

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 864 of 2020**

[Arising out of Order dated 13<sup>th</sup> March, 2020 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata in Company Petition No. (IB) No. 2084/KB/2019]

**IN THE MATTER OF:**

**Bhaskar Biswas,**

Suspended Director of Oxford Facilities Management,  
Having his Residential Address  
540D, Bombay Bagan Road,  
Kolkata – 700 061.

**...Appellant**

**Versus**

**Avaani Oxford Owners' Association**

Having its registered office at  
136 Jessore Road,  
Kolkata – 700 055.

**...Respondent No. 1**

**Sneh Maheswari**

Interim Resolution Professional  
of Oxford Facilities Management  
Having her office at  
9N, Block A, New Alipore,  
Kolkata -700 053.

**...Respondent No. 2**

**Oxford Facilities Management**

Having its registered office at  
136 Jessore Road,  
Kolkata – 700 055.

**...Respondent No. 3**

**For Appellant:**      **Mr. Jishnu Saha, Sr. Advocate with Ms. Soumya Dutta,  
Mr. Aniruddha Mitra, Mr. Mainak Bose, Advocates.**

**For Respondents:** **Mr. Joy Saha, Sr. Advocate with Mr. Avishek Guha, Mr.  
Shashwat Anand, Mr. Arik Banerjee and Mr. Gaurav  
Sarkar, Advocates for Respondent No.1.**

**Mr. Arun Kumar Gupta, Mr. Rajesh Agarwal and Ms.  
Sneh Maheswari, Advocates for Respondent No. 2 & 3.**

*Cont'd.... /*

**J U D G M E N T****[13.07.2021]****A. I. S. Cheema, J.**

The Appellant, Suspended Director of 'Oxford Facilities Management' (the Corporate Debtor), has filed this appeal against impugned order dated 13<sup>th</sup> March, 2020 passed in CP(IB) No. 2084/KB/2019 vide which order the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench, Kolkata admitted the application under Section 7 of Insolvency and Bankruptcy Code, 2016 ('IBC' for short) filed by Respondent No. 1 – 'Avaani Oxford Owners' Association' and Corporate Insolvency Resolution Process (CIRP) was initiated.

2. Appellant claims and it is argued that the Appellant and Respondent No. 1 both are companies registered under Section 8 of the Companies Act, 2013. Respondent No. 2 is the Interim Resolution Professional (IRP) who was appointed by the impugned order for the Corporate Debtor. Respondent No. 3 is the Corporate Debtor through IRP.

3. It is stated that the application filed under Section 7 claimed that there was debt of Rs.5,64,72,615.80/-. The amount claimed to be in default were deposits made by flat owners with the Developer – 'M/s Avaani Projects and Infrastructure Ltd.' when the flat owners executed respective agreements. It is claimed that the

amounts were not paid to the present Corporate Debtor – ‘Oxford Facilities Management’. The amounts were deposited by the flat owners towards maintenance fund and sinking fund with the Developer and which were held by the Developer and subsequently transferred to the present Corporate Debtor, which is a Non-Profit Company.

4. Appellant claims that earlier against the Developer - ‘M/s Avaani Projects and Infrastructure Ltd.’ there was separate CIRP initiated under Section 7 of IBC and that Respondent No. 1 – Financial Creditor had filed statement of claim in that CIRP which was brought against the Developer Company. While such CIRP was pending, the Respondent No. 1 filed proceedings under Section 7 of IBC for the amounts deposited in terms of the agreement to sell, with the Developer. Appellant claims that the Corporate Debtor had appeared before the Adjudicating Authority and challenged the maintainability of the Section 7 IBC Proceedings filed and that the claim, if any, can be against the Developer Company and claim had been filed before the Resolution Professional of the Developer Company and that the debt was not a financial Debt. It is stated that still the Adjudicating Authority summarily concluded the matter and admitted the application.

5. The Appellant claims that the Developer - ‘M/s Avaani Projects and Infrastructure Ltd.’ proposed to construct ‘Avani Oxford’ a residential complex at Kolkata. Proposed buyers, who later became flat owners, had entered into agreement with the Developer and each of them had deposited, inter alia, towards

sinking fund @ Rs.25/- per Sq. Ft. and towards maintenance @ Rs.2/- per Sq. Ft. per month for 12 months. This was in terms of Clause 6.5 of the Agreement for Sale. The Agreement further provides that the Maintenance Company/ Syndicate is required to be appointed by the Developer for taking over common parts and maintenance of the building complex. The Corporate Debtor came to be incorporated on 4<sup>th</sup> May, 2010. Completion Certificate of the residential complex was received on 21<sup>st</sup> March, 2016. As per the Appellant, the Financial Creditors - Flat Owners alleged deficiency in service and filed consumer complaint before the National Commission having Consumer Complaint No. 1163 of 2016 and on 10<sup>th</sup> August, 2016 on complaint by Respondent No. 1 order of injunction was passed against the Developer restraining utilizing sinking fund which had been deposited by the flat owners in terms of Agreement of Sale. It is stated that the proceedings are still pending. Meanwhile, the Appellant states that on 13<sup>th</sup> March, 2019 an application under Section 7 was filed by Respondent No. 1 which came to be admitted.

6. It has been argued by Learned Counsel for the Appellant that earlier CIRP was initiated against the Developer and in the said CIRP Respondent No. 1 had filed claim but subsequently filed application under Section 7 claiming that they would withdraw the claim against the Developer. According to Learned Counsel, in the Agreement which was entered by the flat owners with the Developer (one copy of which is at page 160 of the Appeal), it is seen that the said amount deposited with the Developer was not to carry interest. Reference is made to Para

7.1 of the Agreement under the heading 'Article-VII – Sinking Fund'. It is claimed that the amount was in the nature of a deposit for being used for maintenance and thus, it was not a 'Financial Debt'. Respondent No. 3 – 'Oxford Facilities Management' was established as a Maintenance Company. It is stated that Respondent No. 3 is 100% subsidiary of the Developer Company - 'M/s Avaani Projects and Infrastructure Ltd.' and no flat owner is member of Respondent No. 3 – Corporate Debtor. It is also claimed that subsequently the Respondent No. 1 (Financial Creditor) Company was established for taking over the management of the building. Learned Counsel for the Appellant submitted that the Appellant was ready to transfer the money which was deposited by the flat buyers but the Appellant was not ready to pay interest and that the Appellant wanted to deduct amount spent on maintenance.

7. It is also argued that in the application under Section 7 of IBC date of default was not mentioned and only in the Reply which is filed in the Appeal by Respondent No. 1 in Para 20 it is stated that the second phase of 'Avani Oxford' was completed on 21<sup>st</sup> March, 2016 and that the date of default is 21<sup>st</sup> March, 2016. The Learned Counsel for the Appellant submitted that Respondent No. 1 should have pursued its claim in the CIRP against the Developer and the present application filed under Section 7 was not maintainable.

8. Counsel for Respondent No. 1 submitted that when the matter had come up before the Adjudicating Authority, the Corporate Debtor did not dispute that it is a

‘Financial Debt’ and issue of limitation was also not raised. It is admitted that Respondent No. 1 earlier filed claim in the CIRP which was filed against the Developer but when present application was filed under Section 7, the Respondent No. 1 had informed the Adjudicating Authority that Respondent No. 1 would be withdrawing the claim filed in the CIRP against the Developer. Thus, it is claimed that it is not a case that for same amount claims in two proceedings are being made by Respondent No.1.

9. Learned Counsel submitted that if Section 5(8)(f) Explanation (i) is perused any amount raised from the allottee falls within the definition of ‘Financial Debt’. Thus, the Respondent No. 1 is a ‘Financial Creditor’. The Learned Counsel referred to copy of Agreement (Page 160 of the Appeal) to submit that the Agreement made provision that the amount being collected from the flat purchaser by the Developer would be held by Respondent No. 3 - Corporate Debtor and after the flat buyers take possession of the flats/units, the sinking fund and the other amounts would be transferred to the Maintenance Company/Syndicate and/or Holding Organization, as the case may be. Learned Counsel for Respondent No. 1 submitted that Respondent No. 1 was the said Holding Company which was entitled to receive the amounts but that the amounts were not transferred by the Corporate Debtor to the Respondent No.1 Company and thus, there was default. The Learned Counsel referred to Reply (Page 10) to submit that the date of default was 21<sup>st</sup> March, 2016 as that was the date on which second phase of ‘Avani Oxford’ was completed. Learned Counsel referred to the Written Submissions filed by the

Builder before the National Consumer Disputes Redressal Commission (Page 274 at Page 278) in which the Opposite Party i.e. Developer stated that it was ready to refund the sinking fund. The said Written Submissions were filed on 23<sup>rd</sup> September, 2016. Counsel for Respondent No. 1 also relied on the Balance Sheets of the Corporate Debtor, copies of which have been filed with Dairy No. 25357 to submit that the debt of the Financial Creditor was admitted in the Balance Sheets for the years from 2016 to 2018.

10. Learned Counsel for Respondent No. 1 further referred to the Deed of Conveyance dated 24<sup>th</sup> March, 2011 as executed in favour of the Flat Buyers. Copy of one of Deed is at Page 110 of the Appeal. Reference was made to Clause (M) at Page 118 to point out that the Corporate Debtor – Maintenance Company was to withdraw no sooner the Association/Society is formed after three years or so upon completion of construction of Avani Oxford-II, whichever is later. Thus, it is argued that although the Corporate Debtor was to handover the amounts collected in terms of the Agreement and Conveyance, the same were not done and there was debt due and default and that the Adjudicating Authority rightly admitted the claim.

11. Having heard Learned Counsel for both the sides and having gone through the record, it is clear that the Sale Agreement executed between the Developer – ‘M/s Avaani Projects and Infrastructure Ltd.’ and the main land owner ‘M/s Electrical Manufacturing Company Ltd.’ and the Corporate Debtor as Maintenance

Company were to render common service and upkeep till the Association/Society of the flat owners was formed. The Corporate Debtor was to look after the maintenance till three years of the Deed of Conveyance by the respective purchasers with the Developer and Maintenance Company or so soon after completion of construction of Phase II of Avani Oxford whichever was later. The Appeal has also put on record that Avani Oxford Project received Completion Certification on 21<sup>st</sup> March, 2016. Section 7 application shows Respondent No. 1 was incorporated on 18<sup>th</sup> June, 2015 and Respondent No. 3 – Corporate Debtor was incorporated on 4<sup>th</sup> May, 2010. The application under Section 7 of IBC (Page 39 of the Appeal) is dated 21<sup>st</sup> November, 2019. Record shows that the Financial Creditors also moved the National Consumer Disputes Redressal Commission in July, 2016 in which orders were passed and even written submissions were filed by the Developer and that the Financial Creditors were pursuing their remedies. The Balance Sheets of the Corporate Debtor have also been filed. Keeping in view judgment in the matter of **“Sesh Nath Singh & Anr. vs. Bidyabati Sheoraphuli Co-operative Bank Ltd. & Anr.”, Civil Appeal No. 9198 of 2019 dated 22<sup>nd</sup> March, 2021** passed by the Hon’ble Supreme Court, it can be said that this is not a case where the Financial creditors were sleeping over their rights. They have been pursuing with the Developer and the Corporate Debtor. The Respondent No. 1 Company of Flat Purchasers has been trying to get back the money deposited by Flat Buyers themselves. They have also pursued rights in Consumer Forum. We

do not find that there is any substance in the claim made by the Appellant that the debt is time barred.

12. Admittedly, the amounts were collected by the Developer and kept with its subsidiary, the Corporate Debtor, for the purpose of maintenance till the Association/ Society or Holding Organization (i.e. Respondent No. 1) gets established to hand over the amounts to the body of the flat owners. Section 5(8)(f) Explanation makes it clear that 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. Thus, we accept the claim made by Respondent No. 1 that it is the 'Financial Debt'. There is Financial Debt due and in default of amount more than threshold stated in Section 4 of IBC. We do not find that there is any error in the impugned order vide which the CIRP was initiated.

13. There is no substance in the Appeal. Appeal is dismissed. No costs.

**[Justice A.I.S. Cheema]**  
**The Officiating Chairperson**

**[V. P. Singh]**  
**Member (Technical)**

Archana