

IN THE NATIONAL COMPANY LAW TRIBUNAL  
COURT NO. V, MUMBAI BENCH

CA NO. 348 OF 2021  
IN  
CA(CAA)-8 (MB)/2021

In the matter of:

Aion Investment Pvt. III Ltd  
C/o GFin Corporate Services Ltd., Level 6,  
GFin Tower, 42 Hotel Street, Cyber City,  
Ebene 72201, Mauritius

... Applicant No. 1

IDBI Trusteeship Services Ltd.  
Asian Building, Ground Floor, 17, R.  
Kamani Marg, Ballard Estate, Mumbai  
400001

... Applicant No. 2

*In the matter between:*

Future Consumer Limited

..... Transferor Company No. 1

Future Lifestyle Fashions Limited

..... Transferor Company No. 2

Future Market Networks Limited

..... Transferor Company No. 3

Future Retail Limited

..... Transferor Company No. 4

Future Supply Chain Solutions Limited

.....Transferor Company No. 5

Future Bazaar India Limited

..... Transferor Company No. 6

Acute Retail Infra Private Limited

.....Transferor Company No. 7

Basuti Sales and Trading Private Limited

.....Transferor Company No. 8

Brattle Foods Private Limited

.....Transferor Company No. 9

Chirag Operating Lease Co. Private Limited

.....Transferor Company No.10

Hare Krishna Operating Lease Private  
Limited

.....Transferor Company No.11

Nice Texcot Trading & Agency Private  
Limited

..... Transferor Company No.12

Nishta Mall Management Company Private  
Limited

.....Transferor Company No.13

Ojas Tradelease and Mall Management  
Private Limited

..... Transferor Company No. 14

Precision Realty Developers Private Limited

.....Transferor Company No. 15

Rivaaz Trade Ventures Private Limited

..... Transferor Company No. 16

Syntex Trading & Agency Private Limited

.....Transferor Company No. 17

Taquito Lease Operators Private Limited

..... Transferor Company No. 18

Unique Malls Private Limited

.....Transferor Company No. 19

And

Future Enterprises Limited

..... Transferee Company

and their respective shareholders &  
creditors.

**Order Reserved on: 13.04.2022**

**Order Pronounced on: 20.04.2022**

**Coram:**

Hon'ble Suchitra Kanuparthi, Member (Judicial)

Hon'ble Anuradha Sanjay Bhatia, Member (Technical)

***(Appearances Via Video Conferencing):***

For the Applicant : Mr. Venkatesh Dhond, Senior Counsel a/ w  
Shashwat Rai and Tvishi Pant i/ Keystone Partners

For the Respondent : Mr. Gaurav Joshi, Senior Counsel

*Per: Suchitra Kanuparthi, Member (Judicial)*

**ORDER**

**CA 348 of 2021 in CA (CAA) 8 of 2021**

1. This is an application filed jointly by the Majority Debenture Holder and Debenture Trustee (acting on behalf for the benefit of holders of

NCDs) on being aggrieved by the conduct of the Transferee Company in denying the status of the Debenture Trustee (acting for and on behalf of and for the benefit of the holders of NCDs) as an unsecured creditor of the transferee company and consequently denying the contractual and statutory rights available to such unsecured creditor under Section 230-232 of the Companies Act, 2013.

#### Brief facts

2. Fairvalue had issued unlisted, secured redeemable NCDs of principal amount of Approximately INR. 1070,00,00,000/- pursuant to the debenture trust deed dated 27.11.2018 and executed between the fair value and the debenture trust deed. The original trust deed was amended on 26<sup>th</sup> of September 2019 and supplemental deed of amendment. In order to secure the NCDs issued by the fair value, an exclusive first ranking pledge was created for Future Corporate Resources Pvt. Ltd., an exclusive first ranking pledge was created by Ritvika Trading Pvt. Ltd.
3. In addition to provide security to secure NCDs, the payment of outstanding amounts in respects of NCDs by Fairvalue, a personal guarantee dated 27.11.2018 was issued by Mr. Kishore Biyani in favour of Debenture Trustee. The Transferee Company RTPL, Bluerock E-Services Pvt. Ltd. have also executed an agreement dated 03.12.2018 wherein it was captured that FEL acknowledges that upon inability or failure of Fairvalue to make any payments to the specific lenders as an when they fall due, each of the FEL parties jointly and severally, unconditionally and irrevocably, undertakes to provide such funds or the support as may be necessary to enable fair value on or its obligations to such lenders. The relevant clauses of the agreement dated 03.12.2018 is reproduced below:

*"The FEL Parties acknowledge that Fairvalue shall be committing significant resources, raising funds from the Specified Lender to procure and make available the Assets for lease pursuant to the clauses hereinabove and for payment of advance amounts to procure the Assets, and the Specified Lender shall be providing the said funds on the basis of and placing reliance upon the assurances, covenants, commitments and undertakings of the FEL Parties given under this Agreement. In connection with this Agreement, the FEL Parties hereby agree as follows:*

*(a)... .. ;*

*(b) upon the inability or failure of Fairvalue to make any payments to the Specified Lender as and when they fall due, each of the FEL Parties jointly and severally, unconditionally and irrevocably, undertake to provide such funds or other support as may be necessary to enable Fairvalue to honour its obligations to such Specified Lenders, it being clarified that the FEL Parties shall be entitled to set-off any such funds or support provided against any payments due under the relevant lease agreements;"*

*(emphasis supplied)*

*'FEL Parties' as mentioned above and defined under the Specified Contract includes the Transferee Company, BSPL and RTPL. 'Specified Lender' has been defined in the Specified Contract to mean "any Person, which has advanced or proposed to advance debt to Fairvalue for the purchase of Assets on the basis of amongst other things, Fairvalue and FEL having executed this Agreement, and shall include any trustee who is acting on behalf of or for the benefit of or holds security for the benefit of such Person (which expression shall, unless repugnant to the context or meaning*

*thereof be deemed to mean and include its successors and permitted assigns)".*

4. Pursuant to the letter dated 25.03.2020, the Debenture Trustee declared that in event of default has occurred under Debenture Trust Deed, Fairvalue did not undertake any attempts to cure such events of defaults. Fairvalue further failed to make the payment of relevant interests/ coupon due on the interest falling on 30.06.2020 in view of the breaches by fair value and triggering of event of default. The Debenture Trustee issued an enforcement notice dated 02.09.2020, *inter alia* declaring that all outstanding amounts in respect of NCDS payable under transaction of documents, to be paid immediately in accordance with the provisions of the debenture trust deed. Further on instructions of majority debenture holder vide letter dated 23.10.2020 sought payment of Rs. INR. 1492,05,11,483.50/- from FEL. The transferee company vide letter dated 26.10.2020, in response to the letter dated 23.10.2020 of the Debenture Trust Deed stated that on account of being listed company/ entity, it can only make payments after seeking relevant Corporate approvals in accordance with the applicable laws.
5. The applicant further submitted that neither the Transferee Company nor the Fairvalue have denied their obligations to make the payments of the outstanding amount in respect of the NCDs as claimed under the specified contract invocation letter and thus claimed that the applicant is an unsecured creditor of the Transferee Company.
6. The present application under Section 230-232 of the Companies Act, 2013 has been filed with respect to the composite scheme of arrangement of certain entities belonging to the Future Group.

7. The Applicant claimed that as per the provisions of the Debenture Trust Deed and other transaction document and the proposed scheme is sought to be sanctioned without the consent of the Debenture Trustee. The Debenture Trustee vide letter dated 26.02.2021 addressed to the transferee, have stated that by virtue of the specified contract the debenture holders and Debenture Trustee are the financial creditors/unsecured creditor of the Transferee Company in accordance with this specified contract letter, and thus claimed that they have a right to receive all notices, vote at the meeting of the creditors at the proposed scheme of amalgamation.
8. On 12.03.2021, the Transferee Company responded to the letter dated 26.02.2021 issued by the Debenture Trustee, in which it had stated that the contents of the letter dated 26.02.2021 required careful and thorough deliberation.
9. This Tribunal vide order on 28.09.2021 had *inter alia* directed a meeting of creditors of the Applicant Company, however the Transferee Company had not issued a notice to the Debenture Trustee intimating about the meeting of the unsecured creditors proposed to be held. The debenture trustee upon the instructions of the majority debenture holders on 21.10.2021 issued letter to the Chairman (Mr. Sailesh Haribhakti) claiming that their financial creditors of the Transferee Company and that was entitled to vote on the proposed scheme. No response was received from the Chairman.
10. The transferee company on 25.10.2021 in complete disregard of the specified contract r/w specified contract, blatantly denied the acceptance of Debenture Trustee as a creditor.
11. The proposed scheme affects the rights of the Debenture Trustee as an Unsecured Creditor and hence had no other recourse than to

invoke the jurisdiction of this Tribunal to enforce its right under the contract.

## Reply

12. At the outset, it is respectfully submitted that the present Application is premature, legally misconceived, not maintainable under Rule 11 of the NCLT Rules 2016 under which the present Application is filed, and liable to be dismissed at the threshold.
13. The concise statement of relevant facts is as follows:
  - a. On 27 November 2018, Fairvalue Advisors Pvt. Ltd. ('Fairvalue') had issued unlisted, secured, redeemable NCDs of principal amount of INR 1070,00,00,000 pursuant to a Debenture Trust Deed (*Annexure A to the captioned Application*) executed between Fairvalue and IDBI/Debenture Trustee.
  - b. Crucially, Fairvalue is not a party to the scheme as proposed. FEL is, *inter alia*, engaged in the business of developing, owning and leasing infrastructure for the various businesses of the Future Group and its customers.
  - c. On 3 December 2018, FEL, Ritvika Trading Pvt. Ltd. ('RTPL'), Bluerock E-Services Pvt. Ltd. ('BSPL') and Fairvalue entered into an agreement i.e. the Specified Contract. BSPL and RTPL are wholly owned subsidiaries of FEL. FEL, BSPL and RTPL are collectively referred to as 'FEL Parties' in the said Specified Contract. Pursuant to the said Specified Contract, a letter dated 3 December 2018 ('Specified Contract Letter') was issued by Fairvalue to Debenture Trustee and FEL. Since the FEL Parties were desirous of availing on lease certain Assets (as defined in the said Specified Contract) for the purposes of FEL's business and Fairvalue was desirous of making available such Assets,



the said Specified Contract was entered into by and between the FEL Parties and Fairvalue. As a part of the Specified Contract, Fairvalue was required to make available the assets which would be taken on lease by FEL (the existence thereof was a pre-condition to the arrangement) and in the absence thereof, the Applicants would not have called upon FEL to provide funds to Fairvalule or the Applicant. In the absence of any lease arrangement between FEL and Fairvalue, the obligation of FEL to provide funds to Fairvalue does not arise.

- d. It is alleged by the Applicants that Fairvalue has committed certain defaults under the Debenture Trust Deed pursuant to which the default notices were sent by the Debenture Trustee /Applicant No.2, as more particularly mentioned in the said Application.
- e. On 23 October 2020, Debenture Trustee /Applicant No.2 addressed a letter calling upon FEL to make payment of INR 1492,05,11,483.50 as the alleged outstanding amount with respect to the NCDs issued by Fairvalue to be made by FEL to the Applicants. Under no contract with the Applicant has FEL given any guarantee for redemption of the NCDs issued by Fairvalue. In fact, even the ill-advised Application is silent as to this aspect. There is no debtor-creditor relationship between the Applicants and the FEL nor is the same contemplated under any agreement
- f. On 26 October 2020, FEL duly replied to the said letter dated 23 October 2020. It is pertinent to note that FEL nowhere admitted its alleged liability and/or recognized the Applicants as a creditor as is now sought to be alleged by the Applicants as an afterthought.

- g. Pertinently, even in its subsequent correspondence with the Debenture Trustee, i.e. by its letters dated 12 March 2021 and 25 October 2021, FEL did not admit the Applicant as a creditor vis-à-vis FEL.
- h. FEL by its letter dated 25 October 2021 categorically stated that: (i) reliance on the Specified Contract and the Specified Contract Letter to assert the purported claim and contend to be a creditor of FEL was misplaced; (ii) without prejudice, at best, FEL's obligation was to provide funds or support Fairvalue to enable it to honor its obligations under the Specified Contract to Specified Lenders (as defined in under the Specified Contract); and (iii) the clauses of the Specified Contract and the Specified Contract Letter invoked by the Applicants did not create any obligation whatsoever upon FEL in such a manner that Debenture Trustee / Debenture Holders i.e. the Applicants would partake a status of creditor of FEL.
14. FEL states that the Applicants are not the creditors of FEL, whether secured or unsecured for the following amongst other reasons, each of which is without prejudice and in the alternative to one another:
- a. Fairvalue, RTPL and BSPL are not part of the Proposed Scheme.
  - b. The Applicants fail to appreciate the terms and conditions of the Specified Contract. The rights and obligations of FEL flow exclusively from the Specified Contract and FEL is not party to and/or an obligor in any manner under the Debenture Trust Deed as such. There is thus no privity between the Applicants and FEL, specifically under the Debenture Trust Deed. In this regard, few clauses of the said Specified Contract are reproduced herein below:

*"2.3 In consideration of Fairvalue executing this Agreement and agreeing to make available to the FEL*

*Parties the Assets during the Term pursuant to Clause 2.1, FEL shall pay to Fairvalue a commitment fee equal to 3% (three percent) per annum of the Specified Amount (Commitment Fee), calculated on and from the Execution Date and payable semi-annually on June 30th and December 31st in each year, with the first such payment being made on 30 June 2019. Any such payment of Commitment Fee shall be subject to deduction of tax at source as per the provisions of the Income Tax Act 1961.*

*2.4 The FEL Parties may from time to time, issue a notice in writing to Fairvalue, specifying the type and quantity of Assets that they wish to avail on lease. Promptly, and no later than 30 days from the date of such notice, the Parties shall mutually discuss in good faith and agree upon the exact Assets which shall be the subject matter of such lease, and the terms and conditions on which such lease shall be granted, and for this purpose the Parties also agree to enter into definitive documentation recording the terms of such lease. The Parties agree that the FEL Parties shall be entitled to set-off any lease rentals or other amounts due under such lease agreements, against the Commitment Fees that it has paid or that is payable under this Agreement.*

*2.5 The FEL Parties may also from time to time, issue a notice in writing to Fairvalue, if they wish to purchase any of the Assets. Promptly, and no later than 30 days from the date of such notice, the Parties shall mutually discuss in good faith and agree upon the exact Assets which shall be the subject matter of such sale and purchase, and the terms and conditions on which such sale shall be consummated, and for this purpose the Parties also agree to enter into definitive documentation recording the terms of such sale. The Parties acknowledge and agree that Fairvalue may require the FEL Parties to provide non-cash consideration (including in the form of assets), as purchase consideration for such sale. The Parties agree that the FEL Parties shall be entitled to set-off any purchase consideration due under such sale agreements, against the Commitment Fees that it has paid or that is payable under this Agreement.*

*2.6 If Fairvalue does not make the Assets available for lease or for sale pursuant to Clause 2.4 or 2.5 (as the case may be), it shall be liable to pay to the FEL Parties*

*demurrage or delay charges, on terms to be agreed between the Parties.*

*2.7 The FEL Parties acknowledge that Fairvalue shall be committing significant resources, raising funds from the Specified Lender to procure and make available the Assets for lease pursuant to the clauses hereinabove and for payment of advance amounts to procure the Assets, and the Specified Lender shall be providing the said funds on the basis of and placing reliance upon the assurances, covenants, commitments and undertakings of the FEL Parties given under this Agreement. In connection with this Agreement, the FEL Parties hereby agree as follows:*

*(a) the FEL Parties shall, promptly (and without any demur or delay) upon request by Fairvalue or a Specified Lender, in writing, create security over their assets for the benefit of Fairvalue in order to secure their obligations hereunder, or, to secure the obligations of Fairvalue to any Specified Lender, for the benefit of any Specified Lender, and to the satisfaction of the Specified Lender;*

*(b) upon the inability or failure of Fairvalue to make any payments to the Specified Lender as and when they fall due, each of the FEL Parties jointly and severally, unconditionally and irrevocably, undertake to provide such funds or other support as may be necessary to enable Fairvalue to honour its obligations to such Specified Lenders, it being clarified that the FEL Parties shall be entitled to set-off any such funds or support provided against any payments due under the relevant lease agreements;*

*(c) the FEL Parties shall, at all times until the Final Settlement Date, subordinate all claims that the FEL Parties or their Affiliates or their customers may have against Fairvalue, to any claims of the Specified Lender;*

*(d) the FEL Parties shall not take any action which results in or is likely to result in Fairvalue or any of the FEL Parties being unable to fulfil their obligations hereunder or under any agreement that FEL or any FEL Party has entered or will enter into with a Specified Lender; and*

*(e) the FEL Parties acknowledge that the definitive documents entered into with a Specified Lender may require that this Agreement not be amended, assigned or terminated without the Specified Lender's consent, and if there is such requirement, then they shall not so amend, assign or terminate this Agreement without the Specified Lender's consent; and*

*(f) notwithstanding any illegality, termination, breach, novation or assignment of this Agreement by operation of law or any act or omission on the part of any of the Parties hereto, the FEL Parties shall continue to remain bound by their covenants and assurances: (i) to pay to Fairvalue, or if a Specified Lender so requires in writing, directly to such Specified Lender, an amount of the Commitment Fee due for the unexpired portion of the Term; and (ii) under Clause 2.7 (a) and Clause 2.7 (b) hereinabove, and the Specified Lender shall have the right to require the FEL Parties to perform and act upon their assurances contained herein above.*

15. From the reading of the above clauses of the Specified Contract, it is clear that, until and unless Fairvalue performs its part of obligation i.e. acquiring the Assets and making the same available to FEL Parties, there is no obligation on FEL of any payments or to be made and has failed and neglected to acquire the Assets and making the same available to the could be FEL Parties as required under the Specified Contract and thus, there is no obligation/ liability cast upon FEL as per clause 2.7 (b) or otherwise. In any event, under no circumstances can the Applicant be said to be a creditor of FEL. The Applicants continue, if at all, to be creditors of Fairvalue and not of FEL.

16. The Debenture Trustee / Applicant No.2 has invoked Clause 2.7(b) of the Specified Contract and relevant clauses of the Specified Contract Letter (*Annexure G to the captioned Application*) by its letter dated

23 October 2020 (*Annexure J to the captioned Application*) to claim the status of financial creditor of FEL. The relationship between the Applicants / Debenture Trustee on one hand and FEL on the other, have been misconstrued in the above Application. As is evident from even a bare reading of the said clause, and without prejudice to all the contentions raised above, it is submitted that, at the very highest, the obligation of FEL is to provide support to Fairvalue as per the terms of the Specified Contract in case Fairvalue is unable to perform its obligations to the Specified Lenders, i.e. the Applicants herein. There is no obligation whatsoever cast on FEL to pay the Applicants. Therefore, in no possible manner can it be construed to mean that, on an alleged breach committed by Fairvalue *vis-a-vis* the Applicants, the Applicants can claim to be creditors of FEL. The Applicants in the present misconceived Application proceed on the assumption that they are creditors of FEL, however, they have failed and neglected to demonstrate this at the threshold. Therefore they have failed to establish that they have or even otherwise any statutory rights *qua* FEL as claimed by them. Needless to say, FEL seriously disputes the status of the Applicants as creditors of FEL and such disputes cannot be entertained in the present proceedings whether at this stage (it being premature) or even subsequently. The same are clearly beyond the scope of the present proceedings.

### Finding

17. Heard the senior counsel for the Applicant/Intervenor and the senior counsel for the Respondent and perused the records.
18. The legal question that arises for consideration is whether the applicants/ Objector is a financial creditors/ unsecured financial creditor of the Applicant Companies of Future Group who propose to merge by virtue of the scheme of arrangement under section 230-232 of the Companies Act, 2013 and whether this Court is empowered

to adjudicate the dispute with regard to the applicants claim, while passing orders under section 230-232 of the Companies Act, 2013?

19. Admittedly fair value had issued unlisted secured redeemable NCDs of principal amount of INR 1070,00,00,000/- pursuant to the Debenture Trust Deed.
20. The Applicants are thus enforcing rights of the specified agreements dated 03.12.2018 between the Future Enterprises Pvt. Ltd, Bluerock E-Services Pvt. Ltd. , Ritvika Trading Pvt. Ltd. and Fairvalue Advisors Pvt. Ltd., wherein FEL was desirous to lease certain assets and Fairvalue had agreed to lease out the said assets and further that certain covenants and undertakings of the parties record that in the event of failure to make payments to the specified lenders, as and when they fall due, FEL undertook to provide such funds as may be necessary to enable Fairvalue to honour the obligations to such specified lenders. The term specified lenders was defined, which means any person who has advanced or proposes to advanced debt to Fairvalue for the purchase of the assets and shall include a trustee acting on behalf or for the benefit of such person.
21. The Bench notes that the Applicant is not the party to the said agreement dated 03.12.2018. However, such a specified contract was not worked out and no lease were granted. Further, the obligation of FEL in pursuance of the specified contract to provide funds to fair value does not arise.
22. This Bench notes that Fairvalue has defaulted in payments under the Debenture Trust Deed and as such the applicant sought enforcement of the debenture trust deed in view of event of default. Further, upon perusal of the Debenture Trust Deed, it can be seen that FEL is not the party of the Debenture Trust Deed. There is no privity of contract between the applicant and FEL Transferee Company herein. The

applicant is trying to enforce the obligation of the payment under the specified contract dated 03.12.2018.

23. It is pertinent to refer to rule 9 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, which contemplates that the notices for the purpose of meeting shall be the persons who has an outstanding debt owed by the Company to the respective class or classes of creditors that remains outstanding as per the latest audited Financial statement. Rule 9 is as follows:

*"9. Voting.—The person who receives the notice may within one month from the date of receipt of the notice vote in the meeting either in person or through proxy or through postal ballot or through electronic means to the adoption of the scheme of compromise and arrangement.*

*Explanation. For the purposes of voting by persons who receive the notice as shareholder or creditor under this rule—*

*(a) "shareholding" shall mean the shareholding of the members of the class who are entitled to vote on the proposal; and*

*(b) "outstanding debt" shall mean all debt owed by the company to the respective class or classes of creditors that remains outstanding as per the latest audited financial statement, or if such statement is more than six months old, as per provisional financial statement not preceding the date of application by more than six months."*

24. In the backdrop of the factual matrix narrated above, this bench is of the opinion that the Applicant/ Objector is not the Financial / Unsecured Creditor as per the statement of account/ books of accounts maintained by the Transferee Company. The Applicants have sought to enforce certain obligations of FEL as captured in the specified contract between the Transferee Company and Fairvalue dated 03.12.2018. This Bench also concludes that there is no privity of contract/nexus/arrangement between the Applicant and the



Transferee Company herein to repay certain debts, thus it is proved beyond doubt that there is no creditor and borrower relationship between the Applicant and the Transferee Company herein. Hence, no notice is required to be issued to the Applicant herein.

25. The Court doth as follows:

- i. C.A. 348 of 2021 is dismissed.

**Sd/-**

Anuradha Sanjay Bhatia  
Member (Technical)

**Sd/-**

Suchitra Kanuparthi  
Member (Judicial)