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**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH**

**PRESENT: HON'BLE SHRI RATAKONDA MURALI- MEMBER JUDICIAL
HON'BLE SHRI NARENDER KUMAR BHOLA-MEMBER TECHNICAL**

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 12.09.2019 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP (IB) NO. 503/9/HDB/2018
NAME OF THE COMPANY	Ninety-nine Breweries Pvt Ltd
NAME OF THE PETITIONER(S)	W Botique Properties LLP
NAME OF THE RESPONDENT(S)	Ninety-nine Breweries Pvt Ltd
UNDER SECTION	9 OF IBC

Counsel for Petitioner(s):


Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

Petition is admitted vide separate orders.


Member (T)
Binnu


Member (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH

CP (IB) NO. 503/9/HDB/2018

U/s 9 of IBC, 2016

In the matter of:

W. Boutique Properties LLP
Plot No. 1254/A, Road No. 63
Jubilee Hills, Hyderabad – 500033
Telangana

... Petitioner /
Operational Creditor

VERSUS

Ninety Nine Breweries Private Limited
Plot No. 281/2, H.No. 8-2-293/82/A/281
Hyderabad, Telanagana

... Respondent/
Corporate Debtor

Date of order: 12.09.2019

Coram:

Hon'ble Shri Ratakonda Murali, Member (Judicial)

Hon'ble Shri Narendra Kumar Bhola, Member (Technical)

Appearances:

For the Petitioner: Shri Avinash Desai along with Shri
Pranav. M, Ms. C. Sindhura, Ms. Kopal.S
and Shri T.P.S. Harsha, Advocates

For the Respondent: Shri A. Nagaraj Kumar and Shri V.J.V.
Ramana Advocates

Heard on: 30.07.2019 & 20.08.2019

**PER: SHRI RATAKONDA MURALI
MEMBER (JUDICIAL)**


CLAIM:-

1. The Operational Creditor "W. Boutique Properties LLP" filed this Petition under Section 9 of the Insolvency & Bankruptcy Code, 2016 ("I&B Code) against Ninety-Nine Breweries Private Limited (Corporate Debtor) stating that the Corporate Debtor defaulted in repaying an amount of Rs.66,99,268/- (Rs. Sixty Six Lakhs Ninety Nine Thousand Two Hundred Sixty Eight only) plus interest Rs. 4,79,042/- @ 18% p.a. The amount claimed to be in default is with effect from 16.03.2018 and sought for admission of the Petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

AVERMENTS BY PETITIONER:-

2. The averments apropos to the case in brief are:-
 - (1) W. Boutique Properties LLP (Operational Creditor) is an Interior Design Firm which entered into a Service Agreement dated 10.09.2016 with M/s Ninety-nine Breweries (Corporate Debtor) for carrying out interiors and furnishings with respect to a built up area of 10000 sq feet of commercial / retail space located at Hyderabad in the premises of Corporate Debtor Company to establish a micro-brewery.
 - (2) According to the said Agreement, the Corporate Debtor had to pay Operational Creditor an amount not less than Rs. 2,34,13,000/- with respect to the works executed along with an additional amount of Rs. 53,75,000/- for execution of works viz FIRE, CCTC and HVAC as specified under Clause 3.1 of the Agreement.



- (3) The Operational Creditor stated that the parties mutually agreed upon for execution of additional works as such the price escalated and amount payable by Corporate Debtor was Rs. 3,56,76,689/-
 - (4) The Operational Creditor raised invoices and Corporate Debtor made payment only to the extent of Rs.2,44,50,000/- as against the total amount due. It is also the case of Operational Creditor that it handed over the premises to the Corporate Debtor in June 2017 and Corporate Debtor commenced its operations.
 - (5) The Operational Creditor in November 2017 and January 2018 clarified and reiterated that they are willing to sort out the snag list and make deductions in the total dues in relation to the extra works carried out and further that it is important for Operational Creditor to settle the invoices so as to enable them to clear the payments to the vendors who completed the works under the contract. A reminder to this effect was also issued to Corporate Debtor on 16.03.2018.
 - (6) It is the case of Operational Creditor that Corporate Debtor raised issues with regard to the measurements under the Bill of Quantities (BOQ) and sought to rely on a fresh set of BOQ measurements for settling the dues, despite having taken measurements in the presence of members of Operational Creditor and Corporate Debtor.
 - (7) A reminder dated 02.05.2018 was sent and Corporate Debtor was directed to first release payment with respect to the rest of the items under BOQ and that the differences with regard to the measurements of certain items in BOQ may be kept on hold and be released after due
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deliberations. However, Corporate Debtor resorted to claiming the whole BOQ is a mismatch and desisted from making any payment. As such an amount of Rs.66,99,268/- is due and payable by Corporate Debtor as on 16.03.2018.

- (8) When Corporate Debtor failed to make payment, the Operational Creditor issued notice dated 11.06.2018 in Form 3 demanding to make good the dues. The Corporate Debtor issued reply dated 15.06.2018 wherein they raised baseless claims like delay in completion of the project, non-completion of the work under the agreement and denial to approve the enhanced amount, BOQ measurements and quality of work done.
- (9) According to Operational Creditor, the disputes raised by the Corporate Debtor does not fall within the purview of the work executed by the Operational Creditor but executed by third parties which was brought to the notice of the Corporate Debtor. Further Corporate Debtor has not raised any dispute with regard to the debt.

COUNTER BY RESPONDENT:-

3. The Corporate Debtor raised several objections in the reply as under:-
- (1) The Operational Creditor handed over the semi-finished premises after a delay of seven months in June 2017 as against on or before 11.11.2016.
- (2) The Operational Creditor admitted that it received Rs.2,93,61,992/- on 16.09.2016 and 12.05.2017 including Rs.5,90,000/- and Rs.10,21,922/- that were the deductions but was paid by the Corporate Debtor. It is also contended that Rs.3,66,057/- was deducted towards tax on 26.05.2017.

- (3) It is also alleged that the Operational Creditor claimed different amounts on various dates without any basis. It is further the case of Corporate Debtor that as per Clause 24.1 of the Agreement, all applicable taxes and duties shall be paid by the Operational Creditor but in fact the Operational Creditor charged CGST @ 9% and SGST @ 9% amounting to Rs.10,21,922/- is illegal more so because the Operational Creditor handed over semi-finished premises to it and that the Operational Creditor raised proforma invoice on 16.03.2018 and not the final invoice.
- (4) The contention of the Corporate Debtor is that there is no basis for charging Revised Contract Value (basic) in Proforma Invoice when the Contract/Agreement is not revised at any point of time. Further the Operational Creditor did not raise any invoices for the work done on 12.05.2017. It is also contended that Corporate Debtor refuted all the claims made by the Operational Creditor in reply to the demand notice dated 11.06.2018.
- (5) The Corporate Debtor stated that the unfinished works of the premises was completed by itself by incurring an amount of Rs.15,00,000/- . It is the case of Corporate Debtor that it lost its business owing to delay caused by the Operational Creditor.
- (6) The Corporate Debtor further relied on Clause 4.6 and 4.6.1 of the Agreement and stated that it is entitled to recover liquidated damages to a maximum of 7.5% of the price from the Operational Creditor for the delay in completion of the work. The Corporate Debtor also relied on Clause 35.2 of the Agreement and stated that all

dispute to be resolved by arbitration under the Arbitration and Conciliation Act, 1996.

- (7) It is stated by the Corporate Debtor that there was differences leading to dispute on the BOQs and terms of services under the Agreement and the same was settled between the parties. As such there is no liability as such crystallised. Further Corporate Debtor contended that where there is a dispute and no crystallized liability and no occurrence of default by the Corporate Debtor, the present Petition needs to be dismissed.

REJOINDER BY PETITIONER

4. The Operational Creditor filed rejoinder to the counter filed by the Corporate Debtor and reiterated the averments as under:-
- (1) It denies the contention of Corporate Debtor that semi-finished premises was handed over to the Corporate Debtor. Only at request from Corporate Debtor to execute additional works, in addition to the Service Agreement dated 10.09.2016, it resulted in delivery of the fully furnished premises in June 2017. Further Operational Creditor was constantly apprising the Corporate Debtor about the status of works being undertaken by Operational Creditor.
- (2) It is the case of Operational Creditor that both the parties mutually agreed to extend the time period for completion of services because of the request from Corporate Debtor to execute additional work which also resulted in escalation in the total consideration payable to Operational creditor.
- (3) It is the case of Operational Creditor that it received only Rs.2,44,50,000/- out of Rs.3,11,49,268/- and remaining Rs.66,99,268/- is

the debt due to the Petitioner / Operational Creditor.

- (4) The contention raised by the Corporate Debtor that it did not receive the proforma invoice is false and the same was sent to the Corporate Debtor vide email dated 16.03.2018 followed by a reminder dated 26.03.2018.
- (5) The Operational Creditor submits that Corporate Debtor is making an incorrect statement that it has wrongly levied Goods and Service Tax on the Respondent. The Operational Creditor in fact has not received any amount since 2016 and that it is unable to comply with statutory requirements due to failure of the Corporate Debtor to pay its dues. Further the proforma invoice was neither denied nor disputed by the Corporate Debtor.
- (6) The Operational Creditor denied the contention of Corporate Debtor that Operational Creditor has not raised invoices for the work done on 12.05.2017 and states that the proforma invoice includes the work done on 12.05.2017. It is also the case of Operational Creditor that measurements under BOQs were taken in the presence of members of Corporate Debtor. Further the Corporate Debtor has not raised any dispute with regard to the debt in its reply letter dated 15.06.2018.
- (7) The Operational Creditor relied on the decision of Hon'ble Supreme Court in the case of Mobilox Innovations Private Limited Vs Kirusa Software Private Limited reported in (2018) 1 SCC 353.
- (8) It is the case of Operational Creditor that the Respondent/Corporate Debtor did not raise any dispute before issuance of demand notice dated 29.05.2018 but raised for the first time on

15.06.2018 in its reply to the demand notice and that too without any documentary proof.

- (9) The Operational Creditor states that though there is availability of arbitration clause in the agreement, it does not prevent the Petitioner to approach this Tribunal and file a petition under IBC. It is also stated that Higher Courts have held in various decisions that presence of arbitration clause is in no way an impediment to initiation of CIRP. Hence, urged this Tribunal to admit the petition.


DISCUSSION:

5. We have heard the Counsel for Operational Creditor and Counsel for Corporate Debtor. Written submissions are filed. The same will be dealt in the course of the order. The Learned Counsel for Operational Creditor would contend that Corporate Debtor committed default of the balance amount of Rs.66,99,268/-. The Learned Counsel contended that the Operational Creditor is in the field of Interiors Design and entered into Service Agreement with the Corporate Debtor for carrying out interiors and furnishings of the premises of the Corporate Debtor in a built up area of 10000 sq.ft to establish a micro-brewery. The Learned Counsel for Petitioner contended that there is no dispute between parties with regard to entrusting the design work to the Operational Creditor by Corporate Debtor and the Service Agreement is shown at page Nos. 19-44 of Vol. I of the paper booklet. The draft of the service agreement is shown at page Nos 45-75. The invoice raised is shown at page No. 76 dated 16.03.2018. The contract value is Rs.3,56,76,689 and amount payable was Rs.66,99,268/-. The Operational Creditor handed over the premises to the Corporate Debtor in June 2017 and Operational Creditor was demanding the Corporate Debtor to pay the balance amount which is evident in emails addressed to the Corporate Debtor. However, Corporate Debtor failed to pay the same and committed

default. The demand notice in Form-3 was issued to the Corporate Debtor on 29.05.2018 and Corporate Debtor replied to the Demand Notice on 15.06.2018 raising frivolous objections. The Learned Counsel contended that prior to the reply to the demand notice, the Corporate Debtor never raised any dispute regarding quality of services or on any other grounds and for the first time the Corporate Debtor raised alleged dispute for which there is absolutely no proof filed in support of the alleged dispute by the Corporate Debtor. It is a moonshine dispute and it is not a real dispute. It is illusory and hypothetical. Thus, the Learned Counsel contended that no credence can be given to the alleged dispute and petition is liable to be admitted. The Learned Counsel also relied on the decision of Hon'ble Apex Court in Mobilox Innovations Private Limited Vs Kirusa Software Private Limited reported in (2018) 1 SCC 353 for the proposition that disputes must not be illusory, hypothetical or imaginary and disputes must be supported by evidence. Except orally alleging that there is a pre-existing dispute, the Corporate Debtor has not filed any document. Thus, Learned Counsel contended that the petition is liable to be admitted.

6. On the other hand, it is the case of Learned Counsel for Corporate Debtor that Agreement was for completion of the work in the premises and the value estimated for completion of the furnishing is Rs.2,34,13,000/-, which is the final limit. As per agreement the price for services shall remain firm unless otherwise agreed upon and the services to be completed by 12.11.2016. The counsel contended, time is the essence of the agreement and parties had to adhere to the same in strict sense. The service provider to bear all the tax liabilities and any dispute arising under the Agreement is to be resolved through Arbitration.
7. The Learned Counsel for Corporate Debtor contended that Operational Creditor handed over the semi-furnished premises to the Corporate Debtor in June 2017

i.e after a delay of seven months. Counsel contended the explanation given by the Operational Creditor is not correct and so is the claim. Learned Counsel contended that proforma invoice was not at all served on the Corporate Debtor and there is no proof as to how the Operational Creditor estimated the value of services at Rs.3,56,76,689/-. The Corporate Debtor has given a reply raising dispute and questioning the alleged amount said to be due by the Corporate Debtor. The Counsel also contended that Corporate Debtor in fact incurred additional amount for completing the furnishings and spent Rs. 15 lakhs for the said purpose. The contention of the Counsel is that there is a clause in the Agreement for deciding disputes before the Arbitrator. The present petition is, ill-conceived and that the amount is not crystallized and petition is liable to be dismissed.

8. It is not in dispute that parties entered into service agreement dated 10.09.2016. The contention of Operational Creditor that on the request of the Corporate Debtor it had attended to the additional works and therefore, the bill amount for the services was Rs.3,56,76,689/- out of which the Corporate Debtor paid Rs.2,34,13,000/- and balance is Rs.66,99,268/-. It is a specific case of Operational Creditor that it was demanding the Corporate Debtor to pay the balance. Proforma invoice is filed at page No. 76 of Vol. II. According to the Learned Counsel for Operational creditor handed over the premises to the Corporate Debtor after completing the furnishing works in June 2017.
 9. It is interesting to note that both parties admitted that premises was handed over to Corporate Debtor in June 2017. The Corporate Debtor for the first time in the reply raised a dispute alleging that Operational Creditor had handed over semi-furnished premises. Had it been true, then Corporate Debtor should have raised a dispute instead of waiting to give reply till a Demand Notice was sent to it by the Operational Creditor. In fact Corporate
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Debtor filed email which is dated 29.11.2018 as annexure to the counter. The Corporate Debtor relied on Annexure-I attached to the Counter, which is Form No. 16-A. Except these two documents there are no other documents filed by Corporate Debtor raising any dispute. It is for the Corporate Debtor to establish that there was a pre-existing dispute. The dispute must be real with supporting evidence. However in this case, the Corporate Debtor had not filed any supporting evidence with regard to the alleged dispute that Operational Creditor had handed over semi-furnished premises and that there is a dispute with regard to the claim. Further Corporate Debtor raised all these contentions with regard to non-execution of works by Operational creditor and that Corporate Debtor incurred expenditure as stated in the invoices only after demand notice was issued by Operational Creditor.

10. The Operational Creditor filed email communications along with rejoinder which is shown at page Nos. 10-14. At page No. 10, the email dated 16.03.2018 was sent to Jishnu Reddy. This email shows Operational Creditor is sending the invoice for the balance amount and it is pending for the last 8 months. The Corporate Debtor asked for break-up information at page No.11 of rejoinder. The Operational Creditor filed another email. This is dated 16.03.2018 where under the Corporate Debtor replied to the Operational Creditor's email that mail will be sent making corrections in the invoices. On 26.03.2018, another email was sent by the Operational creditor to the Corporate Debtor. Again Operational Creditor is bringing to the notice of Corporate Debtor about the pending invoices for the last 8 months.
11. So, it is very clear that proforma invoice was sent to the Corporate Debtor but no serious dispute was raised by Corporate Debtor at any point of time prior to the Demand Notice. All the points raised in the dispute were in response to the emails sent by the Operational Creditor. Had it been a real dispute, this ought not to


have been raised by the Corporate Debtor in response to the emails received from Operational Creditor. Therefore, no credence can be given to the alleged dispute. Even if there is variation in the amount of the claim, the same cannot be the grounds to reject the petition. The claim will be looked after by IRP in case it is filed before the IRP. On this ground petition cannot be rejected.


12. For admitting a Petition under Section 9 of IBC, the Operational Creditor to establish debt and default and further no pre-existing dispute. We have examined the documents filed on both sides. The alleged pre-existing dispute is only imaginary and illusory and not supported by any material proof. As such, the Petition deserves to be admitted.
13. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions:-
 - (1) The Adjudicating Authority hereby prohibits 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, Tribunal, arbitration panel or other authority; Transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;



- (2) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (3) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (4) That the order of moratorium shall have effect from 12.09.2019 till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- (5) That this Bench hereby appoints Mr. Ganapati Ram Appana, IBBI Regn No. IBBI/IPA-002/IP-N00351/2017-2018/11001 Mob No. 9490094900 e-mail id: Ganapati.ram1@gmail.com as Interim Resolution Professional to carry the functions as mentioned under the Insolvency & Bankruptcy Code. He will submit his consent in Form-2 within three days of receipt of copy of this order.
- (6) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

Accordingly, this Petition is admitted.


(Narender Kumar Bhola)
Member (Technical)
12.9.2019


(Ratakonda Murali)
Member (Judicial)
12-9-19