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