

**In The National Company Law Tribunal
Kolkata Bench
Kolkata**

C.P. (IB) No. 115/KB/2019

In the matter of :

An application for initiation of corporate insolvency resolution process by an Operational Creditor under Section 9 and other applicable provisions of the Insolvency and Bankruptcy Code, 2016, (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of :

MR. ARUP KUMAR GUPTA, having office at 11/13 Selimpur Road, Kolkata 700031, West Bengal;

..... Operational Creditor/Applicant

Versus

In the matter of :

M/S. HOTEL EAST PALACE PRIVATE LIMITED., a Company Incorporated under the Companies Act, 1956 and a Company within the meaning of Companies Act, 2013 and having its registered office at 84/4, Satyen Roy Road, 2nd Floor, kolkata 700034, West Bengal.

.... Corporate Debtor/Respondent

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In the matter of :

MR. ARUP KUMAR GUPTA] OPERATIONAL CREDITOR
M/S. HOTEL EAST PALACE PRIVATE LIMITED] CORPORATE DEBTOR

Judgement / Order delivered on : 07/08/2019

Coram: Shri Jinan K.R., Hon'ble Member (Judicial) &
Shri Harish Chander Suri, Hon'ble Member (Technical)

Counsel on Record :

MR. SWARVANU SAHA, ADVOCATE] FOR OPERATIONAL CREDITOR

ORDER

Per Shri Harish Chander Suri, Member (T)

1. This petition i.e. CP (IB) No. 115/KB/2019 under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, has been filed by **Mr. Arup Kumar Gupta**, hereinafter referred to as the "Operational Creditor" against **M/s. Hotel East Palace Private Limited**, a Corporate entity having its Registered Office in Kolkata, hereinafter referred to as the "Corporate Debtor".

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2. It is submitted in the application that the Corporate Debtor had approached the Operational Creditor to handle and settle the litigation filed by Punjab National Bank regarding the business loan which the Corporate Debtor had taken from the Bank.
3. It is further submitted that the Operational Creditor sent an e-mail dated 28th June, 2018 to the Corporate Debtor explaining in details the schedule of their fee for the work that was required to be done and in response the Corporate Debtor through letter dated 11th June accepted the fee schedule of the Operational Creditor. The Operational Creditor thus engaged and deputed services of the Advocates and took steps accordingly and thereafter raised the bill of Rs. 10,50,000/- (Rupees Ten Lakh Fifty Thousand Only) upon the Corporate Debtor but the Corporate Debtor did not pay the bills in spite of several requests. Therefore the Operational Creditor had no alternative but to send a notice in Form No. 4, under Section 8 of the Insolvency and Bankruptcy Code but, even then the Corporate Debtor has not paid the bills necessitating the filing of this application.
4. On perusal of the documents enclosed with the application and relied upon by the Operational Creditor, we find that Annexure 'A' is the letter dated June 28, 2018 sent by the Operational Creditor to the

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Corporate Debtor as regards DRT Hearings and Bank OTS in which the Operational Creditor has "quoted his fees", which is reproduced as under:-

"DRT Hearings & Bank OTS."

We refer to the discussions we had at our office yesterday regarding your Bank matters of your hotels and the concurrent DRT hearings taking place. We are agreeable to take up the assignments on your behalf. We will negotiate with your banker, PNB, to arrive at an acceptable OTS proposal. Simultaneously, we will also assist counsel at DRT hearings to try and ensure that your case is heard in the right perspective. Our fees for the assignment will be as follows:-

- a) 4% of the difference in the OTS amount between that offered by PNB i.e. Rs. 11.00 crore and the amount of OTS negotiated by us.*
- b) For DRT hearing it will be fixed Rs. 25,000/- per hearing.*
- c) Out-of-pocket expenses for any outstation travel that may have to be undertaken*

The client will need to pay an amount of Rs. 2.00 lac along with acceptance of this offer letter and it will be adjusted against our final bill. The balance payment will have to be made on completion of the above assignment by us. You will please appreciate that our terms are very competitive considering the amount of work that needs to be done. Further, you will not be required to pay any part payment till final completion of the assignments.

We look forward to working with you and establishing a mutually beneficial relationship. As a token of your acceptance to the above terms and conditions, kindly return the duplicate copy of this letter duly signed by yourselves along with a cheque for Rs. 2.00 lac favouring the undersigned".

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5. Annexure 'B' is the copy of the letter dated 11th July, 2018 written by the Corporate Debtor to the Operational Creditor which is as under:-

"Sub: Acceptance of your Modified Offer to settle the case between Hotel East Palace and PNB.

Dear Sir,

We accept your modified terms and conditions vide mail dated 28.06.2018. In the mean time we have transferred Rs. 1 Lakh (One Lakh) vide NEFT dated 11.07.2018 to start with the job and balance of Rs. 1 Lakh (One Lakh) will be transferred to the same account within 30 days.

Please acknowledge".

6. We find that the copy of the letter dated 11th July, 2018 was stated to have been sent along with Annexure containing modified terms and conditions but there is no such attachment found with this letter on record. The Applicant has also enclosed an e-mail purported to have been sent by the Corporate Debtor to the Operational Creditor on October 30 at 6.15 p.m. which is reproduced here:-

"To

Mr Gupta,

We have gone through your mail dt. 30.10.2018 and deeply shocked to learn for the first time so much unkind words from one of the best professional in the city of this field. However you are requested to carry forward your extremely good work which is unparallal as like before. In the meantime your latest demand will be fulfilled through Mr. Roy. Never mind still we believe you can deliver for this Hotel as you are the best of the city."

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This e-mail was followed by various other mails purported to have been sent by Hotel East Palace to the Operational Creditor.

7. The Operational Creditor has filed a copy of demand notice dated 22nd December, 2018 sent by post which is stated to have been received by the Corporate Debtor on 26th December, 2018. It is stated in the said notice that the Operational Creditor has referred to various e-mails sent by him to the Corporate Debtor including the ones dated 28th June, 2018, 26th October, 2018 and 10th November, 2018. The Operational Creditor has also enclosed therewith letter dated 11th July, 2018 and invoice dated 17th September, 2018.
8. The Corporate Debtor though was directed to be served notice by this Tribunal but has chosen not to appear and so there is no representation on its behalf in the Court either on 30th July, 2019 or on 2nd August, 2019. So, the Corporate Debtor was therefore directed to be proceeded Ex-parte.
9. While analysing the case of the Operational Creditor, in the absence of the corporate debtor, it is noticed that even though with the letter dated June 28, 2018, the Operational Creditor is stated to have sent the schedule of fees to the Corporate Debtor and on 11th July, 2018 another letter is stated to have been received by the Operational

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Creditor from the Corporate Debtor and it had an attachment with it regarding the modified terms and conditions which are purported to have been accepted by the Corporate Debtor but we do not find any copy of the modified terms and conditions having been accepted and approved by the Corporate Debtor on record. Apart from this letter, the Corporate Debtor has nowhere issued any engagement letter or any other letter authorising the Operational Creditor to appear on their behalf or to take up their loan issue with the Bank and the e-mails purported to have been written by the Corporate Debtor also cannot be verified. The whole story in this matter revolves around letter dated 28th June, 2018 written by the Operational Creditor to the Corporate Debtor and according to the demand of the Operational Creditor asking the Corporate Debtor to deposit Rs. 2,00,000/- (Rupees Two Lakhs Only) for completion of the assignment given to the Operational Creditor.

10. The letter/invoice dated 17th September, 2018 purported to have been written by the Operational Creditor to the Corporate Debtor indicates that from July to September within 2 months the Operational Creditor has raised bill for his professional fees to the tune of Rs. 10,50,000/- without enclosing therewith any order sheets of the Courts or other Authorities where the Operational Creditor had been appearing on behalf of the Corporate Debtor. It is further

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noticeable that Rs. 2.00 lacs deposited by the Operational Creditor has not been deducted or given credit to in the final bill issued. The facts and documents produced and placed on the record do not convince us as to their authenticity and as to the occurrence of the default.

11. In view of the aforesaid facts, this case is a doubtful case because the Operational Creditor has failed to prove on record the Schedule of payments agreed upon by the Corporate Debtor. The Corporate Debtor has not issued any instructions to the Operational Creditor from time to time to appear before the various Authorities for which the payment is being demanded by the Operational Creditor, the demand of fees is not supported by copies of any orders of the Authorities before whom the Operational Creditor had appeared on behalf of the Corporate Debtor. The Operational Creditor has not been able to prove any Operational debt due to him from the Corporate Debtor. In the result, C.P. (IB) No. 115/KB/2019 is rejected. However, no order as to cost.

12. Registry is hereby directed under section 9(5)(ii) of the I & B Code, 2016 to communicate the order to the Operational Creditor and the Corporate Debtor by Speed Post as well as through E-mail.

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13. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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(Harish Chander Suri)
Member (T)

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27/8/19

(Jinan K.R.)
Member (Judicial)

Signed on this, the 7th day of August, 2019.

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