IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.04/BB/2020
U/s 7 of IBC, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

Between:

Mr. Sawraj Kumar
B-102, Sona Kiran,
L. M Road, Dahisar West,
Mumbai – 400 068. - Petitioner/Financial Creditor

And

M/s. Expat Projects and Development Private Ltd.
Carlton Towers, A-Wing,
3rdFloor, Unit No.301-314,
No.1 Old Airport Road,
Bengaluru – 560 008. - Respondent/Corporate Debtor

Order Pronounced on: 12th March, 2021

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present (through Video Conference):

For the Petitioner : Ms. Bhargavi Devi, Advocate

For the Respondent : Shri Uday Shankar R., Advocate

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. CP (IB) No.04/BB/2020 is filed by Mr. Sawraj Kumar (hereinafter referred to as ('Petitioner/Applicant/Financial Creditor) U/s 7 of the IBC, 2016, R/w Rule 4 of the I&B (AAA) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of M/s. Expat Projects & Development Private Ltd., on the ground, that it has committed default for total amount of Rs.15,03,11,397/-(Rupees Fifteen Crores Three Lakh Eleven Thousand Three Hundred and Ninety Seven only).

2. Brief facts of the case, as mentioned in the Company Petition, which are relevant to the issue in question, are as follows:

(1) M/s. Expat Projects & Development Private Ltd. ('Respondent/ Corporate Debtor') was incorporated on 14.09.2007 under the Companies Act, 1956 bearing the CIN: U45202KA2007PTC043869 and having its Registered Office situated at Carlton Towers, A Wing, 3rd Floor, Unit No.301-314, No.1 Old Airport Road, Bengaluru-560008. Its Authorised Capital is Rs.20,00,000/- and Paid-up Capital is Rs.10,00,190/-. The Company is engaged in the business of real estate, construction and civil engineering.

(2) On 31.10.2019, an amount of Rs.15,03,11,397/- is payable by the Expat Projects Bangalore Holdings Pvt. Ltd. (hereinafter as 'Expat Bangalore') as prime obligor to the Applicant / Petitioner, in terms of the Booking Confirmation Letter dated 10.04.2014, as amended vide Booking Confirmation Letter dated 05.02.2015 and by Expat Projects & Development Pvt. Ltd. (hereinafter as 'Expat Projects'), the Respondent herein, as guarantor in terms of Guarantee dated 20.06.2016. The debt of the Corporate Debtor Expat Projects has arisen in terms of Guarantee guaranteeing to fulfil all obligations of Expat Bangalore in terms of above letters.

(3) Expat Bangalore and Expat Projects had approached the Applicant, requesting him to invest in a project known as Expat Central – The Hub" now known as "Expat Navata" at Chandapura, proposed to be developed by Expat Bangalore. It was represented by the Respondent that Expat Bangalore/Expat Group is the owner of about 26 acres of land in Chandapura and had envisaged a project in 67 acres of land into apartment complexes, and that it would develop the land into apartments of several units. The Corporate Debtor inter alia assured that the project master plans would be available by June, 2014 and project launch is scheduled for January 2015 and possession of the investor flats would be handed over by December 2016. Based on the representations, the Applicant agreed to invest into the project towards the purchase of total of fifty-six apartments

in the project with an option to exit in the event of delay or default by Expat-Group. The said booking confirmation/letter provides, that, in case, the Expat Bangalore fails to meet any of its obligations or failure to complete the assigned block or building by the end of December 2016, the Applicant will have right to opt for refund of full payment with 12% compounded interest. The Booking Confirmation letters further state that formal agreement of sale be executed once approvals come through.

(4) It is stated that the booking confirmation at Document No.2 & 3 is an arrangement between the Parties, where the Applicant agreed to pay amount to avail services of the Expat Bangalore, who would in turn develop building/flats; on later date, if the development is completed within the agreed timeline, enter into agreement/s to sell or opt out in the event of failure to develop within agreed timelines, in which case, Expat Bangalore would repay the amounts with interest at agreed rates. Further in the event of delay in the launch of the project beyond June 2015, the Applicant would have the option to exit the project and seek refund of all amounts paid under the Booking Confirmation letters along with compound interest at the rate of 12% p.a., repayable within 30 days from the date of receiving of notice of the exit. The amounts paid by the Applicant to the Respondent and/or Expat Bangalore developer under assured return scheme had the commercial effect of a borrowing. The Respondent admittedly received a total of Rs.8,81,96,500/- as on 17.08.2015.

(5) The booking was taken in the name of the Applicant and he was assigned with Customer No.C1320642. However, initially, booking confirmation letters had been issued in the name of Maritime & Management Services Co. WLL, Bahrain, and the initial booking note had reference to three different Companies including one which had no relation to the transaction. It was issued on the letter head of the Respondent, signed by Mr. Diwakar Ramamurthy, on behalf of Expat Properties India Ltd. (A Company of Expat Group not related to the

transaction) and the seal of Expat Projects the Respondent was affixed and the offer was for a project to be developed by Expat Bangalore. The issuances of the said note in the name of Maritime & Management Services erroneous.

(6) Payments were made by the Applicant in favour of the Respondent, and receipts for individual payments were also issued by the Respondent, whereas, the understandings stated that the development would be carried out by Expat Bangalore. In view of the same, the Respondent agreed to stand as Guarantor for Expat Bangalore, in respect of the Project and for repayment of the amounts to the Applicant, in the event of there being delay/default, as per the terms of the Agreement. The Corporate Debtor defaulted as the development was delayed and to this day, the project has not commenced. In terms of Clause 21 (a) of booking confirmation/ letter, notice of exit from the project was issued by the Applicant on 24.10.2016, the receipt has been acknowledged. In view of the same, principal liability to pay the amounts along with interest originally arose on 24.11.2016; i.e., within 30 days from receiving notice of the exit, in terms of Clause 18 of the Agreement dated 10.04.2014. On the said date, total amount payable to Applicant was Rs.10,96,30,253/-.

(7) Subsequently, in pursuant to mutual discussions and the payment schedule shared by Expat Bangalore and the Respondent, it was agreed that a total amount Rs.11,72,29,534/- would be repaid by the Respondent and/or Expat Bangalore to the Applicant in instalments between January and August 2017. Subsequently, the payment schedule was extended till not later than 30.09.2017. Interest at the rate of 12% was leviable on any delays in payments of the instalments till August 2017, and any delays in payment of instalments in the month of September 2017 was chargeable with interest at the rate of 14%. Further, any delays in payment of instalments from October 2017 would be chargeable with interest at the rate of 18%. Pursuant to the said payment Schedule, a sum of

Rs.1,50,00,000/- has been repaid as on 24.04.2017 and the total outstanding as on 31.03.2018 was as follows:

Total amount outstanding as on 31.03.2018	Rs.12,98,91,082/-
Amount repaid as on 24.04.2017	Rs.1,50,00,000/-
Total Amount of Debt as on 31.03.2018	Rs.11,48,91,082/-

(8) The Applicant invoked the Performance Guarantee of the Respondent, vide its letter dated 16.11.2017. In response, Mr.Arvind Gowda, who was the CEO of Expat Group in 2017, addressed an email dated 24.11.2017, which evidences the acknowledgement of debt, the liability to pay a higher rate of interest and the bad state of affairs of the Expat Group of companies including Corporate Debtor. Mr. Arvind Gowda is also a Director of Expat Bangalore and Expat Projects and is also presently managing one of their group Companies from Pune.

(9) As the Respondent and Expat Bangalore failed to repay the amount with interest as agreed, demand notices/insolvency notices were issued to both Companies namely, Expat Bangalore and Expat Projects, the Respondent on 17.01.2018. The demand notices were issued on bonafide belief that the Applicant is an Operational Creditor. A Reply was issued by the Counsel of the Respondent, on 03.02.2018 inter alia admitting the debt and stating that the Respondent is keen to discuss and find a solution. Thereafter, in absence of receipt of funds during notice period, the Applicant filed an Application in Form 5 on 19.03.2018 to initiate CIRP against Expat Bangalore before this Tribunal vide CP (IB) No.82 of 2018 on the bonafide belief that the Applicant was Operational Creditor and the same was dismissed by the Adjudicating Authority by an order dated 07.08.2019 inter alia stating that "*we are unable to categorise the above debt as an "Operational debt". It is vital to mention here that in either case of the Petitioner being categorised as a Home Buyer or an Investor, it is clear that the amount disbursed by the Petitioner was against the consideration of the time value and money and did*

have a commercial effect of borrowing in the hands of the Corporate Debtor". It further added that the order will not come in the way of the Applicant to invoke any other remedy available under any law.

(10) Under Guarantee dated 20.06.2016 executed by the Respondent, the Respondent had irrevocably guaranteed the full performance by Expat Bangalore of its obligations under the Booking Confirmation Letter and had undertaken to indemnify the Applicant immediately upon demand without deduction for all losses, expenses and liabilities. Further, the Respondent had expressly stated that the liability of the Respondent under the Guarantee shall be primary Obligor and in no way conditional upon Applicant first proceeding against Expat Bangalore.

3. The Respondent has filed its statement of objections dated 20.02.2020 by inter alia contending as follows:

(1) There are pre-existing disputes with another Company in respect of the claim made against this Respondent. Further, the Petitioner has initiated a suit before the Commercial Court, Bengaluru by way of Pre Institution Mediation in PIM No. 244/2019, wherein the claim of the Petitioner is disputed and the Non Starter Report has been issued by Bengaluru District Legal Services Authority, Bengaluru. Further, the claim of the Petitioner against the Principal has been rejected by this Tribunal vide Order dated 07.08.2019 in CP (IB) No. 82/ BB/2019. The Respondent is alleged to be a borrower and in view of the dismissal of the claim against the Principal, the claim against the Guarantor is liable to be dismissed.

(2) The claim of the Petitioner vis-a-vis M/s. Maritime & Management Services Co WLL as against Expat Projects and Development Pvt. Ltd., the Principal Company against whom the claim is made herein needs to be ascertained due to multiple documents dated 10.04.2014 and 05.02.2015 are in existence. Further, the alleged Guarantee in respect of which claim is made is nonest as Guarantee

is unilateral letter. A valid Guarantee Agreement is essentially a Tripartite Agreement between the Principal, Creditor and the Guarantor. The document not being a Tripartite Agreement and does not create any legal rights and obligation inter-se the parties. Hence, the said document does not constitute a valid legally enforceable Guarantee. And it is not registered and is insufficiently stamped. And the letter produced in the Petitioner (Document No.17) was obtained by way of fraud and misrepresentation without disclosing to the Respondent, the Agreement vide letters dated 10.04.2014 and 05.02.2015 executed between M/s. Maritime & Management Services Co WLL and the Expat Properties India Pvt. Ltd. and Expat Projects and Development Pvt. Ltd. Hence, the Respondent is discharged its liability to indemnify, if any, created vide letter dated 20.06.2016 produced by the Petitioner. As per Document No. 18A of the Petition, the Petitioner has terminated the Agreement with the Principal without any intimation to the Respondent in respect of the Breaches or Non-Performance on account of the Principal Company. Hence, no liability arises unto the Respondent. Further, the alleged Guarantee has not been invoked by the Petitioner. That Respondent has not received any notice till date in respect of the invocation.

(3) That Documents Nos. 5 to 11 of the Petition, is clear that the transaction was made on behalf of M/s. Maritime & Management Services Co WLL by the Petitioner. The receipts issued reflects as under:

"Sawraj Kumar
Director
M/s. Maritime & Management Services Co WLL"

Therefore, it constitutes sufficient proof that the transactions were made by the Petitioner on behalf of the M/s. Maritime & Management Services Co WLL, which has been now disputed by the Petitioner for reasons best known to him and these Insolvency proceeding has been initiated by the Petitioner fraudulently, and with malicious intention to coerce the Respondent and extort money.

(4) Since the Petitioner claims to be a Flat buyer, the proceedings are not maintainable in the light of the principles laid down by the Hon'ble Apex Court in *"Pioneer Urban Land and Infrastructure Limited & Anr. Vs. Union of India & Ors."* wherein it is *inter alia* held allottee, who has knocked at the doors of the NCLT as a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment and taking possession and merely seeking refund shall not be entitled to any remedy under this Code.

(5) The Respondent is a Company engaged in the business of Realty and has over years build a brand and good will for itself. The Respondent is solvent and is capable of repaying the all the legal dues payable to any parties. However, the Respondent has a cash crunch due to market conditions which by itself is not sufficient to prove the insolvency. The Company has a strong net worth with various on-going projects in progress.

(6) Hence, the petition deserves to be rejected.

4. The Petitioner has filed Rejoinder for the Statement of Objections filed by the Respondent, on 18.03.2020 by inter alia stating as follows:

(1) Pre institution mediation in PIM No. 244/2019 was filed by the Applicant against both the prime obligor, Expat Bangalore as well as the Respondent as the suit for recovery against the Expat Bangalore and the Respondent comes under commercial dispute as defined under Commercial Courts Act and Section 12A of the said Act, envisages a mandatory reference to mediation (Pre-Institution Mediation and Settlement) to attempt to resolve difference out of court, before a suit can be instituted. As a matter of fact, the Respondent and Expat Bangalore had both consented for mediation and withdrew their consent at the stage of making payment for mediation. The non-starter report dated 02.01.2020 reflects the Respondent was not ready to participate in the mediation proceedings and thereafter the commercial suit was filed on 14.01.2020 much later to the initiation of these insolvency

proceedings. None of these facts have any bearing on the instant insolvency application since the Applicant has moved this forum as Financial Creditor u/s 7 of the Code. That Document No.17 of the petition is stamped by the Dy. Commissioner of Stamps and Registration on 08.11.2019 as is evident in the endorsement on the Guarantee. Further, it is false and malicious to state that the Guarantee has been obtained by way of fraud and misrepresentation. The exit notice was addressed to Mr. Santhosh Shetty, CMD Expat group, copied to Mr. Dillon and Mr. Vinod Bhatia. Mr. Santhosh Shetty is Director of prime obligor Company as well as that of the Respondent guarantor Company.

(2) Exit notice does not in any way discharge the Respondent of its liabilities under Guarantee and a plain reading of the guarantee issued by the Respondent made this apparent. There are two factors are of prime importance viz., booking confirmations at document No.2 & 3 provided an option to exit for the Applicant in case of the Respondent failing to develop as per agreed timelines and on such exit, the Respondent was obligated to return the amounts paid by the Applicant together with interest and payment schedule shared with the Applicant at Document No.19 provides for a scheme for the return of money to the Applicant and undeniably provides for interest to be payable at the rate of 12% on the principle amount.

(3) The Guarantee executed on 20.06.2016, the last payment was made on 24.04.2017, the guarantee was invoked on 16.11.2017 and the instant Application was filed on 13.11.2019/15.11.2019 and thus Application is not time barred.

5. Heard Ms. Bhargavi Devi, learned Counsel for the Petitioner, and Mr. Uday Shankar R., learned Counsel for the Respondent, **through Video Conference**. We have carefully perused the pleadings of the Parties and the extant provisions of the Code, the Rules made there under, and the Law on the issue as cited and relied upon by the Parties.

6. Ms. Bhargavi Devi, learned Counsel for the Petitioner, while reiterating elaborate averments made in the Petition, as briefly stated supra, has also filed her written arguments dated 14.08.2020, by *inter alia* stating as follows:

(1) The Respondent agreed to repay the amounts with interest and in furtherance shared a payment schedule. An amount of Rs. 1.5 Crore was paid as per schedule. The Respondent agreed that a total amount of Rs.11,72,29,534/- would be repaid by the Respondent to the Applicant in instalments between January and August 2017. Subsequently, this payment schedule was extended till September 30th, 2017.The Petitioner claims as an investor and not Home buyers to fulfil the requisite conditions as per law. There is clear evidence that there was time value for money since Applicant had an exit option from the agreement. In respect of suspension of IBC proceedings in terms of Ordinance No. 34, the suspension is only in respect of defaults that arise on or after 25th March 2020, hence not relevant to instant Application.

(2) The instant application is for the Insolvency against the debt owed by Respondent as a Guarantor vide Guarantee dated 20.06.2016. The PIM No. 244/2019 is against both Prime Obligor as well as the Respondent as the suit for recovery comes under Commercial dispute as defined under Commercial Courts Act and Section 12A of the said Act, envisages a mandatory reference to mediation before a suit can be instituted. A Guarantee Agreement need not be a tripartite agreement. The fact that initial booking was issued erroneously in the name of M/s. Maritime and Management Services Co WLL as against the Applicant was brought up by the Applicant with the Respondent and Expat Bangalore vide email dated 19.04.2016.

(3) CP (IB) No.82/BB/2019 filed against the Principal/Prime Obligor was dismissed as the Application was filed u/s 9 of the IBC by inter alia holding they are unable to categorise the debt as "operational

debt" and further stated that the order will not come in the way of Applicant to invoke any other remedy available under any law.

7. Shri Uday Shankar R., learned Counsel for the Respondent, while reiterating the averments made in the Reply, as briefly stated supra, has also filed his written arguments on 04.08.2020 by *inter alia* contending as follows:

(1) There is absence of clarity regarding, who is the actual Principal Company against whom claim is initiated. Further, there is existence of multiple document/letters dated 10.04.2014 and 05.02.2015 executed by and between Expat Properties India Pvt. Ltd., Expat Projects and Development Pvt. Ltd. and M/s Maritime & Management Services Co. The Petition is liable to be dismissed on the ground of vagueness. Since the so-called Agreement needs to be proved in trial before the trial court as it is a booking letter dated 10.04.2014 and 05.02.2015 and the same letter has been executed between Expat Properties India Ltd. and M/s. Maritime & Management Services Co. W.L.L and Expat Projects & Development Pvt. Ltd. and M/s. Maritime & Management Services Co, on the same subject matter leading to a doubt as to which document is genuine.

(2) The Respondent is not the corporate guarantor under Section 5-A of Code. A valid Guarantee Agreement is a Tripartite Agreement and as per Sec. 126 of Indian Contract Act, 1872, there needs to be existence of Principal Debtor, Creditor and a Guarantor. The letter at Document No.17 has been obtained via misrepresentation and fraud. The similar nature of two agreements has been executed by and between M/s. Maritime & Management Services Co WLL and Expat Properties India Pvt. Ltd. & Expat Projects and Development Pvt. Ltd. via email dated 10.04.2014 and 05.02.2015.

(3) The Respondent is solvent and is capable of repaying all the legal dues payable to any parties. The Respondent has excess assets over liabilities, but in present case there is no legal debt payable to the Petitioner which falls within the definition of IBC.

8. As facts narrated above, cause of action in the instant case arises initially by virtue of letter dated 10.04.2014 issued by Expat Projects Bangalore Holdings Pvt. Ltd. to the Petitioner by confirming booking of One Building consisting of 40 flats with 20 One BHK Units and 20 Two BHK Units in Expat Projects Bangalore Holdings Pvt. Ltd. proposed apartment development *'Expat Central – The Hub'* in Chandapura, Bangalore. Time Schedule & Delays are mentioned under Clause 18 to 23 of the Agreement which inter alia reads as under:

> *"18. In case of delay in project launch beyond June 2015, Purchaser will have the option to exit the project and Expat will return the funds along with 12% compounded interest within 30 days from receiving notice of the exit.*
>
> *19. In case of delay in completion/ handing over the project beyond June 2017, Expat will compensate Purchase at a rate of Rs.5/ sq. ft. per month.*
>
> *20. Completion for above purposes means a stage when the construction is complete with required amenities like roads, water, power, sewerage, lifts, car park, power backup, etc., for the assigned block or building and occupation certificate has been issued by the authorities as habitable.*
>
> *21. a) In case of failure on the part of Expat to meet any of its obligations or failure to complete the (assigned block or building) even by end of December 2017, Purchaser will have the right to opt for refund of full payment with 12% compounded interest from Expat for the period in which the money is held by Expat. Interest on each instalment to be calculated separately based on respective dates of receipts and returns.*
>
> ***b) In case Expat fails to refund the full amount with the 12% compounded interest, Purchaser to have the right to exercise lien mutually agreed asset of Expat properties having a value equivalent to that of the full amount paid by Purchaser along with 12% compounded interest. Expat would allot a property/asset that is mutually agreeable to both parties and is easily marketable.***
>
> ***22. The Purchaser will have the right to resell, register the building in full, part or flat by flat without any transfer fee levied by the builder. The Purchaser has the option to use Expat services for transfer/registration formalities at an agreed fee.***
>
> *23. Formal Agreement of Sale will be executed once approvals come through. This document will govern the sale transaction detailed herein till a formal agreement is carried out."*

Therefore, it is relevant to point out here that Clause 21(b), 22 & 23 above would be ultimate cause of action for the Petitioner to invoke. However, terms and conditions are being changed and parties also changed in furtherance of original transaction by creating confusion about ultimate terms and conditions to govern the parties.

9. Subsequently, Addendum dated 05.02.2015 to the said letter was issued by further clarifying the terms and conditions mentioned earlier. Subsequently, by another letter dated 17.08.2015, booking of 56 units in Expat Central – The Hub, was confirmed, which consists of 28 one BHK, 14 two BHK and 14 two and a half BHK. The Respondent has further issued a letter dated 20.06.2016 in consonance with the Agreement/Letter dated 10.04.2014 read with Addendum dated 05.02.2015, by inter alia guaranteeing the Petitioner full performance and compliance by Expat Projects Bangalore Holdings Pvt. Ltd. However, the Performance Guarantee contains a condition that it shall not be invoked on occurrence of any force majeure event i.e. riots, insurrection, war, terrorist action, occurrence of fire, floods, Acts of God, calamity and similar unforeseen circumstances, which are beyond the such Party's control. Therefore, the transaction in question relates to purchase of Flats and not an investment as claimed.

10. After various discussions with the Respondent, the Petitioner issued a Demand Notice dated 17.01.2018 under the provisions of the Code demanding payment in respect of an unpaid operational debt due from Respondent for an amount of Rs.10,99,39,128/-. In pursuant to the above notice, the Respondent has given a reply dated 03.02.2018 by proposing to settle the issue. Since no settlement has been reached between the Parties, the Petitioner has earlier filed C.P. (IB) No.82/BB/2018 before this Adjudicating Authority, under Section 9 of the Code, by seeking to initiate CIRP for the same amount of amount as claimed in the instant Petition. However, the Adjudicating Authority has dismissed the same by an Order dated 07.08.2019 with the following observations:

"12. From a reading of the above case law and the extant provisions of law, we are unable to categorise the above debt as an 'Operational Debt'.

13. In the instant petition, in light of the discussion on the proposition of law entailed in the preceding paragraphs and considering the circumstances of the case; we found that the Petition filed under Section 9 of I&B Code, 2016 is incomplete and ought to be rejected.

14. In the result, CP (IB) No.82/BB/2018 is hereby rejected. However, this order will not come in the way of Petitioner to invoke any other remedy available under any law so as to get the grievances redressed. No order as to costs."

11. After dismissal of said CP, the Petitioner has again filed the present Petition, U/s 7 of Code for the same set of facts. The contention of the Petitioner that the Petitioner is fully entitled to invoke provisions of the Code once again by changing the Section of Code from Section 9 to Section 7 is not tenable and it is liable to be rejected. The Adjudicating Authority has given a clear finding that liberty granted to the Petitioner is to invoke any other remedy available **under any Law,** do not mean to invoke provisions of the Code again by changing Section. Since the judgement has become final, the Petitioner is estopped from invoking the provisions of the Code for the same set of facts.

12. In terms of letter dated 10.04.2014 and 05.02.2015 and other connected letters, it is clear that the Applicant invested money for purchase of Flats in question. Clause 21(b) of letter dated 10.04.2014 confers rights to the Purchaser (Petitioner herein) to exercise lien mutually agreed asset of Expat properties having a value equivalent to that of the full amount paid by Purchaser along with 12% compounded interest. Expat would allot a property/asset that is mutually agreeable to both parties and is easily marketable. Formal Agreement of Sale will be executed once approvals come through. This document will govern the sale transaction detailed herein till a formal sale agreement is carried out. Therefore, the original letter confers right only to exercise lien on the property but not to recover the money, which are subsequently alleged to have been agreed upon by the Parties. There are so many differences in the booking of the Flats and the letters exchanged by the Parties. It is also not in dispute that in pursuant to the initial discussion, the Respondent admittedly paid part payment for an amount of Rs.1,50,00,000/- as on 24.04.2017. The contention of the Petitioner that he is entitled to invoke the Performance Guarantee given vide letter dated 16.11.2017, and can invoke the provisions of the Code is not at all tenable. The Petitioner can enforce Performance Guarantee by invoking the provisions of Specific Performance Act. There is no correlation to various documents filed by the Parties with reference to the debt and default in question, and unless debt and default in question prima facie proved/established, CIRP cannot be initiated. There are no legally valid agreements produced in support of case of Petitioner and as stated supra, only one letter dated 10th April, 2014 started cause of action. And the Petitioner has not produced any legally valid agreement/contract executed between the Parties except by way of mere exchanging letters. Therefore, disputed question of fact and law on letters exchanged cannot be adjudicated in summary proceedings as contemplated under the provisions of Code, to decide question of debt and default. It is also not in dispute that the Petitioner has initiated suit before the Commercial Court, Bangalore, by way of Pre Institution Mediation in PIM No.244/2019. Report has been issued by Bengaluru District Legal Services Authority, Bengaluru.

13. The Petition is filed with an intention to recover the alleged outstanding amount after receiving part-payment as stated supra, which is against the object of Code.

14. For the aforesaid reasons and circumstances of the case, we are of the considered opinion that the Petitioner has filed the instant Petition on misconceived facts and law, and also failed to make out any prima facie case with regard to debt and default, so as to initiate CIRP against the Corporate Debtor. Therefore, the Petition is liable to be dismissed.

15. In the result, C.P. (IB) No.04/BB/2020 is hereby dismissed. However, this order would not preclude the Petitioner to prosecute its case before

Commercial Court and also to take appropriate legal course of action under any other Law as granted in earlier Order dated 07.08.2019 passed in C.P. (IB) No.82/BB/2018. No order as to costs.

ASHUTOSH CHANDRA
MEMBER, TECHNICAL

RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL

Krishna