

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH, (Court – II)
SPECIAL BENCH
KOLKATA**

C.P. (IB) No. 148/KB/2018

IA (IBC) No. 239/KB/2022

***An application under Rule 11 of the NCLT Rules, 2016 for impleading
Metro Railway, Kolkata.***

In the matter of:

(1) State Bank of India, a body corporate constituted under the State Bank of India Act, 1955 having its registered office at 14th Floor, Corporate Centre, Madame Cama Road, Nariman Point, Mumbai, Maharashtra – 400021.

... Financial Creditor

-Versus-

(1) Tantia Constructions Ltd., a company having its registered office at 25/27, N.S. Road, Kolkata – 700092.

... Corporate Debtor

In the matter of:

(1) Krsishna Hi-Tech Infrastructure Pvt. Ltd., an Operational Creditor having its registered office at 637, Rajdanga Main Road, Kasba, Kolkata – 700107.

... Applicant

-Versus-

(1) Kshitiz Chhawchharia, Resolution Professional of Tantia Constructions Limited, having his office at 8A & 8B, Satyam Tower, 3 Alipore Road, Kolkata - 700027.

... Respondent No. 1

-And-

(2) The Chief Engineer, Construction, Metro Railway Kolkata, Metro Rail Bhawan, 8th Floor, 33/1, J.L. Nehru Road, Kolkata – 700071.

... impleaded Respondent No. 2

Date of hearing: 04/01/2023

Date of pronouncing the order: 10/11/2023

Coram:

Smt. Bidisha Banerjee : Member (Judicial)
Shri Balraj Joshi : Member (Technical)

Appearances (via video conferencing/physically):

Mr. Ratnanko Banerji, Sr. Adv. : **For Chairman of Monitoring Committee**
Mr. Deep Roy, Adv. :
Mr. Rahul Auddy, Adv. :
Mr. Aditya Gooptu, Adv. :
Mr. Swatarup Banerjee, Adv. : **For the SRA**
Mr. Avishek Guha, Adv. :
Mr. Sariful Haque, Adv. :
Mr. Chitresh Saraogi, Adv. :
Ms. A. Dutta, Adv. :
Mr. S.K. Tiwari, Adv. : **For Income Tax Authority**
Mr. Diptomoy Taluker, Adv. : **In IA 1378/2022**
Mr. Triptimoy Talukder, Adv. :
Mr. A.K. Srivastava, Adv. : **For Krishna Hi-Tech Infrastructure Pvt. Ltd. in IA/773/2021 & IA/239/2022**
Mr. Akash Sharma, Adv. :
Mr. Ajay Gaggar, Adv. : **For SBI**
Ms. R.P. Paul, Adv. :

ORDER

Per: Bidisha Banerjee, Member (Judicial)

1. Heard Ld. counsels for parties.
2. This Operational Creditor, therefore, prays for the following reliefs, inter alia: -
 - (a) Allow the application for impleadment and allow the Applicant to array Metro Railway, Kolkata as a Party Respondent No. 2 in IA No. 773 of 2021.

3. The admitted facts that appear from pleadings are the following: -

- (i) State Bank of India, the Financial Creditor filed an application under Section 7 of IBC against M/s. Tantia Constructions Ltd., the Corporate Debtor alleging that the Corporate Debtor has committed default in paying financial debt of more than Rs. 2,13,90,70, 549/-.
- (ii) Admitting the application, this Adjudicating Authority vide its order dated 13.03.2019 initiated CIRP against the Corporate Debtor Tantia and appointed Mr. Kshitiz Chhawehharia as an IRP for ascertaining the particulars of creditors and Constitution of the Committee of Creditors.
- (iii) The Krishna Hi-Tech Infrastructure Pvt. Ltd. (in short “KHIPL”), being an Operational Creditor submitted its claim of Rs. 1,81,00,496/- to the IRP on 24.04.2019.
- (iv) The RP, however, admitted a sum of Rs. 3,26,538/- only. Aggrieved, KHIPL preferred an I.A. No. 497 of 2020. This Adjudicating Authority on 15/07/2021 observed the following: -

“The total amount claimed was Rs. 1,81,00,496/- (Rupees One Crore eighty-one lakh four hundred ninety-six only) as per the following break up: -

<i>S. No.</i>	<i>Particulars</i>	<i>Amount</i>
<i>(a)</i>	<i>Monthly rental due</i>	<i>Rs. 74,55,544/-</i>
<i>(b)</i>	<i>Interest as at Insolvency commencement date calculated at compound interest at 3 times of the bank rate as per the MSME Samadhan (interest on delayed payment) under MSME Act, 2006</i>	<i>Rs. 56,82,790/-</i>
<i>(c)</i>	<i>Cost of materials lying at the site of the Project of the Corporate Debtor</i>	<i>Rs. 49,62,162/-</i>

Total **Rs. 1,81,00,496/-**

Out of the aforesaid amount, the RP allowed a claim of Rs. 3.26 lakh.

The Bench noted the following: -

“4.7.....This is a case where the RP itself was aware from the records that there was only one time supply of materials by the applicant and the monthly charge was towards the hiring cost of those materials. It is also admitted by the RP that the materials are still lying at the project site and have not been returned so far to the applicants.”

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“4.12.....There is nothing that prevented the RP from considering payment of the basic rent since the materials of the applicant were at all material times in the custody of the corporate debtor and being used at the site of the project awarded to the corporate debtor. Therefore, there is no doubt in our mind that the applicant was indeed entitled to the basic rent without his having to submit any proof other than the work order in this respect. As far as the cost of materials supplied component is concerned, the RP was right in not accepting this part of the claim because no proof for arriving at such a value was provided by the applicant in Form ‘B’. The RP was also right in disallowing the tax component since the invoices were only proforma invoices and not duly signed.”

(v) The Applicant KHIPL after receiving the order supra, sent an email to the Resolution Professional, Mr. Kshitiz Chhawchharia on 26/07/2021 demanding payment of rent and release of materials lying at Metro Railway, Kolkata, aggregating Rs. 140.33,657.44 along with interest @18%.

(vi) The RP on 06/08/2021 responded as follows:

“Separately, as duly recorded in the Order, we once again deny that the corporate debtor has received any payment from the **Kolkata Metro Railway,** in relation to your goods, since October, 2021.

We Shall update you on your claim once the MC instructs the undersigned for further course of action”.

4. The applicant alleges that: -

- (i) The RP has failed to communicate with Metro Rail and the new contractor and purportedly allowed the Corporate Debtor to misappropriate the rentals accrued to the applicant from month to month.
- (ii) The authorised representative of KHIPL requested the Ld. Resolution Professional to re-verify the claims of KHIPL, but the RP failed and neglected to pay heed to the said e-mail of KHIPL.
- (iii) The applicant prayed for a direction to the RP to pay the lease rent from 14.03.2019 till date for the materials supplied by the Applicant at the project site of M/s. Tantia Constructions Limited, as per the rental order dated 25.11.2016 and also release the materials immediately vide IA No. 773.
- (iv) The matter was heard in part on 10th February, 2022 after the Monitoring Committee filed its reply affirmed on 4th February, 2022. In course of hearing on 10th February, 2022 the monitoring committee of the Corporate Debtor stated that there was an on-going civil dispute between CD and Metro Railway and the matter is sub-judice. The applicant was directed to implead Metro Railway, Kolkata. Hence, the applicant has preferred this IA to implead Metro Railway.

5. Contention of Metro Railway

The Dy. CE(Con-I) of Metro Railway by way of an affidavit has stated the following, gist whereof would be thus: -

- (i) The Tantia Constructions Limited was awarded the work of Execution of Civil Engineering works of PSC Viaduct between Noapara and Dum Dum Cantonment and various civil works at Noapara in connection with integration of Airport line with Metro Railway at Noapara, vide tender no. Civil/1885 on 12.08.2010.

- (ii) The work was to be completed by 11.02.2012 i.e., within 18 months from the date of issue of Letter of Acceptance [LOA] dated 12.08.2010.
- (iii) The last extension was granted by the Competent Authority upto 30.04.2018, with a token penalty of Rs. 50000/- per month from 01.07.2017 onwards.
- (iv) The contract has been rescinded vide letter dated 26.02.2018 in terms of Clause 62 of Standard General Condition of Contract.
- (v) Tantia Constructions Limited vide letter dated 05.03.2018 invoked arbitration in terms of Clause 62 of Standard General Condition of Contract. The Hon'ble High Court Calcutta by its order dated 12.03.2020 constituted an Arbitral Tribunal by appointing (1) Hon'ble Justice Bhaskar Bhattacharya (Retd) as Presiding Arbitrator, (2) Hon'ble Justice Nadira Patherya (Retd) and (3) Hon'ble Justice Debi Prasad Dey (Retd) to resolve the disputes between Tantia Constructions-Vs-Metro Railway Kolkata.
- (vi) M/s. Tantia Constructions had claimed a sum of Rs. 55.39 crore in their Statement of claims (SOC) including claim for steel material lying at Metro Railway site after termination of contract for an amount of Rs. 2,26,58,570.00 being claim no 15 of the said Statement of Claims (SOC).
- (vii) The Metro Railway had duly submitted its Statement of Defense [SOD] before Arbitral Tribunal where it denied the claim of the Contractor in full, as not payable as per the contract agreement.
- (viii) It is submitted that after termination of the said contract under Clause 62 of General Condition of Contract on 26.02.2018, the contractor was called for joint measurement on 12.03.2018, vide letter dated 17.04.2018, the contractor was requested to clear the site of all tools and plants, machineries, cranes and other heavy instruments and other material lying at site and to remove staging, shuttering plates, pipes props, trosses etc. without damaging already constructed structures and also small hutments

establishment, offices, stores, labour huts etc to make whole stretch of site encumbrance free within 7 days.

- (ix) Vide letter dated 20.02.2019, in response to contractor's letter dated 04.02.2019, Metro Railway replied that after the contract was rescinded, the contractor was given considerable time to remove its material, hence it is presumed that the entire material has already been removed from site. The Metro Railway further advised the contractor for joint inspection on 28.02.2019 for material available if any.
- (x) However, it is emphatically admitted that vide letter dated 12.03.2019, Metro had informed that "The material vide sl. no: 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11 cannot be removed and are retained as per clause 62(b) of GCC. That as per clause 62(2) (b) of GCC, the Metro Railway has right to retain the materials, tools and plants till the completion of work and that the Metro Railway never denied the material to be lifted by agency and accordingly they removed material from site except such materials. Further that some of the materials are still not free as girders already cast by Contractor on casting bed not yet launched by new agency in joint inspection note dated 01.03.2019, it was clearly mentioned that the Shoring joist was embedded in earth (item 21) and the Metro Railway vide letter dated 12.03.2019 had already given permission to remove the same within one month time.
- (xi) Metro Railway thus claims that "the shoring material has already been removed and taken away by the Tantia Constructions Ltd." as stated in letter dated 12.03.2019. The joint inspection note makes it clear that contractor has taken away all the materials except in sl. no. 6, 7, 8, 9, 10 and 11 and Item no. 21 related to Shoring materials has been taken away by the representative of M/s. Tantia Constructions Ltd. as duly acknowledged on 05.04.2019. "There is nothing payable in final bill against NS Items no NS-5 and NS-6" and that "there is no shoring material lying with Metro Railway".

6. From the foregoing paragraphs, it is evident that Metro had engaged the CD Tantia for construction works. The CD had taken loan from SBI. It failed to complete the work and repay SBI. SBI thus preferred CP 148/2018 against the CD Tantia to initiate CIRP. The KHIPL is an operational creditor of CD and its materials are lying at the site of work of CD, being Noapara Dum Dum viaduct of Metro. The RP has already been directed to release the rentals in favour of KHIPL and Arbitration Proceedings are going on between Metro and the CD. The rent has not been calculated or released so far, the basic premise being that the Metro Rail has not paid for the same.
7. In the aforesaid backdrop and in view of the direction noted above impleadment of Metro by way of this IA is allowed. Let necessary corrections be carried out in the petition.
8. Plain copy for communication and compliance.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 10th day of November, 2023.

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