

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

I.A.No.28/2020 in
C.P. (IB) No.132/BB/2017
U/s. 60, R/w Sec 45 &
49 of the I&B Code, 2016

Between:

Mr. Shivadutt Bannanje,
Resolution Professional of
M/s. Fortuna Urbanscape Private Limited,

No. 228, Classic Orchid,
Behind Meenakshi Temple,
Bannerghatta Road,
Bangalore – 560 076

... Applicant/RP

And

**M/s. Fortuna Urbanscape Private
Limited**
Fortuna Building, New No.7,
Old No. 390, 13th Cross,
Sadashiv Nagar,
Bengaluru – 560 080 & 36 Ors.,

... Respondents

Pronouncement of Order: 29th January, 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 Applicant/RP : Mr. Raghuram Cadambi

For the Respondent : None



ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A.No.28/2020 in C.P. (IB) No.132/BB/2017 is filed by Mr. Shivadutt Bannanje, ('Applicant/RP'), U/s. 60, R/w Sec 45 & 49 of the I&B Code, 2016, by inter-alia seeking to consider and restore the rights under the Joint Development Agreement (JDA) dated 21.11.2011, as if the Agreement of Cancellation dated 12.06.2019, had not been entered into; to consider and protect the interest of the home buyers, who are the victims of such transaction etc.
2. Brief facts of the case, which are relevant to the issue in question, are as follows:
 - (1) Initially, the main Petition bearing C.P. (IB) No.132/BB/2017 filed by M/s. Reliance Capital AIF Trustee Company Private Limited (Petitioner) against M/s. Fortuna Urbanscape Private Limited (Corporate Debtor), U/s.7 of IBC, 2016 R/w Rule 4 of I&B (AAA) Rules 2016, was admitted by the Adjudicating Authority, vide its Order dated 09.08.2019, by initiating CIRP, appointing IRP, imposing moratorium etc. Subsequently, the IRP has been confirmed as a Resolution Professional by the Tribunal vide its order dated 25.10.2019.
 - (2) The Corporate Debtor had previously entered into a Joint Development Agreement (JDA) and General Power of Attorney on 21.11.2011, with Owners of the agricultural lands bearing Sy. No.25/1 and Sy. No.26 totalling to 3 Acres 11 Guntas and Sy No. 42/5 measuring 3 Acres 15 Guntas and Sy. No. 42/6 measuring 2 Acres 26 guntas respectively, totally measuring 9 Acres 12 Guntas of Venkata Village, Yelahanka Hobli, Bangalore Urban District. Out of these lands, 3 Acres 11 Guntas with respect to



Sy. No. 25/1 and Sy. No.26 was to be developed for commercial purposes, and the remaining 6 Acre 1 Gunta with respect to Sy. No. 42/5 and Sy. No. 42/6 was to be developed for residential purposes, after obtaining necessary permissions and sanctions of the concerned authorities. The share of the Corporate Debtor in the residential project under the said JDA was sixty percent (60%) and for commercial projects was fifty-eight percent (58%). The house buyers consisting of 50 people had paid an advance/full payment of Rs.10,05,19,370/- towards Apartments and the villa plots in the said project.

- (3) Further, as per the JDA dated 21.11.2011, some relevant clauses in the said matter are as follows:

Clause Number	Brief Summary
Clause 11.2	The owners agree not to revoke the said general power of attorney till the sale of the Developer share and execution of last sale deed in the Schedule Property with respect to Developer share.
Clause. 6	The developer hereby agrees to complete the construction in all respects the Residential and Commercial building and the Owner's constructed Area within 48 (Forty eight) months' time from the date of sanction plan with an extended period do 12 months. In the event of any delay in completing the construction even after grace period of 12 months as stated above for the reason other than which is stated above the developer will be



	given subject to payment of penalty for Rs.5,00,000/- (Rupees Five Lakhs only) per month for delay by way of damages by builders agreed to pay every month till delivery of owners constructed area.
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- (4) The Corporate Debtor has paid the landowners a sum of Rs.20,59,66,102/- as deposit towards the JDA. In addition to above, the Corporate Debtor had settled a land dispute with another Company by paying a sum of Rs.6,54,50,000/-. The Corporate Debtor also incurred various other expenses for the development of land amounting to Rs.17,17,22,491/- Hence totalling land expenditure to Rs.44,31,38,593/-.
- (5) On 12.06.2019, the Corporate Debtor represented by its then Director i.e. Mr. Sailesh Sreeramulu cancelled the JDA dated 21.11.2011 with the Respondent/Land Owners (Respondent No.2 to 37) and also revoked the General Power of Attorney dated 21.11.2011 vide an Agreement of Cancellation dated June 12, 2019. However, the Landlords paid a sum of Rs.13 Crores as a consideration for the Cancellation of JDA wherein Rs.10 crores was paid on 19.06.2019 balance of Rs.3 Crores was paid on 02.07.2019. From the above sum of Rs.13 Crores paid by the Land Owners towards the cancellation of the JDA, a sum of Rs.10 crores was utilised for payment of TDS dues of the Corporate Debtor and the balance of Rs.3 Crores has been transferred to the personal account of the Promoter/Director of the Company i.e. Mr. Sailesh Sreeramulu on 02.07.2019.
- (6) Subsequently, the land owners of the said property (i.e. Respondent No.2 to 37) had entered into another JDA dated 14.06.2019 with another developer vide Document registered_No.



622/2019- 20, Book I, at the office of the Sub-Registrar, Gandhinagar (Hebbal), Bengaluru.

- (7) In view of the above, the Applicant submits that the house buyers have not received any communication regarding the cancellation of the earlier JDA dated 21.11.2011 neither have they received the refund of their investment along with interest on such cancellation of the JDA. Further, the new developer has neither taken any responsibility towards the liability of Rs.10,05,19,370/- i.e. the investment made by the 50 house buyers and the interest thereon. Therefore, the said transactions lack bonafide and have seriously affected the claims of the home buyers.
- (8) It is alleged that the promoter of the Corporate Debtor had entered into an undervalued transaction and such transactions were entered for keeping the assets of the Corporate Debtor beyond the reach of those buyers, who were entitled to make a claim against the Corporate Debtor. Further, the Cancellation of JDA had taken place on 12.06.2019 which is within the period of one year of commencement of CIRP of the Corporate Debtor and hence falls within the purview of Sec 46 of the I&B Code, 2016. The home buyers would be put to great hardship and irreparable loss, if the Application as prayed for is not allowed.
3. Heard Shri Raghuram Cadambi, learned Counsel for the RP **through Video Conference**. We have carefully perused the pleadings of the Parties and also extant provisions of the Code and Rules made thereunder.
4. The Applicant has filed IA No. 334 of 2020 (for approval of Resolution plan), IA No 362 of 2020 Under Sections 66, 69, 25(2) of Code. While



seeking Approval of Resolution Plan, as approved by COC, the Applicant still chose to file Applications. It is relevant to mention here that once Resolution Plan is approved by Adjudicating Authority, CIRP is deemed to be closed, Resolution Professional also ceased to be as such but only he will be a Member of Supervising Committee along with others to monitor the implementation of Resolution Plan, under the new Management. And the Resolution plan accepted by the COC is not contingent on recovery contemplated in Applications filed by the Applicant. It is also to be mentioned here that procedure under Liquidation is different where termination of Liquidation proceedings would be resorted to after liquidating all the assets of Corporate Debtor. The Applicant has not explained as to how he will prosecute the said Applications, after he ceased to be as RP, after approval of Resolution Plan. And the new Management is not concerned with these Applications, as their Resolution plan is not contingent on the result of the Applications filed by the Resolution Professional herein.

5. In the above context, it is relevant to refer the judgement dated 26th November, 2020 rendered by Hon'ble High court of Delhi in *W.P.(C) 8705/2019 & CM APPL. 36026/2019 in the case M/S VENUS RECRUITERS PRIVATE LIMITED versus UNION OF INDIA AND ORS.*, wherein the question that has arisen is whether under the Insolvency and Bankruptcy Code, 2016 (*hereinafter, 'IBC'*), an application filed under Section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the RP in filing/pursuing such applications. The jurisdiction of the NCLT to hear applications under Section 43 after the approval of the Resolution Plan, is thus under challenge. Wherein it is *inter-alia* held/observed as follows:



- i) If an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Resolution Plan is approved, in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the Company. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Resolution Plan. In the present petition, this Court is concerned with a Corporate Debtor, in respect of which the Resolution Plan was approved by the NCLT and an application is sought to be filed by the RP as former RP through its counsel. The RP cannot wear the hat of the '**Former RP**' and pursue an avoidance application in respect of preferential transactions after the hat of the Corporate Debtor has changed and it no longer remains a Corporate Debtor. This would be wholly impermissible in law as the mandate of the RP has come to an end. The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a Corporate Debtor which is now under a new management unless provision is made in the final
- ii) A far-fetched argument was made by the ld. counsels for the Former RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the



CIRP and not beyond that. The fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company. As can be seen in the present case, the Corporate Debtor in its new avatar has terminated the agreement with the Petitioner.

iii) The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract which now stands terminated, after the approval of the Resolution Plan. The above discussion is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the Corporate Debtor which may assist in liquidating the company at the final stage. However, that is not the case in the present petition.

iv) In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders are liable to be set aside. The proceedings qua the Petitioner before the NCLT under the Avoidance application are accordingly quashed.

6. This Adjudicating Authority has also considered similar issue I.A No. 446 of 2018 in CP (IB) No. 122/BB/2017 filed by Smt. Ramanathan Bhuvaneshwari, under Section 66 r/w Section 25 (2), 69, 70 and



other applicable Sections of I & B Code, 2016. This Adjudicating Authority, after considering the matter has disposed of the said Application by an order dated 16.04.2019 with the following directions:

"Therefore, we are of the prima facie view that the findings given in Forensic Audit Report only prima established the fraudulent transaction in question. Therefore, it is necessary to conduct further investigation by SFIO in the affairs of the Company basing on the findings given in Forensic Audit Report, after affording proper opportunity to concern opposite parties to defend them. Hence we are inclined to refer the matter to SFIO for further investigation by invoking powers conferred u/s 212/213 of the Companies, Act 2013 and thereafter, aggrieved party can take appropriate legal course of action.

In the result by exercising power conferred on this Adjudicating Authority which being NCLT u/s 213 of Companies act, 2013. I.A No. 446/2018 in CP (IB) No. 122/BB/2017 is disposed of with the following directions:

- (1) Learned Resolution professional is directed to forward all material documents, which is connected to the present case including the Forensic Auditor report date d14.12.2018, the Central Government, within a period of three week from the receipt of the copy of the order.*
- (2) Learned Resolution Professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/otherwise duly following principles of natural justice.*
- (3) The Central Government is directed to refer the matter to the SFIO for further investigation into the affairs of the Corporate Debtor, Bank of Maharashtra and other related companies including*



Director of Companies of Corporate Debtor & related Companies and officials of Bank of Maharashtra basing on the report of Forensic Audit report as expeditiously as possible.

(4) Bank of Maharashtra is also directed to extend full assistance to the SFIO to complete the investigation as expeditiously as possible.

(5) The parties are at liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case.

(6) The prayer as sought for in the application stands disposed of in the light of above direction

(7) No order as to costs."

Aggrieved by the said order, the third party, Shri Lagadapathi Ramesh (Respondent/Appellant) filed Company Appeal (AT) (Insolvency) No. 574 of 2019, which was finally disposed of by the Hon'ble NCLAT vide order dated 20.09.2019 with the following directions:

"39.the Civil Procedure Code is not applicable for any proceeding before the Tribunal and in terms of Section 424, the Tribunal is guided by principle of natural justice and subject to other provisions under the Companies Act, 2013 or the I & B Code or any rule made thereunder. The Tribunal and the Adjudicating Authority have also been empowered to regulate their own procedure.

40.In view of the aforesaid position of law also, the procedure laid down under Section 213 of the Companies Act, 2013 can be exercised by the Tribunal/ Adjudicating Authority, as held above.

41. Further, after the investigation by the Inspector, if case is made out and the Central Government feels that the matter also requires investigation by the 'Serious Fraud Investigation Office' under Section 212 of the Companies Act, 2013, it is open to the Central Government to decide whether in such case the matter may be referred to the



'Serious Fraud Investigation Office' or not. This will depend on the gravity of charges as may be found during the investigation by the Inspector.

42. In view of the aforesaid position of law, we are of the view that the Adjudicating Authority was not competent to straight away direct any investigation to be conducted by the 'Serious Fraud Investigation Office'. However, the Adjudicating Authority (Tribunal) being competent to pass order under Section 213 of the Companies Act, 2013, it was always open to the Adjudicating Authority/Tribunal to give a notice with regard to the Company Appeal (AT) (Insolvency) Nos. 574 & 592 of 2019 aforesaid charges to the Promoters and others, including the Appellants herein and after following the procedure as laid down in Section 213, if prima facie case was made out, it could refer the matter to the Central Government for investigation by the Inspector or Inspectors and on such investigation, if any, actionable material is made out and if the Central Government feels that the matter requires investigation through the 'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'.

43. We, accordingly, modify the impugned order dated 16th April, 2019 and refer the matter to the Central Government for investigation through any Inspector or Inspectors.

44. As we have heard learned counsel for the parties and prima facie we are of the view that the matter requires investigation to find out whether one or other promoter or the company as referred to in paragraph 9 and quoted above to find if they have violated any of the provisions of Sections 68, 69, 70, 71, 72 & 73 of the 'I&B Code', we modify the impugned order dated 16th April, 2019 and refer the



matter to the Secretary, Ministry of Corporate Affairs, Government of India, to get the matter investigated by Inspector or Inspectors and following the procedure in terms of Section 213 of the Companies Act, 2013 and/ or on such report after investigation by the Inspector, the Central Government feels that the matter is further required to be investigated by Company Appeal (AT) (Insolvency) Nos. 574 & 592 of 2019 the 'Serious Fraud Investigation Office' it may do so and thereafter, if actionable material making out case of fraud is made out after such investigation by the 'Serious Fraud Investigation Office', it may act in terms of sub-section (2) of Section 236 of the 'I&B Code' for referring the matter to the Special Court.

Both the appeals stand disposed of with aforesaid observations and directions. No costs.

7. With reference to the instant case, the issue raised by the Applicant is on the Joint Development Agreement ('JDA') dated 21.11.2011 and its Cancellation dated 12.06.2019, on ground that the cancellation of the JDA would affect the interest of the Homebuyers, who are the victims of the agreement. The Applicant himself stated to has examined the records and thus come to the conclusion that by virtue of the cancellation of the agreement, Shri Sailesh Sreeramulu got transferred an amount of Rs. 3 crores to his personal account, out of the receipts received due to cancellation of the JDA in question. It is also relevant to be noted that the land owner of the said property has again entered into the JDA dated 14.06.2019 with another Developer vide Document registered No. 622/2019-20, Book I, at the office of the Sub-Registrar, Gandhinagar (Hebbal), Bengaluru. Therefore, third party rights also have come into an issue, which cannot be decided without involving all the parties to the issue. The Home buyers have not raised any objections/litigation with regard to the



said JDA and its cancellation with the Management of Corporate Debtor, except making their grievance to the Applicant herein (RP) about the alleged irregularities in the transaction in respect of the JDA and its cancellation. The issue cannot simply concluded by the Applicant by perusal of relevant records and it requires detailed investigation by involving the concerned parties in such investigation and should come to the definite conclusion about the irregularities stated to have been committed. Moreover, when the Applicant himself has filed I.A No. 334 of 2020 seeking the approval of Resolution Plan submitted by the Koncept Shelters, he has not stated as to who will prosecute the Interim Applications filed along with the said IA No 334 of 2020. And the Adjudicating Authority cannot adjudicate the issue whether the cancellation of the JDA is proper or not, in summary proceedings as contemplated under the provisions of the Code. It is also relevant to point out that I.A No. 334 of 2020 filed by the Applicant seeking approval of the Resolution plan of Koncept Shelters, is approved by the Adjudicating Authority, vide separate order dated 29.01.2021.

8. For the aforesaid reasons and circumstances, we are of considered view that the Applicant has not placed substantial evidence to prove that the transaction in question is beyond doubt and mere examination of records did not clinch the issue to pass any directions as sought for. However, the Applicant can be given liberty to take appropriate action in the light of orders of this Adjudicating Authority and Appellate Authority, as detailed supra, after approaching the IBBI.
9. In the result, **I.A No. 28 of 2020** in CP (IB) No. 132/BB/2017 is disposed of with the following directions:



- 1) The Applicant is granted liberty to take appropriate action in the light of order dated 16.04.2019 passed in I.A No. 446 of 2018 in CP (IB) No. 122/BB/2017 filed by Smt. Ramanathan Bhuvaneshwari and in consonance with order dated 20.09.2019 passed in Company Appeal (AT) (Insolvency) No. 574 of 2019, which was finally disposed of by the Hon'ble NCLAT, in consultation with the IBBI.
- 2) No order as costs.

(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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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

&

I.A. No.334 of 2020

U/s. 30(6), 31 & 60 of the I & B Code, 2016

R/w Regulation 39 of IBBI Regulations, 2016

In the matter of:

Shri. ShivaduttBannanje,
(Resolution Professional of
M/s. Fortuna Urbanscape Private Limited),
Office at S-709, South Block,
Manipal Centre,
No.47, Dickenson Road,
Bangalore – 560 042

... Applicant/Resolution Professional

Date of pronouncement: 29th January, 2021

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

Parties/Counsels Present:

For the Resolution Professional: Shri. Raghuram Cadambi

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A. No.334 of 2020 in C.P. (IB) No.132/BB/2017 is filed by Mr. Shivadutt Bannanje, Resolution Professional of M/s. Fortuna Urbanscape Private Limited (hereinafter referred to as 'Applicant/Resolution Professional') U/s 30(6), 31 and 60 of the I&B Code, 2016 R/w Regulation 39 of IBBI, Regulations, 2016 by seeking approval of the Resolution plan, submitted by the Resolution Applicant



Koncept Shelters U/s 31 of the Code for revival of the Corporate Debtor; to declare the Resolution Plan to be binding on the Corporate Debtor and its employees, Members, Creditors, including Authorities to whom statutory dues are owned, guarantors and other stakeholders involved in the Resolution Plan.

2. Brief facts of the case, which are relevant to the issue, in question, are, as follows;

- (1) C.P.(IB) No.132/BB/2017 is filed by M/s. Reliance Capital AIF Trustee Company Private Limited & Another ('Petitioner/Financial Creditor') U/s 7 of I&B Code, 2016, was admitted by the Adjudicating Authority, vide Order dated 09th August, 2019 by initiating Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor by appointing by appointing the Applicant as IRP, imposing moratorium, etc. Subsequently, the IRP was confirmed as RP.
- (2) In Pursuant with Regulation 6 of IBBI, Regulation 2016, the Applicant issued a Public Announcement in Form A on 14.08.2019 in English and Kannada Newspapers, calling upon creditors of the Corporate Debtor to submit their claims to the Applicant on or before 28.08.2019. The Applicant also prepared the final list of Creditors of the Corporate Debtor. The COC at its 2nd meeting held on 09.10.2019, approved the invitation for expression of interest in Form-G and authorized the Applicant to publish the same. The COC also approved the evaluation matrix to be used for scrutinizing the Resolution Plans to be received by the Applicant. A publication seeking expression of Interest (EOI) in Form G was published on 11thOctober, 2019 in English Newspaper & Kannada Newspaper. In pursuant to this invitation, 10 (ten) prospective Resolution



Applicants have submitted their expressions of interest to the Applicant, including the Resolution Applicant, which submitted its expression of interest on 11.11.2019. Based on these expressions of interest, the Applicant prepared a provisional list of eligible prospective Resolution Applicants, under Regulations 36A (10) of the CIRP Regulations.

- (3) The Applicant also received an expression of interest from a Fortuna Constructions (India) Private Limited on 14.11.2019 after the last date for submission of EOI, which was 11.11.2019. The COC rejected the EOI of Fortuna Constructions (India) Private Limited as it disqualifies under Section 29A of the Code.
- (4) In the 3rd meeting held on 06.12.2019, the COC approved the provisional list of prospective resolution applicants, drafts of the 'request for resolution plan' and information memorandum proposed to be issued by the Applicant to the finalized list of prospective Resolution Applicants. Subsequently, in terms of the resolution passed by the COC in its 3rd meeting, the Applicant issued information memorandum and request for Resolution plan to the finalized list of prospective Resolution Applicants. The request for Resolution plan stipulated that the last date of submission for resolution plans was on 13.01.2020. However, the COC at its 4th meeting held on 14.01.2020 approved the extension of the time period for submission of the resolution plan from 13.01.2020 to 27.01.2020 and also the extension of CIRP by a period of 90 days from 05.02.2020. Further, based on the Resolution passed by the COC on 14.01.2020, the Applicant filed I.A No. 79 of 2020 seeking an extension of the CIRP by a period of 90 days and the same was granted by the Adjudicating Authority on 06.02.2020.



- (5) At the 5th COC meeting, based on the requests of the prospective resolutions applicants, the COC once again approved the extension of time period for resolution plan submission from 28.01.2020 to 10.02.2020. In the meantime, the Applicant commissioned a valuation report under Regulation 35 of the IBBI, Regulations 2016, to value the assets of the Corporate Debtor from the two sets of valuers. Accordingly the Applicant received two valuation reports i.e. three from each set of valuers and details are as under:

Set 1:

- (1) Mr. Aswartha M (Regn. No: IBBI/RV/02/2019/11914): For valuation of plant and machinery
- (2) Mr. InturiVeeraiah (Regn. No: IBBI/RV/01/2018/10058): For valuation of land and building and
- (3) Mr. Venkata Subbarao Kalva (Regn. No: IBBI/RV/04/2019/11140): For valuation of securities and financial assets

Set 2:

- (1) Mr. K.G Ramesh (Regn. No: IBBI/RV/02/2019/11417): For valuation of plant and machinery
- (2) Mr. S. J. Ranganatha (Regn. No: IBBI/ RV/ 04/2018/ 10069) : For valuation of land and building and
- (3) Mr. Ravindra Narayana Rao (Regn. No: IBBI/RV/04/2019/11084): For valuation of securities and financial assets

- (6) The fair value and liquidation value of the Corporate Debtor as determined by Two different sets of registered valuers are set out below:

Registered Valuer	Fair Value (Rs.)	Liquidation Value (Rs)
Set 1 of the registered valuers	22,88,70,961	17,58,04,303
Set 2 of the registered valuers	24,04,78,783	18,55,24,245

- (7) At the 6th meeting held on 20.05.2020, the COC ratified further extension for submission of the resolution plan till 10.03.2020



and at the same meeting, the Applicant presented the resolution plans submitted by the 2 (Two) resolution Applicants including the Resolution Applicant Konzept Shelters, for consideration of the Members of the COC. Each of these plans was discussed and was agreed for further discussion be continued at the subsequent meeting of the COC. The 7th COC meeting was held on 24.06.2020, in which the Applicant apprised the Members that certain changes were required to be made by the Resolution Applicants and also informed that he had apprised the respective Resolution Applicants of the amendments required in order for the same to be compliant with provisions of the code. Accordingly, the COC suggested issuing a reminder to all to submit their revised Resolution plans and resolved that based on the revised Resolution plans received from the Resolution Applicants, the two highest bidders be invited for further negotiations and discussion.

- (8) At the same meeting, a combined resolution plan was received in respect of the Corporate Debtor and two other group companies from the suspended Directors of the Corporate Debtor on 24.06.2020 and the Applicant also expressed concerns regarding combined resolution plan stating that the suspended Directors had not provided any explanation as to how they are not disqualified u/s 29A of the Code; the combined plan had been received after the last date of submission of resolution plans, and after the other resolution plan had been opened in front of the COC and the plan jointly proposed the resolution of 3 Companies, which has not been envisaged by the Code, instead of addressing the resolution of a single company in different plans.



- (9) At the 8th COC meeting held on 30.07.2020, the Applicant submitted the Resolution plan for approval of the CoC submitted by the Resolution Applicant, which was the only plan, met the criteria set out in the request for Resolution plan under Section 30 (2) of the Code. After examining and based on the discussion with the Resolution Applicant, the COC suggested to the Resolution Applicant to submit slightly modified plan, which can then be put for vote by way of e-voting. Further, at the same meeting, the Applicant explained the COC that the Corporate Debtor itself submitted a Resolution plan by way of an email dated 29.07.2020 which was allegedly authorized by a Board resolution dated 27.07.2020, however the Board of Directors of the Corporate Debtor had been suspended under the Code with commencement of the CIRP and the resolution could not have validly passed and resolution plan has not been preceded by the fulfillment of the mandatory requirement. Further, the largest Financial Creditor also expressed the concerns on submission of the resolution plan by the Corporate Debtor that they not have any confidence in the Corporate Debtor and same concern was also reiterated by the authorized representative of the homebuyers. The question of approval/rejection of this resolution plan submitted by the Corporate Debtor was agreed to be put for vote by way of e-voting. Subsequently, after considering the suggestion of the COC expressed at the 8th COC meeting, the Resolution Applicant submitted the Resolution plan by way of an email dated 04.08.2020.
- (10) The salient features/terms of the Resolution plan of the Resolution Applicant ,are as under:



- a) The Resolution Applicant, **Koncept Shelters**, is a partnership firm engaged in real estate and construction activity since FY 2012-13 in Bangalore and there are 3 partners in the firm i.e., Govindaraju K.S, Aruna Govindaraju and Shri Charan Chowdhary and he has prior relationship with the Corporate Debtor.
- b) The Resolution Applicant infuse an amount of Rs.8,60,00,000/- into the corporate Debtor by way of subscription of equity shares at face value of Rs. 10/- and through unsecured loan by itself. He is also ready and willing to provide a performance bank guarantee of Rs. 1,00,00,000/- under Regulation 36B (AA) of the CIRP Regulations.
- c) The Resolution Applicant undertakes to bear the CIRP cost, which is paid in priority to all other dues. The Resolution Applicant proposes nil payment to the operational Creditors of the Corporate Debtor as they would have received nil in the event of liquidation. In accordance, with Section 53 of the code, or if the amount invested under the resolution plan was to be distributed in accordance with Section 53 of the code. He also proposes to pay pending workmen's dues in accordance with Schedule 6 of the resolution plan. The manner of fulfillment of the Corporate Debtor's obligations to the secured financial creditors and the homebuyers is set out in clause 2 (iv) of Schedule 4 of the resolution plan. The secured Financial Creditors shall be repaid in 4 installments, and shall be paid a total sum of Rs. 8,00,00,000/-.
- d) The homebuyers (windflower project) may chose to purchase the apartment, by paying additional amount of Rs. 900/- per



sq feet which shall be payable in three installment and also undertaken to hand over the possession of the apartment units to the homebuyer within a period of 4 years from the date of approval of resolution plan. The homebuyers who do not avail of this option, the Resolution Applicant agreed to pay back the advance payments received by the Corporate Debtor towards sale consideration after deducting an amount of Rs. 1,000/- per square feet of the sold area and the amount shall be paid to them in 8 quarterly installments commencing one year after the Hon'ble Tribunal approves this resolution plan.

- e) The homebuyers (Casabona project) may choose to purchase the apartment, paying an additional amount of Rs. 5,000/- per square feet in relation to the cost of construction which shall be payable in 3 installments. The Resolution Applicant undertaken to hand over possession of the apartment units to the homebuyers within a period of 4 years from the date of approval of resolution plan. The homebuyers, who do not avail of this option, the Resolution Applicant agreed to pay back the advance payment received by the Corporate Debtor towards sale consideration, after deducting an amount of Rs. 5,000 per sq. feet of the sold area and the amount shall be paid to them in 8 quarterly installments commencing one year after the Hon'ble NCLT approved the Resolution plan.
- f) The Resolution Applicant proposes nil amount for the unsecured Financial Creditors i.e, the project Lake Towers buyers, since there is no underlying assets/land on which the construction of apartments to the Fortune Lake Towers investors can be made. If the land pertaining to the



development of the project is made available to them by order of this Hon'ble Tribunal, the Resolution Applicant shall on discussion with the creditors execute the necessary project.

- g) The Resolution Applicant proposes nil payment towards the Government dues of the Corporate Debtor as they would have received nil in the event of liquidation in accordance with Section 53 of the code or if the amount invested under the resolution plan was to be distributed in accordance with Section 53 of the code. The Resolution Plan also provides for the appointment of a Monitoring committee consisting of the Applicant, two representatives from the secured Financial Creditors and one representative of the Resolution Applicant to effectively supervise the implementation of the plan from the date of approval date.

- (11) The Applicant, after receiving the Resolution plan from the Resolution Applicant, placed the same for the approval for vote by the COC. At the same time, the Applicant also placed resolution for the rejection of the Resolution plan filed by the Corporate Debtor itself for vote by the COC. Since the COC consists of homebuyers, who are represented by an Authorized representative on the committee, the Applicant first provided an opportunity to the homebuyers to cast their vote on the items, by intimating them by way of an email dated 05.08.2020 informing that the voting window would be kept open for a period of 24 hours i.e, from 4 p.m on 06.08.2020 till 4. p.m on 07.08.2020. However, the time was extended on the request made by the Authorized Representative of the homebuyers till 10.A.M on 08.08.2020.



- (12) Accordingly, the Homebuyers cast their votes on both the items on the e-voting platform in the permitted time-slot. The result of the voting by the homebuyer was 96.56% of the homebuyer approved the Resolution plan of the Resolution Applicant, and 100% of the homebuyers rejected the Resolution plan submitted by the Corporate Debtor. And on the same day, the Applicant provided other members of the COC, the same opportunity by way of email dated 05.08.2020 with respect to voting on the rejection of the Resolution plan submitted by the Corporate Debtor and the approval of the plan of the Resolution Applicant and informed that the voting window will kept open for a period of 48 hours from 4.p.m on 06.08.2020 till 4.p.m on 08.08.2020. After casting the votes on both the items, the result of the voting was 95.07% of the COC approved the plan submitted by the Resolution Applicant, 4.01% of the COC rejected the plan and 0.94% of the COC abstained from voting and 98.12% of the COC rejected the resolution plan submitted by the Corporate Debtor and 0.91% of the COC approved and 0.99% of the COC abstained.
- (13) Therefore, the COC of the Corporate Debtor, considering the feasibility and viability and the manner of distribution proposed, approved the Resolution plan of the Resolution Applicant by an overwhelming majority. The Resolution plan, apart from being in compliance with the provisions of the Code and the CIRP regulations, represents an avenue for the Corporate Debtor to be revived, and for the maximization of the value of the assets of the Corporate Debtor, while also addressing the interest of the Creditors of the Corporate Debtor, which also includes homebuyers.



3. Heard Shri. Raghuram Cadambi, Learned Counsel for the RP, **through Video Conference**. We have carefully perused the pleadings of both the Parties and extant provisions of the Code and the Rules made there under and the Law on the issue.
4. Shri Raghuram Cadambi, learned Counsel, while reiterating various averments made in the Application, has further submitted that Resolution Plan submitted by **Koncept Shelters** was approved by COC with 95.07% positive vote; with 4.01% negative vote and 0.94% abstained from voting. The Applicant has followed the extant provisions of Code and the Rules made there under in conducting CIRP in question. and the Resolution is approved with requisite majority. Therefore, he has urged the Adjudicating Authority to approve the Resolution Plan as prayed for.
5. In order to approve a Resolution Plan U/s 31(1) of the Code, Resolution Professional should examine each Resolution Plan as prescribed under Section 30(2)(b) of the Code, as mentioned below:
 - a) *provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor as set out in clause 4 of the resolution plan*
 - b) *provides for the payment of the debts of operational creditors in accordance with Section 30 (2) (b) of the code in Schedule 4-part xii) of the resolution plan;*
 - c) *provides for the management of the affairs of the corporate debtor after approval by this Hon'ble tribunal in schedule 3 of the resolution plan.*
 - d) *Provides for effective implementation and supervision in clause VI of the resolution plan;*
 - e) *Similarly, the resolution plan complies with the requirements prescribed by the CIRP Regulations, as set out therein.*



6. In compliance with the said conditions, the RP has submitted various documents and statements, as per provisions of the Code and the Rules made there under. And these compliances are briefly pointed out as under:

(1) The RP examined the Resolution plan received from Resolution Applicant i.e. Konzept Shelters for Corporate Debtor of Fortuna Urbanscape Private Limited and certified as follows:

- a) The said Resolution plan complies with all the provisions of the I & B Code 2016 (Code), the IBBI (Insolvency Resolution Process of Corporate Debtor) Regulations 2016 and does not contravene any of the provisions of the law for the time being in force.
- b) The Resolution Applicant i.e. Konzept Shelters submitted an affidavit pursuant to Section 30(1) of the Code confirming his eligibility U/s 29A of the Code to submit Resolution plan. The contents of the said affidavit are in order.
- c) The said Resolution plan has been approved by the COC in accordance with the provisions of the Code and CIRP Regulations made hereunder. The Resolution plan has been approved by 95.07% of voting share of the COC after considering its feasibility and viability and other requirements specified by the CIRP Regulations.
- d) I sought vote of members of the COC by electronic voting system .which was kept open for 24 hours as per the Regulation 26 of the CIRP Regulations.

(2) The Resolution plan includes a statement under Regulation 38 (1A) of the CIRP Regulations as to how it has dealt with the



interest of all stakeholders in compliance with the Code and Regulations made there under:

7. The above facts and circumstances, clearly established that the revised Resolution Plan dated 03.08.2020 submitted by Koncept Shelters, Resolution Applicant, was approved by the Committee of Creditors for Fortuna Buildcon (India) Pvt Ltd. It also provides for the appointment of a Monitoring committee consisting of the Applicant, two representatives from the secured Financial Creditors and one representative of the Resolution Applicant to effectively supervise the implementation of the plan from the date of approval date. The Applicant has filed Form H and also an affidavit by confirming all the requisite procedure under the extant provisions of law have been followed. It is settled position of law that Tribunal cannot interfere the commercial wisdom of COC in taking decision to approve the Resolution plan, unless arbitrary exercise of power is alleged to have been resorted to. The Promoter of Corporate Debtor has also participated in the Resolution process and its Resolution plan has been rejected by COC. Aggrieved by the same, they have filed I. A.No.335/2020 U/s. 60(5)(C) of the Code , which is dismissed by separate order by the Adjudicating Authority. Since the Adjudicating Authority is bound by statute with regard to time lines prescribed under it , it is necessary to consider the Application and pass final orders on the issue. Therefore, we are of considered opinion that the Resolution Plan in question is in compliance with the object and extant provisions of Code and the rules made there under, and thus it is fit to be approved under Section 31(1) of the IBC, 2016.



8. In the result, both **CP (IB) No. 132/BB/2017 & I.A No. 334 of 2020** are disposed of with the following directions:

- (1) The Resolution Plan dated 03.08.2020 submitted by the Koncept Shelters (Resolution Applicant) as approved by the Committee of Creditors at their 8th meeting held on 30.07.2020 is hereby approved by declaring that the Resolution Plan will be binding on the Corporate Debtor and its employees, Members, Creditors including the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force, as authorities to whom statutory dues are owed, guarantors, and other stakeholders involved in the resolution plan.
- (2) The moratorium imposed vide Order dated 09.08.2019 passed in the CP shall cease to have effect from the date of communication of the order.
- (3) The Resolution Professional is directed to handover the management control of all the assets, documents/records in physical and/or digital form on an as is where is basis to the Resolution Applicant immediately, and the Resolution Professional will be ceased to be Resolution Professional.
- (4) The Resolution Professional shall forward all records relating to the conduct of the CIRP and the Resolution Plan to the Board to be recorded on its database.
- (5) The Resolution Applicant shall pursuant to the Resolution Plan approved under sub-section (1) obtain the necessary approval required under any law for the time being in force within a period of the one year from the date of approval of the Resolution Plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, which is later:



- (6) The Resolution Applicant is at liberty to file miscellaneous Application seeking for clarification(s), if any requires, in the implementation of the terms and conditions to the Resolution Plan.
- (7) No order as to costs.



**ASHUTOSH CHANDRA
MEMBER, TECHNICAL**



**RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL**

gy

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

I.A.No.335/2020 in
C.P. (IB)No.132/BB/2017
U/s. 60(5)(C) of the I&B Code, 2016
R/w Rule 11 & 32 of the NCLT Rules, 2016

Between:

M/s. Fortuna Urbanscape Private Limited,
Fortuna Viva,
Survey No. 98/1, Kogilu Village,
Yelahanka Hobli,
Bengaluru – 560 080

- Applicant

And

Mr. Shivadutt Bannanje,
Resolution Professional of
M/s. Fortuna Urbanscape Private Limited
Manipal Center, S-709,
South Block a47, Dickenson Road,
Bangalore – 560 042

- Respondent/RP

Pronouncement of Order: 29th January, 2021

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

Parties/Counsels Present (through Video Conference):

For the Applicant : Mr. Vivekananda.S
For the RP/Respondent : Mr. Raghuram Cadambi



ORDER

Per:Rajeswara Rao Vittanala, Member (J)

1. I.A.No.335/2020 in C.P. (IB)No.132/BB/2017 is filed by M/s.Fortuna Urbanscape Private Limited, ('Applicant'), U/s. 60(5) of the I&B Code, 2016, R/w Rules 11 & 32 of the NCLT Rules, 2016, by inter-alia seeking to set aside the approval of Resolution Plan of M C George, by Committee of Creditors in its 8th COC meeting held on 30.07.2020; to approve the Resolution Plan of the Applicant herein Or in the alternative, direct the Resolution Professional to place the entire Resolution Plan submitted by the Applicant herein before the Committee of Creditors for reconsideration.
2. Brief facts of the case, which are relevant to the issue in question, are as follows:
 - (1) Initially, C.P.(IB) No.132/BB/2017 is filed by M/s. Reliance Capital AIF Trustee Company Private Limited & Another ('Petitioner/Financial Creditor') U/s 7 of I&B Code, 2016. was admitted by the Adjudicating Authority vide Order dated 09th August, 2019 by initiating Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor by appointing the Applicant as IRP, imposing moratorium, etc. Subsequently, in the first meeting of the COC held on 06.09.2019, the IRP was confirmed as RP.
 - (2) In pursuance to issue for RFRP (Request for Resolution Plan by the Applicant, the Promoters, of the Corporate Debtor, who are eligible to make Application submitted their Application vide Email dated 29/07/2020. However, the Resolution plan of Applicant was rejected on untenable grounds, though Matrix offered by the Resolution Applicant herein is better and has



offered more sum than any other Resolution Applicants. During 6th meeting of Committee of Creditors held on 20th May 2020, the Resolution Professional informed about the Resolution Applications received from two Resolution Applicants i.e., Aishu Dreamland Limited and Koncept Shelters. The Applicant submitted its Resolution Application on 29/07/2020 for placing the same before Committee of Creditors. The brief particulars of Resolution Plan submitted by Applicant herein is as hereunder:-

- a. *Provision of Payment of 100% Insolvency Resolution process cost (IRPC) within 15 days from Transfer Payment*
- b. *Total Payment of **INR 12 Crores** to Reliance AIF Management Company Limited and Reliance Nippon Life Asset Management Limited, Financial Creditors of Corporate Debtor. Upfront payment of 2.4 crores within 30 days from the transfer date and the payment of INR 9.6 Crores paid equally every six months spread over 3 years from upfront payment made.*
- c. *Commitment to complete construction at windflower project within 4 years and casabona within 1 year*
- d. *Homebuyers- windflower shall pay difference of booking amount paid per square feet and INR 5600, if any. To illustrate a homebuyer has booked his home unit at Rs.5200 per square feet then he is required to pay INR 400 (INR 5600-5200) per square on the basis of percentage of completion method. Homebuyer B has booked his home unit at INR 5600, then no additional liability to homebuyer B*



- e. Homebuyer – Casabona shall pay difference of booking amount paid per square feet and INR 18000, if any*
 - f. Internal Generation of Revenue by selling 70 houses units in Windflower project and 2 house units in casabona*
 - g. In Principle consensus to share upside revenue sharing above minimum sale price of INR 6500 and INR 18000 per sq. feet for windflower and Casabona respectively at 60:40 i.e., 60% to be retained by Resolution Applicant and 40 % to Financial Creditor.*
- (3) The amount offered by the Applicant for financial Creditor is INR 12,00,00,000 whereas, the amount offered by Koncept Shelters is INR 8,50,00,000; similarly they have offered to operational Creditors and Employees are INR 99,50,075 and INR 49,06,784 respectively, whereas nothing was offered to them by Koncept Shelter. This is a clear violation of section 30 (2) (b) of Insolvency and Bankruptcy Code, 2016. The Resolution plan submitted by the Applicant rank higher in order of all the Resolution Applications received in the case. The homebuyers too stand to benefit by offer made by the Applicant. Mr. PadmaiahVuppu, who has a wide experience in construction industry will infuse INR 200,00,000 within 15 days of transfer date by subscribing to optionally convertible preference shares which will boost the financial health of the corporate debtor.
- (4) The Promoters have contributed their sweat and blood to the growth of the Corporate Debtor. They have worked years together to build these projects. They have experience in construction industry, and they can definitely pull out the Corporate Debtor from these crises. There is no doubt the Corporate Debtor will



bounce back and experience profits very soon in the hands of promoters, if opportunity is given. The promoters will be put to irreparable hardship if this Application is not allowed. The Applicant is also ready and willing relook at the offer and come up with the better offer, if opportunity is given. All the stakeholders will stand to benefit out of this enhanced revision. On the other hand, promoters, creditors, and various other stakeholders would lose more if the Resolution Plan submitted by M C George is approved.

3. The Respondent has filed his Statement of objections to the instant Application, by *inter alia* contending as follows:

- (1) The COC at its 2nd Meeting held on 09.10.2019 approved the invitation of expression of interest in From G and the evaluation matrix for scrutinizing the resolution plans to be received by the Respondent. In pursuance, the Respondent had issued Paper Publication for the invitation of EOI on 11.10.2019 in both English and Kannada Newspapers. Further, 10(Ten) prospective Resolution Applicants submitted their EOI to the Respondent, based on which, the Respondent prepared a provisional list of eligible prospective Resolution Applicants. Evidently, the Corporate Debtor was not one of such prospective Resolution Applicants, who showed its interest in submitting a Resolution plan.
- (2) On 06.12.2019, at the third meeting of the Committee of Creditors of the Corporate Debtor, the Committee of Creditors approved the (i) provisional list of prospective Resolution Applicants; (ii) drafts of the 'request for resolution plan' and information memorandum proposed to be issued by the Respondent to the finalized list of prospective Resolution



Applicants. In terms of the resolutions passed by the Committee of Creditors dated 06.12.2019, the Respondent issued the information memorandum and request for resolution plan to the finalized list of prospective Resolution Applicants, which did not include the Applicant. The request for resolution plan stipulated that the last date for submission of the resolution plans was 06.01.2020. However, at the 3rd meeting of the COC, this date was extended to 13.01.2020. During 4th meeting of the COC of the Corporate Debtor held on 14.01.2020, the COC approved (i) the extension of the time period for submission of the resolution plan from 13.01.2020 to 27.01.2020; and (ii) the extension of the period of the corporate insolvency resolution process by a period of 90 days from 05.02.2020. And this Hon'ble Tribunal granted such extension by way of its order dated 06.02.2020 in I.A No.79/2020. Further, at the 5th Meeting of COC, the COC once again approved the extension of time period of submission of the Resolution Plan from 28.01.2020 to 10.02.2020. Again at 6th Meeting of the COC the Resolution Plan submission time period was extended till 10.03.2020. At the same meeting, the Respondent presented the key terms of each of the resolution plans submitted by 2 (two) Resolution Applicants, including Konzept Shelters, which are summarized in the minutes of the meeting, for the consideration of the members of the COC. Each of these plans was discussed and deliberated upon by the COC, and it was agreed that further discussion would be continued at the subsequent meeting of the COC.

- (3) At the 7th meeting of the COC held on 24.06.2020, the Respondent apprised the Members that certain changes were required to be made by the Resolution Applicants, in order for



their plans to be compliant with the provisions of the Code and the CIRP Regulations. The Respondent also informed the Members that he had apprised the respective Resolution applicants of the amendments required, in order for the same to be compliant with the provisions of the Code. Accordingly, the COC suggested issuing a reminder to all Resolution Applicants to submit their revised resolution plans in compliance with the requirements of the Code. The COC also resolved that based on the revised plans received, the two highest bidders be invited for further negotiations and discussions.

- (4) At the 8th meeting of the COC of the Corporate Debtor on 30.07.2020, the Respondent informed the COC that the Resolution Plan submitted by the Koncept Shelters was the only plan, which met the criteria set out in the 'request for resolution plan' U/s 30(2) of the Code, and placed the Resolution Plan before the COC for their approval under Section 30(3) of the Code. Koncept Shelters was represented by its Representative at such meeting, as permitted under Section 30(5) of the Code. After examining the Resolution plan of Koncept Shelters, and based on discussions with Koncept Shelters, the COC suggested that Koncept Shelters could submit a slightly modified plan which could then be put for vote by way of e-voting. At the same meeting, the Respondent apprised the COC that the Corporate Debtor itself had submitted a Resolution plan by way of an email dated 29.07.2020, which had been allegedly authorized by a Board Resolution dated 27.07.2020. However, the Respondent also informed the Members that the Board of directors of the Corporate Debtor had been suspended under the Code with the commencement of the CIRP and hence such resolution could not



have been validly passed. Further, the Respondent apprised the Members that the submission of this resolution plan had not been preceded by the fulfilment of the mandatory requirements of submission of EOI and the short listing as an eligible Resolution Applicant. The largest financial Creditor also expressed concerns relating to the submission of the Resolution plan by the corporate debtor at such a belated stage, and stated, *inter alia*, that they did not have any confidence in the corporate Debtor. The concerns expressed by the largest financial creditor were also reiterated by the Authorized Representative of the homebuyers. The question of approval/rejection of this resolution plan submitted by the Corporate Debtor was agreed to be put for vote by way of e-voting. Subsequently, after considering the suggestions of the COC, Konzept Shelters submitted the Resolution Plan by way of an email dated 05.08.2020.

- (5) After apprising relevant provisions of Code, the Respondent placed a Resolution for the rejection of the Resolution Plan filed by the Corporate Debtor itself for vote by the Committee of Creditors. Since the Committee of Creditors consists of homebuyers, who are represented by an authorized representative on the Committee, the Respondent first provided an opportunity to the homebuyers to cast their vote on these items, by intimating Authorized Representative by way of an email dated 05.08.2020. Accordingly, the homebuyers cast their votes on both the items on the e-voting platform. The result of the voting by the homebuyers was as follows: i) 96.56% of the homebuyers approved the resolution plan submitted by Konzept



Shelters; and ii) 100% of the homebuyers rejected the resolution plan submitted by the Corporate Debtor.

(6) On the same day i.e. 05.08.2020, the Respondent provided the other members of the COC the same voting opportunity by way of an email dated 05.08.2020, with respect to voting on (i) the rejection of the resolution plan submitted by the Corporate Debtor; and (ii) the approval of the Resolution Plan submitted by Konzept Shelters. Accordingly, the Committee of Creditors cast their votes on both the items on the e-voting platform. The result of the voting by the Committee of Creditors was as follows: i) 95.07% of the Committee of Creditors approved the resolution plan submitted by Konzept Shelters, 4.01% of the Committee of Creditors rejected the plan and 0.94% of the Committee of Creditors abstained from voting; and ii) 98.12% of the Committee of Creditors rejected the resolution plan submitted by the Corporate Debtor, 0.91% of the Committee of Creditors approved the plan and 0.99% of the Committee of Creditors abstained from voting.

(7) Therefore, the Committee of Creditors of the Corporate Debtor, having considered the feasibility and viability of the resolution plan submitted by Konzept Shelters and the manner of distribution proposed thereunder, approved such plan by an overwhelming majority under Section 30(4) of the Code. Hence an application numbered as I.A. No. 334 of 2020 came to be filed by the Respondent herein seeking the approval of this Hon'ble Tribunal under Section 30(6) of the Code in respect of the resolution plan filed by Konzept Shelters.

4. Heard Shri Vivekananda.S, learned Counsel for the Applicant, and Shri Raghuram Cadambi, learned Counsel for the RP, through Video



Conference. We have carefully perused the pleadings of the Parties and also extant provisions of the Code and Rules made there under.

5. Shri Vivekananda.S, learned Counsel for the Applicant. While reiterating his averments made in the Application, as briefly stated supra, has further filed written submissions dated 22.01.2021 by *inter-alia* contending as follows;

- (1) The Resolution Professional did not entirely go through the Resolution Plan. It can be seen from the Minutes of 8th Committee of Creditors meeting, at page No. 130 of the Application. This makes it very evident that the RP himself was not aware of the Resolution Plan proposed by the Applicant. So, to explain the same to COC, that too through virtual mode is certainly impossible. This undoubtedly makes it clear that a fair procedure was not followed while considering the Resolution plan. On this ground alone the Resolution plan submitted by the Koncept Shelters is liable to be set aside and the Resolution plan submitted by the Applicant is deserves to be considered.
- (2) One of the project by name "Fortuna Windflower" would reap the benefit of more than Rs.38 crores. The Project has already been partially completed and out of 135 Apartments which belongs to Corporate Debtor, only 55 Apartments have been sold and 70 Apartments are unsold. From the above said 55 Apartments the Corporate Debtor is still yet to receive 24.2 Crores. From the rest 70 Apartments, the Corporate Debtor would receiving more than 89 cores. When this being the position, the Corporate Debtor is being sold at throw away price of Rs.8.5 cores including CIRP Cost. The



Resolution Professional has failed to appraise this fact to Committee of Creditors, inspite of knowing the fair value of the Property/Corporate debtor.

- (3) Further in the Project named Casabona, there are 3 Apartment which belongs to Corporate Debtor out of which only one is sold and two apartments are unsold. These Apartments are worth Rs.9 crore each and only 30% of work is to be completed. Assuming a cost of Rs.6 crores for completion of the project, the Koncept Shelters would still reap the benefit of Rs.12 crores. When this is position, the RP should have applied his mind and thought about the interest of all the stakeholders.
- (4) The Corporate Debtor is mere a guarantor to the Borrower. If the rules of Group Insolvency were applied in the present case, many projects could have been avoided going through this kind of distress sale as in the case of present scenario. The promoters of the Company should be given an opportunity of reviving the same, since the Fortuna Projects (India) Private Limited, which is one of the guarantor to Fortuna Buildcon (India) Private Limited, is already going through Liquidation, for paying the liability of the loan availed by Fortuna Buildcon (India) Private Limited. However, Corporate Debtor is unable to take advantage of the same since group Insolvency Regulations have not come into force. In view of the above the Resolution plan submitted by the Promoters, which is permitted under section 240A of the Insolvency and Bankruptcy Code, 2016 is required to be considered favourably.



- (5) Further, the Applicant has relied upon the Judgement of the Hon'ble NCLAT dated 02.05.2018 in the matter of *Rajputana Properties Pvt Ltd vs Ultratech Cement Limited*. Therefore, submits that Operational Creditors have been discriminated and interest of other stakeholders has given a go-bye. This Hon'ble Tribunal has power to set aside the Resolution plan approved by the CoC in view of its being extremely discriminatory and does not maximize the value of the asset of the Corporate Debtor, which is the first objective of the Code. And there is an inadvertent typographical error in the prayer, instead of Konzept Shelter, M C George's name has been mentioned. This Hon'ble Tribunal may be pleased to overlook the typographical error.
6. Shri Raghuram Cadambi, learned Counsel for the RP, while reiterating the averments made in the Reply, as briefly stated supra, has further submitted that the allegations made by the Applicant against the Respondents are baseless and un-tenable. Therefore, he has urged the Adjudicating Authority to dismiss the Application.
7. In the light of above averments of the Parties, the main point for consideration in the instant Application is whether the Applicant has indefeasible right to accept its Resolution Plan by COC.
8. As detailed supra, the allegation of the Applicant that its plan was not properly projected by the Resolution Professional before the COC, which lead to its rejection, is not borne out of record. Under the extant provisions of Code, Resolution professional has to certify that whether resolution plans submitted are in compliance with extant provisions of law or not. Therefore, the Resolution professional has correctly projected the merits of Applicant's plan before COC. The proceedings of 7th and 8th COC Meetings clearly indicate that the



Resolution plan of the Applicant was duly considered and rejected by the Members of COC. Even the eligibility of Applicant to participate in CIRP is in doubt. Mr. Sailesh Kumar Sriramulu and Mr. Rajesh Kumar Sriramulu, who are former Directors of Corporate Debtors, are facing proceedings vide IA No. 362 of 2020) filed by the Resolution Professional, under Sections 66, 69 & 25 (2) (i) of IBC, 2016 R/w Rule 32 of the NCLT Rules, 2016 and the same is pending on the file of this Tribunal.

9. The contention of the Applicant that they are ready to offer more packages for the stake holders in comparison to the package offered by the successful Resolution Applicant (Koncept Shelters) is not tenable. It is not mere more packages that are material to be considered, it is to be in compliance with various provisions of Code and the rules made there under and ultimately it should satisfy the Members of COC. As rightly pointed out by the Resolution Professional, the offer/Resolution plan offered by the Applicant suffers from various impediments, and thus it is not fit to be accepted. The Applicant has no indefeasible right to consider its plan but has right to consider its proposal in a justified manner by the Resolution Professional and Members of COC. We are satisfied that the claim of the Applicant was duly considered by RP and Members of COC and it do not warrant interference by the Tribunal. The Adjudicating Authority, after considering the merits of Resolution plan submitted by Koncept Shelter, has approved it by separate order dated 29th January, 2021, passed in IA No. 334 of 2020.
10. For the aforesaid reasons and circumstances, we are of the considered opinion that the Applicant failed to make out any case to interfere in the matter. Therefore, it is liable to be dismissed.



11. In the result, **I.A.No.335/2020**in C.P. (IB)No.132/BB/2017 is hereby dismissed as devoid of merits. No order as costs.



(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL



(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Brunda

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

BENGALURU BENCH

I.A.No.362/2020 in
C.P. (IB)No.132/BB/2017
U/Ss. 66, 69 & 25 (2) (i) of IBC, 2016
R/w Rule 32 of the NCLT Rules, 2016

Between:

Mr. Shivadutt Bannanje

Resolution Professional of
M/s. Fortuna Urbanscape Private Limited
R/a. S-709, South Block,
Manipal Centre,
No.47, Dickenson Road,
Bengaluru – 560 042

Applicant

And

1. Mr. Sailesh Kumar Sriramulu

Former Director,
Fortuna Urbanscape Private Limited
R/a. No.12, Lalitha Manor,
2nd and 3rd Floor, 14th Cross,
AECS Layout,
Sanjay Nagar,
Bengaluru – 560 094

2. Mr. Rajesh Kumar Sriramulu

Former Director,
Fortuna Urbanscape Private Limited
R/a. No.12, Lalitha Manor,
Flat No.2-A, 15th Cross,
AECS Layout, Sanjay Nagar,
Bengaluru – 560 094

Respondents

Date of pronouncement: 29th January, 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 Applicant : Shri Raghuram Cadambi
For the Respondents : None

ORDER

Per: Rajeswara Rao Vittanala, Member (Judicial)

1. I.A.No.362/2020 in C.P.(IB)No.132/BB/2017 is filed by Mr. Shivadutt Bannanje, Resolution Professional of M/s. Fortuna Urbanscape Private Limited (Applicant), U/s. 66, 69 & 25 (2) (i) of IBC, 2016 R/w Rule 32 of the NCLT Rules, 2016, by inter alia, seeking to direct the Respondents to contribute an amount of Rs.45,09,38,613/- to the assets of the Corporate Debtor; to impose fine of Rs.1,00,00,000/- on the First and Second Respondents U/s.69 of the Code, and direct that such amount be contributed to the assets of the Corporate Debtor.
2. Brief facts of the case as mentioned in the Application, by inter alia stated as follows:
 - (1) Initially, C.P. (IB)No.132/BB/2017 was filed by M/s. Reliance Capital AIF Trustee Company Pvt. Ltd. & Anr. (Petitioners/ Financial Creditors), U/s.7 of the IBC, 2016 against M/s. Fortuna Urbanscape Pvt. Ltd. (Respondent/Corporate Debtor), and same was admitted by the Adjudicating Authority vide an Order dated 09.08.2019, by initiating CIRP, appointing Shri Shivadutt Bannanje, as IRP, imposing moratorium etc. Subsequently, the IRP has confirmed as Resolution Professional vide Order dated 25.10.2019.
 - (2) After taking custody of the documents of the Corporate Debtor, the Applicant began examining such documents, and found that the Respondents had undertaken several

fraudulent transactions to benefit themselves at the cost of the Corporate Debtor and to prejudice its creditors and other stakeholders. Specifically, the Applicant found that the Respondents had diverted and siphoned off significant sums of money from the Corporate Debtor to achieve their own ends. Further, the Applicant also found that the Respondents had committed several acts in the conduct of business of the Corporate Debtor which were intended to defraud creditors of the Corporate Debtor.

- (3) Thereafter, the Applicant found irregularities with respect to the property in which the Corporate Debtor held rights of joint development along with the land owners. The Corporate Debtor had entered into a Joint Development Agreement (JDA) dated 21.11.2011, subsequent supplemental agreements, and a General Power of Attorney dated 21.11.2011, with the absolute owners of the agricultural lands bearing Sy.No.25/1 and Sy.No.26 totalling to 3 Acres 11 Guntas and Sy.No.42/5 measuring 3 Acres 15 Guntas, and Sy.No.42/6 measuring 2 Acres 26 Guntas respectively, totally measuring 9 Acres 12 Guntas of Venkata Village, Yelahanka Hobli, Bangalore Urban District. Of this Property, the 3 Acres 11 Guntas with respect to Sy.No.25/1 and Sy.No.26 were to be developed for commercial purposes and the remaining 6 Acres 1 Gunta with respect to Sy.No.42/5 and Sy.No.42/6 were to be developed for residential purposes, for a project known as Project Lake Towers/North city. Under the JDA, the share of the Corporate Debtor in the residential portion of the project was 60% and for the commercial portion was 58%. Based on the representations of the Respondents and the Corporate Debtor, around 50 Homebuyers had paid an aggregate advance/full payment of Rs.10,05,19,370/- to



the Corporate Debtor, towards the apartments and the villa plots in the Project.

- (4) The Respondents claim that the Corporate Debtor spent around Rs.44,31,38,613/- towards various aspects of the development of the Project. This amount includes (a) Rs.20,59,66,102/- paid to be landowners as deposit under the JDA; (b) Rs.6,54,50,000/- towards settlement of a land dispute with another Company; and (c) Rs.17,17,22,491/- towards expenses for the development of the Project. These expenses are also reflected in the audited financial statements as well as the ledger extract of the Corporate Debtor for the FY ended on 31.03.2019. However, despite having allegedly spent such a substantial amount using the investment of the homebuyers, the construction of the Project was not even commenced as on the insolvency commencement date. On 12.06.2019, the First Respondent, acting for the Corporate Debtor cancelled the JDA and revoked the GPA by executing an Agreement of Cancellation dated 12.6.2019.
- (5) Under the terms of the Agreement of Cancellation dated 12.06.2019, the land owners paid a sum of Rs.13,74,00,000/- to the Corporate Debtor, of which a sum of around Rs.10 Crores was paid on 19.06.2019 and the balance amount of around Rs.3 Crores was paid on 02.07.2019. Of this amount, the Applicant was shocked to find that a sum of Rs.3,12,50,000/- was diverted to the personal account of the First Respondent. No explanation as to why this amount was paid to the Corporate Debtor is forthcoming. There is no resolution of the Board of Directors that forms the basis of this transfer. The 1st Respondent appears to have simply transferred this money to his personal Bank Account, without any authorization whatsoever. This sum was received by the Corporate Debtor for the cancellation of the JDA, and in the

context of the Corporate Debtor having receiving advance payments from numerous homebuyers. However, these homebuyers were not even informed regarding the cancellation of the JDA; nor did they receive the refund of their investment let alone any interest on such refund. The Respondents, have undertaken the following actions through the Corporate Debtor:

- i. The Corporate Debtor enters into the JDA to develop the Project;
 - ii. Towards sale of apartments in the Project, the Respondents solicit and receive a total sum of Rs.10.05 Crores from various homebuyers;
 - iii. Despite the accounts of the Corporate Debtor revealing that a sum of Rs.44.31 Crores purportedly having been spent by the Corporate Debtor towards construction, the Corporate Debtor does not even commence construction;
 - iv. The Corporate Debtor cancels the JDA, without even informing the homebuyers, and receives a sum of Rs.13,74,00,000/- for such cancellation;
 - v. A sum of Rs.3.12 Crores is diverted from the Bank Account of the Corporate Debtor to the personal account of the First Respondent, while no sums whatsoever are returned to the homebuyers.
- (6) Based on this, the Applicant sought to appoint transaction auditors to undertake a comprehensive forensic audit of the books of the Corporate Debtor and arrive at detailed findings, so that the Applicant could take suitable measures under the Code and the IBBI (IRP) Regulations, 2016 in order to recover such funds siphoned away by the Respondents. At the first and second meetings of the CoC of the Corporate Debtor on 06.09.2019 and 09.10.2019, respectively, the Applicant also proposed the appointment of transaction auditors. This



proposal was approved by the CoC. Accordingly, the Applicant appointed M/s. Sarath & Associates, Chartered Accountants, as the transaction Auditor of the Corporate Debtor ("Transaction Auditor"), by way of an appointment letter dated 04.11.2019, to undertake forensic audit of the Corporate Debtor for the period April, 2012 to August, 2019.

(7) For the purpose of auditing the transactions of the Corporate Debtor, the Transaction Auditor sought several documents and points of information from the Respondents, who had been the Directors and in control of the Corporate Debtor, and were personally responsible for effecting all transactions of the Corporate Debtor. However, the Respondents evaded these requests on one pretext or another. The Audit Report records at '*Information Required and Received Status*' that certain documents are either fully or partially pending to be provided. This non-cooperation of the Respondents was a deterrent in the timely completion of the transaction audit and caused substantial delays.

(8) Despite the non-cooperation of the Respondents, the Transaction Auditor was able to complete the audit, and submitted its report dated 15.08.2020 to the Applicant on 16.08.2020. The important findings contained in such report are as follows:

- i Pursuant to the cancellation of the JDA executed by the Corporate Debtor pertaining to Project Lake Towers/ Northcity (Project) on 12.06.2019, on 02.07.2019, the owners of the land refunded an amount of around Rs.13,74,00,000/- to the Corporate Debtor. However, the amount originally advanced by the Corporate Debtor to the landowners under the Joint Development Agreement was around Rs.27,14,00,000/- i.e. twice the amount refunded by the landowners.



- ii Of the amount refunded by the landowners, on the same day i.e. 02.07.2019, an amount of Rs.3,12,50,000/- was diverted to the personal account of the First Respondent, without any valid reason or explanation offered by the Respondents. The Audit Report relies upon exhibit 5.1 in support of this finding.
- iii This mala fide transfer of Rs.3,12,50,000/- was effected at around the same time that the First Respondent purchased convertible debentures of the Corporate Debtor held by a foreign investor M/s. Kelfer Holdings Private Limited. The First Respondent acquired these debentures for Rs.2,66,00,000/-. This is despite the fact that these debentures had been purchased by M/s. Kelfer Holdings Private Limited for Rs.42,58,00,000/- and the current liability of the Corporate Debtor in respect of these debentures (including interest) as on March, 2019, is Rs.65,06,00,000/-.
- iv Further, the Audit Report also found that, at the same point in time, i.e., on 01.07.2019, the First Respondent, purchased shares in the Corporate Debtor held by M/s. Hemlock Limited, again at a discount. These findings of the Transaction Auditor are based on Exhibits 2.2 and 2.3 which are appended to the Audit Report.
- v Therefore, based on these findings, the Transaction Auditor observed that the First Respondent utilized the funds belonging to the Corporate Debtor which were illegally diverted to his personal account, for the purchase of convertible debentures and shares issued by the Corporate Debtor itself. Upon being questioned, the Respondents failed to provide any cogent reason for the illegal diversion of funds or the dubious purchase of the



debentures and shares issued by the Corporate Debtor by the First Respondent.

- vi The Audit Report records that the Corporate Debtor has spent almost Rs.44,30,00,000/- on the Project, using funds which included advances of around Rs.10,05,19,370/- raised from the homebuyers. However, a visit to the site revealed, as recorded by the Transaction Auditor in the Audit Report, that as on 20.12.2019, no construction activity had commenced on the site of the Project.
 - vii In fact, the Transaction Auditors have found that construction activity on two (2) other projects of the Corporate Debtor i.e., Windflower and Cassa Bona had also come to a complete standstill since 2016.
 - viii The Audit Report observes that an amount of Rs.78,00,000/- belonging to the Corporate Debtor was diverted for the personal expenses of the elder brother of the First and Second Respondents, Lat Sri Narsh Kumar (who passed away in 2016).
- (9) In fact, owing to the mala fide acts committed by the Respondents to defraud the creditors of the Corporate Debtor, specifically in cancelling the JDA and diverting a significant portion of the refund arising therefrom to the personal account of the First Respondent, the Applicant filed an I.A. bearing No.28/2019, U/s.60, 45 and 49 of the Code before this Adjudicating Authority, by *inter alia* seeking (a) setting aside of the Agreement of Cancellation dated 12.06.2019; (b) restoration of rights under the JDA; and (c) direction to the First Respondent to deposit the amount of Rs.3,00,00,000/- into the account of the Corporate Debtor. The order of this Adjudicating Authority has not yet been released.



(10) Based on an inspection of the documents of the Corporate Debtor and the findings of the Audit Report, the Applicant has made a determination on the fraudulent nature of these transactions, and seeks to file the present Application before this Adjudicating Authority based on the grounds set out below.

(11) Therefore, the Transaction Auditor has found, and the Applicant has determined, for the purposes of Section 66 of the Code, that the business of the Corporate Debtor was carried on with intention to defraud the creditors and other stakeholders of the Corporate Debtor. In addition for the purposes of Section 69 of the Code, the acts of the First and Second Respondents also amount to a transfer of the property (money) of the Corporate Debtor for their own illegal ends and for defrauding the genuine creditors of the Corporate Debtor. The intention of the Respondents to defraud the creditors of the Corporate Debtor is evident from the absence of any reasonable basis or explanation for the (i) undervalued purchase of debentures and shares issued by the Corporate Debtor, or (ii) the routing of funds of the Corporate Debtor into the personal account of the First Respondent. The Respondents have failed to provide any satisfactory explanation of these mala fide transactions, when called upon by the Transaction Auditor.

(12) Therefore, the Respondents have diverted/siphoned off from the Corporate Debtor Rs.45,09,38,613/- in the following manner:

- i Rs.44,31,38,613/- which the Respondents claim to have spent through the Corporate Debtor towards various aspects of the development of the Project.;
- ii Rs.78,00,000/- belonging to the Corporate Debtor which was diverted for the personal expenses of the elder



brother of the 1st and 2nd Respondents, Late Sri Naresh Kumar.

(13) Therefore, the instant Application is filed for seeking the reliefs as prayed for.

3. Heard Shri Raghuram Cadambi, learned Counsel for the Resolution Professional, **through Video Conference** and none appeared of the Respondents. We have carefully perused the pleadings of the Party and extant provisions of the Code and Rules made there under.
4. The Applicant has simultaneously filed IA No. 334 of 2020 (for approval of Resolution plan), IA No 362 of 2020, Under Sections 66, 69, 25(2) of Code. While seeking Approval of Resolution Plan, as approved by COC, the Applicant still chose to file Applications. It is relevant to mention here that once Resolution Plan is approved by Adjudicating Authority, CIRP is deemed to be closed, Resolution Professional also ceased to be as such but only he will be a Member of Supervising Committee along with others to monitor the implementation of Resolution Plan, under the new Management. And the Resolution plan accepted by the COC is not contingent on recovery contemplated in Applications filed by the Applicant. It is also to be mentioned here that procedure under Liquidation is different where termination of Liquidation proceedings would be resorted to after liquidating all the assets of Corporate Debtor. The Applicant has not explained as to how he will prosecute the said Applications, after he ceased to be as RP, after approval of Resolution Plan. And the new Management is not concerned with these Applications, as their Resolution plan is not contingent on the result of the Applications filed by the Resolution Professional herein.



5. In the above context, it is relevant to refer the judgement dated 26th November, 2020 rendered by Hon'ble High court of Delhi in *W.P.(C) 8705/2019 & CM APPL. 36026/2019 in the case M/S VENUS RECRUITERS PRIVATE LIMITED versus UNION OF INDIA AND ORS.*, wherein the question that has arisen is whether under the Insolvency and Bankruptcy Code, 2016 (*hereinafter, 'IBC'*), an application filed under Section 43 for avoidance of preferential transactions can survive beyond the conclusion of the resolution process and the role of the RP in filing/pursuing such applications. The jurisdiction of the NCLT to hear applications under Section 43 after the approval of the Resolution Plan, is thus under challenge. Wherein it is *inter-alia* held/observed as follows:

- i) *If an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Resolution Plan is approved, in effect, the NCLT would be stepping into the shoes of the new management to decide what is good or bad for the Company. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Resolution Plan. In the present petition, this Court is concerned with a Corporate Debtor, in respect of which the Resolution Plan was approved by the NCLT and an application is sought to be filed by the RP as former RP through its counsel. The RP cannot wear the hat of the 'Former RP' and pursue an avoidance application in respect of preferential transactions after the hat of the Corporate Debtor has changed and it no longer remains a Corporate Debtor. This would be wholly impermissible in law as the mandate of the RP has come to an end. The NCLT also has no jurisdiction to entertain and*



decide avoidance applications, in respect of a Corporate Debtor which is now under a new management unless provision is made in the final

ii) A far-fetched argument was made by the ld. counsels for the Former RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the CIRP and not beyond that. The fact that the new management can take a decision in respect of any agreement which is deemed to be not beneficial to it also supports the interpretation that after the Plan is approved, the company is completely in the hands of the new management and neither the NCLT nor the RP has any right or power in respect of the said company. As can be seen in the present case, the Corporate Debtor in its new avatar has terminated the agreement with the Petitioner.

iii) The parties would have to be therefore left to their civil and other remedies in terms of the contract between them. The NCLT ought not to be permitted to now adjudicate the preferential nature of the transaction under a contract which now stands terminated, after the approval of the Resolution Plan. The above discussion is only in the context of Resolution processes and would however not apply in case of liquidation proceedings. In the case of a liquidation process, the situation may be different inasmuch as the liquidator may be able to take over and prosecute applications for avoidance of objectionable transactions. The benefit of orders passed in respect of such transactions may be passed on to the Corporate



Debtor which may assist in liquidating the company at the final stage. However, that is not the case in the present petition.

iv) In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders are liable to be set aside. The proceedings qua the Petitioner before the NCLT under the Avoidance application are accordingly quashed.

6. This Adjudicating Authority has considered similar issue in I.A No. 446 of 2018 in CP (IB) No. 122/BB/2017 filed by Smt. Ramanathan Bhuvaneshwari, under Section 66 r/w Section 25 (2), 69, 70 and other applicable Sections of I & B Code, 2016. This Adjudicating Authority, after considering the matter has disposed of the said Application by an order dated 16.04.2019 with the following directions:

“Therefore, we are of the prima facie view that the findings given in Forensic Audit Report only prima established the fraudulent transaction in question. Therefore, it is necessary to conduct further investigation by SFIO in the affairs of the Company basing on the findings given in Forensic Audit Report, after affording proper opportunity to concern opposite parties to defend them. Hence we are inclined to refer the matter to SFIO for further investigation by invoking powers conferred u/s 212/213 of the Companies, Act 2013 and thereafter, aggrieved party can take appropriate legal course of action.

In the result by exercising power conferred on this Adjudicating Authority which being NCLT u/s 213 of Companies act, 2013. I.A No. 446/2018 in CP (IB) No. 122/BB/2017 is disposed of with the following directions:

- (1) Learned Resolution professional is directed to forward all material documents, which is connected to the present case including the Forensic Auditor report date d14.12.2018, the*



- Central Government, within a period of three week from the receipt of the copy of the order.*
- (2) Learned Resolution Professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/otherwise duly following principles of natural justice.*
- (3) The Central Government is directed to refer the matter to the SFIO for further investigation into the affairs of the Corporate Debtor, Bank of Maharashtra and other related companies including Director of Companies of Corporate Debtor & related Companies and officials of Bank of Maharashtra basing on the report of Forensic Audit report as expeditiously as possible.*
- (4) Bank of Maharashtra is also directed to extend full assistance to the SFIO to complete the investigation as expeditiously as possible.*
- (5) The parties are at liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case.*
- (6) The prayer as sought for in the application stands disposed of in the light of above direction*
- (7) No order as to costs."*

Aggrieved by the said order, the third party, Shri Lagadapathi Ramesh (Respondent/Appellant) filed Company Appeal (AT) (Insolvency) No. 574 of 2019, which was finally disposed of by the Hon'ble NCLAT vide order dated 20.09.2019 with the following directions:

"39.the Civil Procedure Code is not applicable for any proceeding before the Tribunal and in terms of Section 424, the Tribunal is guided by principle of natural justice and subject to other provisions under the Companies Act, 2013 or the I & B Code or any rule made thereunder. The Tribunal and the Adjudicating Authority have also been empowered to regulate their own procedure.



40. In view of the aforesaid position of law also, the procedure laid down under Section 213 of the Companies Act, 2013 can be exercised by the Tribunal/ Adjudicating Authority, as held above.

41. Further, after the investigation by the Inspector, if case is made out and the Central Government feels that the matter also requires investigation by the 'Serious Fraud Investigation Office' under Section 212 of the Companies Act, 2013, it is open to the Central Government to decide whether in such case the matter may be referred to the 'Serious Fraud Investigation Office' or not. This will depend on the gravity of charges as may be found during the investigation by the Inspector.

42. In view of the aforesaid position of law, we are of the view that the Adjudicating Authority was not competent to straight away direct any investigation to be conducted by the 'Serious Fraud Investigation Office'. However, the Adjudicating Authority (Tribunal) being competent to pass order under Section 213 of the Companies Act, 2013, it was always open to the Adjudicating Authority/Tribunal to give a notice with regard to the Company Appeal (AT) (Insolvency) Nos. 574 & 592 of 2019 aforesaid charges to the Promoters and others, including the Appellants herein and after following the procedure as laid down in Section 213, if prima facie case was made out, it could refer the matter to the Central Government for investigation by the Inspector or Inspectors and on such investigation, if any, actionable material is made out and if the Central Government feels that the matter requires investigation through the 'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'.

43. We, accordingly, modify the impugned order dated 16th April, 2019 and refer the matter to the Central Government for investigation through any Inspector or Inspectors.

44. As we have heard learned counsel for the parties and prima facie we are of the view that the matter requires investigation to find out whether one or other promoter or the company as referred to in paragraph 9 and quoted above to find if they have violated any of the provisions of Sections 68, 69, 70, 71, 72 & 73 of the 'I&B Code', we modify the impugned order dated 16th April, 2019 and refer the matter to the Secretary, Ministry of Corporate Affairs, Government of India, to get the matter investigated by Inspector or Inspectors and following the procedure in terms of Section 213 of the Companies Act, 2013 and/ or on such report after investigation by the Inspector, the Central Government feels that the matter is further required to be investigated by Company Appeal (AT) (Insolvency) Nos. 574 & 592 of 2019 the 'Serious Fraud Investigation Office' it may do so and thereafter, if actionable material making out case of fraud is made out after such investigation by the 'Serious Fraud Investigation Office', it may act in terms of sub-section (2) of Section 236 of the 'I&B Code' for referring the matter to the Special Court.

Both the appeals stand disposed of with aforesaid observations and directions. No costs.

7. As stated supra, the Applicant has filed IA No. 28 of 2020, which also relates to JDA and its cancellation and consequential transactions. Again filed the instant Application by clubbing that issue too. For the reasons stated in the order dated 29th January, 2020 passed in IA No. 28 of 2020, we are inclined to dispose of the instant Application with similar directions.
8. In the result, I.A No. 362 of 2020 in CP (IB) No. 132/BB/2017 is disposed of with the following directions;
 - 1) The Applicant is granted liberty to take appropriate action in the light of order dated 16.04.2019 passed in I.A No. 446 of



2018 in CP (IB) No. 122/BB/2017 filed by Smt. Ramanathan Bhuvaneshwari and in consonance with order dated 20.09.2019 passed in Company Appeal (AT) (Insolvency) No. 574 of 2019, which was finally disposed of by the Hon'ble NCLAT, in consultation with the IBBI.

2) No order as costs.



ASHUTOSH CHANDRA
MEMBER, TECHNICAL



RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL

Shruthi