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IN THE NATIONAL COMPANY LAW TRIBUNAL  
BENGALURU BENCH

C.P. (IB) No.132/BB/2017  
U/s 7 of IBC, 2016  
R/w Rule 4 of I&B(AAA) Rules, 2016

In the matter of:

**M/s. Reliance Capital AIF Trustee  
Company Pvt Limited and Another**  
Reliance Centre, 19, Walchand Hirachand  
Marg, Ballard Estate,  
Mumbai - 400 001 - Petitioner/Financial Creditor

Versus

**M/s.Fortuna Urbanscape Private Limited**  
Fortuna Building, New. No.7,  
Old No.390, 13<sup>th</sup> Cross,  
Sadashiv Nagar,  
Bangalore - 560 080. - Respondent/Corporate Debtor

Date of Order: 9<sup>th</sup> August, 2019

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)  
2. Hon'ble Dr. Ashok Kumar Mishra, Member (Technical)

Parties/Counsels Present:

For the Petitioner : Shri S.S.Naganand, Senior Counsel with  
Shri M.G.Nanjappa, Ms. Priyanka Das

For the Respondent : Shri Dharma Tej

ORDER

**Per:** Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB)No.132/BB/2017 is filed by M/s. Reliance Capital AIF  
Trustee Company Private Limited and another (**Petitioner**



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**/Financial Creditor)** U/s 7 of IBC, 2016, R/w Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by inter-alia seeking to initiate Corporate Insolvency Resolution Process (CIRP) in respect of **M/s.Fortuna Urbanscape Private Limited, (Respondent/Corporate Debtor)** on the ground that the Corporate Debtor committed a default in payment of Rs.59,42,52,495/- (Rupees Fifty Nine Crores Forty Two Lakhs Fifty Two thousand Four Hundred and Ninety Five Only), (Principal + Accrued interest + Redemption Premium + Additional Interest + Default Interest as on 31.03.2017 as per terms of the Transaction Documents) along with 21.50% IRR which shall continue to accrue as per terms of the Transaction Documents from 31.03.2017 till realization of payment.

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.Reliance Capital AIF Trustee Company Private Limited and another (Petitioner/Financial Creditor) was incorporated on 20.08.2013, under the provisions of Companies Act, 1956, with CIN: U74999MH2006PTC164793, having its registered office at Reliance Centre, 7<sup>th</sup> Floor, South Wing, Off Western Express Highway, Prabhat Colony, Santacruz (East), Mumbai 400 055, India, in its capacity as the trustee of Reliance Capital AIF Trust, a SEBI registered Alternate Investment Fund with No. IN/AIF 2/14-15/0111 pursuant to an Indenture of Trust, Investing through its scheme called **Reliance Yield Maximizer Alternative Investment Fund – Scheme I** and acting through its investment manager, Reliance AIF



Management Company Limited, a Company registered under the provisions of the Companies Act, 1956, (through its Authorized Signatory Mr.Vijendra Rangwani).

- 2) M/s.Fortuna Urbanscape Private Limited (Respondent/ Corporate Debtor/FUPL) was incorporated on 21.02.2011 having registered address at: Fortuna Building, New No.7, Old No.390, 13<sup>th</sup> Cross, Sadashiv Nagar, Bangalore-560080. The Authorised Share capital of the Corporate Debtor is Rs.6,93,00,000/- and the paid up share capital is Rs.75,03,800/-.
- 3) The Financial Creditor(s) being the Debenture Holders have pursuant to execution of the transaction Document lent Rs.46,05,00,000/- to Fortuna Buildcon India Private Limited by subscribing to/purchasing 46,05,000 senior secured redeemable non-convertible debentures of Rs.100/- each issued by FBIPL for a total value of Rs.46,05,00,000/- as per the terms specified in the Transaction Documents.
- 4) It is submitted that the Fortuna Unbanscape Private Limited, Fortuna Projects (India) Private Limited and Fortuna Buildcon India Private Limited are group Companies promoted by Late Mr.S.V.Naresh Kumar and Mr.Shailesh Kumar. The Group Companies are inter alia engaged in the business of real estate development.
- 5) It is submitted that as per the Board Resolution dated 17.06.2014, the FUPL, i.e Corporate Debtor herein, has also ratified that it would give security towards repayment of the amount on behalf of FBIPL and would mortgage the Mortgaged Properties No.2 as mentioned under the Registered Mortgaged Deed dated 02.09.2014, along with all



rights, title and interest in the respective projects being developed by it on the said lands, in favour of the Financial Creditors.

- 6) It is submitted that as per the Transaction Documents executed (definitive Agreements) and the Irrevocable and Unconditional Corporate Guarantee Dated 02.09.2014 in particular the Corporate Debtor herein has secured the Debenture Outstanding's of FBIPL and has offered to pay on demand the Debenture outstanding's to the Financial Creditor.
- 7) It is submitted that towards the said subscribed amount of Rs.46,05,00,000/-, the financial creditor has no far only received an amount of Rs.7,84,34,618/- from the FBIPL, the Borrower, and FBIPL has failed to repay the balance debt amount till date. Thus, default has been committed on the payment of the debt which is in violation of the terms of the payment schedule as contained in Schedule 3 of the Debenture subscription Agreement.
- 8) It is submitted that as the Corporate Debtor failed to remit the debt amount, the financial creditor was compelled to issue Demand Notice dated 05.04.2017; 07.04.2017; 07.04.2017; 31.03.2017 and as per Legal Notice dated 30.06.2017 reporting the default of payment and requesting for the repayment of debt from the FBIPL and the Corporate Debtor herein.
- 9) It is submitted that in response to the said notices, the FBIPL (borrower) has issued a Reply letter dated 13.06.2017 and Email dated 13.06.2017, thereby acknowledging and admitting its inability to pay their debt

*(Signature)*



and also requested time for repayment of Rs.59,42,52,495/, stating that FBIPL was facing a lot of challenges after the demise of its Managing Director Mr.Naresh Kumar and sought 9 months' time to make the payment of NCDs outstanding in parts within this period of the Financial Creditor.

- 10) It is submitted that as per the Chartered Accountant Certificate dated 03.04.2017 issued by an independent Chartered Accountant along with the Memo of calculation, the Corporate Debtor is liable to pay an amount of Rs.59,42,52,495/-, /- (Rupees Fifty Nine Crores Forty Two Lakhs Fifty Two thousand Four Hundred and Ninety Five Only), (Principal + Accrued interest + Redemption Premium + Additional Interest + Default Interest as on 31.03.2017.
- 11) It is submitted that on the failure of the FBIPL's failure and neglect to pay the Debenture outstanding , the financial creditor has invoked the Corporate Guarantee of the Corporate Debtor herein and called upon the Corporate Debtor herein, to pay Rs.59,42,52,495/-, (Rupees Fifty Nine Crores Forty Two Lakhs Fifty Two thousand Four Hundred and Ninety Five Only), including interest till 31.03.2017 as per terms of the transaction Documents, which shall continue to accrue as per terms of the Transaction Documents and irrevocable and Unconditional Corporate Guarantee Dated 02.09.2014 from 31.03.2017 till realization of payment to the Financial Creditor
- 12) It is submitted that as the Corporate Debtor herein, i.e. Co-Borrower, has defaulted in the payment of monies as per the Transaction Document and the Financial Creditors,



have, jointly and severally, filed the present Petition for inability of the Corporate Debtor to repay the debt amounting to Rs.59,42,52,495/- as on 31.03.2017 (along with interest as per terms of the Transaction documents till realization of payment) to the Financial Creditors herein.

13) It is submitted that the Corporate Debtor herein, has admittedly its inability to repay the debt in the Objections filed before the Hon'ble Tribunal and till date has failed to resolve the payment of debt to the financial Creditor though several opportunities were given by the Tribunal to the Corporate Debtor to resolve the payment. In view of the default committed by FBIPL, FUPL being the Corporate Guarantor of the Principal Borrower, the Corporate Debtor herein is required to pay the financial creditor.

3. The Respondent has filed Statement of Objection dated 01.02.2018, by inter alia contending as follows:

- 1) It is submitted that the application filed by the Petitioner to intimate CIRP under the I&BC, 2016 is not maintainable in Law or facts and the same is liable to be rejected.
- 2) M/s.Fortuna Urbanscape Private Limited is a Company incorporated under the provisions of the Companies Act, 1956 and consisted of Two Shareholders, namely, Late Sri Naresh Kumar and Shri Sailesh Kumar.
- 3) It is submitted that, Fortuna Buildcon India Private Limited undertook a project known as "Fortuna Viva", which was for development of 418 apartments. The said project was under a joint Development Agreement with the owners of loans, which turned out to be 256 Apartments, totally measuring 358296 Sq. ft. for the construction and development of the



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said project, FBIPL had borrowed a sum of Rs.46,05,00,000/- initially from the Petitioner. It is pertinent to note that, FUPL is a Corporate Guarantor for the said project loan, and is not a primary borrower. FUPL had given security for the project loan obtained.

- 4) Due to the untimely demise of one of the Directors of FBIPL, Late Sri Naresh Kumar on 07.04.2016, the project faced certain obstacles and hurdles due to which the project could not proceed smoothly and payment to the Petitioner also became difficult. At this juncture, the petitioner started pressurizing FBIPL for the payment of dues, amounting to Rs.59,42,52,495/-. FBIPL had its email Letter dated 13.06.2017 sought for Nine Months' time to make the payment of NCD outstanding in parts. Though the Petitioner received the said Letter from FBIPL, they seem to have hurriedly filed this Petitioner against the Respondent, which is premature and arbitrary.
- 5) It is submitted that, as of today, the total cost incurred by FBIPL for the project is Rs.22,52,33,192/- and the total balance required for the completion of the Project is Rs.77,63,49,000/-.
- 6) FUPL hereby submits that, the account claim by the Petitioner to the tune of Rs.59,42,52,495/- is not tenable or justified. The said amount of Rs.59,42,52,495/- is not payable, since the initial borrowing was only Rs.46,05,00,000/-.
- 7) It is submitted that, the properties given as security which includes Apartments proposed to be built as well as Two Plots constructed in the Apartment Complex called "Casa



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Bona" belonging to the Respondent herein, would be sufficient to clear the debt which is due to the Petitioner. Hence, FUPL cannot be considered as insolvent and the proceedings initiated for IRP for FUPL would not be justified under these circumstance. Therefore, the invocation of I&BC, 2016 would not be justified and the application needs to be rejected.

4. Heard Shri S.S.Naganand, learned Senior Counsel along with Shri M.G.Nanjappa, Ms.Priyanka Das, learned Counsel for Petitioner. None appears for the Respondent. We have carefully perused the pleadings of the party and extant provisions of the Code and the law.
5. Shri S.S. Naganand, learned Senior Counsel for the petitioner, while pointing various contents of various documents filed along with Company petition, has further submitted that the instant petition is filed strictly in accordance with law and Debt and default in question is admittedly not in dispute and a qualified Resolution Professional namely, Shri Shivadutt Bannanje bearing IP Regn.No.IBBI/IPA-002/IP-N00266/2017-2018/10779 is suggested to appoint him as IRP. Therefore, the Learned Senior Counsel urged the Tribunal to admit the case by initiating CIRP in respect of Corporate Debtor with all consequential orders.
6. The case is being listed for admission on various dates viz. 23.11.2017, 01.12.2017, 05.12.2017, 20.12.2017, 16.01.2018, 01.02.2018, 22.02.2018, 15.03.2018, 28.03.2018, 12.04.2018, 25.04.2018, 02.05.2018, 05.06.2018, 11.06.2018, 03.07.2018, 13.07.2018, 01.08.2018, 09.08.2018, 06.09.2018, 28.09.2018, 08.10.2018, 22.10.2018, 19.11.2018, 10.12.2018, 17.12.2018,

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16.01.2019, 13.03.2019, 21.03.2019, 03.04.2019, 31.05.2019, 13.06.2019, 25.06.2019, 10.07.2019 24.07.2019 & 06.08.2019. Since the parties used to submit that they are exploring for the possibility of settlement, the case is adjourned on all these dates at the request of parties. However, the Respondent is not able to resolve the issue in question despite affording ample opportunities for the same. Therefore, there is no other alternative for the Adjudicating Authority except to decide the case for admission as per merits.

7. As stated supra, the Debt and default in question is admitted by the Respondents but it is only contending that the Debt and default in question is not tenable or justified and it is not payable, since the initial borrowing was only Rs.46,05,00,000/- (Rupees Forty Six Crore and Five Lakh Only) and all amounts released pursuant thereto has been appropriated by the Petitioner towards interest payment which means that, no money actually came into the account of FBIPL. And the properties given as security which includes Apartments proposed to be built as well as Two Plots constructed in the Apartment complex called "Casa Bona" belonging to Fortuna Urbanscape Private Limited, would be sufficient to clear the debt, which is due to the Petitioner. Therefore, the FBIPL cannot be considered as insolvent and the proceedings initiated for Insolvency Resolution Process for FBIPL would not be justified under these circumstances. And the default, if any, cannot be attributed to be a deliberate act and it is due to the circumstances beyond the control of FBIPL and its Directors, and FBIPL has every intention to repay the debts of the Petitioner.
8. The fundamental question arise for consideration in a case filed U/s 7 of Code is whether debt and default in question is



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proved/established with adequate evidence. And the grounds whether such default is deliberate or not; Corporate is having adequate properties to satisfy the debt; default is committed beyond its control; promised to pay etc., are hardly tenable in the instant case as long as debt and default is admitted.

9. So far as the law with regard to initiation of CIRP is concerned, Hon'ble NCLAT vide order dated 15<sup>th</sup> May, 2017 passed in Company Appeal (AT) (Insolvency) No.1 & 2/2017 has dealt the issue of admission of a case filed under Section 7 of the Code, under Paras 55 to 58, which are extracted below:

*"55) Process of initiation of Insolvency Resolution Process by a financial creditor is provided in Section 7 of the I&B Code. As per sub-section (1) of Section 7 of the I&B, the trigger for filing of an application by a Financial Creditor before the Adjudicating Authority is when a default in respect of any financial debt has occurred. Sub-section (2) of Section 7 provides that the Financial Creditor shall make an application in prescribed form and manner and with prescribed documents, including:*

- i. "record of the default" recorded with the information utility or such other record or evidence of default as may be specified;*
- ii. The name of the resolution professional proposed to act as an interim resolution professional; and*
- iii. Any other information as may be specified by the Board.*

*56) The procedure once an application is filed by the financial creditor with the Adjudicating Authority is specified in sub-section (4) of Section 7 to sub-section (7) of Section 7 of the Code. As sub-section (4) of Section 7 of the I&B Code:*

*"(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the*



*existence of a default from the records of an information utility or on the basis of other evidence furnished by the Financial Creditor under sub-section (3)".*

*57) Sub-Section(5) of Section 7 of the I&B Code provides for admission or rejection of application of a Financial Creditors. Where the Adjudicating Authority is satisfied that the documents are complete or incomplete.*

*58) The Adjudicating Authority post ascertaining and being satisfied that such a default has occurred may admit the application of the Financial Creditor. In other words, the statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the Financial Creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'.*

The Hon'ble Supreme Court has upheld the above judgment in Civil Appeal Nos. 8337-8338 of 2017 vide judgment dated 31<sup>st</sup> August, 2017. The Hon'ble Supreme Court has adverted to the Section 7, at para 28, which reads as under:

*"28) When it comes to financial Creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the Corporate Debtor – It need not be a debt owed to the applicant financial Creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the I&B(AAA), Rules, 2016. Under Rule 4, the application is made by a*



*(Signature)*

*Financial Creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the Corporate Debtor in Part II, particulars of the proposed interim Resolution Professional in part III, particulars of the Financial Debt in part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered Post speed post to the registered office of the Corporate Debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of the evidence furnished by the Financial Creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of the Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the Corporate Debtor is entitled to point out also that a default has not occurred in the sense that the "debt", which may also include a disputed claim is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section 97), the adjudicating authority shall then communicate the order passed to the financial creditor and Corporate Debtor within 7 days of admission or rejection of such application, as the case may be."*

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10. By perusal of the Application/Petition and the documents filed in support of the Application/Petition, it is found that the instant Company Petition is filed in a prescribed format with requisite fees and the Statement of Account of the Corporate Debtor issued by Axis Bank is filed along with Application (At Document No.22, Pages 573-590) to show that that the Corporate Debtor has not paid the debt due and Shri Shivadutt Bannanje bearing IP Regn.No.IBBI/IPA-002/IP-N00266/2017-2018/10779 has filed his Written consent in Form 2 dated 22.10.2018, by inter declaring that he is eligible to be appointed as a Resolution Professional in respect of the Corporate Debtor and that there are no disciplinary proceedings is pending against him with the Board or ICSI. Therefore, we are satisfied that the debt and default in question is established and the IRP suggested is prima facie eligible to be appointed, and thus it is a fit case to admit the case by initiating CIRP, imposing moratorium etc.
11. In the light of provisions of Section 7 of the Code, and law as declared by the Hon'ble NCLAT and Hon'ble Supreme Court as extracted above, the Adjudicating Authority/Tribunal has to examine the instant case with regard to default, Application/Petition is complete/incomplete, such default is supported by evidence; and has named IRP. As explained above, the instant Company Petition is filed by M/s.Reliance Capital AIF Trustee Company Private Limited (Financial Creditor) strictly in accordance with provisions of section 7 of Code by inter alia producing record of default as per the Bank Statement; suggested a qualified Resolution Professional namely **Shri Mr. Shivadutt Bannanje, with Registration No. IBBI/IPA-002/IP-N00266/2017-18/10779** to appoint him as IRP. We are of prima facie view that the said RP is provisionally qualified to be appointed as IRP. Therefore, we are of the considered opinion



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that it is a fit case to admit Petition by initiating CIRP in respect of Corporate Debtor with consequential orders/directions.

**12.** In view of the above facts and circumstances of the case, and the law as stated supra, by exercising powers conferred on this Adjudicating Authority, U/s 7(5)(a) and other extant provisions of the IBC, 2016, the following orders are passed:


- 1) CP(IB)No.132/BB/2017 is hereby admitted by initiating Corporate Insolvency Resolution Process (CIRP) in respect of M/s., Fortuna Urbanscape Pvt. Ltd, Corporate Debtor;
- 2) We hereby appoint **Mr. Shivadutt Bannanje, with Registration No. IBBI/IPA-002/IP-N00266/2017-18/10779** as Interim Resolution Professional, in respect of the Corporate Debtor to carry on the functions as mentioned under the I&B Code, 2016.
- 3) The following moratorium is declared prohibiting all of the following, namely:
  - a. In the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
  - b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  - c. any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

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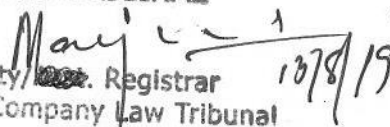


- d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor;
  - e. the supply of essential goods and services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period;
  - f. the provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government
  - g. The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process;
- 4) The IRP should follow all extant provisions of IBC, 2016 and the rules including fees rules as framed by IBBI. The IRP is hereby directed to file progress reports to the Tribunal from time to time.
  - 5) The Board of Directors and all the staff of the Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by IBBI.
  - 6) Post the case for report of the IRP on **09<sup>th</sup> September, 2019**

  
**(ASHOK KUMAR MISHRA)**  
**MEMBER, TECHNICAL**

  
**(RAJESWARA RAO VITTANALA)**  
**MEMBER, JUDICIAL**

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 Deputy Registrar  
 National Company Law Tribunal  
 Bengaluru Bench

