

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

C.P. (IB)-51(ND)2022
With I.A. 5826/2022
And I.A. 2595/2023

IN THE MATTER OF:

M/s Kaliber Associates Pvt. Ltd.

Through its Liquidator,
Mohan Lal Jain,
B-1/12, 2nd Floor, Safdarjung Enclave,
New Delhi-110029

**... Applicant/
Financial Creditor**

VERSUS

M/s Renu Proptech Pvt. Ltd.

31, Jangpura Road, Bhogal
New Dehi-110014

**... Respondent/
Corporate Debtor**

Section: 7 of the IBC, 2016

INTERVENTION PETITION- 39/2022

M/s Kaliber Associates Pvt. Ltd.

Through its Liquidator,
Mohan Lal Jain,
B-1/12, 2nd Floor, Safdarjung Enclave,
New Delhi-110029

**... Applicant/
Financial Creditor**

VERSUS

M/s Renu Proptech Pvt. Ltd.

31, Jangpura Road, Bhogal
New Dehi-110014

**... Respondent/
Corporate Debtor**

AND IN THE MATTER OF:

M/s. BDR Builders And Developers Pvt. Ltd.

Through its Authorized Representative,
Mr. Shreyansh Gupta
Having its Office At C-43, LGF,
Jangpura Extension,
New Delhi-110014

... Applicant

Section: 60(5) of the IBC, 2016

Order Delivered on: 25.07.2023

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Anirban Bhattacharya with Adv. Rajeev
Choudhary For FC

For the Respondent : Adv. Saurav Agarwal, Akhil Sachar, Adv. Sunanda
Tulsyan

For the Intervener : Adv. Gayatri Nandwani

ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

IA-5826/2022

The prayer in the IA is to allow the Applicant therein (the Petitioner in IB-51/ND/2022) to take on record the documents i.e., the Balance Sheet qua the Petitioner for the financial year ending 31.03.2021. For the reasons stated therein the IA is allowed and the Balance Sheet is taken on record.

C.P. (IB)-51(ND)2022

As could be gathered from the facts espoused by him, the Petitioner herein is presently undergoing the Liquidation process. It was ordered to be liquidated in terms of the order dated 02.01.2020 passed by this Adjudicating Authority in C.P. (IB) No. 228/2018. By filing an application bearing I.A. No. 4559/2020 in C.P. (IB) No. 228/2018 under Section 33(5) read with Section 35(1)(k) of IBC, 2016, the Ld. Liquidator appointed qua the Petitioner sought approval of this Adjudicating Authority for institution of suit or other legal proceedings against various borrowers of the Petitioner including the Respondent herein.

2. According to the Petitioner, as could be derived from the bank statement of the Petitioner for the period from 14.01.2016 to 20.01.2016, various loans and advances totalling Rs.3,31,00,000/- (Rupees Three Crores and Thirty-One Lakhs Only), had been disbursed to the Corporate Debtor. The details of the amount reads thus: -

Date as per the Bank Statement	Particulars	Bank Name	Account No.	Cheque No.	Amount (In Rs.)
14.01.2016	Renu Propotech Pvt. Ltd.	Union Bank of India	349401010 928400	33088533	2,31,00,000
20.01.2016	Renu Propotech Pvt. Ltd.	Union Bank of India	349401010 928400	32060203	1,00,00,000
TOTAL	Rs. 3,31,00,000/- (Rupees Three Crores and Thirty One Lakhs Only)				

3. It could be pointed out by the Ld. Counsel for the Petitioner, the 'Audited Financial Statements' of the Petitioner as on 31.03.2018 and its Provisional Financial Statements as on 31.03.2019 (CIRP commencement date) reflect a total amount of Rs. 3,31,00,000/- (Rupees three Crores and Thirty-One Lakhs Only) as unpaid to the Petitioner by the Respondent.

4. Audited Financial Statements of the Respondent as on 31.03.2020 also reflects that the Respondent had borrowed money amounting to Rs. 3,31,00,000/- (Rupees Three Crores and Thirty-One Lakhs Only) from the Petitioner, which is due and also payable. Accordingly, the Respondent has acknowledged the amount due to be paid to the Petitioner, (M/s Kaliber Associates Pvt. Ltd., the Applicant/Financial Creditor). The relevant entry could be found under the heading "Business Advances" under "Other Current Liabilities" in the Respondent's (Corporate Debtor's) Audited Financial Statement as on 31.03.2020.

5. In terms of the submissions made by the Petitioner, the aforementioned amount was a short term loan given by the Petitioner to the Respondent, which was payable on demand, thus the first demand notice was given to Respondent by the Interim Resolution Professional of M/s Kaliber Associates Private Limited i.e., the Petitioner herein on 31.01.2019, intimating the Directors of the Respondent that the record (Financial Statements of the Applicant as on 31.03.2017) of the Petitioner reflected that a sum of Rs.3,31,00,000/- was due and payable by the Respondent to the Petitioner. In terms of the notice, Mr. Vinay Talwar, RP also called upon the Respondent

to pay the outstanding balance amounting to Rs. 3,31,00,000/- to the Petitioner.

6. Again, Mr. Ritu Rastogi, the RP, in terms of her missive dated 10.05.2019 called upon the Directors of the Respondent to pay the aforementioned amount of Rs. 3,31,00,000/- to the Petitioner. The Respondent vide its email dated 10.06.2019 gave its response to the letter dated 10.05.2019 written to it by the RP of the Petitioner, espousing therein that one M/s BDR Builders and Developers Private Limited i.e., a sister concern of the Corporate Debtor belonging to BDR Group being run by Mr. Rajesh Gupta (erstwhile Director) and Mr. Dinesh Gupta, had advanced a loan amounting to Rs. 6,00,00,000/- to the Petitioner on the request made by its Ex-Director, Mr. Lalit Modi and a sum of Rs. 3,31,00,000/- was paid by Mr. Lalit Modi, Ex-Director through the Petitioner to the Corporate Debtor as his advance share/contribution to purchase a property at Vasant Vihar, New Delhi. According to Respondent, the proposed purchase could not materialize due to certain reasons beyond the control of the parties.

7. Further stand of the Respondent as captioned by the Petitioner in its Written Synopsis is that Mr. Rajesh Gupta and Mr. Dinesh Gupta Directors of M/s BDR Builders and Developers Private Limited had requested Mr. Lalit Modi to repay the loan amounting to Rs.6,00,00,000/- and Mr. Lalit Modi conveyed his inability to repay the amount and made following proposals: -

- i) To adjust the amount of Rs. 3,31,00,000/- paid by M/s Kaliber Associates Private Limited to M/s Renu Propotech Private Limited

against part payment of the loan outstanding in the books of M/s BDR Builders and Developers Private Limited.

- ii) Mr. Lalit Modi offered to sell the property bearing no. C-1/215 Lajpat Nagar, New Delhi in favour of M/s BDR Builders and Developers Private Limited for a consideration of Rs. 1.51 Crores.
- iii) For the remaining amount he would try to repay the same as early as possible.

8. The conclusive plea of the Respondent as referred to by the Petitioner itself is that the amount of Rs. 3,31,00,000/- shown in the books of Respondent (M/s Renu Propotech Private Limited) was transferred in favour of M/s BDR Builders and Developers Private Limited and the required adjustment was done in the books of accounts of the CD/Respondent, thus the amount of Rs. 3,31,00,000/- as alleged was not payable by Respondent to Petitioner. Nevertheless, the plea of the Petitioner is that the Respondent could not provide any document or information regarding the alleged adjustment and no entry in Audited Financial Statement of CD/Respondent was found to show that the sum of Rs. 3,31,00,000/- paid by the Petitioner to Respondent was adjusted in favour of M/s BDR Builders and Developers Private Limited.

9. In any case, after the reply given by the Respondent, the RP of M/s Kaliber Associates Private Limited namely Mr. Mohan Lal Jain (who replaced Ms. Ritu Rastogi) issued further notices/letters dated 18.07.2019 and 20.07.2020 to the CD calling upon it to pay the aforementioned amount of Rs. 3,31,00,000/- to Petitioner with interest, within 7 days. In response to the

notice dated 20.07.2020, the Respondent reiterated the stand taken by it in reply dated 10.06.2019. Re-joining the stand taken by the CD, the Petitioner wrote letter dated 30.07.2020 espousing that the Oral Agreement entered between the parties as alleged by the Respondent is of no credibility and has no evidentiary value. It is also the plea raised on behalf of the Petitioner that even the plea of adjustment of the amount of Rs. 3.31 Crores payable by the Respondent to Petitioner is not acceptable as on adjustment of the said amount and the consideration for the property bearing no. C-1/215, Lajpat Nagar, Delhi i.e. Rs. 1,51,00,000/-, the remaining amount payable by the Petitioner to BDR Builders and Developers Pvt. Ltd. was Rs. 1.18 Crores, but while submitting its claim before Liquidator of the Petitioner in Form-D, the BDR Developer did not mention about any such adjustment with CD and filed the claim for an amount of Rs. 4,49,00,000/- after adjusting only the amount of Rs. 1,51,00,000/- i.e. consideration for the aforementioned property viz. C-1/215, Lajpat Nagar, Delhi. As can be seen from para-1 and 2 of Part-IV of the Petition, the amount disbursed by the Petitioner to Respondent was Rs. 3,31,00,000/- and the same was defaulted to be paid on 31.01.2019.

10. *Per contra* in the reply filed by it, the Respondent (Corporate Debtor) has espoused that the amount of default viz. Rs. 3.31 Crores was paid by the Financial Creditor to the Corporate Debtor in two tranches i.e. Rs. 2.31 Crores on 14.01.2016 and Rs. 1 Crore on 20.01.2016, thus the present petition being preferred on 17.01.2022, much beyond the prescribed period of limitation is not maintainable. As could be pleaded also by the Petitioner, the Ld. Counsel for the Respondent (CD) contended that M/s BDR Builders and Developers

Pvt. Ltd. and the CD are sister concerns, thus the amount of Rs. 3.31 Crores claimed by the Petitioner as an amount defaulted to be repaid by the CD stood adjusted against Rs. 6 Crores payable by the Petitioner to M/s BDR Builders and Developers Pvt. Ltd. To buttress the plea, the Respondent could make reference to particulars of RTGS dated 09.04.2013 and 24.09.2013 to demonstrate the payment of Rs. 2 Crores and 4 Crores respectively by BDR Builders and Developers Pvt. Ltd. to the Petitioner. The Respondent could also make reference to the balance sheet of the Petitioner for the period ending 31.03.2017 as also to the record of Auditor to show the receipt of Rs. 6 Crores by the Petitioner from M/s BDR Builders and Developers Pvt. Ltd. i.e. the sister concern of the Corporate Debtor. According to the CD Mr. Dinesh Gutpa Director of M/s BDR Builders and Developers Pvt. Ltd., his brother Sh. Rajesh Gupta, the then Director of Corporate Debtor (Respondent) and Lalit Modi the then Director of the Petitioner (FC) had longstanding business relationship, thus in November 2015, during the course of a meeting between them an oral agreement was arrived at to purchase a property in Vasant Vihar and reconstruct the same for sale through Respondent (CD). It is the case of the CD that it was pursuant to such Oral Agreement that Shri Lalit Modi, the then Majority Shareholder (90% shares) deposited the amount of Rs. 3.31 Crores in favour of the Respondent (CD) on 14.01.2016 and 20.01.2016. Regarding the purchase of the property, the Respondent could only state that it was on account of the reasons beyond the control of the parties that the purchase could not be materialised. Para 5 and 6 of the reply filed by the CD reads thus:

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“5. That accordingly, in terms of the aforementioned Oral Agreement arrived at amongst Sh. Dinesh Gupta, Sh. Rajesh Gupta and Sh. Lalit Modi, the purported Financial Creditor herein, through Mr. Lalit Modi, the then Owner/Majority Shareholder holding 97% Shares, on 14.01.2016 and 20.01.2016, deposited a total sum of Rs. 3.31 Crores in favour of alleged Corporate Debtor towards his share for purchase of the aforementioned property in Vasant Vihar.

6. However, on account of reasons beyond the control of the parties, the purchase of the property at Vasant Vihar could not materialized, though it was agreed that the parties shall continue to jointly ascertain a suitable property for purchase in Vasant Vihar.”

11. The further stand taken by the Respondent in its reply is that in the month of September 2016 S/Shri Rajesh Gupta and Dinesh Gupta requested Shri Lalit Modi the then Director of the Petitioner (FC) to repay the loan amount of Rs. 6 Crores, as advanced by M/s BDR Builders and Developers Pvt. Ltd. to the Petitioner, along with interest, which Mr. Lalit Modi was unable to repay on account of his financial constrain. And it was in this wake that the Petitioner herein represented by Mr. Lalit Modi gave an offer to M/s BDR Builders and Developers Pvt. Ltd. to adjust the sum of Rs. 3.31 Crores paid by the Petitioner to the Respondent against the amount payable by the Petitioner to M/s BDR Builders and Developers Pvt. Ltd. and further sold the property bearing no. C-1/215, Lajpat Nagar, New Delhi-110024, for consideration of part of balance amount payable by Petitioner to M/s BDR Builders and Developers Pvt. Ltd. i.e. an amount of Rs. 1.51 Crores. To buttress the plea regarding transfer of the property bearing no. C-1/215,

Lajpat Nagar, New Delhi in favour of M/s BDR Builders and Developers Pvt. Ltd. by the Petitioner, the Respondent made a reference to the Sale Deed dated 28.10.2016 registered vide Registration No. 3942 in Book No. 1, Volume No. 175 at Pages 133 to 141 dated 03.11.2016.

12. In Rejoinder, filed by it, the Petitioner has pleaded that the sum in issue i.e. Rs. 3.31 Crore disbursed by it to the Respondent (CD) is a short-term loan repayable on demand and the first Demand Notice was issued by the Interim Resolution Professional of the Petitioner on 31.01.2019, whereby the Directors of CD were intimated that as per the financial statement of the Petitioner as on 31.03.2017 a sum of Rs. 3.31 Crore was due against the CD and was payable by it to the Petitioner herein. To rebut the plea of limitation raised on behalf of the Respondent, the Petitioner espoused that the loan advanced by the Petitioner to Respondent (CD) being short term loan was payable on demand and the limitation shall commence with the failure of debtor to respond to notice of demand. In terms of the contention raised on behalf of the Petitioner, the date of notice of demand being 31.01.2019, the present petition, filed under Section 7 of IBC, 2016 is within prescribed period of limitation and is not time barred. To buttress the plea, the Ld. Counsel for the Petitioner relied upon the judgment dated 22.02.2012 passed by High Court of Delhi in **IFCI Venture Capital Funds Ltd. Vs. Santosh Khosla and Ors., ILR (2012) II Delhi 646**. The relevant excerpt of the judgment reproduced by the Petitioner in its rejoinder reads thus: -

*“7. I agree with the arguments as urged on behalf of the applicant/plaintiff. **The period of three years arises in the***

facts of the present case not from the date of the grant of the loan, but in fact from the date when default was committed inasmuch as the loan was repayable over a period of many years and in instalments. In such a case, limitation will commence from the date of the default and not from the date of grant of loan. Suits for recovery of amounts in these cases are governed by Article 113 of the Limitation Act, 1963 and not by Article 19 of the Limitation Act, 1963. Further, I may note that the Supreme Court in the case of Syndicate Bank Vs. R. Veeranna and Ors. MANU/SC/1193/2002: 2003 (2) SCC 15 has held that an unqualified acknowledgment of liability gives a fresh cause of action and a fresh period of limitation to file the suit for recovery. In this case, the appellant/plaintiff has exhibited and proved on record the acknowledgment of debts being Ex. P13 dated 29.4.1982 and Ex. P11 dated 6.2.1986. Therefore, looking at it from any angle of the suit having filed within three years of 31.12.1983 i.e. on 17.12.1986 or within three years of the acknowledgment of debts, the suit is within limitation.”

13. To meet the preliminary objection regarding non-maintainability of the petition, being barred by limitation (ibid), the Ld. Counsel for the Petitioner also relied upon the judgment of Hon’ble High Court of Delhi in **Virender Kumar Jain Vs. Alumate (India) Pvt. Ltd., 2012 SCC Online Del 1313**. In the said case, Hon’ble Delhi High Court viewed that if the averments in the plaint showed that the loan was given without fixing any date of repayment, the loan would be repayable on demand and the period of limitation would commence on the date of demand. In the wake of the plea, espoused on behalf of the Petitioner, the present Petition being preferred on 17.01.2022 i.e., within 3 years of Demand Notice dated 19.01.2019 cannot be treated as time barred.

Besides in the Audited Financial Statement of Respondent, as on 31.03.2020, the amount of Rs.3,31,00,000/- received by it from the Petitioner has been acknowledged. Indubitably, the acknowledgement of receipt of amount defaulted to be paid extend the period of limitation. In such situation the limitation starts from the date of acknowledgement.

14. To meet the plea regarding payment of Rs. 3.31 Crores by it to the Respondent (CD) as its contribution/share to buy property in Vasant Vihar, the Petitioner pleaded in the rejoinder that in the absence of there being any written agreement in this regard, the plea cannot be relied upon. According to the Petitioner, no credence can be attached to the stand taken by the Respondent that only on oral understanding between Dinesh Gupta, Rajesh Gupta and Lalit Gupta, the Petitioner could contribute the aforementioned amount. The Petitioner also denied the plea of the Respondent (CD) that the Petitioner had transferred the property bearing no. C-1/215, Lajpat Nagar, New Delhi in the name of M/s BDR Builders and Developers Pvt. Ltd. to satisfy the part of the amount of loan of Rs. 6 Crores taken by it from the said company. According to the Petitioner, there was not even a whisper in the Sale Deed dated 28.10.2016, in terms of which the property was transferred/sold to M/s BDR Builders and Developers Pvt. Ltd. that the sale was for partial satisfaction of the debt of Rs. 6 Crores payable by the Petitioner to M/s BDR Builders and Developers Pvt. Ltd. In the rejoinder filed by it, the Petitioner espoused that the property bearing no. C-1/215 Lajpat Nagar, New Delhi-110024 is still reflected in the balance sheet of the Petitioner as on 31.03.2018. Nevertheless, in para 19 of the rejoinder, the Petitioner admitted

that after the issuance of notice by this Adjudicating Authority in the present proceedings on 27.01.2022, M/s BDR Builders and Developers Pvt. Ltd. sought to withdraw its claim staked before the Liquidator of the Petitioner and amended the same to enable the Corporate Debtor to evade its liability. According to the Petitioner, in view of the provisions of Section 38(5) the revised claim filed by M/s BDR Builders and Developers Pvt. Ltd. could not be allowed to be withdrawn.

15. We have heard the Counsels for the parties and perused the record. The factual position admitted by the parties is: - (i) the Petitioner herein paid Rs. 3.31 Crore to CD i.e. partially on 14.01.2016 (2.31 Crore) and balance on 20.01.2016 (1 Crore); (ii) the Petitioner is liable to pay Rs. 6 Crores to M/s BDR Builders and Developers Pvt. Ltd. The issue of controversy between the Respondents is whether Rs. 3.31 Crore paid by the Petitioner to the Respondent is financial debt or advance given by the Petitioner to the Respondent. In the wake of the rival submissions and pleadings espoused by the counsels for the parties, the following issues arise to be determined by us: - (i) whether the amount of Rs. 3.31 Crore admittedly given by Petitioner to Respondent is financial debt or business advance; (ii) whether entry in balance sheet is sufficient proof to establish that the transaction between the parties referred to therein is financial debt only; (iii) whether the amount (ibid) admittedly paid by the Petitioner to Respondent being business advance cannot be financial debt; (iv) whether the present petition is barred by limitation.

16. To determine the first proposition, we need to analyse the definition of financial debt, given in Section 5(8) of IBC, 2016. The definition reads thus: -

“5(8) “financial debt” means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

[Explanation. -For the purposes of this sub-clause, -

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having commercial effect of a borrowing; and*
- (ii) the expressions, “allottee” and “real estate project” shall have the same meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate of price and for calculating the value of any derivative*

transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or a financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred in sub-clause (a) to (h) of this clause.”

17. As can be seen from the aforementioned definition of the financial debt, it includes money borrowed against the payment of interest; any amount raised by acceptance under any acceptance credit facility or its dematerialized equivalent; the amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan, stock or any similar instruments; the amount of any liability in respect of any lease or hire purchase contract which is deemed as a financial lease or a capital lease; receivables sold or discounted other than any receivable sold on non-recourse basis; any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price; the amount of any liability in respect of guarantee or indemnity for any of the items referred to in sub-clause a-h of sub-section 8 of 5 of IBC, 2016. As far as the question of amount being raised by acceptance under any acceptance credit facility or its dematerialized equivalent is concerned, the acceptance credit is a type of letter of credit i.e. paid by a time draft authorising payment on or after a specific date, if the

terms of the letter of credit have been complied with. The bank accepts Bills of Exchange drawn on the bank by the debtor discounts them and agree to pay them when they mature. There are two types of acceptance of credit, confirmed and unconfirmed. Unconfirmed credit means that the buyer takes the risk that payment will not be made due to any number of contingencies such as shipment, non-delivery, confiscation by Custom Authorities or any other problems. Confirmed acceptance credit means the bank upon which the credit has been issued essentially guarantees payment as long as the terms of LOC are complied with. Certainly, in the present case there being no letter of credit, no such proposition arises. Apparently, the present case does not involve any issue regarding amount raised pursuant to any note purchase facility or issue of bonds, notes, debentures, loan stock, or any similar instrument. The transaction alleged in the captioned petition is also not covered under Clause c, d, e, f, g, h and i of sub-section 8 of Section 5 of IBC, 2016.

18. The salient proposition arises in the present petition, as far as the first and third issues are concerned, is whether in the absence of any financial contract required to be in existence in terms of provisions of Regulation 8(2)(b)(i) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, the amount of Rs. 3.31 Crore can be treated as financial debt, only because the same is reflected in financial statement of the Petitioner. To decipher the proposition, a reference can be made to the judgment of Hon'ble NCLAT in Earth Gracia Buildcon Pvt. Ltd. vs. Earth Infrastructure Ltd. (2021 SCC Online NCLAT 502), in which relying upon the

judgment of Hon'ble Supreme Court in Phoenix Arc Pvt. Ltd. vs. Spade Financial Services Ltd. (Civil Appeal No. 2842 of 2020), the Appellate Tribunal viewed that the essential ingredient of a financial debt is disbursal against consideration for the time value of money. In Anuj Jain IRP for Jaypee Infratech Ltd. vs. Axis Bank Ltd. 2020 SCC Online Supreme Court page 237, relied upon by the Hon'ble NCLAT in Earth Gracia Buildcon Pvt. Ltd. (ibid), Hon'ble Supreme Court ruled that the requirement of existence of a debt which is disbursed against the consideration for the time value of money remains is an essential part even in respect of any of the transactions/dealing mentioned in Clauses a-i of Section 5(8) of the Code, even if it is not necessarily stated therein. In the said judgment, Hon'ble Supreme Court categorically viewed that any of the transactions stated in sub-clauses (a) to (i) of Section 5(8) would be falling within the ambit of 'financial debt' only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In terms of the view taken by the Hon'ble Supreme Court in the said judgment (Anuj Jain IRP for Jaypee Infratech Ltd.) (supra) the essential element of disbursal and that too against the consideration for the time value of money need to be found in the genesis of any debt before it may be treated as financial debt within the meaning of Section 5(8) of the Code. The debt may be of any nature but a part of it is always required to be carrying or corresponding to or at least having some traces of disbursal against consideration for the time value of money. The time value of money need not necessarily be the 'interest'. Enhancement of assets, increase in production and the growth in profits, share value or equity ensures to the benefit of such stake holders are time value of money

constituting the consideration for disbursement of such amount raised as debt with obligation on the part of the company to discharge the same. Relying upon its earlier judgment in Shailesh Sangani, in Earth Gracia Buildcon Pvt. Ltd. (ibid), Hon'ble NCLAT further viewed thus: -

“18. *This Appellate Tribunal in the case of Shailesh Sangani (Supra) held as under:*

“6. A plain look at the definition of ‘financial debt’ brings it to fore that the debt along with interest, if any, should have been disbursed against the consideration for the time value of money. Use of expression ‘if any’ as suffix to ‘interest’ leaves no room for doubt that the component of interest is not a sine qua non for bringing the debt within the fold of ‘financial debt’. The amount disbursed as debt against the consideration for time value of money may or may not be interest bearing. What is material is that the disbursement of debt should be against consideration for the time value of money. Clauses (a) to (i) of Section 5(8) embody the nature of transactions which are included in the definition of ‘financial debt’. It includes money borrowed against the payment of interest. Clause (f) of Section 5(8) specifically deals with amount raised under any other transaction having the commercial effect of a borrowing which also includes a forward sale or purchase agreement. It is manifestly clear that money advanced by a Promoter, Director or a Shareholder of the Corporate Debtor as a stakeholder to improve financial health of the Company and boost its economic prospects, would have the commercial effect of borrowing on the Company Appeal (AT) (Insolvency) No. 616 of 2018 part of Corporate Debtor notwithstanding the fact that no provision is made for interest thereon. Due to fluctuations in market and the risks to which it is

exposed, a Company may at times feel the heat of resource crunch and the stakeholders like Promoter, Director or a Shareholder may, in order to protect their legitimate interests be called upon to respond to the crisis and in order to save the company they may infuse funds without claiming interest. In such situation such funds may be treated as long term borrowings. Once it is so, it cannot be said that the debt has not been disbursed against the consideration for the time value of the money. The interests of such stakeholders cannot be said to be in conflict with the interests of the Company. Enhancement of assets, increase in production and the growth in profits, share value or equity enures to the benefit of such stakeholders and that is the time value of the money constituting the consideration for disbursement of such amount raised as debt with obligation on the part of Company to discharge the same. Viewed thus, it can be said without any amount of contradiction that in such cases the amount taken by the Company is in the nature of a 'financial debt'."

19. *In the aforesaid Judgments, this Tribunal held that the disbursement of debt should be against the consideration for time value of money. However, to pay interest is not only consideration. There may be other considerations also. When the company is in dire need of funds, the promoter/director or shareholder may in order to protect the company infuse funds without claiming interest.*

20. *The report of the Insolvency Law Committee dated 26 March 2018 has discussed the interpretation of the term "time value of money" and stated:*

"The current definition of 'financial debt' Under Section 5(8) of the Code uses the words "includes", thus the kinds of financial debts illustrated are not exhaustive. The phrase "disbursed against the consideration for the time value of

money” has been the subject of interpretation only in a handful of cases under the code. The words “time value” have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.”

(emphasis supplied)

21. *In the present case, Financial Creditor has been unable to point out any consideration for the alleged debt. Thus, they have failed to prove that the transaction in question comes within the definition of Financial Debt.*

Sham transactions.

22. *Ld. Adjudicating Authority held that transactions in question are a sham. Hon’ble Supreme Court in the case of Phoenix Arc Pvt. Ltd. (Supra) held that when the transactions can be held collusive and sham.*

G.3.3 Collusive Transactions

*46 The above discussion shows that money advanced as debt should be in the receipt of the borrower. The borrower is obligated to return the money or its equivalent along with the consideration for a time value of money, which is the compensation or price payable for the period of time for which the money is lent. A transaction which is sham or collusive would only create an illusion that money has been disbursed to a borrower with the object of receiving consideration in the form of time value of money, when in fact the parties have entered into the transaction with a different or an ulterior motive. In other words, the real agreement between the parties is something other than advancing a financial debt. A useful elaboration of “sham transactions” can be found in the opinion of Diplock LJ in *Snook v. London and West Riding Investments Ltd.*:*

“As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a “sham,” it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.”

(emphasis supplied)

Diplock LJ also stated:

“But one thing, I think, is clear in legal principle, morality and the authorities (see Yorkshire Railway Wagon Co. v. Maclure and Stoneleigh Finance Ltd. v. Phillips), that for acts or documents to be a “sham,” with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of “shammer” affect the rights of a party whom he deceived...”

(emphasis supplied)

23. *In the light of the proposition laid down by the Hon’ble Supreme Court, we have examined the impugned order. Ld. Adjudicating Authority in para 13 to 16 discussed the reasons for holding that the transactions in question are sham. We can summarize these reasons as under: -*

(i) The transactions in question have no backing of the board resolution.

- (ii) There is no record to show that the Corporate Debtor was in need of use money (as Loan) involved in the transactions.*
- (iii) There is no agreement of loan and interest.*
- (iv) No document to stipulate the period of repayment.*
- (v) The Financial Creditor Company and Corporate Debtor Company are group companies and the directors and promoters are common in both the companies.*
- (vi) The balance sheet of the Financial Creditor Company for the year ending 31.03.2015 shows loan and advance of INR 18,75,76,212/- to others but the name of the Corporate Debtor Company is not mentioned.*
- (vii) The essential ingredients for financial debt disbursement and consideration for the time value of money is missing.*
- (viii) The Financial Creditor filed claim before the resolution professional for an amount of INR 16,82,17,052/- plus interest @ 12% which has not been substantiated with any documentary evidence.*

24. *On the aforesaid grounds, Ld. Adjudicating Authority held that all these transactions are sham and involved round tripping of the huge amount.*

25. *We are in agreement with the reasoning of Ld. Adjudicating Authority. Hence, we uphold the findings.*

26. *We are of the considered view that the transactions in question between Financial Creditor and Corporate Debtor are sham in nature and do not qualify as Financial Debt, for the purposes of IBC.”*

19. The view taken by Hon’ble Supreme Court in Japyee Infratech Ltd. (Supra) was reiterated in Orator Marketing Pvt. Ltd. vs. Samtex Desinz Pvt. Ltd. (Civil Appeal No. 2231 of 2021). In the said case, Hon’ble Supreme Court

also analysed the connotation of Corporate Debtor and Creditor. Referring to Section 3(8) of IBC, 2016, Hon'ble Supreme Court viewed that a 'Corporate Debtor' means a corporate person who owes a debt to any person as per the definition of the expression in Section 3(8) of IBC, 2016. In terms of the view taken by the Hon'ble Supreme Court in the said judgment, financial creditor is a person who has direct engagement in the functioning of a Corporate Debtor; who is involved right from the beginning while assessing the viability of Corporate Debtor; who would engage in restructuring of the loan as well as in reorganisation of the Corporate Debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

20. As far as the present case is concerned, when the plea of the Petitioner is that it gave short-term loan to Respondent, the stand espoused by the Respondent is that the amount of Rs. 3.31 Crore was given by the ex-director of FC/Petitioner, namely, Lalit Modi to the CD as its share/contribution

towards the amount which both the Petitioner and CD were to utilise to buy some property in Vasant Vihar. According to the CD, the amount claimed by the Petitioner as short-term loan was, in fact, an advance given by the Petitioner to Respondent as contribution to buy some property and cannot be treated as short-term loan, as there was no time value of money involved. To buttress the plea, he relied upon the judgment of Hon'ble NCLAT in PEC Limited Phulchand Exports Pvt. Ltd. (Company Appeal) (AT) (Insolvency No. 1071/2021). In the said case, the amount of Rs. 63.57 Crores given by PEC Limited to Phulchand Exports Pvt. Ltd. as advance, as both of them had entered into contract for procurement, shipping and export of iron ore. The Hon'ble NCLAT refused to accept the said amount as financial debt.

21. Apparently, in the present case, there is no contract between the FC and CD like the one entered into between PEC Limited and Phulchand Exports Pvt. Ltd., for buying the property, as alleged by the CD. Thus, the aforementioned judgment of Hon'ble NCLAT in Company Appeal (AT) Insolvency No. 1071/2021 is in distinct facts. Even otherwise also, the CD is unable to give any details/particulars of the property which according to it was sought to be purchased by the Petitioner and CD jointly. Further, indubitably the amount of Rs.3.31 Crores given by the Petitioner to CD, is reflected in the Financial Statement of the CD. Even if we accept the plea of the CD that the money was given to it, in advance to buy property, apparently the same was given to increase the asset of CD is for consideration of time value of money and cannot be treated as an amount involving no time value of money. It is not the case of the CD that the amount was not received by it. Once the receipt of amount

by CD is not in dispute and the amount is not returned/repaid on demand, there is apparently a default committed by the CD.

22. Placing reliance on the judgment dated 02.12.2019 in Company Appeal (AT) (Insolvency No. 468/2019) viz. Jagdambey International vs. Visa Powertech Pvt. Ltd. (2019 SCC Online NCLAT 1356), Ld. Counsel for the Respondent submitted that in the absence of there being any document to show that the amount reflected in the ledger was disbursed as financial debt or a debt for time value of money, it cannot be held that the entry reflected in ledger and balance sheet of the Petitioner is sufficient proof to arrive at the conclusion that the Petitioner had given the money shown in the balance sheet as short-term loan which should be treated as financial debt. Para 4 and 5 of the judgment reads thus: -

“4. Learned Counsel for the Appellant further states that it was an oral transaction and he is unable to show from the documents that the amount advanced was by way of a Financial Loan for time value of money. Learned Counsel submits that he was only relying on ledger entries and balance sheet of its partnership firm to show that it was financial debt. There is no document to show that there was any interest paid or recovered or claimed. Appellant is unable to show that money transferred created a Financial debt.

5. Going through the reasons recorded by the Adjudicating Authority, we are unable to accept the appeal that there was Financial Debt and default. We agree with the Adjudicating Authority.”

23. We cannot be oblivious of the fact that the Ex-Director of the Petitioner paid an amount of Rs. 3.31 Crore to the Respondent herein. The transaction

is admitted both by the Petitioner and the Respondent. Both of them have tried to give their own version regarding the transaction but none of them could denied the transaction.

24. Even otherwise also, M/s BDR Builders and Developers Pvt. Ltd. could also file Intervention Petition 39/2022 categorically stating therein that the Respondent herein had paid a sum of Rs. 3.31 Crore to BDR Builders and Developers Pvt. Ltd. vide cheque no. 000717 dated 12.08.2020 drawn on Axis Bank Limited and the amount payable by Respondent to Petitioner herein may be adjusted against the claim of M/s BDR Builders and Developers Pvt. Ltd. against the Petitioner, in liquidation proceedings. Para 13-19 of the Petition reads thus: -

*“13. That Renu Propotech Private Limited, had in terms of the said adjustment, paid a sum of Rs. 3.31 Crores to BDR Builders and Developers Private Limited, vide Cheque No. 000717 dated 12.08.2020 drawn on Axis Bank Limited. Copy of the details evidencing payment of Rs. 3.31 Crores by the alleged Corporate Debtor to the Applicant is annexed and marked hereto as **Annexure E**.*

14. That in light of the subsequent facts, more particularly, payment of a sum of Rs. 3.31 Crores by Renu Propotech Private Limited to BDR Builders and Developers Private Limited and that Mr. Dinesh Gupta had learnt about the said claim vide letter dated 30.07.2020 issued by the Liquidator on behalf of Kaliber and received the copy of the Claim dated 17.01.2020 only on 17.01.2022, when the copy of the Company Petition IB-51/ND/2022 was served on the common e-mail id of the Applicant Company, the Applicant filed a revised claim dated

17.03.2022, wherein, the Applicant reduced its principal claim from Rs. 4,49,00,000/- to Rs. 1,18,00,000/-.

15. That in the interregnum, the Applicant has, in terms of the liquidation proceedings, received a sum of Rs. 42,46,329/- from the Liquidator appointed by this Hon'ble Tribunal for the Financial Creditor namely M/s. Kaliber Associates Pvt. Ltd. The Applicant has not been provided with any basis or calculation qua this figure of Rs.42,46,329/-. Without prejudice to the rights and contentions of the Applicant, the Applicant is ready and willing to deposit forthwith any sum received proportionately in excess of its claim of Rs. 1,18,00,000/-. The Applicant has also learnt that Mr. Rajesh Gupta had persistently followed up with the Liquidator for the receipt of remittance of the amount of the sale proceeds from liquidation of Kaliber Associates Private Limited from the Liquidator in his personal account, which was rightly rejected by the Liquidator inasmuch as the said remittances are to be received by the Applicant only. The said conduct of Mr. Rajesh Gupta signifies that the sole intent of filing the inflated claim dated 16.01.2020, was to illegally usurp the said remittances to be received by the Applicant from the liquidation proceedings of Kaliber Associates Private Limited. Copy of the e-mails dated 07.12.2021 to 21.03.2022 exchanged between the Liquidator and Mr. Rajesh Gupta are annexed and marked hereto as **ANNEXURE-F**.

16. That there is otherwise no dispute to the fact, that the Applicant had to receive a sum in excess of Rs. 3.31 Crores from M/s. Kaliber Associates Pvt. Ltd. which amount, M/s. Kaliber Associates Pvt. Ltd. has not paid till date. Further, there cannot be any dispute to the fact that the Corporate Debtor has paid to the Applicant the very same amount of Rs. 3.31 Crores, that the Applicant was to receive from M/s. Kaliber Associates Pvt. Ltd. Therefore, with the payment of Rs. 3.31 Crores by Renu Proptech

to Kaliber, the claim of BDR Builders and Developers Pvt. Ltd. against M/s. Kaliber Associates Pvt. Ltd. got reduced by Rs. 3.31 Crores. Accordingly, Renu Proptech Private Limited was also discharged of the responsibility to pay Rs. 3.31 Crores to M/s. Kaliber Associates Pvt. Ltd.

17. That the Liquidator has not chosen to accept the reduction of claim made by BDR Builders and Developers Private Limited from Rs. 4.49 Crores to Rs. 1.18 Crores, however, the Liquidator has chosen to acknowledge the claim of Rs. 4.49 Crores only. Conspicuously, at the same time, the very same Liquidator has instituted the present Insolvency proceedings against Renu Proptech for the alleged default of Rs. 3.31 Crores. Thus, while the Liquidator acknowledges that Rs. 4.49 Crores has to be paid to BDR Builders and Developers Private Limited (including the quantum of Rs. 3.31 Crores), but the Liquidator has chosen to ignore the payment of Rs. 3.31 Crores by Renu Proptech Pvt. Ltd. to BDR Builders and Developers Private Limited in part satisfaction of BDR Builders and Developers Private Limited's claim against M/s. Kaliber Associates Pvt. Ltd. Thus, the Liquidator is seeking to recover the amount of Rs. 3.31 Crores from Renu Proptech, which amount has already been paid to BDR Builders and Developers Private Limited, so that Renu Proptech is deprived of the said amount which already stands paid.

18. The Liquidator is unnecessarily seeking to expose the sister concern of BDR Builders and Developers Private Limited, i.e. Renu Proptech Pvt. Ltd. to insolvency proceedings, even when admittedly there is no debt due and payable by Renu Proptech to Kaliber.

19. That the Applicant is a necessary and proper party to the present proceedings to place on record the true and correct facts

which are being unnecessarily twisted, denied and disputed by the Liquidator, representing the Financial Creditor.”

25. Thus, apparently, there is evidence on record that the CD is liable to return an amount of Rs.3.31 Crores to Petitioner and has defaulted in repaying the same. While, taking a decision regarding admission of an application under Section 7 (5) of IBC, 2016, the Adjudicating Authority need to be satisfied that a default has occurred, the application is complete and there is no disciplinary proceedings pending against the proposed RP. Apparently, the CD committed default in payment of the amount of loan against the aforementioned loan accounts. The application is complete and the RP suggested by the Petitioner has declared that he is not facing any disciplinary proceedings. The present petition could be preferred within 3 years from the date of demand as also Financial Statement in which the amount is shown due and payable by CD to FC. Being left with no other option, we admit the present Petition.

26. **In the wake, moratorium as provided under Section 14 of IBC, 2016 is declared qua the CD and** as a necessary consequence thereof the following prohibitions are imposed qua the CD, which must be followed by all and sundry:

- “(a) The institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) Transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial

interest therein;

- (c) Any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Respondent.

27. As proposed by the Petitioner, Mr. Gagan Gulati, having Registration No. IBBI/IPA-002/IP-N00893/2019-2020/12832 (Email: ipgagangulati@gmail.com) is appointed as IRP, subject to the condition that no disciplinary proceeding is pending against him and disclosures as required under IBBI Regulations, 2016 are made by him within a period of one week from this Order. It is further ordered that:

“Mr. Gagan Gulati, IRP (Registration No. IBBI/IPA-002/IP-N00893/2019-2020/12832) shall take charge of the CIRP of the Corporate Debtor with immediate effect and would take steps as mandated under the IBC specifically under Section 15, 17, 18, 20 and 21 of IBC, 2016 read with extend provisions of IBBI (Insolvency Resolution of Corporate Persons) Regulations, 2016.”

28. The Petitioner is directed to deposit Rs. 2,00,000/- only with the IRP to meet the immediate expenses. The amount, however, will be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditor.

29. A copy of this Order shall immediately be communicated by the Registry/Court Officer of this Tribunal to the Petitioner /Financial Creditor, the Respondent/Corporate Debtor and the IRP mentioned above.

30. In addition, a copy of this Order shall also be forwarded by the Registry/Court Officer of this Tribunal to the IBBI for their records.

IA-2595/2023

By way of the captioned IA, the Applicant i.e., the CD in Company Petition (IB) No. 51/ND/2022 has tried to espouse that as by moving IA No. 4101/2022 dated 23.08.2022 in its liquidation process, initiated in terms of the order passed in (IB)-228(PB)/2018, the Petitioner herein as sought to assign its unsold asset viz. the amount of Rs. 3.31 Crores defaulted to be paid by the CD, to M/s Builders and Developers Pvt. Ltd. i.e., the sister concern of the CD for Rs.16,51,000/-, the IB No. 51/ND/2022 should be heard after disposal of IA No.4101/2022(ibid). The plea raised in the IA is weird. Nevertheless, we have already passed the order in Company Petition (IB) No. 51/ND/2022 (Supra), thus the captioned IA has become infructuous and is dismissed accordingly.

Intervention Petition 39 of 2022

The salient plea espoused by the Applicant in the Intervention Petition namely Builder and Developers Pvt. Ltd. is that Mr. Lalit Modi Ex-Director of the Petitioner was liable to pay Rs.6 Crores to the Applicant and the Applicant being a sister concern, there was understanding between Mr. Lalit Modi, the Applicant in Intervention Petition and CD that Rs.3,31,00,000/- payable by CD to Petitioner would be adjusted against the aforementioned amount of Rs. 6 Crores payable by Petitioner to M/s Builders and Developers Pvt. Ltd. i.e., the Applicant. It is also the plea espoused by the Applicant that for another

amount of Rs.1.51 Crores, Mr. Lalit Modi had transferred a property viz. C-1/215, Lajpat Nagar to the Applicant herein. The factual plea espoused by the Applicant is falsified from the very fact that the Applicant in the Intervention Petition had staked a claim for Rs.4.49 Cr. (in Form D), before the IRP/RP/Liquidator of the Petitioner. Thus, it had taken into account the price of the aforementioned property i.e. Rs.1.51 Crores only and not the defaulted amount i.e. Rs. 3.31 Crores. Even otherwise also, the Applicant is an independent entity and has no locus to intervene in the present proceedings. The Intervention Petition is not maintainable ergo the same is rejected.

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)