IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT – II

Intervention Petition/1/2022 In C.P.(IB)/527(MB)2022

(Under Section 65 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National company Law Tribunal Rules, 2016.)

Amazon.com NV Investment Holdings LLC

410, Terry Avenue North, Seattle, United States of America-98109.

……Applicant/Intervenor

In the matter of

Bank of India

Having Head Office at: Star House, C-5, 'G' Block, Bandra-Kurla Complex, Bandra (East), Mumbai, Maharashtra- 400001.

……Financial Creditor/Applicant

Vs

Future Retail Limited

Having Registered Office at: Knowledge House, Shyam Nagar, Off. Jogeshwari-Vikhroli Link Road, Jogeshwari(E) Maharashtra -400021.

…….Corporate Debtor/Respondent

Order delivered on: 20.07.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Shri Shyam Babu Gautam

Appearances:

For the Applicant/Intervenor: *Senior Counsel, Mr. Rajiv Nayyar*
a/w Majira Dasgupta
Senior Counsel, Mr. Zal Andhyarujina
a/w. Ms. Akanksha Agrawal & Jahaan Dastur
i/b. P&A Law Offices.

For the Financial Creditor
/Respondent : *Senior Counsel, Mr. Ravi Kadam*
a/w Counsel, Mr. Pulkit Sharma

For the Corporate Debtor : *Counsel, Mr. Shyam Kapadia*

ORDER

Per- Coram

1. It is an Intervention Petition/1/2022 in C.P.(IB)/527(MB)2022 filed by the Amazon.com NV Investment Holdings LLC (for brevity 'Applicant/Intervenor') under section 65 of the Insolvency and Bankruptcy code, 2016 (for brevity 'the Code') read with Rule 11 of National Company Law Tribunal Rules, 2016 (for brevity 'the Rules'), seeking following reliefs:

a.) Direct investigation into fraudulent and malicious initiation of the present proceedings by the Financial Creditor;

b.) Pass an order/direction(s) dismissing the present Petition purportedly filed under Section 7 of the Code by the Financial Creditor;

c.) Pass an order/direction(s) imposing penalty on the Financial creditor and FRL in accordance with Section 65(1) of the Code;

2. On perusal of the Application, it reveals that the applicant is a company based in Unites States of America and listed on the NASDAQ Global Select Market, who invested an amount of Rs 14,310,000,000/- (Indian Rupees Fourteen Billion Three Hundred Ten Million) in Future Coupons Private Limited ("FCPL") and acquired 49% equity share capital in FCPL, for the ultimate benefit of Future Retail Limited ("FRL"). As part of the abovementioned transaction, the following agreements were entered into amongst the Applicant, FRL, FCPL and the Promoters of the Future group:

(a) A shareholder's agreement dated 12.08.2019 ("FRL SHA") was executed amongst FRL, FCPL and the Biyanis. Under the FRL SHA, FCPL was accorded negative, protective, special and material rights with respect to FRL, including, in particular, FRL's retail assets, which included 1,534 small-format and large-format retail stores

as well as the agreements relating to the leases, licenses, sub-leases, sub-licenses, use or occupation of the retail stores ("Retail Assets").

(b) A shareholder's agreement dated 22.08.2019 ("FCPL SHA") was executed amongst the Applicant, FCPL and the Biyanis. Under the FCPL SHA, the rights granted to FCPL under the FRL SHA were to be exercised for the benefit of the Applicant.

(c) A share subscription agreement dated 22.08.2019 ("SSA") was executed amongst the Applicant, FCPL and the Biyanis which recorded the understanding between the parties in relation to the Applicant's investment into FCPL, for the ultimate benefit of FRL.

3. The Applicant has submitted that as per Section 10.2 of the FRL SHA agreement read with Section 14.2 of the FCPL SHA agreement, FRL was prohibited from transferring/disposing off its Retail Assets without the consent of the Applicant. Moreover, as per Section 10.3 of the FRL SHA agreement read with Section 14.3 of the FCPL SHA agreement, FRL was prohibited from transferring/encumbering/disposing of its Retail Assets either directly or indirectly to a 'Restricted Person'. The list of Restricted Persons under the FRL SHA and the FCPL SHA agreements included the MDA Group (*Reliance Retail Ventures Limited* and *Reliance Retail and Fashion Lifestyle Limited*).

After execution of the Agreements, FRL's Board of Directors passed a resolution dated 29.08.2020, approving a Composite Scheme of Arrangement whereby, FRL, along with certain other companies of the Future Group, would amalgamate into another group company, Future Enterprises Limited ("FEL"). FEL would subsequently transfer the 'Logistics & Warehousing Undertaking' and 'Retail & Wholesale Undertaking' as a going concern on a slump sale basis to certain entities of the MDA Group and same was disclosed to the BSE Limited and National Stock Exchange of India Limited ("Indian Stock Exchanges") disclosing the aforesaid proposed transaction (i.e. Scheme). In relation to this, applicant further submitted that the resolution passed by FRL's Board of Directors was in brazen disregard of the contractual agreements between FRL and the applicant.

4. Being aggrieved by this, the Applicant invoked arbitration proceeding against FRL, FCPL and the Biyanis pursuant to Section 25.2 of the FCPL SHA agreement. Whereas, an Emergency Arbitrator acknowledged that FRL has prima facie materially breached the terms of the Agreements to the detriment of the Applicant. Accordingly, paragraph 285© of the EA Order, inter alia, prohibited FRL from taking any steps directly or indirectly to transfer/dispose/alienate/encumber FRL's Retail Assets. The said paragraph has been reproduced herein below:

"(a) the Respondents are injuncted from taking any steps in furtherance or in aid of the Board Resolution made by the Board of Directors of FRL on 29 August 2020 in relation to the Disputed Transaction, including but not limited to filing or pursuing any application before any person, including regulatory bodies or agencies in India, or requesting for approval at any company meeting;

(b) the Respondents are injuncted from taking any steps to complete the Disputed Transaction with entities that are part of the MDA Group;

(c) without prejudice to the rights of any current Promoter Lenders, the Respondents are injuncted from directly or indirectly taking any steps to transfer/dispose/alienate/encumber FRL's Retail Assets or the shares held in FRL by the Promoters in any manner without the prior written consent of the Claimant;

(d) the Respondents are injuncted from issuing securities of FRL or obtaining/ securing any financing, directly or indirectly, from any Restricted Person that will be in any manner contrary to Section 13.3.1 of the FCPL SHA;

(e) the orders in (a) to (d) above are to take effect immediately and will remain in place until further order from the Tribunal, when constituted.

(f) the Claimant is to provide within 7 days from the date hereof a cross undertaking in damages to the Respondents. If the Parties are unable to agree on its terms they are to refer their differences to me qua EA for resolution; and

(g) the costs of this Application be part of the costs of this Arbitration."

The Applicant has also included to his submission that the EA order is an order passed in terms of Section 17(1) and 17(2) of the Arbitration and Conciliation Act, 1996 which is deemed to be an order of the Court and thereby, enforceable in terms of

the Code of Civil Procedure and subsequently, the same was challenged by way of an application seeking vacation of the EA Order which was rejected by the Arbitral Tribunal vide order dated 21.10.2021.

5. The Ld. Senior Counsel present for the Applicant submits that despite being the EA order binding on FRL, FRL proceeded with the Impugned Transaction taking the position that the Emergency Arbitrator was "coram non judice" and as such, FRL was not required to comply with the Binding Injunctions and same stance was taken by FRL in its communications dated 01.11.2020 and 05.11.2020, issued to Securities and Exchange Board of India, Indian Stock Exchanges and the Competition Commission of India whereby, FRL represented that the EA Order does not bind them and requested them to act in furtherance of the Scheme. Moreover, FRL filed a company scheme application under Section 230 of the Companies Act, 2013, before this Tribunal seeking to convene, inter alia, meetings of FRL's shareholders and creditors in pursuance of the Scheme.

The filing of the said scheme/application was directly in teeth of the Binding Injunctions. In view of this, applicant filed a petition seeking enforcement of the EA order and to restrain FRL from taking any steps in furtherance of the Impugned Transaction, before the Hon'ble Delhi High Court. In the EA Enforcement Proceedings, the Hon'ble Delhi High Court passed

an interim order dated 02.02.2021 and *prima facie observed that the EA Order was a valid order under Section 17(1) of the A&C Act and shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 ("CPC") as provided for under Section 17(2) of the A&C Act.* FRL preferred an appeal against the abovementioned order, being FAO(OS) (Comm) No. 21 of 2021 *whereby, the Division Bench of the Delhi High Court on 08.02.2021 stayed the 02.02.2021 Order while allowing the Single Judge in the EA Enforcement Proceedings to pass a detailed order, uninfluenced by any prima facie observations".* Further, on 18.03.2021, the Hon'ble Delhi High Court passed a detailed judgement in the EA Enforcement proceedings, *whereby it rejected all the objections raised by FRL disputing the validity of the EA Order and held that FRL, FCPL and the Biyanis were in deliberate, wilful and continuous violation of the Binding Injunctions and are liable for consequences as per Order XXXIX Rule 2A of the CPC and restrained FRL, and its promoters from taking any further action in violation of the EA Order.*

Being aggrieved by the EA Enforcement Judgment, FRL, FCPL and the Biyanis, filed appeals, bearing ***FAO (OS) (COMM) No. 51 of 2021 and FAO (OS) (COMM) No. 50 of 2021 respectively***, before the Hon'ble Delhi High Court. In the said appeals, the Division Bench of the Delhi High Court stayed the EA Enforcement judgement vide order dated 22.03.2021.

6. The Applicant challenged the Hon'ble Delhi High Court orders dated 08.02.2021 and 22.03.2021 before the Hon'ble Supreme Court of India, by means of ***Special Leave Petition (Civil) Nos. 2586-2587 of 2021, 6113-6114 of 2021 and 6169-6170 of 2021***.

In the aforesaid petitions, the Hon'ble Supreme Court, vide its judgment dated 06.08.2021, set aside the Hon'ble Delhi High Court orders dated 08.02.2021 and 22.03.2021 (DB Stay Orders) and affirmed the order dated 02.02.2021 and the EA Enforcement Judgment passed by the Delhi High Court in the EA Enforcement Proceedings. In this the Hon'ble Supreme Court expounded on the conduct of FRL, FCPL and the Biyanis as follows:

> *"2.6 The Biyani Group thereafter went ahead with the Impugned transaction, describing the award as a nullity and the Emergency Arbitrator as coram non judice in order to press forward for permissions before statutory authorities/regulatory bodies. FRL, consistent with this stand, did not challenge the Emergency Arbitrator's award under Section 37 of the Arbitration Act, but instead chose to file a civil suit before the Delhi High Court being CS. No. 493 of 2020, in which it sought to interdict the arbitration proceedings and asked for interim relief to restrain Amazon from writing to statutory authorities by relying on the Emergency Arbitrator's order, calling it a "tortious interference" with its civil rights ..."*
>
> *"36. A party cannot be heard to say, after it participates in an Emergency Award proceeding, having agreed to institutional rules made in that regard, that thereafter it will not be bound by an Emergency Arbitrator's ruling. As we have seen hereinabove, having*

agreed to paragraph 12 of Schedule 1 to the SIAC Rules, it cannot lie in the mouth of a party to ignore an Emergency Arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately and without delay.

39. Even otherwise, as has been correctly pointed out by Mr. Subramanium no order bears the stamp of invalidity on its forehead and has to be set aside in regular court proceedings as being illegal. This is felicitously stated in several judgments – See Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group, (2011) 3 SCC 363 (at paragraphs 16 to 19), and Anita International v. Tungabadra Sugar Works Mazdoor Sangh, (2016) 9 SCC 44 (at paragraphs 54 and 55). As a matter of ·fact, in Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd. (1997) 3 sec 443, this Court has unequivocally held that even if an order is later set aside as having been passed without jurisdiction. For the period of its subsistence, it is an order that must be obeyed.…

40. However, learned counsel for the Respondents referred to and relied upon the classic passage in Kiran Singh v. Chaman Paswan, (1955) 1 SCR 117 (at page 122) and various other judgments following it to contend that in · cases of inherent lack of jurisdiction, it would be open to a party to ignore an award by an Emergency Arbitrator. They also referred to the judgment in CIT v. Pearl Mechanical Engineering & Foundry Works (P) Ltd., (2004) 4 SCC 597·, where this Court spoke of the jurisdiction of a court or tribunal by stating that such jurisdiction only subsists when a court or tribunal exercises such jurisdiction from the law. It is a power which nobody on whom the law is not conferred can exercise. None of these judgments are applicable in- the fact

situation of the present case. On the contrary, we have pointed out that no party, after agreeing to be governed.

"42. We, therefore, answer the first question by declaring that full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as "awards". Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act."

"76. The second question posed is thus answered declaring that no appeal lies under Section 37 of the Arbitration Act against an order of enforcement of an Emergency Arbitrator's order made under Section 17(2) of the Act. As a result, all interim orders of this Court stand vacated. The Impugned judgments of the Division Bench dated 8 February, 2021 and 22nd March, 2021, are set aside. The appeals are disposed of accordingly."

7. Meanwhile on 28.04.2022, Bank of India filed a Company Petition (IB)-527(MB)/2022 under section 7 of Insolvency and Bankruptcy Code, 2016 before this Tribunal for initiating Corporate Insolvency Resolution Process (CIRP) against FRL for default in repaying an amount of ₹856.10 Crores, as on 31.12.2021. Simultaneously, the Applicant filed this intervention petition and prayed for dismissing the Petition filed under Section 7 of the IBC by the Financial Creditor and for imposing penalty on the Bank of India and FRL in accordance with Section 65(1) of the Code. The Applicant has submitted that the Section 7 Petition arises from a default under the

Framework Agreement dated 26.04.2021 ("Framework Agreement") executed amongst FRL and its lenders. Further submitted that this Framework Agreement is void ab initio and constitutes a nullity. Moreover, the Framework Agreement has been deliberately executed in violation of Binding Injunctions passed in arbitration proceedings ongoing between the Applicant, FRL and its promoters, in order to defeat the Applicant's contractual rights under the Agreements.

The Ld. Senior Counsel for the Applicant argued that despite being aware of the Binding Injunctions and Applicant's pre-existing contractual rights, the Financial Creditor along with 25 other lenders of FRL executed the Framework Agreement. It is shocking to submit that as many as 26 banks, out of whom many were nationalized public sector banks (including the Financial Creditor) which deal with public money, proceeded to enter into the Framework Agreement despite having complete knowledge of the fact that the same would be in derogation of pre-existing contractual rights of the Applicant and in violation of Binding Injunctions. As per clause 5.1 of the Framework Agreement, FRL undertook to monetize its 'Specified Business' which comprised of the small-format stores of FRL. The Applicant submits that FRL's lenders were of complete knowledge of the binding injunctions prior to the execution of the framework agreement. FRL regularly issued disclosures to the Indian Stock Exchanges notifying them about the passing of the EA Order and other material developments in the

Arbitration Proceedings as well as related proceedings before Delhi High Court and was available in the public domain as well as also widely reported in the media. FRL's lenders would have taken into consideration as a matter of prudence. Moreover, two days prior to the execution of the Framework Agreement (i.e., on April 24, 2021), the Applicant addressed a letter notifying FRL's lenders about its contractual rights under which FRL could not transfer its Retail Assets without the Applicant's prior written consent.

The Applicant argued that in the Writ Petition filed by FRL seeking to restrain its lenders from invoking the event of default provisions under the Framework Agreement, FRL has admitted that it had expressly "informed and explained the Respondent Nos 2-27 (i.e., FRL, FCPL and the Biyanis) of the orders of Injunctions passed in arbitration and related proceedings initiated by Amazon.com NV Investments Holdings LLC". The Financial Creditor, in its reply to the Writ Petition, also admitted that the Binding Injunctions restraining disposal/alienation of the Retail Assets existed prior to the execution of the Framework Agreement wherein it stated that "the initiation of disputes and the resultant EA order of the SIAC were much prior in time to execution of the Agreement, and was known to the Petitioner No. 1 (i.e. FRL) at the time of assuming the obligations under the Agreement. Thus, the very execution of the framework agreement with the object of selling the Small Formats Stores is void and a nullity in law.

8. The Applicant further submits that the Framework Agreement discloses several false representations and warranties given by FRL which were perfunctorily accepted by FRL's lenders, including the Financial Creditor herein despite being aware of the Binding Injunctions operating against FRL, FCPL and the Biyanis. These representations and warranties are reproduced herein below:

> *"6.1.2 The Borrower has full corporate power and authority to enter into this Agreement and to take any action and execute any documents required by the terms hereof. This Agreement constitutes its legal, valid, and binding obligation enforceable in accordance with the terms hereof;*
>
> *6.1.3 The Borrower has been duly empowered and authorized to execute the same and to perform all its respective obligations in accordance with the terms contained herein;*
>
> *6.1.8 The Borrower owns/possesses the property, assets and revenues on which it has granted or purports to grant Security Interest under the Financing Documents.*
>
> *6.2 No Contravention*
>
> *The execution and delivery by the Borrower of this Agreement and/or the other Financing Documents to which the Borrower is a party, or its compliance with or performance of the terms and provisions hereof or thereof do not:*
>
> *(a) contravene any provision of any Applicable Law or any order, writ, injunction or decree of any court or Government Entity;*
>
> *(b) conflicts, or is inconsistent with, or results in a breach of, any of the terms, covenants, conditions or provisions of, or constitutes an event of default (howsoever such terms arc defined or described) under, any indenture, mortgage, undertaking, deed of trust,*

credit/loan agreement, any security document or any other agreement, contract or instrument to which the Borrower is a party or by which its property or assets is bound or to which they may be subject or results in the creation or imposition of (or the obligation to create or impose) any security interest upon any of the property or assets of the Borrower.

6.4.1 There are no Legal Proceedings pending or any written notices received which would result into any Legal Proceedings, in India or any other jurisdiction, (a) against the Borrower and (b) regarding the effectiveness or validity or performance of any of the Financing Documents (to which the Borrower is a party), which as per the terms hereof should have been executed or obtained prior to the date on which the representation is being made or repeated."

In relation to this applicant submits that the aforesaid acts committed by FRL and its lenders (including the Financial Creditor herein) are aimed to intentionally injure the Applicant and destroy the substratum of its investment and thereby, constitute a tort of "unlawful means conspiracy". In light of the aforesaid circumstances and under Section 65 of the Code, the present Petition is void and inter alia warrants a dismissal. In this regard, the Applicant places reliance on the judgment of ***Mannalal Khetan and Ors. Vs. Kedarnath Khetan and Ors, (1977) 2 SCC 424 (Para 22)*** wherein the Supreme Court observed that if a statute penalizes an act for the purpose of preventing commission of such an act, then the prohibited act, if done, would be considered to be void. In light of the said judgment, it is clear that the scope of Section 65 of the Code

includes dismissal of a petition which is filed fraudulently or maliciously for purposes other than resolution of insolvency.

9. In addition to this, Applicant further submitted that in parallel with the steps taken pursuant to the Scheme as well as the Framework Agreement, FRL adopted and pursued another ploy to consummate the Impugned Transaction, in collusion with its lenders as well as the MDA Group, by way of a fraudulent stratagem which was solely played out to alienate the substantial majority of FRL's Retail Assets in favour of the MDA Group. FRL, vide its disclosure dated 26.02.2022 made to the Indian Stock Exchanges, falsely claimed that it is 'going through an acute financial crisis' and is 'finding it difficult to finance its working capital needs' and for the first time disclosed that it has received several notices terminating various leases entered into for a significant number of its retail stores due to 'huge outstanding'. It is pertinent to note that FRL, deliberately refrained from disclosing the names of the lessor(s) who had issued the termination notices. Moreover, termination of leases on account of 'huge outstanding' of lease liabilities is starkly inconsistent with the discussions in the meeting held on January 1, 2022 wherein FRL informed its lenders that it has outstanding lease liabilities are merely INR 250 Crores. Subsequently, FRL, vide its disclosure dated 09.03.2022, intimated to the Indian Stock Exchanges that it has received termination notices on March 7, 2022 and March 8, 2022 in

respect of subleased properties from entities belonging to the MDA Group. Vide the said letter, FRL also state that such sub-leased properties aggregated to 835 retail stores and have been contributing approximately 55% to 65% of the retail operations of FRL. The fraudulent handover of the Retail Assets as disclosed vide the February 26 Disclosure and the March 9 Disclosure was in violation of the Binding Injunctions whereby, FRL was injuncted from directly and indirectly alienating its Retail Assets in favour of any party, particularly the MDA Group. It is also pertinent to note that FRL did not give any details whatsoever of the arrangements under which entities of the MDA Group had issued the said termination notices.

FRL, vide another disclosure dated 16.03.2022 to Indian Stock Exchanges, for the first time narrated the entire fraudulent stratagem in order to maliciously handover the Retail Assets to the MDA Group. FRL disclosed that since FRL defaulted in payment towards lease rent for various retail stores, many lessors issued termination notices as well as filed suits for recovery and eviction from their properties. FRL further disclosed that MDA Group reached out to these landlords and has signed fresh lease deeds in respect of such properties and sub-leased the said leases on leave and license basis to FRL. FRL also stated that since the last week of February 2022, the MDA Group has unilaterally terminated such sub-leases and has 'forcefully' taken control of hundreds of retail stores. FRL has stated that FRL's Board has taken a 'strong objection'

against the forcible takeover of Retail Assets by the MDA Group. The relevant portion of the March 16 Disclosure is extracted herein below:

> ***"FRL's Board has taken strong objection to of such action by Reliance Group and has put Reliance Group to notice to reconsider all other actions initiated over the last few days."***

It is pertinent to note that March 16 disclosure failed to give any material details as to when and why such purported lease/sub-lease arrangements were entered into between the MDA Group and FRL were never disclosed and FRL has not taken any action against the MDA Group objecting to such 'forcible' takeover of the retail stores. It is also pertinent to note that paragraph 55(c) of FRL's reply to the Second Enforcement Petition wherein FRL clearly stated that its leases for retail stores were terminated in Dec 2020/ Jan 2021 itself. Assuming that the said statements made by FRL are true and correct, the Applicant submits that at the time of execution of the Framework Agreement and while acting pursuant to its terms, the lenders failed to exercise any due diligence to find out whether the leases entered into by FRL for its retail stores continued to operate or not. Lenders have not taken any legal action against FRL on account of having alienated a major portion of its Retail Assets which constituted 55% to 65% of FRL's revenue. It is evident from a bare perusal of the abovementioned disclosures that the purported handover of the Retail Assets is not simply on account of FRL's failure to pay its

lease rentals or "termination" of lease arrangement, but is an attempted deliberate transfer of the entire retail business of FRL to the MDA Group in the teeth of the Binding Injunctions.

10. The Ld. Senior Counsel for the Applicant further submitted that the alienation of a major portion of the Retail Assets in favour of the MDA Group through the fraudulent stratagem, FRL issued a disclosure dated 23.04.2022 to the Indian Stock Exchanges disclosing the failure of the Scheme on account of the secured creditors (including the Financial Creditor) voting against the Scheme. Additionally, a similar disclosure dated 23.04.2022 was also issued by Reliance Industries Limited to the Indian Stock Exchanges and it was just a strategic decision, as 55–65% of the retail revenue operations of FRL had already been taken over by the MDA Group through the fraudulent stratagem. This demonstrates further collusion between MDA Group, FRL, and its lenders, as immediately after voting against the Scheme, the Financial Creditor filed the Section 7 Petition. The Applicant submits that FRL, through the Financial Creditor herein, seeks to achieve initiation of CIRP against itself in order to take undue advantage of the impact of moratorium period contemplated under Section 14 of the Code in order to defeat the contractual rights of the Applicant with regard to the Retail Assets and to scuttle the Arbitration Proceedings initiated by the Applicant against FRL wherein the EA Order has been passed restraining FRL from

disposing off its Retail Assets. Hence, the Petition, having been filed by the Financial Creditor alleging 'financial debt' arising from the Framework Agreement is an act of collusion aimed at fraudulently and maliciously initiate CIRP against FRL in order to defeat the Applicant's rights.

In view of the aforesaid position, the Applicant submits that this Hon'ble Tribunal ought to delve into such allegations of fraud and collusion made by the Applicant against FRL, the Biyanis and the MDA Group in order to avoid a sheer misuse of the provisions of the Code. Further submitted that the present proceedings initiated under Section 7 of the Code are liable to be terminated and consequently, an appropriate order of penalty of Rupees One Crore as envisaged under Section 65(1) of the Code should be imposed on Financial Creditor and FRL, collectively.

11. In response to this intervention petition, the financial creditor has filed a brief reply and a written submission stating that the allegations made by the Applicant are wholly baseless and speculative in nature. The Intervention Application has been filed by the Applicant in a self-serving manner, motivated solely by its ongoing arbitration proceedings against, inter alia, the Corporate Debtor, with the sole aim to delay the admission of the Section 7 Petition. In fact, the Intervention Application says that the Section 7 Petition has been filed to *"scuttle the ongoing arbitration proceedings between FRL and the Applicant".*

Hence, the Intervention Application is nothing but an abuse of process, motivated solely by self-interest of Amazon. Under the circumstances, costs should be imposed on Amazon for trying to invoke Section 65 to defeat the object of the Code. In every case, upon admission of the Corporate Debtor into insolvency, the consequence of moratorium under Section 14 of the Code follows. In every case, there would be someone who may be affected by the imposition of the moratorium, but the same cannot be the basis of filing an application under Section 65 to oppose a Section 7 petition. Further relied on ***Simplex Infrastructure Ltd. v. Mahendra Investment Advisors Pvt. Ltd. and Anr. (2020 SCC OnLine NCLT 12203)***, where an intervention application under Section 65 of the Code was filed in a petition filed under Section 7 of the Code by a third-party intervenor who was the beneficiary of an arbitral award against the Corporate Debtor, it was observed by the Hyderabad Bench of the Hon'ble Adjudicating Authority that *"the mere fact that if moratorium order is passed, proceedings already initiated against the Corporate Debtor will be kept pending, by itself is not a ground to disqualify the Financial Creditor from filing application under Section 7 of the I&B Code against the Corporate Debtor. The applicant being a third party, has no locus standi to question initiation of proceedings under Section 7 of the I&B Code against the Corporate Debtor."*

The Ld. Senior Counsel for the Financial Creditor argued that the Applicant has miserably failed to establish the

essential requirements of Section 65 of the Code in its Application. *Section 65 lays down a rigorous and exacting standard for holding that initiation of a Section 7 petition is fraudulent or filed with malicious intent for a purpose other than resolution of insolvency.* Therefore, fraud or malice must lie in "initiation' of a Petition u/s. 7 and such initiation should be for a purpose other than resolution of insolvency and Amazon has failed to satisfy the requirements of Section 65. Further, while the initiation in the present case is not for any fraudulent purpose, Section 65 cannot be read in a disjunctive manner as argued by Amazon in its opening oral submissions. The Hon'ble Supreme Court held in ***Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors. (2020) 13 SCC 308*** – that *"Section 65 (1) deals with a situation where CIRP is initiated fraudulently "for any purpose other than for the resolution of insolvency or liquidation".* In fact, the Ld. Senior Counsel for Amazon, subsequently accepted that the test under Section 65 of the Code requires fraudulent initiation for the purpose other than resolution of insolvency. It is submitted that the Section 7 petition has been filed in terms of the Code, the provisions of which bind all the stakeholders under the applicable law and therefore, the question of defeating of any party's rights does not even arise when the process will be conducted in accordance with the Code under the aegis of this Hon'ble Tribunal. The Financial Creditor further insisted to note that the basis of the Applicant's intervention is its investment in FCPL which in turn

holds not more than 9.82% of the shareholding of the Corporate Debtor. Therefore, the Applicant is not even a stakeholder of the Corporate Debtor and is thus, a complete third-party to the proceedings.

12. Further in relation to the contentions made by the Applicant, the Financial Creditor has filed a detailed response in form of written submission, wherein it has submitted that the onus to prove the existence of fraud is on the party alleging fraud, which Amazon has miserably failed to carry out. The debt due to the Financial Creditor predates the dispute between Amazon and the Corporate Debtor and the consequential passing of the EA Order. It is evident from the material placed on record that the loan arrangements between the Financial Creditor and the Corporate Debtor have existed since 2006 (and similarly for the other Lenders for several years prior to the Framework Agreement and the EA Order). Further, Amazon has also acknowledged the distressed financial situation of FRL in the present Application. Therefore, both the debt and the default are bona-fide and the FA was signed, at the request of the Corporate Debtor, with the bona fide intention, in order to provide the Corporate Debtor with an opportunity to repay its debt obligations. In this regard, it is submitted that during COVID-19, RBI issued a Circular dated 06.08.2020 titled "Resolution Framework for Covid-19 Related Stress", permitting the borrowers and lenders to restructure debt / borrowing on

account of COVID-19 related stress. Therefore, the FA was merely another lifeline given to the Corporate Debtor to enable it to repay its debts. Furthermore, the Financial Creditor has security over the assets of the CD, which predates not just execution of the FA and also the EA Order.

13. In addition to this, the financial creditor further submitted that the FA does not violate the EA Order or the Orders of the Hon'ble High Court of Delhi. As argued by Amazon to show that the Lenders had knowledge of the EA Order, it is submitted that the issue of whether or not the Lenders had knowledge of the EA Order is irrelevant since ex-facie the FA is not in breach of the EA Order. The relevant extract of para 285 of the EA Order is reproduced hereinunder:

> *"(a) the Respondents are injuncted from taking any steps in furtherance or in aid of the Board Resolution made by the Board of Directors of FRL on 29 August 2020 in relation to the Disputed Transaction, including but not limited to filing or pursuing any application before any person, including regulatory bodies or agencies in India, or requesting for approval at any company meeting;*
> *(b) the Respondents are injuncted from taking any steps to complete the Disputed Transaction with entities that are part of the MDA Group;*
> *(c) without prejudice to the rights of any current Promoter Lenders, the Respondents are injuncted from directly or indirectly taking any steps to transfer/ dispose/ alienate/ encumber any FRl's Retail Assets or the shares held in FRL by the Promoters in any manner without the prior written consent of the Claimant:"*

The entire edifice of Amazon's challenge to the Section 7 proceedings is solely posited on a plea that the FA breaches Para 285(c) of the EA Order and the status quo orders of the Hon'ble High Court of Delhi on account of Clause 5.1.1. The same is vehemently denied by the Financial Creditor and submitted that the FA has been signed within the four corners of the RBI Circular by all the 26 Lenders. It did not warrant or result in any breach of any judicial or quasi-judicial orders. Further, the status quo direction of the Hon'ble High Court of Delhi had in any event been stayed and hence, not operative. *Further argued that* the FA under Clause 5.1.1 provides for monetisation of specified assets i.e., the small format stores as one of the conditions for extending the timelines for repayment of loans. Clause 5.1.1 does not ipso facto amount to transfer of such small format stores. As per the pleadings of Amazon, a transfer of assets would have amounted to violation of the injunction order. Therefore, mere signing of the FA with Clause 5.1.1 in it did not violate any injunction. Further, Clause 5.1.1 must be read in conjunction with Clause 5.1.2 of the FA which in fact required the Corporate Debtor to obtain all necessary clearances, consents and approvals either under any contract binding on it or under any applicable law which may be necessary for before selling the assets. Clause 5.1.2 of the FA is reproduced here for ease of reference:

> *5.1.2 The Borrower shall, unless already obtained, obtain at the time of monetization all approvals, clearances, consents, certificates, etc.*

required under the Financing Documents in respect of the existing facilities, any contract binding on it and/or under the Applicable Law to enable it the monetization of the Specified Business and utilise the realisations from monetization of the Specified Business for repayment/prepayment of the Facilities as specified herein."

The Ld. Senior Counsel for the Financial Creditor further asked to note that the dispositive part of the EA Order, in Para 285(c) merely states that the Corporate Debtor will not sell any asset without obtaining the consent of Amazon. Therefore, from a reading of Clause 5.1.2 of the FA it is evident that the FA is entirely consistent with the EA Order, insofar as under the FA, the Corporate Debtor was required to obtain all necessary consents, clearances and approvals before proceeding with the sale of the specified assets. Clearly therefore, the FA does not contemplate a breach of any contract or applicable law, and in fact expressly requires all consents, approvals and clearances to be obtained as may be required to monetize such assets and even otherwise, it is a matter of record that no sale of any stores has been conducted by FRL pursuant to the FA till date. Therefore, the question of FA being in violation of any injunctions does not arise. Further in relation to Amazon's argument that no consent has been taken from it, the Financial Creditor submitted that the arguments itself is without any merit, since no sale of any assets has happened pursuant to Clause 5.1.1 of the FA, therefore the stage of FRL seeking consent of Amazon under Clause 5.1.2 was not reached.

14. In relation to FA, the Financial Creditor further argued that FA does not violate the EA Order or the orders of the Hon'ble High Court of Delhi, it is submitted that the two orders of the Single Judge of the Hon'ble High Court of Delhi - (i) dated02.02.2021 (directing FRL to maintain status quo with respect to its assets); and (ii) dated 18.03.2021 (holding that EA Order is enforceable in India and directing FRL to not act in contravention thereof) relied upon by Amazon were not operative on 26.04.2021 i.e. the date the FA was entered into on account of stay granted by the Hon'ble Division Bench.

In fact, Amazon did not plead or even bring on record and deliberately suppressed the orders dated 08.02.2021 and 22.03.2021 passed by the Division Bench of the Hon'ble High Court of Delhi staying the operation of the orders dated 02.02.2021 and 18.03.2021, respectively, passed by the Hon'ble Single Judge of the High Court of Delhi, both of which orders have been heavily relied upon by Amazon in its Intervention Application as well as oral submissions to allege that the FA was executed in violation of the EA Order which was found enforceable in terms of the orders passed by the Hon'ble High Court of Delhi. The Hon'ble Supreme Court vide its order dated 19.04.2021 passed in **S*.L.P. (C) No(s). 6113- 6114/2021*** stayed all "further proceedings" pending before the Single Judge and the Division Bench of the Hon'ble High Court, but admittedly did not stay the two orders of the Division Bench of the Hon'ble High Court which therefore continued to operate. It is only on

06.08.2021 that the Hon'ble Supreme Court allowed Amazon's appeal against the aforesaid two orders of the Division Bench of the Hon'ble Delhi High Court. Thus, the FA was signed when the orders of the Division Bench of the Hon'ble Delhi High Court were subsisting and in force. Further argued that it is settled law that a litigant who suppresses material facts from the court is not entitled to any relief, interim or final. On this ground alone i.e., for suppression of relevant and material facts, the Intervention Application is liable to be dismissed at the threshold.

15. In relation to the scheme of arrangement, the Financial Creditor submitted that it was proposed by Future Group and MDA Group and the Lenders were not a party to the same. The scheme of arrangement proceeded in accordance with directions of the Hon'ble Adjudicating Authority. The passing of the board resolution dated 29.08.2020 in relation to such scheme of arrangement to MDA group being alleged to be in violation of the EA Order has no connection with the Financial Creditor herein and the allegation of collusion of the Lenders with Corporate Debtor and MDA group in this regard is entirely baseless, misleading and a mere attempt to stray from the subject matter of the present proceedings i.e. existence of debt against the Corporate Debtor. Moreover, at the time of voting by the secured creditors, the Financial Creditor and the other Lenders had opposed the scheme of arrangement as admitted

in the present Intervention Application itself. The scheme of arrangement thus stands abandoned due to the adverse vote of the Lenders. Amazon has taken contrary stands in its pleadings. On one hand, Amazon has attempted to show collusion of the Lenders with the Corporate Debtor and MDA Group on account of the scheme of arrangement and on the other, it has categorically admitted in its pleadings that the scheme of arrangement stood rejected by the secured creditors. Therefore, Amazon has failed to establish any involvement of the Lenders with the scheme of arrangement between FRL Group and MDA Group, the entire assertion of Amazon that the Lenders somehow had something to do with the Scheme of Arrangement is rendered completely baseless in view of its admission that the Lenders voted against the Scheme of Arrangement. The said contrary stand clearly shows the falsities which are replete in Amazon's Intervention Application.

16. Amazon's contention that FRL was advised to obtain NOC from the MDA Group but not from Amazon in the meeting held on 01.01.2022 and the same amounts to shows that there is "active collusion" between the Lenders and the Corporate Debtor to sell the stores to the MDA Group. In this regard, Financial Creditor has submitted that the Lenders had suggested to FRL in such meeting that an NOC from the MDA may be obtained by FRL since the very same assets were also a part of the scheme of arrangement between FRL Group and

MDA Group. As part of the scheme of arrangement under Section 230 of the Companies Act, 2013 between the Future Group and MDA Group, which was then pending consideration of the secured creditors i.e. including the Lenders, for their approval, since the assets of the Corporate Debtor were to be demerged as part of a scheme of arrangement (which scheme was pending adjudication before the Hon'ble National Company Law Tribunal) and eventually sold to the MDA Group. Since the sale of small format stores by the Corporate Debtor, if it had been proceeded with could have been to any eligible third party, such assets needed to be upfront carved out of the Corporate Debtor's scheme of arrangement with the MDA Group as MDA Group was ascribing value for all assets, including such assets, in the scheme of arrangement. Pertinently, no sale transaction was entered into pursuant by FRL and no occasion arose to obtain Amazon's consent.

17. Further, on 14.03.2022, the Financial Creditor, acting in capacity as the Facility Agent, issued a public notice (in leading English, Hindi and Marathi dailies) stating that the facilities availed by the Corporate Debtor from the Lenders are secured inter alia by charge over the moveable fixed assets and current assets (including receivables, stock, spares, inventories, cashflows) of the Corporate Debtor, and any person dealing with the same shall transact with such assets subject to the charge of the Lenders which can be pursued and enforced against such

person dealing with these assets. It is pertinent to note that in the L.A. No. 1405 of 2022 filed by the Financial Creditor herein seeking interim reliefs against alienation of assets by the Corporate Debtor and also cessation of office by key managerial persons, the Financial Creditor has categorically pleaded that the Corporate Debtor had entered into a tripartite arrangement with the landlords and MDA group without any intimation to the Lenders for realignment of lease/license agreements. It came to the knowledge of the Financial Creditor from media reports that the MDA group had terminated the said leases/ licences and had taken over the stores. Further, the Financial Creditor has moved this Hon'ble Adjudicating Authority to appoint an IRP/ RP at the earliest who will upon such appointment takeover the management of the Corporate Debtor. The appointment of the IP who would take charge of the assets of the Corporate Debtor would in fact be the most effective way of protecting Corporate Debtor's assets. The entire basis of the Intervention Application is speculative in nature and remains unsubstantiated with evidence, documentary or otherwise. The Intervention Application is riddled with speculations insofar the Applicant has contended that, "it appears that the lender Banks are not only silent spectators but willing collaborators in the fraud." The speculative nature of the Intervention Application is further evident from the submission that "various media reports suggest that the Retail Assets of the Corporate Debtor would be taken over by entities belonging to the MDA Group during the

insolvency resolution process. If this is indeed the case, it would tantamount to using the present proceedings as a tool to circumvent the binding injunctions operating against the Corporate Debtor." Similarly, the Applicant further suggests in para 64 of the present Application that the CIRP would result in handing over the retail assets to the MDA Group through the CIRP at a throwaway price. The above allegations are not only speculative but also contemptuous insofar as aspersions have been cast upon the process under Indian law which upon admission of the Section 7 Petition will be carried out under the aegis of this Hon'ble Adjudicating Authority. It is submitted that the Hon'ble Adjudicating Authority must take a serious view of such statements which are not just speculative and baseless but also contemptuous and dismiss the present Application and impose costs on Amazon for filing a frivolous Intervention Application on the basis of such submissions.

18. On the final day of hearing, the Ld. Senior Counsel for the Financial Creditor argued that the banks are exercising their statutory rights in accordance with law. They are not party to the arbitration proceedings. A plain reading of Para 285 of the EA Order shows that there is no injunction against the Lenders from exercising their contractual rights or statutory rights. Without prejudice, on account of Section 238 of the Code, existence of EA Order cannot interdict the statutory process of the Code. Further argued that for the purpose of the inquiry

under Section 7 of the Code, the Hon'ble Adjudicating Authority is to be satisfied that a "default" has occurred in the payment of a "debt', which has become due and payable. It is submitted that in the instant case, the existence of debt as well as the occurrence of default has been duly established. Even Amazon has acknowledged the distressed financial situation of FRL in the Application.

19. After hearing both the parties and on perusal of material on record, we are of the view that the FA has been signed within the ambit of the RBI Circular by all the 26 Lenders and the question of FA being in violation of any injunctions does not arise as no sale of any assets has happened and seeking consent of Amazon under Clause 5.1.2 was not breached. Moreover, FA does not violate the EA Order or the orders of the Hon'ble High Court of Delhi, as the two orders of the Single Judge of the Hon'ble High Court of Delhi - (i) dated 02.02.2021 (directing FRL to maintain status quo with respect to its assets); and (ii) dated 18.03.2021 (holding that EA Order is enforceable in India and directing FRL to not act in contravention thereof) were not operative as on 26.04.2021 i.e. the date the FA was entered.

The passing of the board resolution dated 29.08.2020 in relation to scheme of arrangement to MDA group being alleged to be in violation of the EA Order has no connection with the Financial Creditor and the allegation of collusion of the Lenders

with Corporate Debtor and MDA group seems to be baseless, since, at the time of voting by the secured creditors, the Financial Creditor and the other Lenders had opposed the scheme of arrangement, same has been admitted by the intervenor himself. The onus to prove the existence of fraud is on the party alleging the same and in the present case, the applicant had miserably failed to establish the same. As per Para 285 of the EA Order, there is no injunction against the Lenders from exercising their contractual rights or statutory rights. Further, the banks are exercising their statutory rights in accordance with law as they are not party to the arbitration proceedings. Moreover, the Applicant is not even a stakeholder in respect of the Corporate Debtor and, a complete third-party to the proceedings before this Tribunal and has no *locus standi* to question initiation of proceedings under Section 7 of the Insolvency and Bankruptcy Code against the Corporate Debtor. For the aforestated reasons, we hereby **dismiss** the present intervention petition with no cost.

SD/- SD/-

SHYAM BABU GAUTAM **JUSTICE P.N. DESHMUKH**

(MEMBER TECHNICAL) **(MEMBER JUDICIAL)**

Arpan, LRA