IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III
IB-756(ND)/2022

Order 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. INFINITY INTERIORS PRIVATE LIMITED

Having its registered office at:

506, Abhiraj Building, Munisuvarat, B-68,

Swastik Society, C. G. Road, Ahmedabad-380009.

CIN: U45400GJ1998PTC034591 **...... Operational Creditor**

VERSUS

M/s. ESPIRE RESORTS PRIVATE LIMITED

Having its registered office at:

A-41, MCIE, Delhi Mathura Road, Badarpur,

New Delhi-110044.

CIN: U70109DL2009PTC195765 **...... Corporate Debtor**

Order Delivered On: 24.01.2024

CORAM:
SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Applicant : Mr. Adith Nair, Adv.

For the Respondent : Mr. Britesh Chaudhary, Mr. Karan Singh, Mr. Prims Kumar, Mr. Sanjeev Chaudhary, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application has been filed by M/s. Infinity Interiors Private Limited, the Applicant/Operational Creditor before this Adjudicating Authority under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 6 of the Insolvency and Bankruptcy (Application to

Adjudicating Authority) Rules, 2016, ("Adjudicating Authority Rules"), for initiating the Corporate Insolvency Resolution Process ("CIRP"), against M/s. Espire Resorts Private Limited, the Respondent/Corporate Debtor on the ground that the Corporate Debtor has defaulted/failed to clear the outstanding principal amount of Rs. 1,34,06,164/- (Rupees One Crore Thirty Four Lakh Six Thousand One Hundred and Sixty Four Only) plus Rs. 12,55,628/- (Rupees Twelve Lakh Fifty Five Thousand Six Hundred and Twenty Eight Only) as interest totalling to Rs. 1,46,61,792/- (Rupees One Crore Forty Six Lakh Sixty One Thousand Seven Hundred and Ninety Two Only) together with further interest @18% p.a. on balance principal amount from 01.04.2022 till realisation and 18% GST on the interest component. The date of default in the present matter is 24.07.2021.

2. **Submissions of the Applicant/Operational Creditor:**

i. It is the case of the Applicant/Operational Creditor that the Corporate Debtor placed four Work Orders for carrying out interior works at their site at Fort Barwara Resort situated at Chauth Ka Barwara, Sawai Madhopur, Rajasthan-322702. Pursuant to the said Work Orders, various interior works were carried out by the Operational Creditor at the site for which periodical bills were raised. However, despite repeated reminders, pleading and follow-ups via E-mails and Whatsapp messages with the Corporate Debtor's project team to make the payments of the outstanding dues, they failed and neglected to make the payment. Consequently, the Operational Creditor was unable to deploy the required manpower as per the needs at the site. As per the terms of the said Work Orders, the Corporate Debtor was liable to make the payment of the outstanding bills within a period of 10 working days.

ii. In view of the non-payment of outstanding dues from time to time for more than 3 and a half years, the Operational Creditor was disheartened and disappointed due to the delay in the non-release of the bill payments, supply of hardware, issue of amendment orders, damage of woodwork and clearance of wastage wood claim, the Operational Creditor was compelled to terminate the project by their E-mail dated 06/07/2021.

iii. Mr. Manish Mehta, a project team member of the Corporate Debtor vide his email dated 12/07/2021 agreed to terminate the contract without a second thought. He also cancelled the passes of the Operational Creditor's staff and workmen from entering the site to collect all the equipment i.e. tools, tackles and materials from the site. Lastly, he stated that he would collate the various accounts and shall revert to the Operational Creditor.

iv. Accordingly, the Operational Creditor vide their E-mail dated 14/07/2021 forwarded to the Corporate Debtor, the Proforma Invoices for the work done by them at the site and called upon the Corporate Debtor to make the payments of the same.

v. The Operational Creditor sent various emails and followed up with the Corporate Debtor's team for the payments of their various invoices sent to them. However, till date no steps have been taken by them for the payment of the outstanding dues except for taking various lame excuses.

vi. After repeated efforts of the Operational Creditor, the Parties entered into an exchange of various emails starting from 23.03.2022 with each other. The Corporate Debtor has avoided the proper certification of the bills to avoid paying the Operational Creditors invoice amounts. The Operational Creditor had finally called upon the Corporate Debtor vide their email dated 27.04.2022 and informed them that the amounts certified by them are not agreeable.

vii. The Operational Creditor issued the Demand Notice dated 04/05/2022 under Section 8 of the Code to the Corporate Debtor under Rule 5 of the Adjudicating Authority Rules for the Principal Amount of Rs. 1,34,06,164/- along with the Interest amount of Rs.12,55,628/- @ 18% p.a. (including applicable GST on the interest amount @ 18%) towards interest as on 31.03.2022.

viii. The Corporate Debtor sent a reply dated 26/05/2022 and stated that the Bills are not verified and are excessive and also falsely contended that the work was not completed on time and there was no workforce on site. They falsely contented that the Corporate Debtor suffered financial losses.

ix. The Operational Creditor sent a Rejoinder dated 02/07/2022, to the Reply sent by the Corporate Debtor dated 26/05/2021 in detail and thereby denied the contents of the Reply as false and incorrect and called upon the Corporate Debtor to make the payment.

3. **Submissions of the Respondent/Corporate Debtor:**

i. The Corporate Debtor has filed a reply affidavit denying the allegations made by the Applicant and stated that the Applicant has falsely increased the amount of certified RA bills, without any basis to cover up the statutory limit of Rs. 1,00,000/- as provided under the Code.

ii. The Respondent vide email dated 24.03.2022 shared with the Applicant the account reconciliation statement. A bare perusal of the account reconciliation statement shows that the Respondent had paid to the Applicant an amount of Rs. 7,40,80,894/-, whereas the total amount of Final Certified RA Bills comes to Rs. 7,00,07,145.76/-. Therefore, it is the Applicant who is liable to refund to the Respondent, the excess payment received from the Respondent and the Applicant has failed to reach the statutory threshold limit of Rs. 1,00,00,000/- to initiate CIRP against the Respondent.

iii. It is submitted that the Applicant approached the Respondent and made false representation that the Applicant was a big name for carrying out Interior Works and that it had a lot of experience in delivering the best quality of Interior work in a time-bound manner and that the Applicant was known in the market for its "best in the industry" services. However, the Applicant failed to complete the work so assigned to it despite various reminders and various extensions of time being granted by the Respondent to the Applicant.

iv. It is the case of the Respondent that at times, there was no workforce at all on the site and the Respondent was forced to send repeated reminders to the Applicant to send the required workforce on site so as to timely conclude the work so assigned to them. Further, the material required for carrying out the work (so assigned to the Applicant under the LOIs) was within the Applicant's scope. However, on various occasions, the Applicant failed to purchase the required material, causing further delay in the completion of the Respondent's project. Due to such delay, the Respondent was facing hardship in opening the said resort on the scheduled date, which not only caused financial losses to the Respondent but also caused a loss of reputation and goodwill in the hospitality industry/business.

v. The Respondent paid an excess amount to the Applicant as an advance to execute and complete the work in a time-bound manner. Further, seeing that the Applicant would not be able to meet the constantly extended deadlines and basis of the Applicant's false assurances to get the Respondent's work completed on time, the Respondent had to de-scope some of the Applicant's work (Zanana Mahal and Temple-1) and had to get the same done, by employing some other contractors.

vi. It is mentioned that post termination of the LOIs, the representative of the parties herein checked and verified the remaining/pending RAS (Running Account Invoices) so raised by the Applicant for execution of part work in terms of the said LOls and Store Inventory lying at the Respondent's site. After verifying the said RAs and store inventory, the Respondent shared the Final Certified RAs with the Applicant, vide email dated 25.04.2022 and requested the Applicant to submit their Tax Invoices. However, the Applicant failed to submit any such Tax Invoice with the Respondent.

vii. The Applicant's claim for Rs. 8,50,000/- towards wastage of Wood, the Respondent submits that in terms of the said LOIs, the purchase of material including wood was within the Applicant's scope and the Applicant was liable to handover the Interior work to the Respondent, post completing the same in all respect including the Wooden Work. Therefore, any wastage of wood for making a final product to be used in such Interior Work was within the Applicant's scope and the same cannot be attributed to the Respondent.

viii. The Applicant's claim for Rs. 9,77,120/- towards Supply of Hardware items to the Respondent, the Respondent submits that the Applicant had not provided to the Respondent any document related to the purchase of Hardware material and Respondent's approval for purchasing the same. Therefore, the Respondent cannot determine and verify if the alleged purchase of hardware material was even approved by the Respondent or that the amount of any such hardware material was part of the scope of LOI's so assigned to the Applicant.

4. **Analysis and Findings:**

I. We have heard the Ld. Counsel appearing for both parties and also perused the records.

II. The following issues emerge for Consideration:

First Issue: Whether the present application is within the minimum default amount of Rs.1,00,00,000/- as provided under Section 4 of the Code or not.

Second Issue: Whether there is a pre-existing dispute with respect to the amount claimed to be due in the application or not.

III. **Threshold Limit**

i. The Respondent has raised a Preliminary Objection as to the maintainability of the present application filed under Section 9 of the Code on the ground that the amount claimed is below the threshold limit of Rs. 1,00,00,000/- as envisaged under Section 4 of the Code.

ii. The Applicant/Operational Creditor has claimed the outstanding principal amount of Rs. 1,34,06,164/-, however, invoices brought on record do not confirm the same.

iii. Admittedly, the Respondent vide email dated 24.03.2022 shared with the Applicant, the account reconciliation statement. A bare perusal of the account reconciliation statement shows that the Respondent had paid the Applicant, an amount of Rs. 7,40,80,894/-, whereas the total amount of Final Certified RA Bills comes to Rs. 7,00,07,145/-.

iv. After subtracting the advance payment amounting to Rs. 40,73,749/- (Rs. 7,40,80,894/- & Rs. 7,00,07,145/-), the principal outstanding amount comes to Rs. 93,32,415/- (Rs. 1,34,06,164/- & Rs. 40,73,749/-). After perusal of the work order and invoices, we find that the work order and invoices do not indicate/provide that in the event of failure on the part of the Corporate Debtor to pay the invoiced amount, the Applicant was entitled to interest on the due amount. In the present case, the Applicant failed to provide any communications that show that interest will be charged in the case of delayed payment which has been agreed by the parties. Hence, we observe that the Interest cannot be clubbed together to reach the threshold limit of Rs. 1,00,00,000/-.

v. The Applicant has failed to justify the aforesaid claim and also failed to substantiate the submission by any documentary evidence. Hence, we are satisfied that the present application is below the threshold limit of Rs.1,00,00,000/-.

IV. Pre-Existing Dispute

i. The Second defence of the Corporate Debtor is based on the existence of a prior dispute before the issuance of the Section-8 demand notice. Their argument is based on the following e-mail communications dated 18.08.2021, 19.08.2021, 12.07.2021 and 20.07.2021, which are extracted below for ready reference:

E-mail dated 18.08.2021

"Hi Mr. Shah,

As per my information, their are still some areas left out for the reconciliation, Mr. Mukesh is now at site, please do ask your team to co-ordinate with him to close the balance areas also.

Best regards

Manish"

<u>E-mail dated 19.08.2021</u>

"Dear Mr. Manish,

You're wasting our time and deliberately reducing our bill. You're removing the quantity and decreasing the previous given percentage as well from the bill. This is not acceptable. Previously our all bill was certified by your site as well as billing team after checking each and everything now why the quantity and percentage are changing at the time of finalization?

We cannot accept this act.

Regards

For INFINITY INTERIORS PVT. LTD.

Ketan R. Shah"

<u>E-mail dated 20.07.2021</u>

"Dear Mr. Shah

We are quite displeased with the contents of your email. On one hand you have stated that you do not want any unpleasant dispute with your Client (i.e. us) regarding your termination and on the other hand in the very same email, you have in a very subtle manner threatened us as well for not employing any other agency/vendor.

You may please note and appreciate that despite repeated reminders none of your workmen have come to the site since the past week and the work has therefore been stalled completely. This is when you were already running way behind the assured schedule and when the deadline for us to open our resort is approaching. You may further note that basis your commitments to us we have been performing your side of the contractual obligations as well so as to meet the deadlines and have accordingly purchased the material worth substantial amount. And this is when you instead of carrying out your remaining obligations and meeting the deadlines, not only stop your *workmen from coming to site but also send us an email about termination of your contract.*

Under these circumstances when you are doing everything possible and in your control to prevent us from meeting our deadlines, if you expect us to take your dictate by once again accommodating your illegal arm twisting requests then you are mistaken and are being under blatant misconceptions. We have every right (legally and even otherwise) to take all the steps necessary to meet our approaching deadlines. We cannot be expected to just sit and wait for you to send your limited number of unprofessional and untrained workmen on site to just waste time and carry out inferior quality work.

Having said the above, we would reserve our comments as regards the attachments of your email and would like to reiterate that you are free to reach out to us at site for having a joint meeting basis mutually convenient time and date for any clarification that you may need to clarify. At present, our prime focus is to finish the pending work (which you had left in between), within the timelines set earlier. You may further note that any obstruction or an attempt to create any obstruction by you or any of your workers or any attempt to enter the site premise on any pretext without a written consent from our end will be viewed very severely and will invite legal consequences for Trespassing and related offences.

You may please take note of the above accordingly

Best Regards

Manish"

<u>E-mail dated 12.07.2021</u>

"Dear Mr. Shah,

This has reference to our repeated reminders to you since last week for sending the required workforce on site so as to conclude the work assigned to you in a time bound manner thereby enabling us to stick to our deadline of 01st September 2021 for *opening our resort to business. Please note that since last week (except for Monday) no workmen from your team has come to the site and consequently the work handled by them has been pending completion/ initiation despite your repeated assurances and commitments claiming that you shall not fall short on the deliverables atleast this time as the entire exercise is required to be done in a time bound manner, considering the approaching cut-off date for opening up of the resort.*

You would agree with us that despite the various accommodations accorded by us to you and you failing us each time, be it repeated extension of time, de-scoping work from the work assigned under your scope as you were not able to allocate adequate resources on site as per the committed deadlines, us buying material with our funds (on your demands and assurances that you shall complete the work assigned in a time bound manner and as per the quality assured) even though the same was part of your scope and responsibilities, coupled with many other failed commitments, we continued to extend our full support to you in the hope that since you had claimed to have the required experience for handling this kind and scale of work, you would finally be able to deliver as per our expectations. However, you not only failed our expectations but intentionally with malafide intent kept on delaying the completion of work thereby arm-twisting us into succumbing to your repeated illegal and corrupt demands like paying you advances, giving extensions and even buying material on your behalf from time to time. You knowing fully that the deadline for opening of the resort is approaching, you still stopped sending your workmen at the site from last week (their headcount was as it is very low and never reached the number assured by you) and have instead sent us an email asking us to terminate your contract.

Before we respond to your email qua your request for termination, you may please refer to the work orders awarded to *you for execution of work (including subsequent amendments) and the various emails exchanged between us. A mere perusal of the same will very clearly indicate that you have failed to complete the work related to Guest Wing, Kids Den & Young Adult Look-out, Zanana Mahal and Temple -1, despite not just various reminders but also repeated time extensions so granted to you. We even extended an amount of INR.35,00,000/- (Rupees Thirty Five Lacs Only) as an advance (which has not yet been accounted for as yet), followed by a subsequent amount of INR.20,00,000/- (Rupees Twenty Lacs Only) merely on the basis of your commitment and assurances to complete the work in a time bound manner. In addition to the aforesaid amount, we had also had to pay an amount of INR.6,80,000/-(approx.) towards your labourers working on site whom you refused to pay thereby putting us in spot for such payments even when the same was part of your role and responsibilities. By not paying your workmen on site, you purposely and with a malafide intent made the situation so volatile that we had to budge to the pressure created by you else the workmen would not work on site.*

Further, seeing that you would not be able to meet the constantly extended deadlines, we basis your assurances and in a desperate attempt to get our site completed on time, de-scoped your work and are getting it done through some other contractors for Zanana Mahal and Temple-1. Since you exhibited your incompetence to procure the material, we, basis your assurances that once we have provided the material, you shall use the same and conclude the work in a time bound manner, bought a lot of material as well which was originally part of your scope. We procured Glass & Shower cubicles amounting to INR.22,00,000/- (Rupees Twenty two Lacs only) and further spent INR.3 Lacs (Rupees three lacs) approx for purchase of PU & Polish. We also started the process of buying woods for INR.20,00,000/- (Rupees Twenty Lacs Only) and purchased all the hardware items as per *list provided by you earlier based on the work orders so assigned to you and as per the further list provided to us later on.*

Despite all these huge expenses incurred by us in order to facilitate your work competition schedule, you still failed to deploy the required number of workmen on site on the pretext of Covid. While several other contractors working on the site managed to get their deadlines adhered to with full work farce, you could not even manage to deploy the initial labour of about 55 persons on site which was assured to be increased to 100 persons by you. It is quite evident that your intent to conclude the work assigned was missing and no efforts whatsoever were ever made by you to accomplish and meet the deadlines so assured by you. Your prime concern clearly remained extorting money from us on some pretext or the other as you were aware that it would be very difficult for us to engage some other contractor at this stage and thus you took complete undue advantage of the situation every time.

Be that as it may, now that you have expressed your true intent to discontinue working on the project by asking us to terminate your contract, we are left with no option but to once again accede to your request and figure out ways and means to meet the deadlines which were originally to be met by you for getting our resort completed in a time bound manner. Under the circumstances, we will have to engage the services of some other contractor to conclude the work left in between by you despite having a substantial advance amount being held by you from our end in addition to the amount spent by us on purchasing the raw material and various other heads. Please note that all such additional expense shall obviously be debited to your account.

Accordingly, basis your request in the trail mail, we hereby formally terminate your contract and cancel all the passes etc. (if any) to your employees and workmen to enter the site. Any further entry after this email by any of your personnel shall be *treated as unauthorised and shall be in the category of Trespassing.*

Lastly, since an imminent emergency situation has been caused due to your unprofessional conduct and also because we have very little time to meet our requirements to be able to meet the deadline of 01st September 2021, we shall try to collate the various accounts and shall revert back to you with the amount which you are liable to pay to us on account of the various factors as mentioned above. Meanwhile, please feel free to reach out to us at site to have a joint meeting basis mutually convenient time and date for any clarification that you may need to clarify.

You may please take note of the above accordingly.

Best regards

Manish"

ii. The e-mail communications dated 18.08.2021, 19.08.2021, 12.07.2021 and 20.07.2021, clearly establishes the fact that the Corporate Debtor raised a pre-existing dispute before the issuance of Section 8 demand notice. It can be demonstrated that the parties were constantly in discussions over pre-existing and unresolved disputes. Hence, we are satisfied that the Corporate Debtor had raised a pre-existing dispute with respect to the amount claimed by the Operational Creditor.

iii. It is well-settled law that if the Corporate Debtor raises a plausible contention about a pre-existing dispute, which is not just a moonshine or feeble legal argument, it would suffice for the Adjudicating Authority to reject the application filed under Section-9 of the Code, the Adjudicating Authority being precluded from determining as to whether the Corporate Debtor would be successful or not, with regard to the said dispute, at the time of decision making.

V. We therefore answer the first issue and second issue as follows:

In the facts and circumstances of the present case, we are of the considered view that the Corporate Debtor has been able to raise a plausible contention regarding the threshold limit (minimum default amount) and pre-existence of “dispute” between the parties.

5. In view of the above analysis and findings, we are satisfied that the present Applicant fails to fulfill the criteria laid down under Section 9 of the Code. It is accordingly ordered as follows:
   - **i.** The Application bearing **IB-756(ND)/2022** filed by the Applicant under Section 9 of the Code r/w Rule 6 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **dismissed.**
   - **ii.** The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

   No order as to costs.

Sd/-	Sd/-
(ATUL CHATURVEDI)	**(BACHU VENKAT BALARAM DAS)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**