IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

C.P. (IB) No.110/BB/2022
U/s 7 of I&B Code, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

In the matter of:

M/s. Profectus Capital Private Limited
Registered Office at
B-17, Art Guild House, 4th Floor,
Phoenix Market City, Kurla (West),
Mumbai – 400 070. … Petitioner / Financial Creditor

Versus

M/s. Bangalore Blues Entertainment India Private Limited
Vikas Tech Park, 1st Floor,
#105, 1st A Cross Road, 5th Block,
Koramangala Industrial Layout,
Bengaluru – 560 095. … Respondent / Corporate Debtor

Order delivered on: 13th April, 2023

Coram: 1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Present:

For the Petitioner : Shri Harish Srivatsa L., Adv.
For the Respondent : Ms. Suja Surendran,Adv

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. The present Petition has been filed on 12.05.2022 under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'IBC /

Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by **M/s. Profectus Capital Private Limited** (hereinafter referred to as 'Petitioner / Financial Creditor') with a prayer to initiate the Corporate Insolvency Resolution Process (CIRP) in respect of **M/s. Bangalore Blues Entertainment India Private Limited** (hereinafter referred to as 'Respondent / Corporate Debtor') for defaulting an amount of Rs.1,26,65,985.07/- as on 19.04.2022.

2. The Corporate Debtor was incorporated on 15.06.2012 with CIN: U55101KA2012PTC064410 having its registered office situated at Vikas Tech Park, 1st Floor, #105, 1st 'A' Cross Road, 5th Block, Koramangala Industrial Layout, Bengaluru-560095. Hence, the jurisdiction lies with this Adjudicating Authority. Its Authorised Share Capital is Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only) and Paid-up Share Capital is Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only).

3. Brief facts of the Petition are given hereunder:

(a) The Corporate Debtor approached the Financial Creditor for availing business loan for the purpose of Working Capital Management. Based on the representations made by the Corporate Debtor, Financial Creditor herein has agreed to lend and advance credit facility to the Corporate Debtor a sum of Rs.1,50,00,000/- (Rupees One Crore Fifty Lakh Only) to be disbursed in Loan 1 – Rs.1,00,00,000/- (Rupees One Crore Only) and Loan 2 – Rs.50,00,000/- (Rupees Fifty Lakh Only) *vide* its sanction letter dated 29.05.2019. In terms of the sanction letter the Corporate Debtor had agreed to repay the credit facility in daily instalments.

(b) Pursuant to sanction of credit facility, the Corporate Debtor has passed Resolution to avail the financial assistance of Rs.1,00,00,000/- from the Financial Creditor vide its Board Resolution dated 31.05.2019 and executed a Merchant Advance – Facility Agreement dated 31.05.2019 for an amount of Rs.1,00,00,000/- in favour of Financial Creditor.

(c) Subsequently, the Corporate Debtor has passed resolution to avail the financial assistance in respect of Loan-2 of Rs.50 Lakhs from the Financial Creditor vide its Board Resolution dated 31.08.2019 and executed a Merchant Advance – Facility Agreement dated 31.08.2019 for an amount of Rs.50 Lakhs in favour of Financial Creditor.

(d) The Financial Creditor has disbursed an amount of Rs.1,00,00,000/- on 31.05.2019 (Loan-1) and Rs.50,00,000/- on 31.08.2019 (Loan-2) to the Corporate Debtor towards the Working Capital Management, making the total loan amount disbursed is Rs.1,50,00,000/-.

(e) Vide letters dated 31.12.2020 (at pages 108 & 111 of CP), the Corporate Debtor requested the Financial Creditor to restructure its loan and the same was accepted by the Financial Creditor. Accordingly, the Corporate Debtor has executed a Restructuring Agreement dt.31.12.2020 and also Facility Agreement for converting outstanding amount of Rs.40,44,363/- as Loan-3. In this regard, Guarantee Deed was executed by Mr. Srikanta Upadhyay and Mrs. Vandana Upadhyay in favour of Financial Creditor for Loan-3 of Rs.40,44,363/-.

(f) It is stated that on 03.04.2021, the Corporate Debtor has defaulted the daily instalment repayment, which is the Date of Default. Accordingly, the Financial Creditor on 22.03.2022 issued legal notice to the Corporate Debtor and recalled the Loan. Since the CD has not made any payment, the present Petition has been filed for the default in payment of outstanding debt.

4. In support of its submissions, the Petitioner *inter alia* filed the following documents:

(a) Copy of the Sanction Letter dated 29.05.2019 wherein the Credit Facility in the form of Loan 1 and Loan 2 sanctioned to the CD;

(b) *Copy of Corporate Debtor's Board Resolutions dated 31.05.2019 and 31.08.2019 for Loan 1 and Loan 2 respectively;*

(c) *Copy of the Merchant Advance – Facility Agreements dt.31.05.2019 and dt.31.08.2019 executed by the Corporate Debtor in favour of Financial Creditor for Loan 1 and Loan 2 respectively;*

(d) *Copy of Corporate Debtor's request letter for restructuring of Loan-1 and Loan-2 dated 31.12.2020;*

(e) *Copy of the Resolution Plan dated 31.12.2020 issued by the FC;*

(f) *Copy of the Restructuring Agreement executed by the Corporate Debtor dated 31.12.2020;*

(g) *Copy of the Facility Agreement for Loan-3 executed by the Corporate Debtor dated 31.12.2020;*

(h) *Copies of Loan 1, 2 and 3 with Foreclosure Statement;*

(i) *Copies of the Personal Guarantee Deed provided by Mr. Srikanta Upadhyay and Mrs. Vandana Upadhyay for Loan 1, 2 and 3;*

(j) *Copy of the Legal Notice dated 22.03.2022 issued by the Financial Creditor to the Corporate Debtor and recalled the loan;*

(k) *Information Utility Report for 3 Loan Accounts.*

5. Respondent *vide* its statement of objections dated 27.09.2022 and also subsequent written submissions dated 02.03.2023 has *inter alia* contended as under:

(a) The Respondent-Corporate Debtor (CD) is incorporated in the year 2012 and is engaged in the business of operating hotels, restaurant and resto-bar, etc. It has established three outlets, namely, Simon Says Brew Works, The Black Pearl and Boozy Griffin. In order to expand its business in Chennai, the CD availed a business loan of Rs.1,50,00,000/- from the Financial Creditor and the loan was disbursed in two tranches, Loan-1 being Rs.1 Crore and Loan-2 being Rs.50 Lakhs. To avail the same, the CD executed various documents like Facility Agreement, Guarantee Deed etc. in favour of the Financial Creditor.

(b) It is contended that in view of the Pandemic, the entire Country went into a nationwide lockdown from March, 2020. Due to the restrictions imposed upon the business, the CD was unable to carry on normal business activities, while continuing to incur all the overhead expenses.

(c) During Sept. 2020, the Govt. of Karnataka relaxed the restrictions and allowed restaurants to function, however, with only 50% capacity. The Government withdrew all restrictions only during January, 2021. Thus, from March, 2020 to January, 2021, the CD was unable to carry on its normal business while it had to incur its regular expenses in Karnataka. Since the restrictions in the State of Tamil Nadu continued for a longer period, it continued to face the challenges for its new establishment.

(d) In December, 2020, the CD requested for restructuring of Loan 1 and Loan 2 with the Financial Creditor, in order to overcome the impact of the pandemic on its business. On 31.12.2020, the Financial Creditor approved the Resolution Plan for restructuring the Loan 1 and Loan 2 of Corporate Debtor and executed a Restructuring Agreement in favour of the Financial Creditor and capitalized the accrued outstanding dues of Rs.40,44,363/- as Loan 3.

(e) The business of the CD continued to face the financial stress in view of the 2nd wave of Covid-19 resulting in the declaration of lockdown. The Govt. of Karnataka relaxed the restrictions by allowing restaurants to open in July, 2021. Meanwhile, further discussion was in progress with the Financial Creditor for the settlement of its dues. Following such discussion, both Parties agreed to settle the dues of Rs.1,15,11,286/- at Rs.65 Lakhs in three tranches and accordingly, CD issued 3 Cheques in favour of the Financial Creditor. However, due to continued effect of Covid-19, the CD was unable to fully recover from the financial stress and was unable to settle the dues of the Financial Creditor in time as agreed. Pursuant thereto, the Petitioner has initiated proceedings u/s 138 of the N.I. Act, which is still pending consideration.

(f) With the easing of the Pandemic, the business of the Corporate Debtor has improved. Despite all the challenges faced by it, they have paid Rs.4 Crores towards its debt to Banks and NBFCs from March 2020 till September 2022. It is contended that the CD is a Solvent Company and the value of its Assets are greater than its Liabilities and that the CD is giving employment to close to 300 individuals. Hence, the essence of the Code would be defeated if a Company that is generating substantial revenue, would be subjected to the rigors of the CIRP.

(g) Further, it is contended that even when there is existence of a debt, the Adjudicating Authority has the power to reject an application if the Financial Creditor is using the procedure of Insolvency as a backdoor tool to a recovery mechanism, which is the case in the instant CP and thus prays to dismiss the Petition with costs for maliciously initiating the proceedings under the Code. Vide Memo dated 04.11.2022, the CD *inter alia* has placed on record its Provisional Balance Sheet as at 31.03.2022.

(h) In support of its contentions, the Respondent-CD had relied upon the following decisions:

i. *Agarwal Veneers v. Fundtonic Service Pvt. Ltd., NCLAT, Order dated 05.08.2022;*

ii. *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd., MANU/SC/1196/2017;*

iii. *Drip Capital v. Concord Creations (India) Pvt. Ltd., (MANU/NC/3701/2021).*

6. Subsequently, the Petitioner filed rejoinder dt.11.10.2022; and further written submissions dt.23.02.2023, by *inter alia* further stating as under:

(a) The Financial Creditor has supported the restructuring of the credit facilities granted to the Corporate Debtor and as a part of Resolution Plan extended moratorium of 90 days. Despite restructuring the credit facilities the CD failed to adhere the same and defaulted in payment of the instalments due and payable to the Financial Creditor after lapse of moratorium period. Therefore, the Financial Creditor recalled the Loan Facilities *vide* its Loan Recall Notice dated 23.02.2022. Despite service of the notice, both the CD and Personal Guarantors failed to repay the Loan.

(b) As regards the settlement of dues of Rs.65,00,000/- in 3 tranches by the CD, it is stated that the said settlement was offered by the Financial Creditor in the month of October, 2021 subject to condition that the settlement offer would stand null and void on failure to pay the settlement amount within the agreed timelines and in such an event the CD would be liable to pay the entire outstanding dues. From the above, it is clear that the CD admittedly failed to settle the dues in time as agreed, accordingly the said settlement failed and the liability of the CD was restored to the actual outstanding dues i.e. a sum of Rs.1,15,11,286/-. The CD having full knowledge of relaxation of Covid restrictions for restaurants agreed to the Settlement Terms, however despite having continued the business as normal, CD failed to adhere to the settlement terms and defaulted in repayment.

(c) Further, the CD has in unequivocal terms admitted its debts due to the Financial Creditor in its objections. The CD till date has not made any payment towards the loan 1, 2 and 3 after restructuring of the said loans in the month of December, 2020.

(d) The Financial Creditor has placed on record the CIBIL Report of the CD as generated on 07.04.2022 which reflects that various amounts were outstanding to more than 40 Financial Creditors totalling to

Rs.19,80,40,811/-. The said Credit Bureau report also recorded and evinced that 28 out of 40 credit facilities are in default with Non-Standard Asset classification. The said CIBIL Report is placed on record as Annexure-A to the Rejoinder.

(e) From the said CIBIL Report, it is clear that the CD has made payments only to few set of Financial Creditors of its choice which are in the nature of preferential payments / avoidance transactions to defeat the claims of other creditors / stakeholders.

(f) As regards the contention of the Respondent that it is a solvent Company, the Petitioner submits that the CD has not produced any of its audited balance sheet, cash flow statements or financials to justify its stand that its assets are greater than its liabilities. The plain reading of the CIBIL Report of the CD demonstrate that the CD is in CMR-10 ranking which was assigned by the TransUnion CIBIL which indicates that 'Highest likelihood of defaulting or is already a defaulter' and indicates that the CD is under chronic credit stress.

(g) The CD is commercially insolvent and unable to discharge its liability under a credit facility of Rs.1,26,65,985/- for over 1.5 years cannot be allowed to escape the consequences by citing its asset base, employment to 300 individuals, etc.

(h) The first default for the Loan Nos.1 and 2 were on 18.03.2020 and upon restructuring and capitalisation of outstanding loan amount as Loan 3 was also defaulted on 03.04.2021. The CD admittedly unable to settle the dues of the Financial Creditor in time and repeatedly failed to honour its commitments despite availing the restructuring and moratorium to support the Covid-19 stress and indulged in preferential payments.

(i) While stating that the decisions relied upon by the Respondent has no applicability to the facts of the present case, the Petitioner relied upon the following decisions:

i. *Haryana Financial Corporation & Ors. v. Jagdamba Oil Mills & Ors., (MANU/SC/ 0056/2002);*

ii. *Swiss Ribbons Pvt. Ltd. v. Union of India (MANU/SC/0079/2019)*

iii. *E.S. Krishnamurthy & Ors. v. Bharath Hi Tech Builders Pvt. Ltd. (MANU/SC/1249/2021).*

7. Heard Shri Harish Srivatsa L., Ld. Counsel for the Petitioner and Ms. Suja Surendran, Ld. Counsel for the Respondent and perused the pleadings on record.

8. It is seen from the Petition that the present case is filed by M/s. Profectus Capital Private Limited seeking to initiate CIRP against the Corporate Debtor - M/s. Bangalore Blues Entertainment India Private Limited. As per Form-1 of the Petition it is seen that the Financial Creditor had disbursed Rs.1,00,00,000/- on 31.05.2019 & Rs.50,00,000/- on 31.08.2019 making the total loan amount disbursed was Rs.1,50,00,000/- (Rupees One Crore and Fifty Lakh Only) towards the Working Capital Management to the Corporate Debtor. Copies of the Merchant Advance-Facility Agreements, Restructuring Agreement executed by the Corporate Debtor in favour of the Financial Creditor have been annexed to the Petition as Annexures D, F, I and J. **Clause 6** of the said Facility Agreement provides for the **Repayment**, wherein the Daily Instalment Amount is to be paid to the Bank Account designated by M/s. Profectus Capital Private Limited i.e., the Petitioner herein, **Clause 8** provides for **Interest and Other Charges**, **Clause 19** provides for the **Events of Default** and **Clause 20** provides for **Consequences on Event of Default** wherein it is *inter alia* stated as under:

> *"**20.1** Upon the occurrence of an Event of Default or Potential Event of Default, the Lender may by written notice to the Borrower, declare the Outstandings under the Facility including the Additional Interest, to be immediate due and payable (whereupon the same shall become so payable together with accrued interest thereon, additional interest and any other sums and charges then owed by the Borrower under the Agreement."*

9. Since the Corporate Debtor herein failed to maintain financial discipline in repayment of the said both Loans, the loan was classified as NPA in the books of the Financial Creditor and both the Loan-1 and Loan-2 were defaulted on 18.03.2020. Subsequently, as per the request of the Corporate Debtor, the said loans were restructured pursuant to acceptance of Resolution Plan letter dated 31.12.2020 and execution of Restructuring Agreement and Loan Agreement for conversion of outstanding dues into another Loan i.e. Loan-3 *vide* Facility Agreement dated 31.12.2020 which was executed between the Petitioner and Respondent. The said Resolution Plan depicts the grant of moratorium of 90 days and conversion of outstanding dues of Rs.40,44,363/- as Loan-3. However, the Corporate Debtor again failed to adhere to the resolution plan and restructuring of the loan, and defaulted in payment of the instalments due and payable to the Financial Creditor after lapse of moratorium period, and accordingly the loan account was defaulted on 03.04.2021. Therefore, the Financial Creditor recalled the Loan Facilities vide its Loan Recall Notice dated 22.03.2022. Despite service of the said notice, both the Corporate Debtor and Personal Guarantors failed to repay the loan. The aforesaid defaults were also recorded with the Information Utility and copies of the Form-D-Record of Default issued by the NeSL are enclosed to the Rejoinder. The Respondent also in its statement of objections has *inter alia* accepted that the Corporate Debtor was unable to settle the dues of the Financial Creditor in time as agreed due to the Pandemic.

10. From the aforesaid observations, it is seen that the Corporate Debtor has availed loan facilities from the Financial Creditor against payment of interest and it defaulted in repayment of such 'financial debt' which has become due and payable. Therefore, the first ingredient of 'debt' has been satisfied as required under the Code. Part-IV of Form-1 of the CP shows that the total claim amount as on 19.04.2022 is Rs.1,26,65,985.07/- with the date of default of daily instalment payment being 03.04.2021. Since the default in repayment by the Corporate Debtor in respect of the loan facility is well above the threshold limit of Rupees One Crore, the 'default' is established as required under the Code. Copies of the Statement of Loan Account Nos.1, 2 and 3 along with calculation sheet of the credit facilities granted were annexed to the Petition as Annexures K, L and M.

11. As regards Limitation, the date of default as mentioned in Form-1 is 03.04.2021 and the instant Petition has been filed on 12.05.2022, which is within the period of limitation.

12. The Respondent in its reply has contended that even though the Corporate Debtor was affected by the Covid-19, it was in the path of recovering its financial situation and also settlement talks was in progress with the Financial Creditor in respect of the loans availed by it. Further, both the Parties agreed to settle the dues of Rs.1,15,11,286/- at Rs.65,00,000/- in three tranches and accordingly, the CD issued 3 Cheques in favour of the Financial Creditor. However, due to the effect of Covid-19, the CD was unable to settle the dues of the Financial Creditor in time. It further stated that they have paid over Rs.4 Crores towards its debt to Banks and NBFCs from March 2020 till September 2022. It also relied upon certain decisions as stated supra, in respect of which the Petitioner stated that the said decisions has no applicability to the facts of the present Case. The Petitioner states that the decision of the Hon'ble NCLAT in the matter of *Drip Capital Inc. v. Concord Creations (India) Pvt. Ltd.* relied upon by the Respondent, has been set aside with a direction to the Adjudicating Authority to admit the same. It is noticed from the Respondent's reply that the Corporate Debtor has neither disputed the claim nor denied the Agreements entered into between the Parties.

13. We have carefully considered the arguments of the respective Counsels and their pleadings. Considering the aforesaid observations, we are of the view that the instant Petition is liable to be admitted. In view of the facts and circumstances discussed above, the present Petition being complete and having established the default in payment of the financial debt and for the default amount being above Rs.1,00,00,000/- (Rupees One Crore Only), the **Petition** is **admitted** in respect of **Respondent-Bangalore Blues Entertainment India Private Limited** u/s 7 of the I&B Code, 2016. Accordingly, moratorium is declared in terms of Section 14 of the Code. As a necessary consequence of the moratorium in terms of Section 14, the following prohibitions are imposed, which must be followed by all and sundry:

i. *The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
ii. *Transferring, encumbering, alienating or disposing off by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;*
iii. *Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
iv. *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.*

It is further directed that the supply of essential goods or services to the Corporate Debtor as may be specified, shall not be terminated or suspended or interrupted during the moratorium period.

The provisions of sub-section (1) shall however, not apply to such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority, and to a surety in a contract of guarantee to a Corporate Debtor.

The order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Adjudicating Authority approves the Resolution Plan under sub-section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, as the case may be.

14. The Financial Creditor has proposed the name of Mr. Indrajit Mukherjee, a qualified insolvency professional having Registration No. IBBI/IPA-001/IP-P-01533/2018-2019/12450 as the Interim Resolution Professional (IRP) in respect of the Corporate Debtor. Written Consent given by the IRP in Form 2 dated 27.04.2022 has been filed along with the Petition, wherein, it was declared he is eligible to be appointed as an IRP in the case of the Corporate Debtor and that no disciplinary proceedings are pending against him with the Board or Indian Institute of Insolvency Professionals of Institute of Chartered Accountants of India. However, since the Authorisation for Assignment (AFA) shown in Form-B dt.11.11.2021 was expired on 10.11.2022, the IRP shall file the copy of the renewed AFA within one week from the receipt of copy of this order.

15. The Law Research Associate of this Adjudicating Authority has checked the credentials of Mr. Indrajit Mukherjee, and there is nothing adverse against him. In view of the above, the Bench appoints **Mr. Indrajit Mukherjee**, bearing Registration No. IBBI/IPA-001/IP-P-01533/2018-2019/12450 with registered address at Flat No.B-405, Siddhivinayak Twins, Plot No.9, Sector 17, Roadpali, Kalamboli, Navi Mumbai-410218 (MH) having Mobile: +91-7045312912, Email: indrajitmukherjee15@yahoo.com as the Interim Resolution Professional of the Corporate Debtor. The IRP is directed to take the steps as mandated under Sections 15, 17, 18, 20 and 21 of IBC, 2016.

16. The Financial Creditor shall deposit a sum of **Rs.2,00,000/- (Rupees Two Lakhs Only)** with the IRP to meet the expenses arising out of issuing public notice and inviting claims. These expenses are subject to approval by the Committee of Creditors.

17. The Interim Resolution Professional shall after collation of all the claims received against the Corporate Debtor and the determination of the financial position of the Corporate Debtor constitute a Committee of Creditors and shall file a report, certifying constitution of the Committee to this Adjudicating Authority on or before the expiry of thirty days from the date of his appointment, and shall convene first meeting of the Committee within seven days for filing the report of Constitution of the Committee. The Interim Resolution Professional is further directed to send regular progress reports to this Adjudicating Authority every fortnight.

18. A copy of the order shall be communicated to both the Parties. The learned Counsel for the Petitioner shall deliver a copy of this Order to the Interim Resolution Professional forthwith. The Registry is also directed to send a copy of this Order to the Interim Resolution Professional at his e-mail address forthwith.

Sd/-	**Sd/-**
MANOJ KUMAR DUBEY	**T. KRISHNAVALLI**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**