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

C.P. (IB) No.124/BB/2017
U/s 7 of IBC, 2016
R/w Rule 4 of I&B (AAA) Rules, 2016

In the matter of:

1. M/s. Reliance Capital AIF Trustee
Company Private Limited
Regd. Off: Reliance Centre,
19, Walchand Hirachand Marg,
Ballard Estate,
Mumbai - 400 001.

& Another - Petitioners/Financial Creditors

Versus

M/s. Fortuna Buildcon India Pvt. Ltd.
Regd. Off: Fortuna Building,
Old No.390, New No.7,
13th Cross, Sadashiv Nagar,
Bangalore - 560 080.

- Respondent/Corporate Debtor

Date of Order: 09th 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 with
Shri M.G. Nanjappa and Ms. Priyanka Das

For the Respondent : Shri Dharma Tej

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. C.P. (IB) No.124/BB/2017 is filed by M/s.Reliance Capital AIF Trustee
Company Private Limited and M/s.Reliance Nippon Life Asset



Page 1 of 15



Management Limited (*formerly known as M/s.Reliance Capital Asset Management Limited*) – PMS Division (hereinafter referred to as 'Petitioners/Financial Creditors') under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, by inter alia seeking to initiate Corporate Insolvency Resolution Process in respect of M/s. Fortuna Buildcon India Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor') on the ground that it has committed default for a total outstanding amount of Rs.59,42,52,495/- (Rupees Fifty Nine Crore Forty Two Lakh Fifty Two Thousand Four Hundred and Ninety Five Only) as on 31.03.2017 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, are as follows:

(1) M/s.Reliance Capital AIF Trust represented by its Trustee Reliance Capital AIF Trustee Company Private Limited and acting through its Investment Manager, Reliance AIF Management Company Limited (hereinafter referred to as 'Petitioner/ Financial Creditor') is incorporated on 20.08.2013 with SEBI Registration No.IN/AIF 2/14-15/0111 and having its registered office at Reliance Centre, 19, Walchand Hirachand Marg, Ballard Estate, Mumbai-400001.

(2) M/s. Reliance Nippon Life Asset Management Limited (*formerly known as Reliance Capital Asset Management Limited*) – PMS Division (hereinafter referred to as 'Petitioner/Financial Creditor') is incorporated on 24.02.1995 with Identification Number U65910MH1995PLC220793 and having its registered office at

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Reliance Centre, 7th Floor, South Wing, Off Western Express Highway, Santacruz (East), Mumbai - 400055.

- (3) M/s. Fortuna Buildcon India Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor'/FBIPL) is a Private Limited Company incorporated on 09.03.2012 under the provisions of Companies Act, 1956 with CIN: U45200KA2012PTC062908 and having its registered office at Fortuna Building, Old No.390, New No.7, 13th Cross, Sadashiv Nagar, Bangalore-560080. Its Authorised Share Capital is Rs.5,00,000/- (Rupees Five Lakh Only) and the Paid-up Share Capital of the Company is Rs.1,00,000/- (Rupees One Lakh Only).
- (4) It is stated that the Corporate Debtor with a view to raise debt to complete the construction and development of the Mortgaged Property No.1, Mortgaged Property No.2 and Mortgaged Property No.3 (as mentioned in Deed of Mortgage dated 02.09.2014), requested the Financial Creditor(s) to sanction Rs.57,00,00,000/- (Rupees Fifty-Seven Crores Only) in favour of the Corporate Debtor assuring issuance of private placement of senior secured redeemable Non-Convertible transferable Debentures (NCDs) to the Debenture Holders i.e. the Financial Creditors herein, in one or more tranches as per the terms set out in the Transaction Documents.
- (5) It is stated that M/s. Fortuna Projects (India) Private Limited ('FPIPL') and M/s. Fortuna Urbanscape Private Limited ('FUPL') are the Group Companies of the Corporate Debtor and the said Companies offered to repay the debt amount, along with interest, on behalf of the Corporate Debtor to the Financial Creditor(s) in the event of default in their capacity as Co-obligors/Corporate Guarantors, as governed by inter alia Debenture Subscription

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Agreement dated 02.09.2014, Debenture Trust Deed dated 02.09.2014, Deed of Irrevocable and Unconditional Corporate Guarantee Deed dated 02.09.2014 and other Transaction Documents.

- (6) On the assurances given by the Corporate Debtor along with the Corporate Guarantors/ Co-Obligors towards the sanction and repayment of the subscribed amount, the Financial Creditor/Debenture Holder herein lent Rs.46,05,00,000/- (Rupees Forty-Six Crores Five Lakhs Only) to the Corporate Debtor herein by subscribing to 46,05,000 senior secured redeemable Non-convertible Debentures (NCDs) of Rs.100/- each in the manner specified under Clause 2 and 4 of the Debenture Subscription Agreement and other Transaction Documents. In respect of said subscribed amount of Rs.46,05,00,000/- (Rupees Forty-Six Crores Five Lakhs Only), the Corporate Debtor has so far only paid an amount of Rs.7,84,34,618/- to the Financial Creditor(s)/Debenture Holders. Thus, the Corporate Debtor has committed default 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.
- (7) On failure to remit the debt amount, the Financial Creditor was compelled to issue Demand Notices dated 05.04.2017, 07.04.2017, 07.04.2017, 07.04.2017, 31.03.2017 and 30.06.2017 to the Corporate Debtor by demanding to pay defaulted amount. In response to the said notices, the Corporate Debtor has issued a reply letter dated 13.06.2017 and email dated 13.06.2017, whereby acknowledging and admitting its inability to pay the debt and also requested time for repayment of Rs.59,42,52,495/- (Rupees Fifty Nine Crore Forty Two Lakh Fifty




- Two Thousand Four Hundred and Ninety Five Only), stating that FBIPL, and sought time to make the payment of NCDs outstanding in parts within this period to the Financial Creditor.
- (8) 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 Crore Forty Two Lakh 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) to the Financial Creditor as on 31.03.2017 (further accruing till the date of realization of payment). The Corporate Debtor defaulted in the payment of the debt as per the Transaction Documents, the Financial Creditors have jointly and severally have filed the preset Petition for inability of the Corporate Debtor to repay the debt amounting to Rs.59, 42,52,495/- (Rupees Fifty Nine Crore Forty Two Lakh Fifty Two Thousand Four Hundred and Ninety Five Only), as on 31.03.2017 (along with interest as per terms of the Transaction Documents till realization of payment) to the Financial Creditors herein.
- (9) It is contended that admittedly there is debt and default and the Application/Petition is filed in accordance with law and Resolution professional namely Shri Shivadutt Bannanje bearing IP Regn.No.IBBI/IPA-0C2/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 pending against him with the Board



or ICSI. Therefore, the Tribunal is urged to admit the case by initiating CIRP, imposing moratorium etc.

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

- (1) It is stated that the Application filed by the Petitioner to initiate CIRP under the Code is not maintainable in Law or facts and the same is liable to be rejected.
- (2) M/s. Fortuna Buildcon India Private Limited ('FBIPL') is a Company incorporated under the provisions of Companies Act, 1956 and consisted of two shareholders namely, Late Shri Naresh Kumar and Shri Sailesh Kumar. The Company was incorporated with a view to carry out Real Estate projects and was the brainchild of Late Shri Naresh Kumar, who died on 07.04.2016. Late Shri Naresh Kumar singlehandedly built the Company and its reputation with the able assistance from his siblings Shri Rajesh and Shri Sailesh Kumar, who are the present Directors of the Company.
- (3) One of the projects that the Respondent undertook is known as "Fortune Viva", which was for development of 418 apartments. The said project was under a Joint Development Agreement with the owners of the lands and the Developer namely FBIPL was entitled to 62% of the Apartments built under the JDA, which turned out to be 256 Apartments, totally measuring 358296 sq. ft. for the construction and development of the said project, FBIPL had borrowed a sum of Rs.46,05,00,000/- (Rupees Forty Six Crore and Five Lakh Only) initially from the Petitioner. The Company had also given security for the project loan obtained. Though the project was going on smoothly, due to the untimely



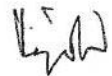
demise of Late Shri Naresh Kumar, the project faced certain obstacles and hurdles due to which the project could not proceed smoothly and payment to the Petitioner also became difficult. However, the siblings of Late Shri Naresh Kumar, namely Shri Rajesh and Shri Sailesh Kumar, started to slowly bring back the project on track. At this juncture, the Petitioner started pressurizing for the payment of dues, amounting to Rs.59,42,52,495/-. FBIPL had by its email letter dated 13.06.2017 sought for nine months' time to make the payment of NCD outstanding in parts. Though the Petitioner received the said letter, they seem to have hurriedly filed this Petition on 07.11.2017 itself, which is premature and arbitrary.

- (4) It is stated that the Petitioner and FBIPL have an Escrow Account in which the amount received under the agreements from the prospective purchasers have been deposited. However, the Petitioner went on appropriating the said amount without permitting FBIPL to utilize the money for completion of the project. This act of the Petitioner also hindered the progress of the project.
- (5) It is stated that as of today, the total cost incurred for the project is Rs.22,52,33,192/- (Rupees Twenty Two Crore Fifty Two Lakh Thirty Three Thousand One Hundred and Ninety Two Only) and the total balance required for the completion of the project is Rs.77,63,49,000/- (Rupees Seventy Seven Crore Sixty Three Lakh Forty Nine Thousand Only).
- (6) The Company has worked out options by which the project could be completed and the Petitioner would be paid back its dues in full:

W/A



- a. *Option 1:* The Company proposes that the amount received from the prospective purchasers will be deposited in the Escrow Account and part of the received amount (to be mutually discussed and negotiated) would be paid to the Petitioner and the balance would be utilized by FBIPL for the construction.
- b. *Option 2:* FBIPL finds a Third Party Investor/Developer who would complete the project and the Petitioner Reliance Capital AIF Trustee Company Private Limited, would be paid its dues as per the negotiated settlement with the Third Party Investor/Developer.
- (7) It is stated that the amount claimed by the Petitioner to the tune of Rs.59,42,52,495/- (Rupees Fifty Nine Crore Forty Two Lakh Fifty Two Thousand Four Hundred and Ninety Five Only) is not tenable or justified and it is not payable, since the initial borrowing was only Rs.46,05,00,000/- (Rupees Forty Six Crore and Five Lakh Only) and all amounts released pursuant thereto has been appropriated by the Petitioner towards interest payment which means that, no money actually came into the account of FBIPL.
- (8) It is stated that the properties given as security which includes Apartments proposed to be built as well as Two Plots constructed in the Apartment complex called "Casa Bona" belonging to Fortuna Urbanscape Private Limited, would be sufficient to clear the debt which is due to the Petitioner. Hence, FBIPL cannot be considered as insolvent and the proceedings initiated for Insolvency Resolution Process for FBIPL would not be justified under these circumstances. Further, the default, if any, cannot be attributed to be a deliberate act. The default, if any, is due to



the circumstances beyond the control of FBIPL and its Directors. FBIPL has every intention to repay the debts of the Petitioner and does not in any way wish to cause a loss to the Petitioner. Therefore, the invocation of the Code would not be justified and the application needs to be rejected.

4. Heard Shri S.S. Naganand, learned Senior Counsel along with Shri M.G.Nanjappa, Ms.Priyanka Das, learned counsel for the Petitioner. None appears for the Respondent. We have carefully perused the pleadings of the party and extant provisions of the Code and the rules made thereunder and law on the subject.
5. Shri S.S. Naganand, learned Senior Counsel for the petitioner, while pointing various contents of various documents filed along with Company petition, has further submitted that the instant petition is filed strictly in accordance with law and Debt and default in question is admittedly not in dispute and a qualified Resolution Professional namely, Shri Shivadutt Bannanje bearing IP Regn.No.IBBI/IPA-002/IP-N00266/2017-2018/10779 is suggested to appoint him as IRP. Therefore, the Learned Senior Counsel urged the Tribunal to admit the case by initiating CIRP in respect of Corporate Debtor with all consequential orders.
6. The case is being listed for admission on various dates viz. 23.11.2017, 01.12.2017, 05.12.2017, 20.12.2017, 16.01.2018, 01.02.2018, 22.02.2018, 15.03.2018, 28.03.2018, 12.04.2018, 25.04.2018, 02.05.2018, 05.06.2018, 11.06.2018, 03.07.2018, 13.07.2018, 01.08.2018, 09.08.2018, 06.09.2018, 28.09.2018, 08.10.2018, 22.10.2018, 19.11.2018, 10.12.2018, 17.12.2018, 16.01.2019, 13.03.2019, 21.03.2019, 03.04.2019, 31.05.2019, 13.06.2019,



25.06.2019, 10.07.2019 24.07.2019 & 06.08.2019. Since the parties used to submit that they are exploring for the possible 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 opportunity for the same. Therefore, there is no other alternative for the Adjudicating Authority except to decide the case for admission as per merits.

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



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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)."

V. S. D.



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 statute mandates the Adjudicating Authority to ascertain and record satisfaction as to the occurrence of default before admitting the application. Mere claim by the financial creditor that the default has occurred is not sufficient. The same is subject to the Adjudicating Authority's summary adjudication, though limited to 'ascertainment' and 'satisfaction'."

The Hon'ble Supreme Court has 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 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the Corporate Debtor. The speed, within which the adjudicating authority is to

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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.17, Page 533-553) 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.124/BB/2017 is hereby admitted with the following consequential directions:

(1) 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 Buildcon 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.

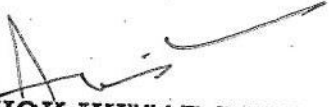
(2) The following moratorium is declared prohibiting all of the following, namely:

- a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

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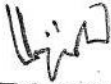


- e. The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- f. The provisions of sub-section (1) shall not apply to such transaction as may be notified by the Central Government in consultation with any financial regulator.
- g. The order of moratorium shall have effect from the date of such order till the completion of the Corporate Insolvency Resolution Process.
- (3) 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.
- (4) 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.
- (5) 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.
- (6) Post the case for report of the IRP on **9th September, 2019**.

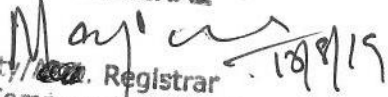

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

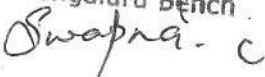
Krishna




(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

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 Deputy Registrar
 National Company Law Tribunal
 Bengaluru Bench


 Page 15 of 15