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IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

C.P. (IB) No.131/BB/2017
U/s 7 of IBC, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

In the matter of:

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

Versus

M/s.Fortuna Projects (India) Private Limited,
Fortuna Building, New. No.7,
Old No.390, 13th Cross,
Sadashiv Nagar,
Bangalore – 560 080. - Respondent/Corporate Debtor

Date of Order: 9th August, 2019

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

Parties/Counsels Present:

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

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P.(IB)No.131/BB/2017 is filed by M/s. Reliance Capital AIF Trustee Company Private Limited and another **(Petitioner**

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

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

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

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

2) M/s.Fortuna Projects (India) Private Limited (Respondent/ Corporate Debtor/FPIPL) was incorporated on 04.06.2007 having registered address at Fortuna Building, New No.7, Old No.390, 13th Cross, Sadashiv Nagar, Bangalore 560 080. The Authorized Share Capital of the Corporate Debtor is Rs.1,00,00,000/- and Paid-up Share Capital is Rs.50,00,000/-.

3) The Financial Creditor(s) being the Debenture Holders have pursuant to execution of the transaction Document lent Rs.46,05,00,000/- to Fortuna Buildcon India Private Limited by subscribing to/purchasing 46,05,000 senior secured redeemable non-convertible debentures of Rs.100/- each issued by FBIPL for a total value of Rs.46,05,00,000/- as per the terms specified in the Transaction Documents.

4) It is submitted that the Fortuna Projects (India) Private Limited, Fortuna Urbanscape Private Limited and Fortuna Buildcon India Private Limited are group Companies promoted by Late Mr.S.V.Naresh Kumar and Mr.Shailesh Kumar. The Group Companies are inter alia engaged in the business of real estate development.

5) It is submitted that as per the Board Resolution dated 17.06.2014, the FPIPL, i.e. Corporate Debtor herein, has also ratified that it would give security towards repayment of the amount on behalf of FBIPL and would mortgage the Mortgaged Properties No.3 as mentioned under the Registered Mortgaged Deed dated 02.09.2014, along with all

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

6) It is submitted that as per the Transaction Documents executed (definitive Agreements) and the Irrevocable and Unconditional Corporate Guarantee Dated 02.09.2014 in particular the Corporate Debtor herein has secured the Debenture Outstanding's of FBIPL and has offered to pay on demand the Debenture outstanding's to the Financial Creditor.

7) It is submitted that towards the said subscribed amount of Rs.46,05,00,000/-, the financial creditor has no far only received an amount of Rs.7,84,34,618/- from the FBIPL, the Borrower, and FBIPL has failed to repay the balance debt amount till date. Thus, default has been committed on the payment of the debt which is in violation of the terms of the payment schedule as contained in Schedule 3 of the Debenture subscription Agreement.

8) It is submitted that as the Corporate Debtor failed to remit the debt amount, the financial creditor was compelled to issue Demand Notice dated 05.04.2017; 07.04.2017; 07.04.2017; 31.03.2017 and as per Legal Notice dated 30.06.2017 reporting the default of payment and requesting for the repayment of debt from the FBIPL and the Corporate Debtor herein.

9) It is submitted that in response to the said notices, the FBIPL (borrower) has issued a Reply letter dated 13.06.2017 and Email dated 13.06.2017, thereby acknowledging and admitting its inability to pay their debt

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

10) It is submitted that as per the Chartered Accountant Certificate dated 03.04.2017 issued by an independent Chartered Accountant along with the Memo of calculation, the Corporate Debtor is liable to pay an amount of Rs.59,42,52,495/- (Rupees Fifty Nine Crores Forty Two Lakhs Fifty Two thousand Four Hundred and Ninety Five Only) (Principal + Accrued interest + Redemption Premium + Additional Interest + Default Interest as on 31.03.2017.

11) It is submitted that on the failure of the FBIPL's failure and neglect to pay the Debenture outstanding, the financial creditor has invoked the Corporate Guarantee of the Corporate Debtor herein and called upon the Corporate Debtor herein, to pay Rs.59,42,52,495/-, (Rupees Fifty Nine Crores Forty Two Lakhs Fifty Two thousand Four Hundred and Ninety Five Only), including interest till 31.03.2017 as per terms of the transaction Documents, which shall continue to accrue as per terms of the Transaction Documents and irrevocable and Unconditional Corporate Guarantee Dated 02.09.2014 from 31.03.2017 till realization of payment to the Financial Creditor

12) It is submitted that as the Corporate Debtor herein, i.e. Co-Borrower, has defaulted in the payment of monies as per the Transaction Document and the Financial Creditors,

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

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

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

1) It is submitted that the application field by the Petitioner to initiate CIRP under the I&B Code, 2016 is not maintainable in Law or facts and the same is liable to be rejected.

2) It is stated that the Respondent denies the allegations that the Applicant Co. in its capacity as the Trustee of Reliance Capital AIF Trust and acting through its Investment Manager, Reliance AIF Management Co. Ltd., pursuant to the powers conferred in Schedule A of the Investment Management Agreement dated 11.11.2013 and also represented by Debenture Trustee Vistra ITCL India Ltd., are all not well within the knowledge of this Respondent and

hereby denied as false and the Applicant is put to strict proof of the same.

3) It is stated that the Respondent has also further denied the allegation that Reliance Nippon Life Asset Management Ltd. (Formerly Reliance Capital Asset Management Ltd.) PMS Division acting in its capacity as a portfolio manager for and on behalf of its portfolio Management clients and also represented by the Debenture Trustee Vistra ITCL India Ltd, are all not well within the knowledge of this Respondent and hereby denied as false and the Applicant is put to strict proof of the same. And the allegations that management Ltd. – PMS Division and Vistra ITCL India Ltd., has authorization and power to submit the application.

4) The Respondent is not aware of the execution of any of the alleged Transaction documents for the alleged loan of Rs.46,05,00,000/- by M/s.Fortuna Buildcon India Pvt. Ltd., by subscribing to/purchasing 46,05,000 senior secured redeemable non-convertible debentures (NCDs) of Rs.100/- each.

5) It is stated that the Respondent further denied the allegations that as per the alleged Transaction Documents executed (Definitive Agreement) and the Irrevocable and unconditional Corporate Guarantee Dated 02.09.2014 in particular M/s.Fortuna Project India Pvt. Ltd has secured the debenture outstanding of FBIPL and has offered on demand pay the debenture outstanding on behalf of FBIPL of the Financial Creditor are all herby denied as false and at no point of time M/s.Fortuna Project India Pvt. Ltd, has executed any documents or stood as Guarantor. This

Respondent submits that, all the alleged documents are concocted documents and this Respondent is not bound over the same and admittedly the very Board Resolution itself is forged one. And in fact M/s.Fortuna Project India Pvt. Ltd has not passed any Board Resolutions for the alleged borrowal or for the execution of the alleged documents or for standing as Corporate Guarantor.

6) It is stated that the Respondent is not aware of the fact that as on 31.03.2017 FBIPL was liable to pay and has defaulted in the payment of the outstanding dues to the Financial Creditor in respect of the NCDs of Rs.59,42,52,495/- along with 21.5% IRR and which shall continue to accrue as per terms of the Transaction documents from 31.03.2017 and this Respondent is no way concerned to its.

7) The allegation that on failure of FBIPL and on invoking the Corporate Guarantee of FPIPL, FPIPL admitted the liability and requested for time are all hereby denied as false and in fact after receipt of the Legal notice a suitable and detailed reply was also got issued through Advocate, on 19.12.2016 and this Respondent prays this Tribunal to consider the same and part and parcel of this objections. And this Respondent produces the copy of the same, for the kind perusal of this Tribunal. And in the said reply it is categorically denied that, no such Board Resolution was passed in the Company and further no such matter was discussed in any of the meeting of the Company.

8) It is stated that it has not authorized or permitted for standing as Co-obligor or for the alleged mortgage, created under the alleged Deed of Mortgage dated 02.09.2014,

registered as document No.BYP-1-02254-2014-15 Book –I, stored in C.D No.BYPD 216, in the office of the Sub-Registrar, Byatarayanapura, Bangalore, for the alleged loan said to have been availed by M/s.Fortuna Buildcon India Pvt. Ltd., and the same is not binding on this Respondent Company.

9) As stated above, this Respondent never offered or stood as Corporate Guarantor for the alleged borrowal of FBIPL and no such Board Resolution was passed for offering alleged Corporate Guarantee and this Respondent never given any assurances towards sanction and repayment of the subscribed amount, agreed coupon and other dues, the debenture holders lent Rs.46.05,00,000/- to FBIPL by subscribing NCDs of Rs.100/- each being a senior secured redeemable non-convertible debentures for a total value of Rs.46,05,00,000/- in any manner specified under the alleged Debenture subscription Agreement and other transaction documents.

10) The Respondent reiterated that no such alleged Board Resolution were passed by the Respondent Co. much or less dated 17.06.2014 and as such the question of ratification and mortgage would not arise at all and all such alleged documents are got up and fabricated and forged documents.

11) As stated above, FPIPL never offered any corporate guarantees, guaranteeing the repayment of the subscribed amount of RS.46,05,00,000/- along with accrued unpaid interest and other dues under any documents. As it has not offered any such alleged Corporate Guarantee, the question of liability of Rs.59,42,52,495/- does not arise at all and it is

not liable to pay any such amount, with interest dues as alleged.

12) It is with due respect and without prejudice submitted that, the Applicant Company, without exhausting any remedies as against the Principal Borrower Co. i.e., as against FBIPL, has falsely come up with this Application against the alleged Guarantor, only with a malice intention to harass and to put pressure on this Respondent Company and which is not permissible in law. The Respondent denied all other allegations which are not specifically denied or traversed herein, as false.

13) It is stated that the application is not at all maintainable in law and if the same is allowed, the Respondent/defendant will be put to great hardship, untold misery & irreparable injuries and on the other hand no such hardship or injuries will be cause to the Applicant as admittedly the very alleged Corporate Guarantee is a got up an concocted one.

4. Heard Shri S.S.Naganand, learned Senior Counsel along with Shri M.G.Nanjappa, Ms.Priyanka Das, learned Counsel for Petitioner. None appears for the Respondent. We have carefully perused the pleadings of the party and extant provisions of the Code and the law.

5. Shri S.S. Naganand, learned Senior Counsel for the Petitioner, while pointing various contents of various documents filed along with Company petition, has further submitted that the instant petition is filed strictly in accordance with law and Debt and default in question is admittedly not in dispute and a qualified Resolution Professional namely, Shri Shivadutt Bannanje bearing

IP Regn.No.IBBI/IPA-002/IP-N00266/2017-2018/10779 is suggested to appoint him as IRP. Therefore, the Learned Senior Counsel urged the Tribunal to admit the case by initiating CIRP in respect of Corporate Debtor with all consequential orders.

6. The case is being listed for admission on various dates viz. 23.11.2017, 01.12.2017, 05.12.2017, 20.12.2017, 16.01.2018, 01.02.2018, 22.02.2018, 20.03.2018, 28.03.2018, 12.04.2018, 25.04.2018, 02.05.2018, 05.06.2018, 11.06.2018, 03.07.2018, 13.07.2018, 01.08.2018, 09.08.2018, 06.09.2018, 28.09.2018, 08.10.2018, 22.10.2018, 19.11.2018, 10.12.2018, 17.12.2018, 16.01.2019, 07.02.2019, 13.03.2019, 21.03.2019, 03.04.2019, 31.05.2019, 13.06.2019, 25.06.2019, 10.07.2019 24.07.2019 & 06.08.2019. Since the parties used to submit that they are exploring for the possibility of settlement, the case is adjourned on all these dates at the request of parties. However, the Respondent is not able to resolve the issue in question despite affording ample opportunities for the same. Therefore, there is no other alternative for the Adjudicating Authority except to decide the case for admission as per merits.

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

8. The fundamental question arise for consideration in a case filed U/s 7 of Code is whether debt and default in question is proved/established with adequate evidence. And the grounds whether such default is deliberate or not; Corporate is having adequate properties to satisfy the debt; default is committed beyond its control; promised to pay etc., are hardly tenable in the instant case as long as debt and default is admitted.

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

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

i. *"record of the default" recorded with the information utility or such other record or evidence of default as may be specified;*

ii. *The name of the resolution professional proposed to act as an interim resolution professional; and*

iii. *Any other information as may be specified by the Board.*

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

"(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3)."

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

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

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

> "28. *When it comes to financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the Corporate Debtor – it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 pats, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the Corporate Debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the*

adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."

10. By perusal of the Application/Petition and the documents filed in support of the Application/Petition, it is found that the instant Company Petition is filed in a prescribed format with requisite fees and the Statement of Account of the Corporate Debtor issued by Axis Bank is filed along with Application (At Document No.22, Pages 573-590) to show that that the Corporate Debtor has not paid the debt due and Shri Shivadutt Bannanje bearing IP Regn.No.IBBI/IPA-002/IP-N00266/2017-2018/10779 has filed his Written consent in Form 2 dated 22.10.2018, by inter declaring that he is eligible to be appointed as a Resolution Professional in respect of the Corporate Debtor and that there are no disciplinary proceedings is pending against him with the Board or ICSI. Therefore, we are satisfied that the debt and default in question is established and the IRP suggested is prima facie eligible to be appointed, and thus it is a fit case to admit the case by initiating CIRP, imposing moratorium etc.

11. In view of the above facts and circumstances of the case and the law as stated supra, by exercising powers conferred on this Adjudicating Authority, U/s 7(5)(a) and other extant provisions of the Code, C.P. (IB) No.131/BB/2017 is hereby admitted with the following consequential directions:

a. We hereby appointed **Shri Shivadutt Bannanje bearing IP Regn.No.IBBI/IPA-002/IP-N00266/2017-2018/10779**, as the Interim Resolution Professional (IRP) to conduct the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor namely M/s. Fortuna Projects (India) Private Limited and to carry out the functions as mentioned under the I&B Code, 2016 and the Rules framed by the IBBI from time to time.

b. The following moratorium is declared prohibiting all of the following, namely:

   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 of 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 Securitisation 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.

   v. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

   vi. The provisions of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial regulator.

vii. The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process.

c. The IRP is directed to follow all extant provisions of the IBC, 2016 and the Rules including fees rules as framed by the IBBI from time to time.

d. The Board of Directors and all the staff of the Corporate Debtor are hereby directed to extend full co-operation to the IRP, in carrying out his functions as such, under the Code and Rules made by the IBBI.

e. The IRP is directed to file his progress reports to the Tribunal from time to time about the steps taken in pursuant to the CIRP. The IRP is further directed to take expeditious steps so as to complete the process of CIRP within the stipulated time.

f. Post the case for report of the IRP on **09th September, 2019.**

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

CERTIFIED TO BE TRUE COPY
OF THE ORIGINAL
13/9/19
Deputy/Asst. Registrar
National Company Law Tribunal
Bengaluru Bench

Raushan