

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

C.P.(IB)-229(ND)/2024

(Order under Section 7 of the IBC, 2016 Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016)

IN THE MATTER OF:

ILD Owners Welfare Association

ILD Trade Centre,
Sector-47, Sohna Road,
Gurugram-122018, Haryana

..... Financial Creditors/Applicants

VERSUS

M/s. ALM Infotech City Private Limited

Having Its Registered Office at:

B-418, New Friends Colony, New Delhi-110025.

..... Corporate Debtor

Order Pronounced On: 30.07.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Financial Creditors: Mr. Sonal Anand, Mr. Aayush Sai, Advs.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present Application has been filed jointly by ILD Owners Welfare Association, a duly Registered Resident's Welfare Association of the owners/ residents of the "ILD Trade Centre" (hereinafter referred to as "**the Society**" / "**the Financial Creditor**") through Mr. Rakesh Kumar Koul, President of the Society before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or "Code") r/w Rule 4 of the Insolvency

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and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking an Order to initiate Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against M/s. ALM Infotech City Private Limited, the Corporate Debtor.

2. It is the case of the Applicant/Financial Creditor that the Respondent/Corporate Debtor is the Developer of the project in question and had collected 2.95 crores as interest free maintenance deposit from the residents of the Complex and was supposed to hand over the said amount to the Applicant/Financial Creditor (RWA) as per the Conveyance Deed. However, the Corporate Debtor has not handed over the said amount to the Applicant/Financial Creditor despite repeated requests.
3. The Ld. Counsel appearing for the applicant submitted that the interest free maintenance deposit of Rs. 2.95 crores is in the nature of Financial Debt and therefore, the present application under Section 7 maintainable.
4. This Adjudicating Authority vide Order dated 08.05.2024 directed the Ld. Counsel for the Applicant to file an affidavit indicating therein that the amount in question is Financial Debt defined under Section 5(8) of IBC, 2016.

The relevant paragraph of the Order is reproduced as below:

“This application has been filed by M/s. ILD Owners Welfare Association under Section 7 of the IBC, 2016 seeking initiation of CIRP against M/s. ALM Infotech City Pvt. Ltd on the alleged default of Rs. 2,95,00,000/-.

Heard the Ld. Counsel appearing for Applicant. The Applicant is directed to file an affidavit indicating therein that the amount in question is Financial Debt under Section 5(8) of IBC, 2016 with relevant documents, if any within one week.”

5. The Ld. Counsel for the Applicant in compliance with Order dated 08.05.2024 filed an affidavit dated 28.04.2024 and submitted that a Conveyance Deed dated 09.12.2015 was executed between the Allottees and the Corporate Debtor. Clause 26 of the said Deed provides that the financial debt is to be handed over to the Financial Creditor/Society as and when it is formed. The Corporate Debtor owes an amount of Rs. 2,95,00,000/- (along with accrued interest) to the Financial Creditor which is money raised from allottees of the Project – ILD Trade Centre.

Clause 26 of the Conveyance Deed is as follows: -

“26. That in order to maintain the common areas, services, installations, common passages, entrance, corridors, staircase, and other common facilities and amenities, common areas, lifts, escalators, landscaping, secured gates, the Vendor may appoint Maintenance Agency.

The Vendee(s)/Occupier(s) shall pay the maintenance charges to the said Maintenance Agency as per the bills to be raised by it from time to time. The Vendee(s) shall deposit with the Vendor a sum calculated @ Rs100/- per ft./super area towards Interest Free Maintenance Security (IFMS) at the time of offer of possession of the Said Unit. The Vendee(s) shall also sign and execute a separate Maintenance Agreement/document for upkeep and maintenance of the common areas, services, facilities and installations of the complex/Building, more specifically described in the Maintenance Agreement in the standard format of the Vendor, at the time of taking possession of the Said Unit and/or as and when so desired by the Vendor.”

6. He further submitted that the owners of the Apartments of the Project in question have paid the amount towards maintenance to the Corporate Debtor for forming a corpus to be held by the Corporate Debtor till the owners of the Apartments form a society. The Corporate Debtor by virtue of Clause 26 of the Conveyance Deed is under an obligation to hand over the amount towards Maintenance Security Deposit to the society so as to enable the Applicant to maintain the apartments. The said amount in question amounts to Financial Debt within the meaning of Section 5(8) of the IBC 2016.
7. The Applicant contended that the money raised by the Corporate Debtor was neither due nor payable to the Corporate Debtor. The said money has been raised at the time of handing over possession to the owners starting from 2015/16 and is maintained by the Corporate Debtor over a period of 7- 8 years and is earning interest. It was money raised in advance and was never actually due nor payable and in addition to being a means to raise finance is having “time value of money” with the Corporate Debtor having raised the money in advance and utilized it for his own purpose.

8. The Ld. Counsel for the Applicant has relied on the judgment of the Hon'ble Supreme Court in the case of **Global Credit Capital Ltd. & Anr. v. Sach Marketing Pvt. Ltd. & Anr.**” reported as 2024 SCC OnLine SC 649 wherein it was held that amounts covered by security deposits under the agreements constitute financial debt.
9. The co-ordinate Bench of this Adjudicating Authority have initiated CIRP against the Corporate Debtor in “**Vipul Greens Residents Welfare Association v. Vipul Limited**” in **CP(IB)-541(ND)/2019** vide Order dated 12.07.2021 having similar facts, the Financial Creditor being RWA of the Project Vipul Greens in Gurugram and the Corporate debtor was the Builder and the Financial Debt in default was the Maintenance Security Deposit.
10. Be that as it may, the issue as to whether maintenance charges and interest free maintenance security (IFMS) paid by the Applicants to the Corporate Debtor will fall under the ambit of the definition of financial debt within the meaning of section 5(8) of the IBC 2016, has been extensively dealt with in the Order dated 04.05.2023 passed in IB-1097(PB)/2019 by NCLT Delhi, Court-VI wherein it has been held that the amount in question does not qualify as a financial debt. The relevant paragraphs of the above said judgment are extracted below: -

“8. In order to decide whether such amount collected to ensure maintenance of the project and to ensure that the allottees pay monthly maintenance bills on time, we need to look into the definition of Financial Debt under the IBC, 2016. Section 5(8) of IBC, 2016 defines Financial Debt as follows:

"financial debt" means a debt alongwith 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 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;

The Hon’ble Supreme Court of India in ‘**Anuj Jain, RP for Jaypee Infratech Ltd. vs. Axis Bank Ltd.**’, Civil Appeal Nos. 8512-8527 of 2019, has settled the legal position with regard to the definition of financial debt. Relevant para is reproduced hereunder:

“43. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become ‘financial debt’ for the purposes of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money.

[...]

The requirement of existence of debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein.

[...]

In other words, any of the transactions stated in the said 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.”

Further in '**Pioneer Urban Land Infrastructure Ltd. & Anr. Vs. Union of India & Ors.**', Writ Petition (Civil) No. 43 of 2019, the Apex Court has held as under:

“61. In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee of the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment.

[...]

Thus far, it is clear that an allottee “disburses” money in the form of advance payments made towards construction of the real estate project.

67. [...] Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender.”

In the above-mentioned judgement, the Hon'ble Supreme Court had made it clear that in the case of allottees only those amounts which were disbursed with profit as the main aim can be considered as financial debt and are covered under the Explanation to Section 5(8)(f).

In the present case, it is an admitted position that the possession is already handed over to the allottees and the issue remaining is with respect to the maintenance corpus. The corpus so collected by the Respondent was to ensure proper maintenance of the project and hence, it cannot be said that profit was the main aim for collection of such corpus.

9. Therefore, in our considered view, the amount in question is similar to the money paid in advance to a service provider, which in the present case is the service of maintenance. A co-joint reading of Section 5(8) of the IBC, 2016 and the above quoted judgements makes it amply clear that the amount in question does not qualify as Financial Debt.

Further, a similar view has been taken by NCLT, Mumbai Bench in the matter of **Innova Premises Co-operative Society Limited V/s Marathon Nextgen Realty Limited**, CP (IB) No.1042/MB-IV/2020 wherein it was held as follows:

“12. From the perusal of the Premises Ownership Agreement entered with members of the Applicant Society, it is noticed that the amount claimed due from the Corporate Debtor is on account of surplus of collections made by the Corporate Debtor for maintenance of the building owned by the members of the Applicant Society till the handing over of such maintenance obligation to the condominium formed by such flat owners.

The amount so collected was in nature of advances, paid by the flat allottees upon occupation of said flats, towards maintenance charges/taxes recoverable from such flat owners for the period subsequent to the occupation of the flats as well as period of development of the flats.

From the perusal of these documents the Bench is of the view of that there is no dispute that this money was collected for the maintenance/taxes payment and there is no default in handing over the flats booked by members of the Applicant Society.

In our considered view the amount in question is akin to the money paid in advance to a service provider for availing services and defraying expenses to be incurred by such service providers in rendition of agreed services.

13. Since the amount in question is not a financial debt, the Applicant cannot said to be a Financial Creditor so as to make eligible to file an application under section 7 of the Code.

10. Accordingly, in our view the present Application is not maintainable. We hereby dismiss the present application filed under Section 7 of the IB Code, 2016.”

11. The Ld. Counsel for the Applicant during the course of argument has submitted that the said order passed in IB-1097(PB)/2019 is under challenge before the Hon'ble NCLAT, Principal Bench, New Delhi in Company Appeal No. 902/2023 in the matter of **The Verandas Apartment Owners Association v. M/s. Saluja Construction Company Ltd.**
12. We have noted that the Hon'ble NCLAT vide order dated 21.08.2023 has been pleased to issue notice to the Respondent and directed that the pleadings should be completed and the matter is pending before the Hon'ble NCLAT. However, Ld. Counsel for the Applicant has not placed on record any order passed by Hon'ble NCLAT granting interim stay of the operation of the impugned order. Therefore, we are of the view that Order dated 04.05.2023 passed in IB-1097(PB)/2019 is in force and therefore, the present matter is covered by the said Order.
13. We may further add that the NCLT Hyderabad Bench, while dealing with a case on similar facts in the case of **Vasathi Anandi Owners Welfare Association v. Vasathi Housing Limited** vide Order dated 24.11.2023 in CP(IB) 50/7/HDB/2020 held that the present application is not maintainable and the Applicant shall not fall within the meaning of Financial Creditor under section 5(7) of the IBC. The relevant paragraphs of the above said judgment are extracted below: -

“44. Since the ‘corpus fund’ was not collected under any real estate project, as seen above, the owners of the apartments, who are before us in the form of a registered society, cannot be treated as ‘allottee’ under section 5(8)(f) of IBC, in respect of the ‘corpus fund’ as the same was not in relation to the real estate project. The term ‘allottee’ referred in section 5(8)(f) of IBC is also defined in section 2(d) of RERA 2016, to state

(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

Considering the aforementioned, it is clear that the corpus fund collected with an aim of maintaining the project was not from an allottee under a real estate project within the meaning of Section 5(8)(f) of IBC, and therefore it does not qualify as financial debt.

45. From clause 12 of the Agreement of Sale dated 07.02.2013 (extracted above) it is also clear that the corpus fund being an interest free deposit towards maintenance had no stipulation for any consideration for the time value of the money so deposited, which is an essential feature of any financial debt.”

14. We agree with the view taken by NCLT, Hyderabad Bench and therefore hold that the amount in question the maintenance and Interest Free Maintenance Security (IFMS) does not amount to financial debt within the meaning of Section 5(8) of the Code. Therefore, the present application filed under Section 7 of the IBC is not maintainable.
15. The present application **CP (IB)-229(ND)/2024** filed under Section 7 of the Code is **dismissed**.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**