition of law that a dishonoured cheque constitutes acknowledgement within the meaning of Section 18 of Limitation Act. Reference in this regard can be made to the decision

of this Court in Rajesh Kumari v. Prem Chand Jain AIR 1980 Del 80, where it was held that a cheque constitutes acknowledgement and whether it was dishonoured or encashed would be immaterial. It was further held by this Court that where a cheque was dishonoured a fresh period of limitation would start from the date of the cheque. Similar view was also taken in S.C. Gupta v. Allied Beverages Co. Pvt. Ltd. (2009) 163 DLT 495 & also by Full Bench of High Court of Gujarat in Hindustan Apparel industries v. Fair Deal Corporation AIR 2000 Guj 261'

11. In light of the above quoted Judgments, we are of the view that issuance of cheques amounts to acknowledgment of debt. It is a deemed acceptance of the liability on the part of the Corporate Debtor. This shows that there is a debt as well as a default qua the Corporate Debtor.
12. Further, it is the plea of the Corporate Debtor that the Operational Creditor has filed a case under Section 138 of the Negotiable Instrument Act, 1881 and should pursue that only. Here the question that arises is that 'Whether the Operational Creditor can simultaneously pursue proceedings under the Insolvency and Bankruptcy Code (IBC) and Section 138 of the Negotiable Instruments Act, 1881?' While dealing with a similar question, a Three Judge Bench of the Hon'ble Supreme Court in **Ajay Kumar Radheyshyam Goenka vs. Tourism Finance Corporation Of India Ltd : 2023 LiveLaw (SC) 195**, has held as under :

"16. We have no hesitation in coming to the conclusion that the scope of nature of proceedings under the two Acts and quite different and would not intercede each other. In fact, a bare reading of Section 14 of the IBC would make it clear that the nature of proceedings which have to be kept in abeyance do not include criminal proceedings,

which is the nature of proceedings under Section 138 of the N.I. Act. We are unable to appreciate the plea of the learned counsel for the Appellant that because Section 138 of the N.I. Act proceedings arise from a default in financial debt, the proceedings under Section 138 should be taken as akin to civil proceedings rather than criminal proceedings. We cannot lose sight of the fact that Section 138 of the N.I. Act are not recovery proceedings. They are penal in character. A person may face imprisonment or fine or both under Section 138 of the N.I. Act. It is not a recovery of the amount with interest as a debt recovery proceedings would be. They are not akin to suit proceedings.”

13. Thus, deriving from the jurisprudence established by the Hon’ble Supreme Court, it is evident that while recovery proceedings, which are barred under Section 14 of the Insolvency and Bankruptcy Code (IBC), are primarily civil in nature, proceedings under Section 138 of the Negotiable Instrument Act, 1881, are criminal in nature. These two types of proceedings serve distinct purposes and are governed by different legal principles. As such, there is no inherent conflict in pursuing both sets of proceedings concurrently. This legal distinction underscores that an Operational Creditor is entitled to simultaneously seek recourse under the IBC for insolvency proceedings, while also pursuing penal action under Section 138 of the Negotiable Instrument Act, 1881, without contravening the legal framework of either statute.

14. The subsequent question that necessitates our consideration is ‘Whether a case filed under Section 138 of the Negotiable Instrument Act, 1881, constitutes a pre-existing dispute?’. To address this query, we turn to

Section 5(6) of the Code, which delineates the definition of “Dispute” as follows:

(6) "dispute includes a suit or arbitration proceedings relating to-

(a) the existence of the amount of debt;

(b) the quality of goods or service; or

(c) the breach of a representation or warranty;

Further, a Suit is generally referred to as a Civil proceeding initiated by a party in the court of law.

15. On a comprehensive reading of the judgment cited above in paragraph 12 of this order, coupled with the definition of the term ‘Dispute’ under Section 5(6) of the Code, it becomes evident that proceedings initiated under Section 138 of the Negotiable Instrument Act, 1881 are inherently criminal in nature. This classification is pivotal as criminal proceedings do not fall within the ambit of a 'dispute' as defined by Section 5(6) of the Insolvency and Bankruptcy Code (IBC). Consequently, we are compelled to conclude that a case instituted under Section 138 of the Negotiable Instrument Act, 1881 does not constitute a pre-existing dispute.

16. Therefore, the mere pendency of a case under Section 138 cannot be construed as a dispute in the context of the IBC, thereby allowing the Operational Creditor to simultaneously pursue remedies under both legal frameworks without any legal conflict or impediment.

17. Considering the facts of the present case, we find that the debt in question exceeds the statutory threshold of Rs. 1 Crore. There is an established default in the repayment of this debt, and no pre-existing dispute has been demonstrated. Notably, although the Corporate Debtor is not a party to the Service Agreement and the Closure Agreement, it is evident that the invoices

have been issued under the Corporate Debtor's GSTIN, and payments were correspondingly made by the Corporate Debtor. Therefore, the assertion by the Corporate Debtor that it is not privy to the aforementioned arrangements is devoid of merit and untenable.

18. In light of the above facts and circumstances, it is ordered as follows: -

a) The Application bearing **IB-327(PB)/2023** filed by the Applicant/Operational Creditor, under section 9 of the Code read with Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Corporate Debtor is **admitted**.

b) We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, Adjudicating Authority, arbitration panel or other authority;

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

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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

(e) The IB Code 2016 also prohibits Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject

to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.

- c) It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3)(b) of the Code.
- d) The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under subsection (1) of Section 31 or passes an order for liquidation of Corporate Debtor Company under Section 33 of the Insolvency & Bankruptcy Code, 2016, as the case may be.
- e) **Mr. Navneet Arora** having address: Navneet K Arora & Co LLP, Company Secretaries E-8/1, LGF, Near Geeta Bhawan Mandir, Malviya Nagar, New Delhi-110017, Email id **info@navneetaroracs.com**, registration number **IBBI/IPA-002/IP-N00128/2017-2018/10345** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India

(Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.

- f) In pursuance of Section 13(2) of the Code, we direct the IRP to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- g) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.
- h) The IRP shall perform all his functions as contemplated, inter alia, by Sections 17, 18, 20 & 21 of the Code. He is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.

- i) The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- j) The Operational Creditor shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakh Only) with the IRP to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by IRP and shall be paid back to the Operational Creditor.
- k) In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Operational Creditor, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today.
- l) The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.
- m) The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- n) A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Accordingly, the present petition bearing CP No. **IB-327(ND)/2023** is **admitted**. No order as to cost.

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(DR. SANJEEV RANJAN)

MEMBER (TECHNICAL)

-sd-

(MANNI SANKARIAH SHANMUGA SUNDARAM)

MEMBER (JUDICIAL)