



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-IV**

Company Petition No. (IB)-425/PB/2021

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016

IN THE MATTER OF:

M/s. Kaliber Associates Private Limited
Through its Liquidator
Mr. Mohan Lal Jain

... Applicant / Financial Creditor

VERSUS

M/s. Kelvin Buildcon Private Limited

... Respondent / Corporate Debtor

CORAM:

SH. DHARMINDER SINGH, HON'BLE MEMBER (J)

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

Order Pronounced on: 19.09.2022

ORDER

PER: SH. DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

The instant petition is filed by M/s. Kaliber Associates Private Limited ('Applicant') through its liquidator Mr. Mohan Lal Jain under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer to trigger Corporate Insolvency Resolution Process in respect of respondent M/s. Kelvin Buildcon Private Limited ('Corporate Debtor') for default in repayment of financial debt

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of Rs.4,02,75,000/- (Rupees Four Crores Two Lakhs and Seventy Five Thousand Only) .

2. The applicant M/s. Kaliber Associates Private Limited is presently under going through liquidation process vide NCLT, New Delhi order dated 02.01.2020 in C.A. 1524/ND/2019 in CP(IB)No. 228/2018 wherein Mr. Mohan Lal Jain was appointed as Liquidator. The NCLT vide order dated 01.12.2020 in I.A./4559/2020 allowed the applicant to institute any suit, prosecution or other legal proceedings, civil or criminal, on behalf of the corporate debtor against defaulting borrowers.
3. The Respondent Company M/s. Kelvin Buildcon Private Limited having CIN: U45400DL2012PTC230331 against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 20.01.2012 having its registered office situated at 106, Samman Bazar, Bhogal, South Delhi, New Delhi-110014. Since the registered office of the respondent corporate debtor is in New Delhi, this Tribunal having territorial jurisdiction over the NCT of Delhi is the Adjudicating Authority in relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.
4. Brief facts of the case, as mentioned by the applicant in the Company Petition, are as follows:-
 - a) The applicant submits that the applicant had disbursed various loans and advances amounting Rs.6,17,00,000/- to the corporate debtor from the period 27.02.2013 to 02.02.2016 as per the bank statements of the financial creditor. The details of the disbursement are as follow:-
 - i. An amount of Rs.4,00,00,000/- (Rupees Four Crore Only) was disbursed on 27.02.2013 to M/s. Kelvin Buildcon Private Limited.
 - ii. An amount of Rs.60,00,000 (Rupees Sixty Lakhs Only) was disbursed on 13.03.2013 to M/s. Kelvin Buildcon Private Limited.
 - iii. An amount of Rs.9,00,000/- (Rupees Nine Lakhs Only) was disbursed on 14.01.2016 to one of the subsidiaries/group companies of M/s. Kelvin Buildcon Private Limited.



- iv. An amount of Rs.50,00,000/- (Rupees Fifty Lakhs Only) was disbursed on 14.01.2016 to M/s. Kelvin Buildcon Private Limited.
 - v. An amount of Rs.9,00,000/- (Rupees Nine Lakhs Only) was disbursed on 27.01.2016 to one of the subsidiaries/group companies of M/s. Kelvin Buildcon Private Limited.
 - vi. An amount of Rs.4,00,000/- (Rupees Four Lakhs Only) was disbursed on 28.01.2016 to M/s. Kelvin Buildcon Private Limited.
 - vii. An amount of Rs.85,00,000/- (Rupees Eighty Five Lakhs only) was disbursed on 02.02.2016 to various accounts including M/s. Kelvin Buildcon Private Limited
- b) The applicant submits that there had been certain repayments by the corporate debtor during the past years as reflected in the bank statements of the applicants. The applicant further submits that the net amount remaining outstanding due and payable by the corporate debtor is Rs.4,02,75,000 (Rupees Four Crores Two Lakhs and Seventy Thousand Only) as per the applicant's audited financial statement as on 31.03.2018.
 - c) The applicant submits that Mr. Vinay Talwar, interim resolution professional of the applicant intimated the directors of the corporate debtor on 31.01.2019 that the financial statements of the applicant as on 31.03.2017 reflected a sum of Rs 4,02,75,000/- was due and payable by M/s. Kelvin Buildcon Private Limited ('corporate debtor') to M/s. Kaliber Associates Private Limited ('applicant') and called upon them to confirm the balance payable and take steps to pay off the outstanding balance of Rs.4,02,75,000/-.
 - d) The applicant submits that the audited financial statement as on 31.03.2020 of the corporate debtor reflected amount of Rs.35,27,08,820/- under the head short term borrowing which includes amount of RS. 4,02,75,000/- payable to M/s. Kaliber Associates Private Limited ('applicant').
 - e) The applicant further submits that the applicant through its liquidator had issued a legal notice dated 20.07.2020 to the corporate debtor stating that the applicant books of account reflected a sum of Rs.4,02,75,000/- was due and payable by M/s. Kelvin Buildcon Private Limited ('corporate debtor') to M/s. Kaliber Associates Private Limited ('applicant') and called upon them to confirm the balance payable and take steps to pay off the outstanding balance of Rs.4,02,75,000/-.
 - f) The applicant submits that the applicant had submitted the record of default amounting Rs.4,02,75,000/- by M/s. Kelvin Buildcon Private Limited to the Information Utility namely National E-Governance Services Limited. The applicant further submits that National E-

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Governance Services Limited issued its report to the applicant whereby the default filed by the applicant is authenticated.

- g) The applicant have placed the following document on record to prove its claim:
- i. Copy of record of default as registered with National E-Governance Services Limited.
 - ii. Copy of the extracts of the bank statement of M/s. Kaliber Associates Private Limited for the period from 27.03.2013 to 02.02.2016.
 - iii. Copy of the audited financial statements of the corporate debtor for the financial year 2014-2015, 2019-2020.
 - iv. Copy of the audited financial statements of the applicant as on 31.03.2018 and provisional financial statement of the applicant as on 18.01.2019.
 - v. Copy of demand letter dated 31.01.2019, 10.05.2019, 18.07.2019 and 20.07 2020 issued by the applicant through its authorized representatives to the corporate debtor demanding the repayment of the outstanding amount Rs.4,02,75,000/-.
4. The corporate debtor has filed its reply and the averments of the corporate debtor in the reply are stated in brief as below:-
- a) The corporate debtor submits that the alleged amount as transferred by the applicant to the corporate debtor should be Rs.5,14,00,000/- and not Rs.6,17,00,000/- since the amount of Rs.1,03,00,000/- is not transferred by the applicant to the corporate debtor and thus the corporate debtor shall not be liable towards the same. The corporate debtor further submits that the corporate debtor on 23.09,2013, 13.01,2015, 14.01.2015 and 04.03.2015 had paid Rs.1,00,00,000/-, Rs.35,00,000/-, Rs.75,25,000/- and Rs.4,00,000/- respectively aggregate amounting Rs.2,14,25,000/- to the applicant.
 - b) The corporate debtor further submits that after adjusting the payments made by the corporate debtor to the applicant the alleged outstanding amount should be Rs.2,99,75,000/- and not Rs.4,02,75,000/- as claimed by the applicant in Part IV of Form1 of the petition.
 - c) The corporate debtor submits that the alleged transactions have occurred till 02.02.2016 and the said transactions have been shown as short term borrowings in the books of account of the corporate debtor and thereafter same is not acknowledged debt in the books of the corporate debtor and thus, the application filed under Section 7 of the Code, 2016 is hopelessly barred by limitation.

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- d) The corporate debtor further submits that the alleged outstanding debt does not meet the following key requirements to initiate the CIRP under Section of the Code, 2016:-
- i. There is no record to show that on the date of the alleged disbursement of the loan amounts in question have backing of any board resolutions of the corporate debtor.
 - ii. There are no formal agreements of loan and interest.
 - iii. There is no document to stipulate the period of repayment.
- e) In order to support the case, the corporate debtor relied on citations **Sanaya Tea Pvt. Ltd v. Vinergy International Private Limited, Pawan Kumar vs. Utsav Securities Private Limited & Ors bearing Company Appeal (AT)(Ins) No.251 of 2020, Shree Ambica Rice Mill vs. Kaneri Agro Industries Limited Company Appeal (AT)(Ins) No.143 of 2021, Starlog Enterprises Limited v. Anil Menezes Company Appeal (AT)(Ins) No.156 of 2021.**
5. The applicant filed rejoinder to the reply submitted by the corporate debtor. The submissions of the applicant in the rejoinder are stated herein in brief:-
- a) The applicant submits that corporate debtor had made entries in its own audited financial statements for the financial year 2014-15 reflecting a sum of Rs.2,45,75,000/-as 'loans and advances from related parties' under the head 'short term borrowings', the same would amount to an acknowledgement of liability and thus the same is due and payable by the corporate debtor. The applicant further submits that the debt as well default stands authenticated by the Information Utility (NESL) vide its report dated 07.07.2021
 - b) The applicant submits that the money advanced by the applicant to the corporate debtor as on 31.05.2015 was utilized in the business of the corporate debtor and thus, the loan advanced by the applicant involves the time value of money considering the nature of such money. The applicant further submits that that the corporate debtor is a related entity of the applicant and any money advanced for improvement of the financial health or boosting the economic prospects of the related entity would be deemed to have the commercial effect of borrowing. In order to support the contention that disbursed amount is a financial deb, the applicant placed reliance on citations **Shree Ambica Rice Mill v. M/s. Kaneri Agro Industries Ltd Company Appeal (AT)(Ins)No.143 of 2021, Shailesh Sangani v. Joel Cardoso and Anr. Company Appeal (AT)(Ins)No.616 of 2018,**
 - c) The applicant submits that Section 7(3) of the Code, 2016 has used the word "or" and thus, the NESL Report is adequate and no financial

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agreement is required to be filed. The applicant placed reliance **on M/s. Innoventive Industries Ltd v. ICICI Bank & Anr.**

- d) The applicant further submits that, since the loan disbursed was a short term loan repayable on demand and such demand was made on 31.01.2019, for the first time by the applicant through its Interim Resolution Professional, accordingly date of default is 31.01.2019.
- e) The applicant further submits that the instant petition was filed on 23.07.2021 i.e., within 3 years from when the cause of action arose, i.e., when the debt was not paid on demand. In order to support the contention, reliance was placed on **IFCI Ventures Capital Funds Ltd. V. Santosh Khosla and Ors [MANU/DE/1078/2012]** and **Virender Kumar Jain v. Alumate (India) Pvt. Ltd.,[MANU/DE/0885/2012]**.

6. We have heard Ld. Counsel for both the parties and perused the averments made in the petition, reply and rejoinder filed by the parties. The relevant documents annexed with the respective submissions have been examined.

7. As regard to the contention that the loan is barred by limitation, we observe that no repayment date was specified between the parties, although the applicant had asserted in the pleadings that the loan was repayable on demand, however, there was no express term to that effect. We further place our reliance on citation relied by the applicant **Virender Kumar Jain v. Alumate (India) Pvt. Ltd.,[MANU/DE/0885/2012]** wherein it was held that when loan is given without fixing any date of repayment, 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 and not by Article 19 of the Limitation Act, 1963.

8. The Hon'ble Supreme Court in **B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates** held that the Limitation Act would apply to applications filed under Sections 7 and 9 of the IBC. The Court held:

“42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. “The right to sue”, therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the



Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.”

9. In view of the above, we hold that the limitation began to run not when the loans were disbursed, but on the date of default i.e., date of issue of the notice (31.09.2019) for recovery of Rs.4,02,75,000/- when the demand was made by the IRP and the instant petition was filed on 23.07.2021, therefore, the present petition is filed within three years therefrom and the petition is within the period of limitation.
10. As regard to contention of the quantum of debt, we are of the earnest view that the same does not fall for consideration before the Adjudicating Authority at the stage of ‘admission’ of the Application under Section 7 of the Code. At the admission stage, the only requirement is that the minimum outstanding debt should be more than the pecuniary threshold amount provided for under the Code, 2016. From the documents on record, we observe that books of account of the corporate debtor shows an outstanding debt of Rs.2,99,75,000/- under the heading “Short Term Borrowings” whereas the books of account of the applicant shows an outstanding debt of Rs.4,02,75,000/- under the heading Short term loans and advance. Be that as it may, since, the alleged debt outstanding by the corporate debtor is Rs.2,99,75,000/-, which is above the pecuniary threshold limit.
11. As regard to the nature of debt, we are of the affirm view that the definition of ‘Financial Debt’ as defined under Section 5(8) of the Code, 2016 does not expressly exclude an interest-free loan. ‘Financial debt’ would have to be construed to include interest-free loans advanced to finance the business operations of a corporate body. We further observe that the record of default is registered with National E-Governance Services Limited and the said debt is also acknowledged by the corporate debtor in its reply and corroborated in the financial statements of the corporate debtor also. Therefore, on the basis of the given facts and analysis we are inclined to hold

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that the corporate debtor cannot deny the existence of a financial debt as defined in section 5(8) of the IBC as present in the record of the information utility.

12. The Hon'ble Supreme Court of India, on 26th July, 2021 in the **case of M/s Orator Marketing Pvt. Ltd v. M/s Samtex Desinz Pvt. Ltd [Civil Appeal No. 2231 of 2021]**, and upheld that interest free loan would also be considered as 'financial debt' under Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

13. Further, the Hon'ble Supreme Court in the matter of **Innoventive Industries Ltd. vs. ICICI Bank & Anr (2018) 1 SCC 407**, held as follows :-

*"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code. 30. On the other hand, as we have seen, **in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.**"*

*"30. On the other hand, as we have seen, **in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when***



this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.” We note that that the issue of debt being due and payable in the present case is not interdicted by any law but only a technical deficiency of insufficiency of their stamping has been raised which can be cured.

14. Needless to say, the applicant clearly comes within the definition of Financial Creditor. The material placed on record as stated above further confirms that respondent has debt due and has committed default in repayment of the outstanding financial debt. Thus an application under Section 7 of the Code is maintainable if the debt is proved to be due and there is default. In view of the Section 4 of the Code, the moment default is of Rupees one hundred lakhs or more, an application to trigger Corporate Insolvency Resolution Process under the Code is maintainable.
15. On a perusal of Form – I filed under Section 7 of the Code read with Rule 4 of the Rules shows that the form is complete and there is no infirmity in the same. It is also seen that there is no disciplinary proceeding pending against the proposed Interim Resolution Professional.
16. Thus, it is clear that when a default takes place, and debt becomes due and is not paid, the Insolvency Resolution Process shall begin against the corporate debtor. Therefore, on the basis of detailed discussion in the aforesaid paragraphs, we are satisfied that the present petition is complete in all respect. The petitioner financial creditor is entitled to move the petition against the corporate debtor in view of admitted outstanding financial debt and default of the same by the corporate debtor. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the instant petition ***IB-425/PB/2021 stands admitted and CIRP is initiated.***
17. The petitioner in Part-III of the petition had proposed the name of Mr. Gagan Gulati as proposed Interim Resolution Professional. Mr. Gagan Gulati having registration number IBBI/IPA-002/IP-N00893/2019-2020/12832 and email – id advocategulati@gmail.com is appointed as an Interim Resolution

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Professional for corporate debtor. The consent of the proposed interim resolution profession in Form-2 is taken on record.

18. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

- “(a)The institution of suits or continuation of pending suits or proceedings against the corporate debtor 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 corporate debtor 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 corporate debtor 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 corporate debtor.”
- (e)The IB Code 2016 also prohibits *Suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*”

19. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

20. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

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21. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs with the Interim Resolution Professional namely Mr. Gagan Gulati to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however is subject to adjustment towards Resolution Process cost as per applicable rules
22. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing appropriate orders. The Interim Resolution Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.
23. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today.

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(L.N. GUPTA)
MEMBER (T)

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(DHARMINDER SINGH)
MEMBER (J)