



**IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI**  
**COURT - IV**

**ITEM No.1**  
**IB/1122/ND/2020**

**IN THE MATTER OF:**

|                             |     |            |
|-----------------------------|-----|------------|
| Kaliber Associates Pvt. Ltd | ... | Applicant  |
| Versus                      |     |            |
| J. R. Modi Associates Ltd.  | ... | Respondent |

**Order under Section 7 of IBC, 2016.**

**Order delivered on 21.04.2023**

**Coram:**

**Mr. P.S.N. PRASAD,**  
**HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA,**  
**HON'BLE MEMBER (TECHNICAL)**

**ORDER**

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheets.

C.P. (IB)/1122/ND/2020 stands admitted.

**Sd/-**  
**DR. BINOD KUMAR SINHA,**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**P.S.N. PRASAD,**  
**MEMBER (JUDICIAL)**



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

**Company Petition No. (IB)-1122(ND)/2020**

**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. J.R. Modi Associates Private Limited

**... Respondent / Corporate Debtor**

**CORAM:**

**SH. P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)**

**DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

**Order Delivered on: 21.04.2023**

**ORDER**

**PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)**

The present Company Application 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 Company M/s. J.R. Modi Associates Limited ('Corporate Debtor') for default in



repayment of financial debt of Rs.9,05,00,000/- (Rupees Nine Crores and Five Lakhs 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 Corporate Debtor i.e., M/s. J.R. Modi Associates Limited having CIN: U45209DL1997PTC085650 is incorporated on 06.03.1997 under the provisions of the Companies Act, 1956 having its registered office situated at 26, Ground Floor, Siri Fort Road, New Delhi – 110049. Since the registered office of the 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. Briefly stated facts of the case as mentioned in the Company Application, which are relevant to the issue in question and averred by the applicant are that applicant had advanced a total sum of Rs.29,05,00,000/- (Rs. Twenty Nine Crores and Five Lakhs only) to the Corporate Debtor as an advanced against property. It is submitted that the Corporate Debtor had made payments of certain amount on various dates and a total of Rs.9,05,00,000/- (Rs. Nine Crores and Five Lakh only) was still outstanding as on 31.03.2019.
5. Further, it is submitted that since the outstanding amount is advanced against the property which has an appreciation over a period of time and therefore, has the effect of a 'Financial Debt'. To support its contention, the applicant has placed reliance on the Judgement of Hon'ble National Company



Law Appellate Tribunal in the matter of **Shailesh Sangani v. Joel Cardoso [Company Appeal (AT) (Insolvency) No. 616 of 2018]** and Judgement dated 21.05.2018 passed by the Hon'ble National Company Law Appellate Tribunal in the matter of **Mack Soft Tech Pvt. Ltd. v. Quinn Logistics Indian Ltd. [Company Appeal (AT) (Insolvency) No. 143 of 2017]**.

6. The applicant had placed reliance on the following documents to prove the existence of Financial Debt and Default thereto -

- a) Copy of the Bank Statement of M/s. Kaliber Associates Private Limited from 01.04.2008 to 01.06.2019.
- b) Copy of the Audited Financial Statements of Corporate Debtor as on 31.03.2017, 31.03.2018 and 31.03.2019.
- c) Copy of the Record of Default as registered with NeSL.
- d) Copy of the legal notice dated 18.07.2019 and 20.07.2020 issued by the Applicant to the Corporate Debtor demanding the repayment of the outstanding amount.

7. Heard and records perused. From the records, it is observed that this Adjudicating Authority vide order dated 31.03.2022 had initiated the CIRP against the Corporate Debtor in the present application i./e., I.B./1122/2020, wherein also the Corporate Debtor was proceeded ex-parte vide order dated 23.09.2021 of this Adjudicating Authority. The Corporate Debtor had filed Appeals bearing CA (AT) (Ins) No. 443 of 2022 and CA (AT) (Ins) No. 523 of 2022 before the Hon'ble NCLAT on the ground that the Corporate Debtor had filed their Reply on 12.08.2021 and paid the cost also but somehow the Reply was not attached with the main file and therefore, the Corporate Debtor should be given one more opportunity to present its case before the Adjudicating Authority. The Hon'ble NCLAT vide its order dated 27.05.2022 in CA (AT) (Ins) No. 443 of 2022 and CA (AT) (Ins) No. 523 of 2022 had set aside the CIRP admission order dated 31.03.2022 and remanded the matter back to the Adjudicating Authority to decide CP(IB) No. 1122/ND/2020 afresh taking into consideration the Reply of the Corporate



Debtor. The relevant part of the Hon'ble NCLAT's order dated 27.05.2022 is reproduced below:-

“In view of the aforesaid discussions, CA (AT) (Ins) No. 523 of 2022 is allowed and order dated 21.02.2022 is set aside and consequently, the order dated 23.09.2021, whereby the Appellant was proceeded against ex-parte is also set aside. In the order dated 31.03.2022, challenged in CA (AT) (Ins) No. 443 of 2022, the Adjudicating Authority has recorded in Para 6 of the impugned order that “the Corporate Debtor has not filed any Reply nor appeared and hence the Corporate Debtor was proceeded against ex-parte vide order dated 23.09.2021”. Keeping in view that CA (AT) (Ins) No. 523 of 2022 is allowed, the impugned order dated 31.03.2022 is also set aside and the matter is remanded back to the Adjudicating Authority, NCLT, New Delhi to decide CP(IB) No. 1122/ND/2020 afresh taking into consideration the Reply filed by the Appellant on 12.08.2021 and decide the matter as expeditiously as possible. The parties are directed to appear before the Tribunal on 05th July, 2022.”

8. This Adjudicating Authority in compliance of the Hon'ble NCLAT's direction in order dated 27.05.2022 had fixed the matter for arguments on 23.08.2022 in its order dated 05.07.2022. This Adjudicating Authority considering that no one has appeared on 23.08.2022 on behalf of the Corporate Debtor and also the fact that reply of the Corporate Debtor is still not brought on e-portal of this Adjudicating Authority had no other option but to proceed against the Corporate Debtor ex-parte vide order dated 20.09.2022.
9. Since the Corporate Debtor is proceeded ex-parte vide order dated 20.09.2022 of this Adjudicating Authority, the arguments on behalf of the applicant was heard by this Adjudicating Authority and the matter was reserved for orders on 27.02.2023. Further, it is observed that as on the date of reserving the matter also, the defect free reply on behalf of the Corporate Debtor has not come on record of this Adjudicating Authority, which the Corporate Debtor had claimed to have filed on 12.08.2021.
10. It is pertinent to note that Section 7(4) of the Code, 2016 provides that the Adjudicating Authority shall, within fourteen days of the receipt of the



application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Taking into consideration the fact, that Code stipulates a time bound procedure, wherein the adherence to time limits is crucial for the achievement of the objectives of Code, it seems that despite adequate opportunities being granted to the Corporate Debtor for taking necessary steps to place their reply on record and defend in the matter, they have chosen not to avail of those opportunities leading to a prima-facie conclusion that non-placing of their reply on record is nothing but a mere dilatory tactic on the part of Corporate Debtor to derail the entire process.

11. Be that as it may, from the company application and the documents filed with it, we observe that the Applicant had disbursed a total amount of Rs. 29,05,00,000/- to the Corporate Debtor in various tranches, out of which some amount is paid by the Corporate Debtor, however, in a net debt amount of Rs.9,05,00,000/- still remaining unpaid. The audited Financial Statement of the Corporate Debtor as on 31.03.2018 reflects this amount of Rs.9,05,00,000/- due to the Applicant as Advance against property. We further observe that the record of default in respect of the said debt is registered with National E-Governance Services Limited and the said debt also stands corroborated in the Audited Financial Statements of the corporate debtor. Therefore, on the basis of the given facts and analysis we are inclined to hold 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. As regards the time value of money, it has been held by Hon'ble Supreme Court that even if interest is not chargeable as per the agreed transaction, still the principal amount shall qualify as a Financial Debt. Section 5(8) of the Code, 2016 defines Financial Debt as under:-



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 dematerialised 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 the commercial effect of a borrowing; and (ii) the expressions, “allottee” and “real estate project” shall have the 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 or 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 financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

13. From the definition of Financial Debt as extracted above, Section 5(8) of the Code, 2016 includes credit transactions of various natures enlisted in Section 5(8)(a) to 5(8)(i), falling within the purview of Financial Debt, out of which Section 5(8)(f) of the Code, 2016 clearly stipulates that any amount raised under any other transaction including any forward sale or purchase agreement having commercial effect of borrowing shall be covered under the ambit of Financial Debt. Further, it is clear that the main ingredients of a Financial Debt are ‘disbursal’ and ‘time value of money’. In the instant case, disbursal is not disputed and it is rather acknowledged by the Corporate



Debtor vide its audited Financial Accounts as on 31.03.2018. Here, it will be relevant to refer the Hon'ble Supreme Court of India's judgment in the **case of M/s Orator Marketing Pvt. Ltd v. M/s Samtex Desinz Pvt. Ltd [Civil Appeal No. 2231 of 2021;26th July, 2021]** wherein it is observed as follow:-

*22. The NCLT and NCLAT have overlooked the words "if any" which could not have been intended to be otiose. 'Financial debt' means outstanding principal due in respect of a loan and would also include interest thereon, if any interest were payable thereon. If there is no interest payable on the loan, only the outstanding principal would qualify as a financial debt. Both NCLAT and NCLT have failed to notice clause(f) of Section 5(8), in terms whereof 'financial debt' includes any amount raised under any other transaction, having the commercial effect of borrowing.*

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*31. At the cost of repetition, it is reiterated that the trigger for initiation of the Corporate Insolvency Resolution Process by a Financial Creditor under Section 7 of the IBC is the occurrence of a default by the Corporate Debtor. 'Default' means non-payment of debt in whole or part when the debt has become due and payable and debt means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt. The definition of 'debt' is also expansive and the same includes inter alia financial debt. The definition of 'Financial Debt' in Section 5(8) of IBC 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."*

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14. Needless to say, the amount disbursed by the applicant as an advance against property clearly falls within the ambit of Financial Debt under Section 5(8)(f) of the Code, 2016 as the same is having commercial effect of borrowing, Moreover, Applicant clearly comes within the definition of Financial Creditor. The material placed on record as stated above further confirms that Corporate Debtor has debt due and has committed default in repayment of the outstanding financial debt.. Therefore, on the basis of discussion in the aforesaid paragraphs, we are satisfied that the present application is complete in all respects. The Applicant /financial creditor is entitled to move the application against the



Corporate Debtor in view of outstanding Financial Debt in default which is above the pecuniary threshold limit as provided under Section 4 of the Code, 2016. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the instant petition ***I.B./1122/ND/2020 stands admitted*** and CIRP of ***M/s. J.R. Modi Associates Limited*** shall commence.

15. The petitioner in Part-III of the petition has proposed the name of Mr. Rajiv Bajaj as proposed Interim Resolution Professional, having Registration Number IBBI/IPA-002/IP-N00276/2017-2018/10834. Mr. Rajiv Bajaj, having registration number IBBI/IPA-002/IP-N00276/2017-2018/10834 and email – id [rbajajip@gmail.com](mailto:rbajajip@gmail.com) is appointed as an Interim Resolution Professional (IRP) for corporate debtor. The consent of the proposed interim resolution profession in Form-2 is taken on record. The IRP so appointed shall file a valid AFA and disclosure about non-initiation of any disciplinary proceedings against him, within five (5) days of pronouncement of this order.
16. 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.*

17. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government and 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.
18. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (within 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.
19. We direct the applicant Financial Creditor to deposit a sum of Rs. 2 Lakhs (Two Lakh Rupees) with the Interim Resolution Professional namely Mr. Rajiv Bajaj 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
20. The Interim Resolution Professional shall perform all his functions as 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.
21. 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.

22. 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 his 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. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.
24. Accordingly, the instant application filed under Section 7 of the Code, 2016 bearing **I.B./1122 (ND)/2020 stands admitted.**

**Sd/-**  
**(DR.BINOD KUMAR SINHA)**  
**MEMBER (T)**

**Sd/-**  
**(SH. P.S.N PRASAD)**  
**MEMBER (J)**