BEFORETHE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

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

Between:

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

'No. 228, Classic Orchid,
Behind Meenakshi Temple,
Bannerghatta Road,
Bangalore – 560 076 ... Applicant/RP

And

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

Pronouncement of Order: 29th January,2021

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

Parties/Counsels Present (through Video Conference):

For the Applicant/RP : Mr. Raghuram Cadambi

For the Respondent : None

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A.No.28/2020 in C.P. (IB) No.132/BB/2017 is filed by Mr. Shivadutt Bannanje, ('Applicant/RP'), U/s. 60, R/w Sec 45 & 49 of the I&B Code, 2016, by inter-alia seeking to consider and restore the rights under the Joint Development Agreement (JDA)dated 21.11.2011, as if the Agreement of Cancellation dated 12.06.2019 ,had not been entered into; to consider and protect the interest of the home buyers, who are the victims of such transaction etc.

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

   (1) Initially, the main Petition bearing C.P. (IB)No.132/BB/2017 filed by M/s. Reliance Capital AIF Trustee Company Private Limited (Petitioner) against M/s. Fortuna Urbanscape Private Limited (Corporate Debtor), U/s.7 of IBC, 2016 R/w Rule 4 of I&B (AAA) Rules 2016, was admitted by the Adjudicating Authority, vide its Order dated 09.08.2019, by initiating CIRP, appointing IRP, imposing moratorium etc. Subsequently, the IRP has been confirmed as a Resolution Professional by the Tribunal vide its order dated 25.10.2019.

   (2) The Corporate Debtor had previously entered into a Joint Development Agreement (JDA) and General Power of Attorney on 21.11.2011, with Owners of the agricultural lands bearing Sy. No.25/1 and Sy. No.26 totalling to 3 Acres 11 Guntas and Sy No. 42/5 measuring 3 Acres 15 Guntas and Sy. No. 42/6 measuring 2 Acres 26 guntas respectively, totally measuring 9 Acres 12 Guntas of Venkata Village, Yelahanka Hobli, Bangalore Urban District. Out of these lands, 3 Acres 11 Guntas with respect to

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

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

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

	given subject to payment of penalty for Rs.5,00,000/- (Rupees Five Lakhs only) per month for delay by way of damages by builders agreed to pay every month till delivery of owners constructed area.

(4) The Corporate Debtor has paid the landowners a sum of Rs.20,59,66,102/- as deposit towards the JDA. In addition to above, the Corporate Debtor had settled a land dispute with another Company by paying a sum of Rs.6,54,50,000/-. The Corporate Debtor also incurred various other expenses for the development of land amounting to Rs.17,17,22,491/- Hence totalling land expenditure to Rs.44,31,38,593/-.

(5) On 12.06.2019, the Corporate Debtor represented by its then Director i.e. Mr. Sailesh Sreeramulu cancelled the JDA dated 21.11.2011 with the Respondent/Land Owners (Respondent No.2 to 37) and also revoked the General Power of Attorney dated 21.11.2011 vide an Agreement of Cancellation dated June 12, 2019. However, the Landlords paid a sum of Rs.13 Crores as a consideration for the Cancellation of JDA wherein Rs.10 crores was paid on 19.06.2019 balance of Rs.3 Crores was paid on 02.07.2019. From the above sum of Rs.13 Crores paid by the Land Owners towards the cancellation of the JDA, a sum of Rs.10 crores was utilised for payment of TDS dues of the Corporate Debtor and the balance of Rs.3 Crores has been transferred to the personal account of the Promoter/Director of the Company i.e. Mr. Sailesh Sreeramulu on 02.07.2019.

(6) Subsequently, the land owners of the said property (i.e. Respondent No.2 to 37) had entered into another JDA dated 14.06.2019 with another developer vide Document registered_No.

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

(7) In view of the above, the Applicant submits that the house buyers have not received any communication regarding the cancellation of the earlier JDA dated 21.11.2011 neither have they received the refund of their investment along with interest on such cancellation of the JDA. Further, the new developer has neither taken any responsibility towards the liability of Rs.10,05,19,370/- i.e. the investment made by the 50 house buyers and the interest thereon. Therefore, the said transactions lack bonafide and have seriously affected the claims of the home buyers.

(8) It is alleged that the promoter of the Corporate Debtor had entered into an undervalued transaction and such transactions were entered for keeping the assets of the Corporate Debtor beyond the reach of those buyers, who were entitled to make a claim against the Corporate Debtor. Further, the Cancellation of JDA had taken place on 12.06.2019 which is within the period of one year of commencement of CIRP of the Corporate Debtor and hence falls within the purview of Sec 46 of the I&B Code, 2016. The home buyers would be put to great hardship and irreparable loss, if the Application as prayed for is not allowed.

3. Heard Shri Raghuram Cadambi**,** learned Counsel for the RP **through Video Conference**. We have carefully perused the pleadings of the Parties and also extant provisions of the Code and Rules made thereunder.

4. The Applicant has filed IA No. 334 of 2020 (for approval of Resolution plan), IA No 362 of 2020 Under Sections 66, 69, 25(2) of Code. While

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

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

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

ii) *A far-fetched argument was made by the ld. counsels for the Former RP that the former RP is willing to step down and the application can be pursued by some governmental authority such as the SFIO or the MCA. The vesting of such power with authorities that are alien to the CIRP process would be contrary to the IBC, which contemplates supervision by an Adjudicating Authority like the NCLT, duly assisted by an RP, only during the*

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

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

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

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

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

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

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

(1) Learned Resolution professional is directed to forward all material documents, which is connected to the present case including the Forensic Auditor report date d14.12.2018, the Central Government, within a period of three week from the receipt of the copy of the order.

(2) Learned Resolution Professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/ otherwise duly following principles of natural justice.

(3) The Central Government is directed to refer the matter to the SFIO for further investigation into the affairs of the Corporate Debtor, Bank of Maharashtra and other related companies including

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

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

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

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

(7) No order as to costs."

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

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

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

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

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

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

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

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

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

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

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

8. For the aforesaid reasons and circumstances, we are of considered view that the Applicant has not placed substantial evidence to prove that the transaction in question is beyond doubt and mere examination of records did not clinch the issue to pass any directions as sought for. However, the Applicant can be given liberty to take appropriate action in the light of orders of this Adjudicating Authority and Appellate Authority, as detailed supra, after approaching the IBBI.

9. In the result, **I.A No. 28 of 2020** in CP (IB) No. 132/BB/2017 is disposed of with the following directions:

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

(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Brunda