

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

Item No. 1
(IB)-190(PB)/2017

IN THE MATTER OF:

Union Bank of India	Applicant/petitioner
Vs.		
Era Infra Engineering Ltd.	Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, CIRP

Order delivered on 10.01.2020

Coram:

SHRI B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. S. K. MOHAPATRA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant :

Mr. Shyam Padman, Mr. Jaimod Andrews,
Mr. P. Jaimon, Advs. for NITC
Ms. Niti Jain, Adv. for SBI & IOB

For the respondent

Mr. Anish Gupta, Mr. Adarsh Tripathi, Advs.
Mr. Sanjay Gupta, Mr. Sneh Chaudhary, Adv.
for
RP
Mr. Vikram Babbar, Mr. Shashank K. Lal, Advs.
for ICICI bank
Ms. Akanksha Kaushik, Advs. for CA-1304/18
Mr. Deepak Prakash, Ms. Perna Robin, Advs.
for NTPC

ORDER

Per: B.S.V. PRAKASH KUMAR, HON'BLE ACTG. PRESIDENT

HEARD AND DICTATED IN OPEN COURT ON : 10.01.2020

CA-2840(PB)/2019:-


It is an application moved by NIT, Calicut (NITC) against the corporate debtor under Section 60(5) of the Code seeking reliefs, which are as follows:-



- (a) To direct the corporate debtor/RP to co-operate with the taking of the final measurements and reconciliation of the work done by the corporate debtor in the mega hostel project of NITC, within such time as may be fixed by this Tribunal, facilitating the completion of the project by rearrangement of the work with the CPWD without any further delay.
- (b) In the event of the non-cooperation from the part of the corporate debtor, permitting the taking of the final measurements and reconciliation of the work done by the corporate debtor in the mega hostel project of NITC through or in the presence of an independent agency/CPWD as may be decided by this Tribunal.
- (c) To grant such further reliefs as this Tribunal deems fit in the facts and circumstances of the matter.

As against this application, the principal contention of RP Counsel is that this Bench has no jurisdiction to deal with the subject matter, and this issue cannot be decided unless dues outstanding to the corporate Debtor are paid to it.

To substantiate his argument to say that this bench has no jurisdiction, the RP Counsel, Mr. Mehta has relied upon the ratio decided in **M/s. Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors., (Civil Appeal No. 9170 of 2019 decided on 03.12.2019)** by taking us to para numbers 3 (12), 9,29,36,39, 40 & 45.



Before going into the ratio decided in the citation supra, it is imperative to brief the facts of this Application.

The applicant is a reputed National Institute of Technology Calicut, governed by NIT Act, running a fully residential institution with around 6000 students offering 11 UG programs and 30 PG programs and PhD programs in various disciplines. For the institution having felt the shortage of accommodation to the students stay, it had decided around 10 years before to construct a Mega Hostel in its campus. In pursuance thereof, when the corporate debtor had come forward to take up this project, NITC on 30.01.2009 entered into an agreement with the Corporate Debtor for construction of the mega hostel in the NIT Campus, in the said agreement, the corporate debtor promised that it would complete the project on 14.08.2011, but the fact of the matter is, till today it has not been completed. Though the corporate debtor failed to complete and hand over the project within the stipulated time, despite the Applicant Institute is, by virtue of the Agreement, entitled to terminate the agreement and invoke default clauses against the Corporate Debtor, the Applicant, instead of taking those steps, kept on extending period for


completion of the project, initially hoping that it would complete the project, thereafter, by virtue of Court interference, extended time after time. Unfortunately, this extension continued even after this IBC Company Petition was admitted. When the RP also failed to adhere to the supplemental agreement he entered into on behalf of the Corporate Debtor, the Applicant at last on 27.03.2019 terminated the agreement between them, hoping that remaining work could be completed through some other Agency. To enter into agreement with somebody else and also to ascertain the work done by the Corporate Debtor, it is essential to take the measurement of the work done by the corporate debtor, for which, when the Applicant reminded the RP to present at the work site and also to unlock some rooms locked up by the Corporate Debtor, the RP simply has remained not responded.

Now the grievance of this applicant is that, if this RP at least provide measurement of the work done or at least he is present at the time of taking final measurements and reconciliation of the work already done, this Government Institution would be in a position at least to have



rearrangement with CPWD or some other agency to get it completed soon and made available for the purpose to which this conceptualized. It is not the case of the applicant that the present respondent i.e. the RP is not aware of all these facts. In fact, he himself entered into further supplemental agreements saying that he would complete the work on behalf of the corporate debtor but that has also not been completed. When finally, this applicant realizing that nothing would happen any further, it has terminated this agreement on 27.03.2019.

As to participate in taking final measurements and reconciliation, we don't think it would cause any prejudice either to the RP or to the corporate debtor and it will not at all lead to construe that this relief or order will have bearing over determination of the dues payable in between the corporate debtor and this applicant. It is nothing but to allow this applicant to continue with the remaining work so as to avoid further delay and to avoid further escalation of the cost of the project. With regard to the dues payable either by the corporate debtor or by the applicant, the parties are always at liberty to take recourse against each other.



As to jurisdiction over the present subject matter to say that this Bench has no jurisdiction to hear this application, the RP counsel has relied upon Hon'ble Supreme Court case in between **M/s. Embassy Property Developments Pvt. Ltd. (supra)** for saying that this Adjudicating Authority should not exercise jurisdiction.

Upon closely examining the judgement supra, it is evident that ratio held in the citation supra is that section 60 (5) of the IBC is not meant for the corporate debtor/RP to exercise a right that falls outside the purview of the IBC. The factual aspect in the case supra is, the RP proceeded before NCLT against State of karnataka for adjudication of the disputes arising out of the grant of mining lease under MMDR Act 1957, in that context, the Honourable Supreme Court held that issues falling outside the purview of CIRP will not fall within the ambit of Section 60 (5) of the Code. The similarity in between the case supra and the given case is, unfortunate part is Government is the aggrieved, and there the related parties of the Corporate Debtor tried to corner the benefits of the mining lease under the garb of Moratorium, here in this case the Corporate Debtor through its RP putting efforts not



to let the Government Institute free to get their project completed through another agency. Thumb Rule applied in the case supra is initiation of CIRP cannot thwart the proceedings falling under other enactments and falling outside purview of the Code. Applying the same ratio, it shall be construed that this corporate debtor cannot put a halt to the work of third party. This is only a relief sought by the applicant to allow it to take final measurement of the work done by the Corporate debtor, so that tomorrow there won't be any difficulty to ascertain the value of the work and keep the account clear in between the debtor and the Applicant.

Since, the RP himself entered into a supplemental agreement with the applicant for completion of the work by 30.11.2008, and that work has admittedly not been completed within the time mentioned subsequently also, we are of the view that this bench has jurisdiction to deal with the issues transacted during the CIRP. As to Hon'ble Supreme Court ratio in that case is that subject matter falling under other enactments cannot be nullified by invoking either Section 238 of IBC or section 14 IBC (Moratorium). In this case, it is not a subject matter falling under other enactment.



In view of the Reasons aforementioned, the ratio supra is not helpful to the Corporate Debtor, if at all it is applicable, it is applicable to the Applicant because the RP is not expected to bring the activities of the persons other than the Corporate Debtor to halt by holding out IBC. There is a chequered history between the corporate debtor and the applicant, it appears that the case is filed in High Court of Kerala and matter went before Arbitrator and that was also terminated on 22.06.2019 because the arbitrator himself reported to the High Court of Kerala saying that he was unable to complete the arbitration because the RP was not co-operating. For the debtor having failed to complete it, the applicant finally terminated the agreement on 22.06.2019.

Since it is a miscellaneous application, the relief asked by the applicant not having any bearing over the rights of the other parties and the dues payable to each other, and no public law being involved in between the parties, we are of the view that we have jurisdiction to pass a limited order directing the RP to present at the time of taking final measurements.

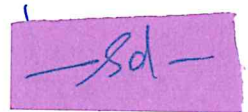
For the parties are at logger heads, we are of the view that if a middleman is there at the time of taking measurements,



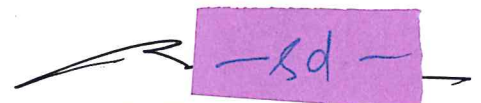
it will remain as proof to both the parties to the measurements, therefore we direct CPWD, Kerala to depute an officer (Engineer) of CPWD having expertise in construction at the time of taking final measurements at the cost of the applicant. The applicant shall inform the RP two weeks before taking the final measurements so as to enable him to attend.

Accordingly, the present application stands disposed of.

All other applications listed for hearing on 05.02.2020.



**(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT**



**(S. K. MOHAPATRA)
MEMBER (TECHNICAL)**