NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 2198 of 2024
&
I.A. No. 8172 of 2024

[Arising out of order dated 30.07.2024 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court III, in C.P.(IB)-229(ND)/2024]

IN THE MATTER OF:

ILD Owners Welfare Association
Through its Authorized Representative,
Sh. Rakesh Kumar Koul

Registered office at: -
ILD Trade Centre,
Sector- 47, Sohna Road,
Gurugram - 122 018
Email ID: ildtcuoa@gmail.com **...Appellant**

Versus

M/s. ALM Infotech City Pvt. Ltd.

Registered office at: -
B-418, New Friends Colony,
New Delhi - 110 025

Corporate office at: -
9th Floor, ILD Trade Centre,
Sector-47, Sohna Road,
Gurugram - 122 018
Email ID: cs@ild.co.in **...Respondent**

Present:

For Appellant : Mr. Sonal Anand, Mr. Aayush Sai and Ms. Surbhi Singh, Advocates.

For Respondent :

O R D E R

ASHOK BHUSHAN, J.

This appeal has been filed challenging the order dated 30.07.2024 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court – III), rejecting Section 7 Application filed by the appellant. Appellant, ILD Owners Welfare Association. Aggrieved by the impugned order has filed this appeal.

2. Brief facts of the case necessary to be noticed for deciding the appeal are:

i. The respondent launched a project by the name ILD Trade Centre at Sector 47, Sohna Road, Gurgaon, in which occupancy certificate was received on 19.11.2010.

ii. Various unitholders booked their respective units on consideration, Builder Buyers Agreement (BBA) was executed and subsequently Conveyance Deed were also executed in favour of the different unit holders in the year 2015 onwards.

iii. Under the Conveyance Deed, unitholders were also required to pay a sum of Rs.100 sq. ft. super area of their respective unit to the respondent towards the **Interest Free Maintenance Security** (IFMS).

iv. The IFMS was collected towards maintenance of the common area and other common facilities and common area amenities.

v. Completion Certificate was also received on 03.06.2016.

vi. With regard to maintenance, complaints were filed by the unitholders as well as the appellant.

vii. Appellant claim to have taken over the maintenance of the project on 08.09.2022.

viii. On 06.10.2023, appellant sent a demand notice of ₹2.95 Crore to the respondent, the project proponent and thereafter in April 2024 filed an application under Section 7, claiming default of the financial debt.

ix. Adjudicating Authority passed an order on 08.05.2024, directing the appellant to file an affidavit indicating therein that amount in question is a financial debt defined under Section 5(8). In compliance of the order dated 08.05.2024, affidavit was filed by the appellant, where it was pleaded that Conveyance Deed dated 09.12.2015 was executed between the allottees and the corporate debtor. Clause 26 of the Conveyance Deed was relied. Adjudicating Authority heard the appellant and by the impugned order rejected the application under Section 7 holding that the IFMS is not a financial debt, hence the application under Section 7 is not maintainable.

x. Aggrieved by the order, rejecting Section 7 application, this appeal has been filed.

3. We have heard learned counsel for the appellant.

4. Learned counsel for the appellant challenging the impugned order submits that amount in default means to raise a finance by the corporate debtor and clearly falls within definition of financial debt. It is submitted that amount in question is covered by Section 5(8)(f) of the Insolvency and

Bankruptcy Code (for short 'the IBC or 'the Code'). It is submitted that as per Haryana Apartment Ownership Act, 1983, responsibility of keep and maintenance of the complex is cast upon the appellant and the financial debt is to be handed over to the appellant. The corporate debtor is not maintaining the project and project is being maintained by the appellant. Hence, the amount which was collected by the corporate debtor towards IFMS was required to be handed over to the appellant for which a demand notice was rightly issued by the appellant. It is submitted that Adjudicating Authority committed an error in rejecting Section 7 application. Judgment relied in the impugned order of Coordinate Bench in the matter of 'Vipul Green Residence Welfare Association' Vs. 'Vipul Limited' is distinguishable.

5. We have considered the submissions of counsel for the appellant and perused the record.

6. From the facts as pleaded in the appeal, it is clear that present is a case where Conveyance Deed has already been executed in favour of the unitholders and the appellant has demanded the amount of IFMS from the corporate debtor, which was to be deposited as per Clause 26 of the Conveyance Deed by the allottees towards maintenance of common area services, installation, common passage, etc. Only question which needs to be considered in this appeal is as to whether the aforesaid amount which was deposited by the appellant towards IFMS is a financial debt which is owed by the corporate debtor to the appellant. Appellant has placed reliance on Section 5(8)(f) which is as follows:

> ***"5.*** *In this Part, unless the context otherwise requires,—*
>
> *(8) "**financial debt**" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*
>
> *…*
>
> *(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);]"*

7. Copy of one of the Conveyance Deed executed between the corporate debtor and the allottee dated 09.12.2015 has been brought on record as (Annexure A – 3). The corporate debtor has been referred as a vendor and the allottee as the vendee and by virtue of the Conveyance Deed, the title of the unit has been transferred to the vendee. Clauses 26 & 27 of the Conveyance Deed which are relevant for present case, are 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 a 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.

27. That the Maintenance Charges shall be payable by the Vendee(s)/ Occupiers to the Vendor/ nominated Maintenance Agency with effect from the date of offer of possession. The maintenance charges shall be fixed by the Vendor/ nominated Maintenance Agency taking into consideration various inputs/ overheads/ charges etc, in its sole discretion. The determination of monthly maintenance charges by the Vendor/ nominated Maintenance Agency shall be final and binding on the Vendee(s). Any tax payable on Maintenance Charges shall also be payable by the Vendee(s).”

8. The Hon’ble Supreme Court in ***‘Global Credit Capital Limited & Anr.’ Vs. ‘Sach Marketing Pvt. Ltd. & Anr.’*** reported in ***2024 SCC OnLine SC 649,*** has laid down that for finding out the character of the debt, nature of the transaction entered between the parties has to be captured and find out and it is only after determining the real nature of transaction, issue can be answered as to whether there is a financial debt or not.

9. When we look into Clauses 26 & 27, it is clear that amount which has been deposited which was asked from the allottees @ Rs.100 per sq. ft. super area towards IFMS was in order to maintain the common area services, installation, common passages, interest corridors staircase and other common facilities and amenities lifts escalators, etc. Clause 27 indicates that the amount maintenance charges shall be payable by the vendee to the vendor or nominated maintenance agency. The amount which is paid by the allottee towards IFMS security is the amount which is paid towards obtaining services and the amount is payable to the vendors/nominated maintenance agencies.

The services thus are to be provided by vendor or maintenance agencies. For being a financial debt within meaning of Section 5(8), the amount needs to be disbursed against the consideration of time value of money and includes thus disbursement for time value of money is a condition precedent for falling any transaction within a definition of financial debt. In all transactions from sub-Clauses (a) to (f) requirement of disbursement for time value of money is must, which has already settled by the Hon'ble Supreme Court in ***'Pioneer Urban Land and Infrastructure Limited & Anr.' Vs. 'Union of India & Ors.'*** reported in ***(2019) 8 SCC 416.***

10. When we look into the nature of transaction entered between the corporate debtor and the allottees towards for payment of IFMS, there is no disbursal for time value of money in the transaction. The amount was required to be paid by the allottees towards the services which was to be given towards maintenance of common areas and other facilities as referred to in Clause 26. In this context, we refer to the judgment of this Tribunal in ***'Corab India Private Limited' Vs. 'Mr. Birendra Kumar Aggarwal, Resolution Profession of Renaissance Indus Infra Private Limited & Anr.'*** in ***Comp. App. (AT) (Ins.) No.749/2024,*** where security deposit was made for obtaining a lease from the corporate debtor. Corporate Insolvency Resolution Process (CIRP) commenced against the corporate debtor and claim was filed by the appellant for admitting the amount of security deposit as a financial debt. Claim was filed in 'Form – C'. Adjudicating Authority rejected the claim of the appellant of financial debt, aggrieved by which the appeal was filed. It was held that security deposit was to be treated as payment towards lease rent

and never disbursed or deposited against consideration of time value of money. The appellant claimed that the security deposit is a financial debt. In the above context, this Tribunal had occasion to consider the above appeal. This Tribunal noticed the essential elements for proving a financial debt. In paragraph 17 of the judgment following was observed:

> ***"17.*** *The essential elements of financial debt in the context of Section 5(8) of IBC is inclusive of debt alongwith interest which disbursal must be against consideration for time value of money and also includes anything which is equivalent to the money that has been loaned as long as commercial effect of borrowing or profit is discernible. It is a well settled proposition of law as laid down by the Hon'ble Apex Court in* ***Pioneer Urban Land and Infrastructure Ltd. v. Union of India (2019) 8 SCC 416*** *that any debt to be treated as financial debt, there must happen disbursal of money to the borrower for utilization by the borrower and that the disbursal must be against consideration for time value of money. In the matter of* ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Limited & Ors. (2020) 8 SCC 401,*** *the Hon'ble Supreme Court has also held that the essential condition of financial debt is disbursement against the consideration for time value of money. Further in the most recent judgment of Hon'ble Supreme Court in* ***Orator Marketing (P) Ltd. v. Samtex Desinz (P) Ltd. (2023) 3 SCC 753,*** *it has been clearly held that financial debt also includes an interest free loan."*

11. This Tribunal held that security deposit was never disbursed or deposited against consideration of time value of money. In paragraph 18, following was held:

> ***"18.*** *We find that the Adjudicating Authority has returned the finding that the Appellant did not fall in the category of a "financial creditor" nor the alleged transaction of Security Deposit fell within the ambit of "financial debt" in terms of the statutory provisions enshrined in Section 5(7) and 5(8) of the IBC. The above*

findings of the Adjudicating Authority have been predicated on the terms of Lease Deed entered between the Appellant and the Corporate Debtor. At this stage we may proceed to examine to determine the real nature of the underlying transaction of Security Deposit in the background of Lease Deed in order to determine whether it qualifies as a financial debt or not for the purposes of the IBC. When we look at the Lease Deed, we notice that the amount of Security Deposit under Clause 3.4 was equivalent to 4 months of lease rent and this sum was to be retained by the Corporate Debtor without any liability to pay interest on it. Thus, the Security Deposit had been advanced as interest free Security Deposit. Thus, from the records and documents, the intent of the two parties was that the Security Deposit was a corpus amount of four months of lease rent kept on hold with Corporate Debtor which would be refundable to the Appellant without interest on termination of lease and after deducting dues arising on account of unpaid lease rent, utility charges and damages caused to property, if any, other than normal wear and tear. It is clear, therefore, that Security Deposit was never disbursed or deposited against consideration for time value of money. Only in the event of failure to refund the Security Deposit from the date such refund was due that the deposit was to be returned with interest of 18%. It was bereft of all elements of commercial borrowing. The essential elements in the principal clause of Section 5(8) of the IBC pertaining to financial debt was therefore not satisfied. Clearly therefore, the present transaction was not disbursement for time value of money and does not fall within the canvas of financial debt as defined under Section 5(8) of the IBC."

12. This Tribunal also considered the question as to whether the amount claimed by the appellant fell into the category of operational debt. The said security deposit was held to be deposit advance for use of lease premises and was held to be covered in the provision of services and therefore fell in the purview of operational debt. Following was laid down in paragraph 21:

"21. From a plain reading of the above definition of "operational debt", it is clear that it must relate to a

claim which is confined to either of the four categories viz. provision of goods, services, employment and Government dues. It may be pertinent to add here that the expression "services" has not been defined in the IBC and has to be interpreted in a broad and purposive manner. The sum of Security Deposit made in the facts of the present case which was given in the form of advance by the Appellant to the Corporate Debtor for prospective occupation of the leased premises on rent, this deposit was in the nature of advance for use of the premises. For a debt to be classified as an 'operational debt', it must bear some nexus with the provision of goods or services, without specifying who is to be the supplier or the receiver of such goods or services as has been held by the Hon'ble Supreme Court in ***M/s Consolidated Construction Consortium Ltd. Vs M/s Hitro Energy Solutions Pvt. Ltd. in Civil Appeal No. 2839 of 2020.*** *Hence the payment of Security Deposit as advance for use of the Leased premises is clearly included in the "provision of services" and therefore falls within the purview of operational debt. We are therefore of the considered opinion that impugned order in not treating the Appellant as an Operational Creditor suffers from legal infirmity and the same cannot be supported."*

13. When we look into the transaction which fell for consideration in the present case, it is clear that IFMS, maintenance security was towards providing services by the vendor/maintenance agencies and the amount was paid by the appellant for obtaining services regarding maintenance and the amount could not be held to be a financial debt.

14. Appellant has also placed reliance on Section 6(6) of Haryana Apartment Ownership Act 1983. Section 6 deals with common areas and facilities, which is as follows:

"6. Common areas and facilities.-

(1) Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. Such percentage shall be computed by taking as a basis the

value of the apartments in relation to the value of the property; and such percentage shall reflect the limited common areas and facilities.

(2) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the apartment owners and expressed in an amended declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument.

(3) The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division or any part thereof unless the property has been removed from the provisions of this Act as provided in sections 14 and 22. Any covenant to the contrary shall be null and void.

(4) Each apartment owner may use the common areas and facilities in accordance with the purpose for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners.

(5) The necessary work of maintenance, repair and replacement of the common areas and facilities and the making of any addition of improvements thereto shall be carried out as provided herein and m the bye-laws.

(6) The association of apartment owners shall have the irrevocable right, to be exercised by the Manager or Board of Managers thereof, to have access to each apartment from time to time during reasonable hours as may be necessary for the maintenance, repair and replacement of any of the common areas and facilities therein or accessible therefrom or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another apartment or apartments."

15. The above provision only indicates that how common area and facilities are maintained and what shall be the undivided interest in the common area and facility of apartment owners. The said provision in no manner supports the submission of the appellant that amount deposited towards IFMS is a financial debt.

16. We, thus are of the view that finding of the Adjudicating Authority holding that amount in question i.e., IFMS does not amount to financial debt, suffers from no infirmity.

There is no merit in the appeal. Appeal dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

28th February, 2025

himanshu