

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI

IBA/515/2019

Under Section 9 r/w Rule 6 of the IBC, 2016

In the matter of M/s. Tidel Park Coimbatore Limited

M/s. B E Billimoria and Company Limited

---Operational Creditor

V/s

M/s. Tidel Park Coimbatore Limited

---Corporate Debtor

Order delivered on: 19.09.2019

Coram:

B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Operational Creditor: *Shri. E. Om Prakaksh, Sr. Advocate*

Shri. S. Karthikei Balan, Advocate

Shri. S. Shivaram, Advocate

For the Corporate Debtor : *Shri. N.R Chandran, Sr. Advocate*

Shri. K.J Parthasarathy, Advocate

Shri. V.P Parivallal, Advocate

ORDER

Per: B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)

Heard and dictated in Open Court on: 13.09.2019

It is an Insolvency and Bankruptcy Application filed by the Applicant/Operational Creditor u/s 9 of the I & B Code for initiation of Corporate Insolvency Resolution Process (CIRP) on the ground the

Corporate Debtor defaulted in paying retention amount of ₹ 3,06,78,151 the along with interest from 12.07.2014 aggregating to ₹ 8,38,18,085.

2. On reading the application and other material placed before this Bench, the Operational Creditor and the Corporate Debtor entered into an agreement dated 05.09.2008 for construction of Tidel Park at Coimbatore. In pursuance of the transaction, the Operational Creditor deposited retention money to the Corporate Debtor, later when differences arose between the parties, as per the said agreement they invoked Arbitration Clause, in pursuance thereof, an Arbitral Award was passed on 12.07.2014 for a sum of ₹ 3,06,78,151 along with interest and other payments, out of the said sum, the Corporate Debtor shall release a sum of ₹ 3,31,19,232.38 within 15 days from the date of Award and in respect to the remaining balance of ₹ 5,17,21,644 being 50% of retention money shall be payable by the Corporate Debtor to the Operational Creditor after the Operational Creditor fulfilled their obligations in respect of the snag works reflected in Annexure-II annexed to Arbitral Award. Before release of

that 50% retention money, the Corporate Debtor shall issue final completion certificate. In the event of default of payment as directed above, this Operational Creditor is entitled to proceed against this Corporate Debtor for execution of the Award dated 12.07.2014. The Snag List being made as part of this as award in Annexure-II, completion of the works in the snag list being the bone of contention between the parties, the said annexure is hereby depicted, which is as follows:

*“ANNEXURE-II
(SNAG LIST)*

- 1. Ground Floor Granite (excluding the Reception Area)*
- 2. Waterproofing – Terrace cracks, wall leakage in Toilet & Basement, STP leakages*
- 3. Supply of Master Key and Grand Master Key & Improper Grouting of door frames*
- 4. Replacement of Tiles – Floor, Dado and Skirting*
- 5. Compound Wall – Top Plastering, Snag & Painting*
- 6. Painting Works – Damages by water leakage & seepage, MS angle for shaft*
- 7. Reflecting Stickers for rubber corner beads*
- 8. Roads, Pavers and WBMs*
- 9. Basement 3, balance concrete*
- 10. Dead mortar cleaning in all basements*
- 11. Submission of P&FM signed Handing Over documents (after rectification)*
- 12. Restoration of ELCOT area”*

3. In respect to completion of this Snag work, the Corporate Debtor counsel says that the Operational Creditor has not attended and completed the work as reflected in the Annexure-II, whereas the Operational Creditor says that the entire Snag work has been completed whereby he is entitled to the retention money as mentioned in the Arbitral Award.

4. As against this transaction, the Corporate Debtor counsel has stated that the Operational Creditor has not completed the work and thereby the applicant is not entitled for the balance of the retention money, on the other hand, the Operational Creditor counsel says since part of the retention money has already been paid after this Award has been passed and even during the pendency of this application, the Corporate Debtor cannot now say that there is a dispute between the parties in respect to completion of the work, therefore it need not pay the remaining balance.

5. It is a fact that in the Arbitral Award, there is a direction against the Corporate Debtor to pay the sum as mentioned above,

but at the same time, the said direction is qualified with a direction to the Operational Creditor to completion of the work reflected in the Snag List annexed to the arbitral award. It is also mentioned that soon after completion of the work as reflected in the Snag List, the Corporate Debtor shall issue completion certificate, but till date no such completion certificate has been issued by the Corporate Debtor.

6. As to completion of this work, the Corporate Debtor counsel has submitted that this Operational Creditor has attended to part of the items as reflected in Annexure-II, which is as follows:

<i>S.No.</i>	<i>Snag Work</i>	<i>Date of Completion</i>
<i>i)</i>	<i>Supply of Master Key and Grand Master Key & Improper Grouting of door frames</i>	<i>20.10.2017</i>
<i>ii)</i>	<i>Compounding wall – Top plastering, Snag & Painting</i>	<i>21.08.2017</i>
<i>iii)</i>	<i>Reflecting stickers for rubber corner beads</i>	<i>26.10.2017</i>
<i>iv)</i>	<i>Road, Pavers and WBMs</i>	<i>29.03.2017</i>
<i>v)</i>	<i>Basement 3, balance concrete</i>	<i>09.09.2014</i>
<i>vi)</i>	<i>Submission of P&FM signed Handing Over documents (after rectification)</i>	<i>14.12.2017</i>
<i>vii)</i>	<i>Restoration of ELCOT area</i>	<i>30.1.2017</i>

7. He has further stated that as per the Annexure to the Award dated 12.07.2014, this Operational Creditor is still to attend to the items as mentioned below:

- (a) Ground Floor Granite (excluding the Reception Area)*
- (b) Waterproofing – Terrace cracks, wall leakage in Toilets & Basements, Expansion Joint leakages in Terrace floor and Retaining Walls.*
- (c) Painting Works – Damages by water leakage & seepage, MS angle for shaft*
- (d) Dead mortar cleaning – Partially done*
- (e) Replacement of Tiles – Floor, Dado and Skirting*

8. In addition to the above submissions, the Corporate Debtor has stated that both the parties held joint inspection of the site on 28.03.2018. The Operational Creditor counsel has not denied holding joint inspection of the site on 28.03.2018. On perusal of this joint inspection report, it is evident that some of the works have not been completed by the Operational Creditor.

9. Since works have not been completed, the Corporate Debtor sent an e-mail on 23.04.2017 to the Operational Creditor notifying the works completed and the works not completed. On 04.01.2018 itself, this Corporate Debtor sent a letter to the Operational Creditor

referring to various aspects of the Snag works which have not been completed by the Operational Creditor, which are as follows:

S. No.	Snag work	Remarks of TPCL
1.	Ground Floor Granite	<p><i>It is denied that the matter regarding replacement of granite slab not being advisable any further has been discussed with officials of TIDEL. TPCL has all through been impressing on BEB the need to attend to the granite works (excluding reception area).</i></p> <p><i>The contentions of BEB that the fact is expressed in its letter dated 13.4.2016 does not release BEB of its obligation as agreed upon as part of the Arbitration Award. Having agreed to attend to granite works as part of the pending snag list and addressing a letter thereafter contradicting the same does not discharge BEB of its liability. The letter is a mere documentation now being used as an excuse to shed responsibility.</i></p> <p><i>It is also denied that the building has been under use without any fuss or hassles. Reference is made to various letters of TPCL putting forth the concerns of TPCL on the pending works and its resultant effect on ambience of the IT Park. As mentioned in the letter, on account of pending works of BEB, both TPCL and its clients have been put to severe discomfort and BEB is responsible for the same.</i></p> <p><i>Also please note that as per Clause 39 of Part IA (Page 61) of the tender document, upon defects, shrinkages or small faults arising and being brought to the knowledge of the contractor, the contractor is under obligation to make good the same at his own cost.</i></p> <p><i>To summarize, TPCL denies that no further rectification / remedial works are possible as regards granite works. BEB is required to carry out works of granite agreed to as part of the Arbitration Award.</i></p>
2.	Water Proofing	

i.	Terrace Cracks	Please note that though surface crack rectification works have been carried out, leakages are noticed in some places which are to be rectified. Portion of retention money released in consideration of the works done.
ii.	Wall leakage in Toilets and Basements	Though Rest Room core packing leakage works have been carried out, water leakages are yet found in many places of rest rooms core packing area. The same has been shown to your site team. Portion of retention money released in consideration of the works done.
iii.	STP Leakages	Though works of STP retaining wall leakage has been carried out, water leakages are yet found in Basement-III of STP.
iv.	Expansion Joint Leakages in terrace and retaining walls	<p>Reference is made to various letters of TPCL, communicating concerns on Leakages in the expansion joints to BEB and to the various occasions the problem has been highlighted to your site team.</p> <p>The expansion joint workmanship executed by BEB sub contractor has been appallingly bad and this is visible from the photographs that are enclosed herewith. During the course of joint inspection, the Architects had instructed BEB to inspect the entire stretch of expansion joints and take necessary corrective action in a professional manner. BEB as a temporary measure has covered the entire expansion joint with plastic sheet above cover slab to prevent water leakage. The onus of setting right the problem of expansion joint leakages completely lies with BEB.</p>
3.	Supply of Master key and Grand Master key & improper grouting of door frames	On completion of Master key and Grand Master key work, 35 Nos. of keys have been handed over to TPCL on 20.10.2017. However Master and Grand master keys are not provided for ACO shaft door – 96 Nos., RWCO shaft door – 128 Nos. and STP door – 3 Nos. Also proper grouting of door frames has not been carried out.
4.	Replacement of Tiles in Floor, Dado and Skirting	<p>Rectification works of tile replacement are pending as the same has to be carried out only after arresting water leakage in Rest Rooms wall area.</p> <p>In view of criticality of the work, TPCL has been constrained</p>



		<i>to attend to major leakages through the dado and skirting in Rest Rooms by itself. Also TPCL has been constrained to replace damaged mirrors in various locations due to water leakage in concealed pipe line.</i>
5.	<i>Painting works – Damaged by water leakage & seepage, MS Angle for shaft</i>	<i>Though painting works in staircase have been completed, Water seepage is yet found in 3 places of wall area of fire exit staircase. MS angle painting in shafts have not started as yet.</i>
6.	<i>Reflecting Stickers</i>	<i>Rubber corner beads are yet to be provided in 28 columns (102 sticker and beads) for which 60M Reflecting sticker have been handed over by BEB to TPCL.</i>
7.	<i>Roads, Pavers and WBM's</i>	<i>BEB completed 11 out of 20 locations identified by TPCL and works relating to 9 locations were removed from BEB scope.</i>
8.	<i>Dead Mortar cleaning in all Basements</i>	<i>Only around 20% of the work has been completed by BEB. As informed vide letter dated 7.1.2017, the dead mortar in the basements are yet to be removed. Photographs are enclosed in proof.</i>
9.	<i>Submission of P&FM signed handed over documents (after rectification)</i>	<i>A set of documents has been handed over on 29.12.2017, however acceptance of the same is subject to completion of rectification works in full as per Arbitration Award.</i>

10. On looking at the admitted facts between the parties, three things are clear. One, this Operational Creditor has not attended to the incomplete snag work as mentioned by the Corporate Debtor. Two, it is a fact that this Operational Creditor has not sent any letter

stating from their side that this work has been completed. And three, the Corporate Debtor has till date not issued any completion certificate.

11. Even before completion of the incomplete snag work, according to the Corporate Debtor, the Operational Creditor issued Section-8 Notice on 13.06.2018 demanding the Corporate Debtor to pay the retention money along with interest and other incidental charges as per the Award dated 12.07.2014. As to the balance money claimed by the Operational Creditor, no confirmation has come from the Corporate Debtor before filing this case.

12. The argument of the Corporate Debtor counsel is that since the Arbitral Award is a qualified award putting a condition upon the Operational Creditor to complete the snag work for payment of ₹5,17,21,644, unless those works are completed, the direction for refund of part retention money shown in the Arbitral Award cannot be enforced against the Debtor.

13. As to part payment made by the Corporate Debtor, it is stated that the Debtor paid it with a belief that they should not keep the money in respect to the work already completed. Therefore for the Corporate Debtor has made some part payments before filing this case and some payments after filing this case with an intention to clear the money in respect to the work completed, it does not amount to entitlement to the Operational Creditor to claim part retention money before completion of the snag works flagged in the Arbitral Award. To substantiate this argument, the Corporate Debtor has placed joint inspection report before this Bench and also communicating the same to the Operational Creditor stating that the works mentioned in that joint inspection has still remained incomplete. Moreover, in the Award itself work completion is to be ascertained from the completion certificate issued by the Corporate Debtor, since no such certificate has been issued by the Corporate Debtor, the Operational Creditor cannot say that debt is admitted by the Corporate Debtor and is under obligation to pay the said money to the Operational Creditor herein. Whether work is completed or

not, or to what extent is completed, these are all the points to be decided by the trial court.

14. As to Insolvency and Bankruptcy Code matters are concerned, debt and default must be clear reflecting that the debtor is under obligation to pay to the Creditor, and then Debtor failing to discharge such obligation. In this case, the Arbitral Award is not an 'unconditional award' directing the Corporate Debtor to pay a sum of money. Since the Award not being an '*unconditional award*' and there being material reflecting that snag work to be completed has not been fully completed by the operational creditor, we cannot assume that an obligation rests upon this Corporate Debtor to pay the money claimed by the Operational Creditor.

15. In view thereof, we are unable to come to a conclusion as per the papers available before us, that the Corporate Debtor is under obligation to pay the money claimed by the Operational Creditor. Therefore we hereby hold that this Applicant has failed to prove debt is in existence between the parties, thereby this **IBA/515/2019** is

hereby **dismissed** giving liberty to the Operational creditor to proceed against the Corporate Debtor if any other remedy is available to the Operational Creditor.

-Sd-

(S. VIJAYARAGHAVAN)
Member (Technical)

-Sd-

(B. S.V. PRAKASH KUMAR)
Member (Judicial)

KNP/TJS