

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH-IV**

**CP (IB) No.1378/MB-IV/2020**

Under Section 9 of the I&B Code, 2016

In the matter of:

**Ratnarup Projects Private Limited**

[CIN: U45200PN2011PTC140408]

...Operational Creditor/Applicant

V/s

**Tamanna Hotels Private Limited**

[CIN: U55101PN2001PTC015858]

...Corporate Debtor/Respondent

**Order Dated: 03.03.2023**

*Coram:*

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

*Appearances (via videoconferencing):*

For the Petitioner(s) : Mr. Tarun Arora, PCA.

For the Respondent(s) : Mr. Omkar V. Deosthale, PCS.

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This is an application bearing C.P. (IB) No. 1378/MB/C-IV/2020 filed by Ratnarup Projects Private Limited, the Operational

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Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (“Code”) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Tamanna Hotels Private Limited, Corporate Debtor.

- 1.1. The Application is filed by Mr. Ajay Nandlal Thourani, Director of Operational Creditor, duly Authorised vide Board Resolution dated 10.10.2020, passed by the Board of Directors, claiming total default of Rs.2,83,95,203/- (Rupees two crore eighty-three lakh ninety-five thousand two hundred three only).
- 1.2. The Date of Default is stated as 28.02.2018 in the Part IV of the Petition and the Petition is filed on 21.10.2020.
2. The Operational Creditor submitted that it was selected for the construction of Phase-I, based on the item rate contract aggregating to Rs.8,35,03,065/- and Service Tax, in pursuance of Tender document dated 04.04.2014 issued by the Architect of the Corporate Debtor and this amount was finally agreed at Rs. 8,76,78,218/- in the Agreement executed with the Corporate Debtor in this behalf. Pursuant to this, the Letter of Intent and Interim Agreement dated 02.05.2014 was issued to the Operational Creditor and finally the item wise quotation dated 08.05.2014 was accepted and agreed at.
  - 2.1. Subsequently, Articles of Agreement dated 06.10.2014 was entered between Operational Creditor and Corporate Debtor wherein the Operational Creditor agreed to construct Hotel and provide the drawings and designs in terms of Tender Document. The invoice(s) raised by the Operational Creditor towards the construction bills were payable by the Corporate Debtor in accordance with

certification by the Engineer/Architect/Project Manager Consultant from time to time.

- 2.2. As per the terms of the Tender r/w Articles, the Corporate Debtor was under contractual obligation to honour the invoices raised within period of 7 days from the date of certification by the Engineer or Consultant.
- 2.3. The Operational Creditor further submitted that for the 'Extended Scope', the formal agreement was not entered into, albeit the drawings, plans and designs were shared with Operational Creditor thereby implying 'go ahead'. For interior work, the Corporate Debtor awarded additional 2 Work Orders dated 12.08.2016 to the Operational Creditor for the work of Gypsum, Ceiling, Painting and Labour for tiling respectively.
- 2.4. Vide E-mail dated 01.10.2016, the Corporate Debtor approved the offer of the Operational Creditor regarding Glazing Works Contract and agreed to make payment as per the agreed terms. Through various Emails dated 02.12.2016, 13.02.2017, 22.05.2017 and 24.08.2017, the rates for extra/additional and non-tender items relating to the work Civil and Interior were communicated and approved.
- 2.5. The Corporate Debtor never adhered to the payment's deadline as per the Contract. As a result, the outstanding amounting to Rs. 4,98,67,215/- as at the end of September, 2017 was due and payable. Between 31.10.2017 and 19.10.2017, the Corporate Debtor paid an amount of Rs.1,00,00,000/- to the Operational Creditor.

- 2.6. As the Corporate Debtor failed to make payments, the Operational Creditor had to stop the work at the site. Vide E-mail dated 28.10.2017, the Corporate Debtor requested the Operational Creditor to continue with the work at site upon assurance of payment. Meanwhile, the follow-up on the outstanding invoices was constantly and rigorously made with the Corporate Debtor.
- 2.7. The Corporate Debtor issued five post-dated cheques on 23.01.2018 to the Operational Creditor, who refused to accept the same. Vide E-mail dated 23.01.2018, the Operational Creditor once again highlighted the undisputed fact pertaining to outstanding dues. The Corporate Debtor once again issued the Cheques in lieu of the earlier Cheques. The two Cheques bearing Nos. 876521 and 876522 aggregating to Rs.98,00,000.- were cleared and the Corporate Debtor kept balance three of the new Cheques issued on hold.
- 2.8. The Operational Creditor issued notice dated 12.03.2018 before depositing the remainder of the Cheques and didn't receive any response from the Corporate Debtor. After waiting for the response, the Operational Creditor proceeded to deposit the remaining Cheques. The Cheques bearing Nos. 876523, 876524 and 876525 were returned unpaid on 15.03.2018, 22.03.2018 and 03.04.2018 respectively with the remarks 'Stop Payment by the Drawer'.
- 2.9. After awaiting the remain payment, the Operational Creditor filed complaint under Section 138 of the Negotiable Instruments Act, 1881 r/w Section 420 of the Indian Penal Code, 1860 on

16.05.2018. Thereafter, on 24.05.2018, the Corporate Debtor issued another set of Post-Dated Cheques in lieu of the promise made by the Corporate Debtor but the Operational Creditor did not agree to the issuance of new Cheques.

2.10. Between September 2018 and October 2018, the Corporate Debtor hired another third-party contractor and assigned the balance work to him. Pursuant to the behaviour of the Corporate Debtor, the Operational Creditor filed legal case under section 38 of the Specific Relief Act, 1963 on 07.12.2018, seeking perpetual injunction to restrain the Corporate Debtor from appointing the new contractor and the case is pending till date.

2.11. The Operational Creditor issued a Demand Notice dated 10.10.2020 under section 8 of the Code demanding an amount of Rs.2,83,95,203/-. The said Demand Notice was received by the Corporate Debtor on 13.10.2020. The Corporate Debtor has replied to the said Demand Notice denying the liability.

3. The Corporate Debtor has filed its Affidavit-in-reply dated 09.03.2021 submitting that -

3.1. There are various deficiencies in the services provided by the Operational Creditor which were raised time and again by PMC, who had certified their interim bills. As per the final agreement, the PMC had the power to notify the Operational Creditor about any deficiency in the work effecting substantial completion before issue of completion certificate. The snag list/defect list was prepared by the PMC before issuance of any completion certificate as on 31.07.2017. The Corporate Debtor on the same day escalated the

matter to the Operational Creditor for clearance and opted not to clear bills until and unless the snag list will get resolved.

3.2. The Operational Creditor was not ready to clear the snag lists raised by PMC and on the other hand delayed completion of interiors which was as separate assignment altogether. Since the assignment was already delayed by the Operational Creditor, the Corporate Debtor was of the impression that engaging any new developer now would be a herculean task and therefore, fresh 5 PDCs were issued to the Operational Creditor, dated 20.02.2018 till 31.03.2018 which were given under the trust and security that the Operational Creditor would complete all the pending jobs before 31.03.2018. After issuance of the aforesaid Cheques, the Operational Creditor encashed two of those five PDCs till 22.02.2018, and used it for the satisfaction of the earlier dues which were unpaid because of the deficiency in the work as stated earlier, though the cheques were issued as the advanced payment not for the earlier dues.

3.3. The Corporate Debtor sent proper email to the Operational Creditor for stopping the payment of all the remaining cheques because of not fulfilling the commitment of completing the assignment by the Operational Creditor. The instructions were given immediately to the bank to stop the payment of the remaining cheques that were issued to the Operational Creditor on 27.02.2018. The Corporate Debtor also given intimation to the Operational Creditor that the payment will be made as soon as the work of 6<sup>th</sup> and 7<sup>th</sup> floor will be completed.

- 3.4. However, the Operational Creditor filed the Criminal Case under section 138 of the Negotiable Instruments Act, 1881 dated 16.05.2018. The Operational Creditor also filed a suit in Civil Court against Corporate Debtor for payment under Specific Relief Act, 1963 which was dismissed by the Court as the Corporate Debtor proceeded with appointing third party vendor to complete the work.
- 3.5. The Corporate Debtor had made payment almost 88% of the total interim bills claimed by the Operational Creditor till date; except for the disputed work wherein snag lists were submitted. The Corporate Debtor met the directors of the Operational Creditor personally and requested them to reconcile the interim bills issued by them and submit the final bill. However, the directors of the Operational Creditor refused to send the final bills till date. Due to their failure to conclude the meeting and reconciliation exercise, the Corporate Debtor requested the PMC to reverify and reconcile each and everything from his own end. The PMC via letter dated 05.10.2020 informed the Corporate Debtor as follows:

*“during the progress of the work, it is custom for contractors to submit interim RA bills and same are clarify in respect of items executed or under progress. Since the interim bills are periodic and not submitted day to day it is understood that the works which are under progress are expected to be completed shortly and considered in the measurement.*

*Generally, after construction or interior work is fully completed in all respect contractor submits full and final bills for the complete project which automatically all the inadvertent, lapses, omissions,*

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*repetition, duplications and measurement of items not executed, if any get rectified. After checking this full and final bill once for all, the advances paid to the contractors against interim RA bills, are deducted, and final payment is generally done by the owner of the Project....*

*.....I would say that you being the owner of the project have full right to check final measurements and satisfy yourself in this regard to any item rate analysis.”*

3.6. There was no amount due to be paid to the Operational Creditor. In fact, the Corporate Debtor is entitled to claim an outstanding debt of Rs.3,656,07,035/- from the Operational Creditor, pursuant to the statement of deductions made for the defects in work and the work has not been done but bills were raised by the Operational Creditor. The deductions made was time and again informed to the Operational Creditor. The Letter dated 06.10.2020 was served to the Operational Creditor much prior to serving Demand Notice for the reasons enumerated hereunder;

- i. Excess measurement shown in the measurement sheets and accordingly the billing amounts were raised in excess of the quantity compared to the actual job done at the Respondent's site by the Petitioner's office relating to Tiling, Kota, Furniture, Ceiling, Marble cladding, Sadarali granite, Counters etc.*
- ii. Technical specification is changed for fixing tiling and marble etc, to increase the interim running billing amount by the Petitioner's office;*

*iii. Respondent have supplied the tiles, marbles, granites, furniture and the amounts which were already paid to the supplier directly by Respondent with the profit on materials supplied and also included the Wastage on materials supplied by the Respondent, to the Petitioner's office along with the tender documents.*

3.7. The sheer intention of the Operational Creditor is clearly reflected in the Board Resolution of the Board of Directors of the Operational Creditor. Following is the extract of the aforesaid resolution:

*iv. "... ... The chairman further pointed out the urgency in having the outstanding recovered given the financial condition at the Company...."*

4. Operational Creditor has filed the Affidavit in Re-joinder 27.08.2021 and refuted the allegations of the Corporate Debtor and made certain prayers which are outside the scope this Code at this juncture.

*Findings:*

5. We have heard the arguments of the Learned Counsel for both the sides and perused the material on record.

5.1. There is no doubt that Corporate Debtor had received the services from the Operational Creditor under the extended scope of work also and rates and the work as certified from time to time by PMC raising the deficiency in the work also. From the perusal of the material placed before us, it is seen that there is some dispute relating to quality of the work which is evident from the PMC snag list also. Further, it is also borne from the evidences that the Corporate

Debtor had engaged another party to complete the work which is evident from the Civil Proceedings wherein an Injunction was prayed by the Operational Creditor. All these events had taken place prior to the issuance of the Demand Notice and lead to an inference that there exists a prior dispute between the parties which may require further enquiry and adjuration. It is settled law that the adjudicating authority has to certify about the existence of the prima facie dispute only and need not to look into the merit of the dispute so long as the dispute claimed by Corporate Debtor does not appear to be a moonshine defense. It is also seen that the Corporate Debtor has released majority of the payment to the Operational Creditor and had engaged another party get the work completed. Hence, this Bench relied upon the Judgment of Hon'ble Supreme Court in *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353*, wherein the Hon'ble Supreme Court observed that:

*Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."*

5.2. In view of this the Present Petition is not maintainable and hence is liable to be dismissed.

**ORDER**

6. This Application being C.P. (IB) No. 1378/MB/C-IV/2020 filed by Ratnarup Projects Private Limited, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) seeking initiation of Corporate Insolvency Resolution Process (CIRP) against Tamanna Hotels Private Limited, Corporate Debtor is hereby **Dismissed**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present Petition.

Sd/-  
Prabhat Kumar  
Member (Technical)

03.03.2023

Sd/-  
Kishore Vemulapalli  
Member (Judicial)