BEFORE THE NATIONAL COMPANY LAW TRIBUNAL

AT BENGALURU

Application No. 5/ 2021

in

IBC Application No. 100/ 2021

Fugistar Diamond Singapore General Partnership
Rep by its Interim Receiver
Singapore ***… Applicant***

vs.

Fugistar Diamond India Private Limited
Rep by its Interim Resolution Professional
Bengaluru ***… Respondent***

1. Fugistar Diamond India Private Limited (Fugistar/ the Company/ the Corporate Debtor) is a company incorporated in Bengaluru, India under the Companies Act, 1956 in April 2005. The Founder of the company is Mr. Vallabh Das who is a diamantaire and an internationally acclaimed gemologist who is well known for procuring rough diamond and converting them into precious diamond ornaments. He was born in Antwerp, Belgium to Indian origin parents and had his entire education in Belgium, other parts of Europe, the US and Singapore. He is a Belgian by birth. He came to India in January 2005 with an intention to convert India, especially, Bengaluru into 'Antwerp of the East' i.e. as a diamond hub for all kinds of diamond ornaments. With this intention, he incorporated the company in a big way as a private limited company having 99% shareholding in it. He was the Managing Director of the company. The remaining 1% share was held by his two Indian friends and both of them were the other two directors of the company which totally had three directors.

2. Right from inception, the company made huge profits solely due to the expertise of Vallabh and his vision for Bengaluru was slowly turning out to become true. Year after year, the company

was showing sturdy growth and exponential profits. Looking at this, in the year 2010, the founder thought of improving his establishments already present in other parts of India in a big way. Therefore, like any other businessmen, he approached the Great Bank of India along with his financials for the past couple of years to seek for a huge loan. The bank was very happy and felt privileged to receive Vallabh and for his decision to have chosen their bank among all others for his business needs. Since the company was making super profits and turnover in hundreds of crores of rupees over the years, Vallabh requested for huge amounts as loan to be disbursed in four tranches. He wanted around INR 1,000 crores as loan which could be disbursed in four instalments during the year 2010 & 2011 of INR 250 crores each. Vallabh said he will be willing and is capable of paying few basis points more as interest rates if the bank would help him. Looking at the lucrative offer, the bank readily accepted to grant the loan. The bank also created charge over his properties to disburse the entire loan amounts where the value of the underlying assets was around INR 500 crores.

3. The company gave spectacular performance in the forthcoming years. So, the founder thought that he can establish his presence in Singapore also so that he can expand his business empire in the other parts of the world. He therefore, set up Fugistar Diamond Singapore General Partnership (the Singapore entity or the GP) in January 2013 as an establishment in Singapore to start his diamond sales business. Regarding the ownership pattern in the GP was concerned, the Indian company owned 99%, Vallabh and his Singapore resident friend owned 1%. The capital contribution to the GP was also as per the ownership of the shareholders. The GP was also making huge profits in the first year of setting up itself. The founder once again thought that with the help of further financial assistance, he should be able to make the Singapore entity also a much bigger success. So, in January 2014, he approached the Singapore Central Bank (the Singapore Bank or SCB) and sought for a loan, in Indian terms, of INR 500 crores. The Singapore bank was sceptic to grant the loan as to the repaying capacity of the GP and hence it said in addition to the assets which are under the ownership of the GP, the bank will require a guarantor to provide the loan. The GP, with the funds infused by the Indian company and with the contribution of the founder, had assets worth INR 250 crores in Singapore by the end of 2013. The Indian company, as it was entirely controlled by the founder himself, stood as a guarantor to the Singapore GP to disburse the loan amount of INR 500. So, the underlying asset took care of 50% of the loan amount and the remaining 50% of loan amount was protected by the guarantee of the Indian company. The Indian company agreed that it will stand, jointly and severally, liable to clear the principal amount and the interests, if any, in case of default by the Singapore GP.

4. Both the Indian company and the Singapore GP performed well until end of 2016. However, the meteoric rise in the image and the profits of both the entities blinded the decisions of the founder and he started to take erratic decisions thereafter as he started to spend the loan amounts and profits of the company for other than the core business activities. He also started to siphon off hundreds of crores of rupees from the company and indirectly from the Singapore GP in the name loans to himself and stashed them in various tax havens like Antigua, Dominica, etc. Imprudent business decisions and siphoning off funds from the company and GP started to decline the prospects of the company. The company did not pay any monthly interests for the whole of 2017. This worried the Indian and the Singapore entities as the entire loan amounts were riding on the back of the founder and on his expertise and good governance. The founder convinced the banks that he will start to repay the loans and accumulated interests in the coming months and stopped them from taking any measures to recover the loans in the manner known to him. But both the entities did not fare well even after his assurances and the funds of the entities were rapidly depleting.

5. In January 2019, knowing that the Indian enforcement agencies may start to initiate various proceedings against him for the continuous default and siphoning off of funds, Vallabh fled to Singapore and applied for Permanent Residency Certificate (PRC) in Singapore. He was awarded PRC in Singapore in January 2020 i.e. one year later. He started to manage the affairs of the Indian company from Singapore since he was the head and brain of the company. He also took complete charge of the Singapore GP since he was physically present in Singapore. By the end of 2020, it was realized by both the banks in India and Singapore that the promises of repayment of the principal and interests were hoax and he only intended to defraud both the banks.

6. Since no repayment of loans and interests happened for almost 4 years in spite of waiting for the founder to repay them, the Indian bank started to declare the loans of the Indian company to the tune of INR 1,000 crores as Non-Performing Assets (NPA) and attached all its movable and immovable assets in India. However, the principal amount, interest, penal interest and other charges stood at INR 1,500 crores by the end 2020. In April 2021, the Great Bank of India filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) before the Hon'ble National Company Law Tribunal at Bengaluru (NCLT/ Adjudicating Authority). The application was filed as per the IBC and the corresponding Rules and Regulations. The application was also given a number as IBC Application No. 100 of 2021. However, the application could not be taken up for admission as there was vacancy of NCLT Members since March 2021. Since there were changes in the laws regarding appointment of tribunal members

in India and since there was a litigation pending in this regard, no appointment could be made till September 2021 and the application of the bank could not be taken up for hearing until then. In October first week of 2021, the application of the bank was taken up and 14 days' time was granted as per section 7 to determine the default of the company and it was categorically determined by the NCLT that the company committed default and admitted the application of the bank on 20.10.2021. The Interim Resolution Professional (IRP) was appointed which was a renowned law firm in Bengaluru. The moratorium period also commenced from 21.10.2021 and all the restrictions as per section 14 of the IBC was applicable to the company. The total dues of the Indian company was around INR 1,500 crores which includes the principal amount, interest, penal interest and other charges. Whereas, the assets located in India by all means was only to the extent of INR 500 crores. There was shortage of assets worth INR 1,000 crores to cover the total default amounts.

7. While this being the situation in India, the Singapore bank also initiated insolvency/ bankruptcy proceeding before the Hon'ble High Court of Singapore (being the insolvency court) against the Singapore GP and also impleaded the Indian company in the application being the unlimited liability guarantor of the Singapore GP. The application under the Singapore Insolvency laws i.e. the Insolvency, Restructuring and Dissolution Act, 2018 (IRDA) was filed by the Singapore bank in September 2021 and the application was readily admitted on 30.09.2021 by the High Court of Singapore. Similarly, an Interim Receiver (similar to Interim Resolution Professional in India) as per IRDA was appointed by the High Court of Singapore and moratorium-like cooling off period was initiated against the Singapore GP to see if the debts could be recovered from the GP, guarantor, etc. The total due along with principal amount, interest, penal interest and other charges worked out to, in Indian terms, INR 1,000 crores. Whereas, the assets located in Singapore by all means was only to the extent of INR 250 crores. There was shortage of assets worth INR 750 crores to cover the total default dues.

8. The Indian bank was of the view that the assets of the Singapore GP also belonged to the Indian company since 99% of the Singapore GP was owned and contributed by the Indian company and since it was an GP, it was a 'look-through' entity which did not enjoy exclusive ownership of the assets like a company. Therefore, it wanted to include the assets located in Singapore also which was worth around INR 250 crores so that as much of the dues of the Indian bank can be recouped. On the other hand, the Singapore bank was of the view that the Indian company was the guarantor of the loans obtained by the GP and hence the assets of the Indian company to the tune of INR 500 crores should be controlled by the Singapore bank so that all its dues will be recouped. There were cross claims over the assets located in Singapore and India by the Indian

and the Singapore banks for the loans obtained in India and Singapore by the Indian and the Singapore entities.

9. The Singapore GP filed an application before the NCLT Bengaluru during the first week of November in the IBC application filed by the Indian bank as Application No. 5 in IBC Application No. 100/ 2021. The application was filed under Clause 12 of the "Draft Provisions" of the Model Law which is based on the "Report of Insolvency Law Committee on Cross Border Insolvency" dated October 2018 (hereinafter called the 'IBC Cross Border Draft Model Law, 2018' or simply the 'Draft Model Law' which shall be deemed to have come into force in India for the purpose of this competition which is based on the UNCITRAL Cross Border Insolvency Laws). As per this application under clause 12 of the Draft Model Law, the applicant i.e. Singapore Interim Receiver prayed the Hon'ble NCLT as follows:

"Hence it is prayed that this Hon'ble Adjudicating Authority be pleased to declare as follows:

i. *That the proceedings initiated in Singapore against the Singapore GP and the Indian company be treated as the 'Foreign Main Proceeding' since it was admitted by the High Court of Singapore before the application in India could be admitted*
ii. *That to declare that the Indian company is also a debtor in Singapore as per Singapore IRDA to have stood as a guarantor with unlimited liability for the loans borrowed by the Singapore GP*
iii. *That the Centre of Main Interest (COMI) of the Indian company is at Singapore since the Founder of the Company Mr. Vallabh who is the head and brain of the Company is permanently residing in Singapore since January 2019*
iv. *That the proceedings initiated by the Indian bank against the Corporate Debtor i.e. the Indian company be stayed and direct it not to proceed further in managing the assets located in India*
v. *That the entire control and management of the assets of the Indian company be granted to the Interim Receiver as appointed by the High Court of Singapore*
vi. *That the Indian bank not be permitted to have any claims over the assets located in Singapore owned by the Singapore GP under the guise of indirect ownership*
vii. *That the entire insolvency proceedings against the Indian company be left to the High Court of Singapore in Good Faith as per Clause 6 of the Draft Model Law*
viii. *That if any assets are left after settling the dues to the Singapore bank then it may be dealt with in accordance with the Indian IBC provisions for the Indian bank's claims.*

10. The IRP of the Indian company which was appointed by the NCLT vehemently opposed the application on each of the prayers sought for by the Interim Receiver from Singapore. The brief grounds for opposing each of the prayers of the Interim Receiver were as follows:

i. *The application filed by the Singapore Interim Receiver is not maintainable as the claim of the Indian bank is superior to the claim that of the Singapore bank. The proceeding in Singapore cannot even be treated as Foreign Non-Main Proceeding and, therefore, far less as Foreign Main Proceeding*

ii. *The application for insolvency was first filed by the Indian bank in India and the delay on account of appointment of the Members cannot be saddled upon the Indian bank as its application was liable to be automatically admitted and hence it ought to be deemed to have been admitted within 14 days of filing its application in April 2021 itself which makes the Indian proceeding as the First and Main Proceeding*

iii. *The assets of the Indian company located in India should be solely and exclusively be used only towards the dues of the Indian bank and the assets of the Singapore GP are also liable to be treated as the assets of the Indian company as the same was held only through a general partnership firm which does not have independent legal status and is a flow through entity for all purposes. The dues of the Indian bank are bigger in proportion compared to the dues of the Singapore bank based on the overall dues of the Indian company and the Singapore GP*

iv. *The Centre of Main Interest (COMI) of the Indian company is obviously in India only since the company was incorporated as per Indian Company laws and was registered in Bengaluru*

v. *The proceedings initiated by the Indian bank be permitted to continue as per the order of the Adjudicating Authority dated 20.10.2021 and that the entire control and management of the assets of the Indian company located in India and Singapore be granted to the Indian IRP*

vi. *The Singapore bank cannot be permitted to have any claims over the assets located in India and Singapore*

vii. *The entire insolvency proceedings against the Indian company be left to the NCLT, Bengaluru as per Public Policy Exception in Clause 4 of the Draft Model Law*

viii. *That if any assets are left after settling the dues to the Indian bank then it may be dealt with in accordance with the Singapore IRDA provisions for the Singapore bank's claims*

11. The application of the Interim Receiver from Singapore has been posted for final disposal before the Adjudicating Authority, Bengaluru. Both the parties are represented by battalion of expert advocates since the issue is first of its kind in India. The parties were granted liberty by the Adjudicating Authority to group/ regroup the above issues and also to add issues which they feel are relevant for disposal of the above application including laying hands on foreign case laws.