

IN THE NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

**CORAM: MS. REETA KOHLI,
HON'BLE JUDICIAL MEMBER**

**MS. KAVITA BHATNAGAR
HON'BLE TECHNICAL MEMBER**

CP No. (IB)-76/7/JPR/2024

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

IN THE MATTER OF:

M/S SDC GREEN PARK RESIDENTIAL WELFARE SOCIETY

...Financial Creditor/ Petitioner

VERSUS

M/S SAND DUNE CONSTRUCTIONS PRIVATE LIMITED

...Corporate Debtor/ Respondent

MEMO OF PARTIES

M/s SDC Green Park Residential Welfare Society
Green Park, Janta Colony,
Jaipur-302004, Rajasthan

...Financial Creditor/ Petitioner

VERSUS

M/s Sand Dune Construction s Pvt. Ltd.,
D-29, Shanti Path, Patrakar Colony,
Jaipur-302004, Rajasthan

...Corporate Debtor/ Respondent

For the Financial Creditors	:	Garvit Khandelwal, Adv.
For the Corporate Debtor	:	Harish Agrawal, Adv. Krishnaveer Singh, Adv.

Sd/-

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CP No. (IB)-76/7/JPR/2024

Order Pronounced On 16.12.2025

ORDER

Per: Ms. Kavita Bhatnagar Technical Member

1. The present Application having *CP No. (IB)-76/7/JPR/2024* has been filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") by *M/s SDC Green Park Residential Welfare Society*, Financial Creditor/Applicant, through Authorised Signatory and Representative of all the Flat Buyers/Allottees, who had paid an amount of Rs. 4,86,65,858 /- (Rupees Four Crores Eighty Six Lacs Sixty Five Thousand and Eight Fifty-Eight Only) towards Maintenance Security Charges (including Club Charges and Contingency Charges) to Corporate Debtor in respect of the Real Estate Project namely "*SDC Green Park Project*" (hereinafter referred to as "Project") being constructed and developed by the *M/s Sand Dune Constructions Private Limited* - Corporate Debtor / Respondent having its registered office is at D- 29, Shanti Path, Patrakar Colony, Jaipur, Rajasthan-302004.
2. That the Financial Creditor / Applicant i.e. *M/s SDC Green Park Residential Welfare Society* is a Society registered as Society under the Rajasthan Societies Registration Act, 1958 in the year 2020, having Identification Number *COOP/2020/JAIPUR/200822*. As *M/s Sand Dune Constructions Pvt. Ltd.*, is registered in State of Rajasthan, hence, it comes within the jurisdiction of NCLT, Jaipur Bench.

CP No. (IB)-76/7/JPR/2024

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3. The present Petition has been filed based on the following facts which are as under: -

3.1 That the Corporate Debtor undertook the construction and development of SDC Green Park Residential Apartments located in Janta Colony, Jaipur. This development consisted of 200 flats distributed across 5 towers, with a total built-up area of 2,80,000 square foot. After the project was developed, the Corporate Debtor sold the flat units to various individuals through Sale Deeds. As per Clause 6 of these Sale Deeds, the Corporate Debtor collected a One-Time Maintenance Security Fee of Rs. 100/- per square foot from all the 200 flat buyers / owners. Clause 6 of the Sale Deed is as under: -

"That the Buyer shall pay the maintenance charges in terms of the maintenance Agreement which will be recurring charges throughout, effective from the date of the possession. The buyer shall execute the Maintenance Agreement with the Service Company for the premises and violation of the terms and conditions of this Sale Deed by the Buyer. Further, it is agreed by the buyer that the liability to pay the maintenance charges shall commence immediately from the date of this Sale Deed irrespective of the fact that Maintenance Agreement has been executed or not by that time. In order to secure the due performance of the Buyer in payment of the maintenance, bill and other charges to be raised by the Maintenance Agency, as the case may be, the Buyer at the time of taking the possession further agrees to deposit, as per Schedule of Payment (Annexure A) annexed hereto, and to always keep depositing with the Owner/Developer as an Interest Free Maintenance Security (IFMS) @ Rs. 100/- per square foot of the Super

Built Up Area purchased. The IFMS shall always vest with the Owners/Developer/Maintenance Agency so appointed at its absolute discretion and shall not be interfered with or obstructed in any manner whatsoever by the Buyer."

In pursuance of the aforesaid Clause the Corporate Debtor received the One Time Maintenance Security Fee amounting to Rs. 2,80,00,000/- (100 x 280000) (Rupees Two Crores Eighty Lakh Only) from all the 200 Flat Buyers/Owners/Allottees.

3.2 That in accordance with the Clause 30 (d) of the Sale Deeds executed between the Financial Creditor and the Corporate Debtor, it was agreed upon that the Corporate Debtor would utilize the interest earned from the Lump Sum Maintenance Security Fee of Rs. 2,80,00,000/- to fund the maintenance of the Society. This arrangement was intended to ensure that the society's upkeep was adequately managed without additional financial burdens on the residents/members of the Society.

3.3 It was submitted that in light of the changed circumstances became of COVID-19 pandemic, the Corporate Debtor issued a letter dated 31.08.2020 to the Financial Creditor, outlining a new financial arrangement for the maintenance of the society where the Corporate Debtor committed to making a monthly payment of Rs. 3,25,000/- to the Financial Creditor, specifically for the upkeep and maintenance of the society. However, as on 30.04.2024, the Corporate Debtor had deposited only a total of Rs. 86,34,142/- into the account of the

Financial Creditor, which falls short by Rs. 56,65,858/- till April, 2024 of the expected amount as agreed upon the monthly payments.

- 3.4 The Corporate Debtor had as per the Sale Deed also collected from each flat owner at the time of purchase an amount of Rs. 50,000/- per Flat Buyer/Owner/Allottees designated as Club Charges, intended for the provision and maintenance of Club Facilities within the society. Additionally, the Corporate Debtor collected a further Rs. 25,000/- per Flat Buyer/Owner/Allottees as Contingency Charges, which were presumably meant to cover unforeseen expenses or emergencies related to the maintenance and operation of the society. Given that there are 200 Flat units involved, the Corporate Debtor has collected a total sum of Rs. 1,00,00,000/- (Rupees One Crore Only) for the Club Charges alone (calculated as Rs. 50,000 x 200). However, despite collecting this substantial amount, the Corporate Debtor has not yet provided the promised Club Facilities to the Flat Buyer/Owner/Allottees. Furthermore, an additional amount of Rs. 50,00,000/- (Rupees Fifty Lakh Only) has been collected from the Flat Buyers/Owners under the category of Contingency Charges. It is contended that such failure to provide the Club Facilities, despite the collection of these funds, raises doubts about the Corporate Debtor's fulfilment of its obligations under the said Sale Deeds.

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3.5 That the Corporate Debtor has failed to provide the promised facilities and has not refunded the substantial amounts collected from the Flat Buyers/Owners. Specifically, the Corporate Debtor has not returned the following sums: -

a) Maintenance Security Charges: Rs. 2,80,00,000/-.

b) Club Charges: Rs. 1,00,00,000/-.

c) Contingency Charges: Rs. 50,00,000/-.

3.6 It has been mentioned that an Application under Section 7 of the Insolvency and Bankruptcy Code was filed before this Hon'ble Tribunal for the initiation of the Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor, titled "*Gateway Welfare Society vs. Sand Dune Constructions Private Limited*" concerning similar issues which came to be registered as CP No. (IB) 58/7/JPR/2022. This Tribunal, after due consideration and deliberations, allowed the Section 7 application and passed an order on 16.07.2024, thereby initiating the CIRP against the Corporate Debtor and the Resolution Professional was duly appointed. However, the said Section 7 application was subsequently withdrawn vide the Order dated 29.07.2024 pursuant to a settlement having reached between the parties. That in terms of Section 18 of the Real Estate (Regulation and Development) Act, 2016 the Corporate Debtor is liable to refund the

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principal amount with simple interest at the rate of 18 per annum thereon.

3.7 This Application has been consolidatedly filed by the M/s *SDC Green Park Residential Welfare Society* through the Authorised Signatory and Representative on behalf of all the 200 real estate allottees who either individually or jointly hold units in the Project being developed by the Corporate Debtor. Thus, it has been stated that the present Application filed by the Financial Creditor is in compliance with the provisos introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019.

4. The Corporate Debtor had filed its reply to the application and made the following assertions: -

4.1 To invoke the jurisdiction of this Tribunal under Section 7 of the IBC, two essentials are the prerequisites, the first being the existence of a debt being a financial debt and there being a default of the aforesaid financial debt, whereas in the present case the petitioner fails to qualify within the definition of a Financial Creditor as envisaged under Section 5(7) of the IBC and also the debt in question fails to qualify as a Financial Debt under Section 5(8) of the IBC and hence the present petition is not maintainable and the same deserves to be dismissed on this count alone without touching upon the merits of the matter.

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4.2 That the Petitioner RWSA is not a Financial Creditor under the provision of Section 5(7) of the IBC Code 2016, Section 5(7) and Section 5(8) are reproduced as under: -

"Section 5(7) "Financial Creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to."

"Section 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 de-materialised equivalent."

4.3 The Corporate Debtor asserts that the aforesaid provision makes it unambiguously clear that for a debt to be qualified as a financial debt it should be disbursed against the consideration for the time value of money. However, in the facts of the present case the amounts so deposited by the purchasers or the members of the RWSA was against Interest Free Maintenance Security (IFMS). In the sale deeds IFMS has been dealt with under Clause 30(d) which is reproduced as under: -

"30(d) That the interest earned on the IFMS @ Rs.100/- per sq. ft. charged by the Owner/Developer as mentioned in Clause (06) of this Deed shall inter-alia will be used for the maintenance of following: -

- i) *Exterior Maintenance: These relate to maintenance of various services and facilities outside the boundary wall till the*

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maintenance thereof is handed over to a local or civil authority for maintenance.

- ii) *Open area Maintenance: These relate to maintenance of open space within the boundary wall of Complex such as maintenance of compound wall, landscaping, electrification, ramps, boundary wall of Complex such as maintenance of compound wall, landscaping, water supply, tube well, sewerage, roads and paths, and other services, within the boundary wall but outside the Complex.*
- iii) *Common areas Maintenance: These relate to maintenance of common areas, lifts, firefighting equipment and other services, inside the said Complex.*
- iv) *Cost of the security service for the said complex, if provided.*
- v) *Cost of insuring the Complex structure.*
- vi) *Repairs and Replacement of Capital Machinery and Equipment installed in the common areas of the Complex and in Club House."*

4.4 For the purposes of exterior maintenance, open area maintenance, common area maintenance - these relate to maintenance of common areas, lifts, firefighting equipment and other services inside the said complex, cost of the security, services, installations, common passages, entrance corridors, staircase and other common facilities and amenities. The amount of maintenance charges shall be payable by the purchaser to the builder or the nominated maintenance agency. The amount which is paid by the allottee toward the IFMS is the amount which is paid for

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obtaining maintenance services and this amount is payable to the vendors/nominated maintenance agencies.

- 4.5 To support his case the Corporate Debtor has referred to the judgment of the Hon'ble NCLAT, New Delhi in the matter of Company Appeal (AT) (Insolvency) No. 2198 of 2024 & I.A. No. 8172 of 2024 titled as *ILD Owners Welfare Association Vs M/s ALM City Infotech Pvt. Ltd.* as below: -

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

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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).”

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 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 been 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 along with 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 for 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."

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.

- 4.6 The Corporate Debtor also referred to the judgment of the Hon'ble NCLT, New Delhi which has also adopted his view in the matter of IB No. 1097/(PB)/2019 titled as M/s The Verandas Apartment Owners Association vs. M/s Saluja Construction Company Limited, wherein also the same view has been adopted in Para No. 8 & 9 of the order which are reproduced 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 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 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 nonrecourse 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 creditor any other instrument issued by a bank or financial institution;*

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(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:

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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 IB-1097/(PB)/2019 18 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.”

4.7 The Corporate Debtor has further elaborated the view taken by the Hon'ble NCLT, Mumbai in the matter of CP (IB) No. 1042/MB-IV/2020 titled as Innova Premises Co-operative Society Limited vs Marathon Nextgen Realty Limited, has held as under: -

“...12. 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. Any debt arising from supply of goods or services including advance paid towards supply of such goods or services fall under the definition of Operational Debt. In the present case, the Applicant has filed this Application claiming itself to be a Financial Creditor under section 5 (8) (f) of the Code whereas the amount in question is in nature of an Operational Debt recoverable from the Corporate Debtor, even if the debit notes towards common amenities as claimed by the Corporate Debtor for the period subsequent to the handing over are not considered.

14. 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.”

4.8 Further, Hon'ble NCLT, Hyderabad in the matter of CP (IB) No. 50/7/HDB/2020 titled as Vasathi Anandi Owners Welfare Association vs. Vasathi Housing Limited, has held as under: -

“...39. We have gone through the documents filed by both the parties and heard the arguments made by the counsels. At the outset, it is imperative to ascertain whether the debt in question can be termed as

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'financial debt' within the meaning of section 5(8) of IBC. The Petitioner has sought to present its case under clause (f) of that section, according to which: (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— (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) "

The order while referring to the judgment of Hon'ble Supreme Court states as under: -

"47. In the aforementioned judgment, the Hon'ble Supreme Court clarified that, in the case of allottee's, only those amounts disbursed with the primary objective of earning profit can be deemed as financial debt and fall under the purview of the Explanation to Section 5(8)(f)."

"49. Therefore, in our considered view, the amount in question is akin to a prepayment made to a service provider, with maintenance services being the relevant service in this case. A comprehensive examination of Section 5(8)(f) of the IBC, 2016, in conjunction with the aforementioned judgments, unequivocally establishes that the said amount does not meet the criteria for classification as Financial Debt."

4.9 In the above referred judgments, it has been clearly opined that amount deposited against IFMS or maintenance security is deposited for

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providing services by the vendors/maintenance agencies and thus the same cannot be held to be a financial debt.

4.10 The Corporate Debtor also contended that the instant petition is barred by limitation in view of Article 137 of the Schedule to the Limitation Act, 1963. As per Article 137 which provides for limitation period, for filing an application where no period of limitation has been prescribed, to be 3 years from the date the right to apply accrues. In view thereof, the limitation for filing a petition under Section 7 of the IBC expired on 07.07.2023 whereas the present petition has been filed by the petitioner in the year 2024 and thus the same is barred by limitation and deserves to be dismissed on this ground also without touching upon the merits of the case.

4.11 Due to disputes amongst the members of the SDC Greenpark Apartment the home buyers incorporated two parallel Resident Welfare Society under the name and style which are as under: 1) SDC Green Park Residential Welfare Society.

2) Green Park Apartment Owners Association.

4.12 That the petitioner has cleverly drafted the petition by referring to the IFMS as One Time Maintenance Security Fee whereas the clear terminology used in the deed is Interest Free Maintenance Security (IFMS). The first two words of the phrase start with the words "INTEREST FREE," thus eliminating any chance of the amount being

classified as financial debt there is no consideration for the time value of money questioning the maintainability of the petition itself. Despite having knowledge of the same, the petitioner is also claiming interest on the amount which was interest free. The petitioner has twisted words and phrases in order to mislead this Hon'ble Tribunal and therefore, the petition deserves to be dismissed with heavy costs.

4.13 It was further submitted by the Corporate Debtor that the home buyers of SDC Green Park Apartment had already initiated litigation against the petitioner company by way of filing of *Consumer Complaint No. 99/2020 titled Mohit Chugani & 27ors Vs Sand Dune Constructions Pvt Ltd.*, which is pending at the stage of Final Hearing before The Rajasthan State Consumer Dispute Redressal Commission, Jaipur for seeking relief with regards to the IFMS.

4.14 It was also submitted that on 26.02.2021 Ld. JM (East) passed Interim Order in favour of plaintiff in that suit and against the defendants (petitioner society herein) wherein the defendants (Petitioner herein) has been restrained by interim temporary injunction from holding the General Body meeting scheduled to be held on 28.02.2021. It is submitted that since the petitioner society has been restrained from holding the General Body Meeting scheduled to be held on 28.02.2021 and aforesaid interim temporary injunction order is still in force and the aforesaid TI Application No 95/2020 is still pending before Ld.

JM(East) Jaipur Metro-I. Hence, how has the petitioner society acted and passed resolution for approaching this Hon'ble Tribunal.

4.15 The Respondent further submits that Section 31 of the Rajasthan Apartments Owners Act, 2015 bars the jurisdiction of Civil Courts and Authority on the matters for which Competent Authority or the Appellate Authority has jurisdiction. The provision of Section 31 of Rajasthan Apartment Ownership Act 2015 is reproduced here under: -

"Section 31 Bar of jurisdiction of courts, etc-No court or other authority shall have, or be entitled to exercise, any jurisdiction, power or authority in relation to the matters for which Competent Authority or the Appellate Authority has, or is entitled to exercise, jurisdiction, power or authority under this Act."

4.16 It was submitted that the subject matter of present petition is the IFMS which is likely to be used for the Common areas and facilities as mentioned in clause 30(d) of the Sale Deed. Thus, the issue of IFMS is the subject matter of Common area and facility. Therefore, the Petitioner is having exclusive forum for adjudication of aforesaid dispute of IFMS i.e. Action under Section 16 of the Act of 2015 before the Competent Authority.

4.17 The respondent further submits that the aforesaid Civil Suit No. 68/2020 titled Mohit Chuggani & Ors. Vs SDC Green Park & Ors. has been filed for seeking relief of to declare Null and Void the Registration

No COOP/2020/Jaipur/200822 of the SDC Green Park Residential Welfare Society being contrary to the provisions of Rajasthan Apartment Ownership Act 2015 and Rules of 2020. The aforesaid suit is pending before Ld. Judicial Magistrate (East), Jaipur Metro for adjudication. Therefore, present petition is not maintainable in view of pendency of aforesaid civil suit.

4.18 It was further submitted by the Respondent / CD that the alleged amount of Rs. 4,86,65,858/- is not due from respondent company. The aforesaid amount of Rs. 4,86,65,858/- is not payable by the respondent to petitioner. The petitioner society has filed false claim against the respondent company. The petitioner has failed to submit a single document showing that the aforesaid amount has been deposited by the members of the society with the Respondent. The Respondent company was maintaining the Apartment w.e.f. 2012-2013 and in carrying out the said maintenance, every month, lakhs of rupees have been spent by the respondent from his own fund as additional maintenance amount. The home buyers never repaid the additional maintenance amount to the respondent till date to maintain his IFMS corpus, due to which the respondents suffered huge loss and were compelled to file money recovery civil suit in Civil Court against home buyers which is pending before Ld. Civil Judge and Judicial Magistrate (East), Jaipur Metro First.

sd/-

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4.19 It is also submitted that since the home buyers of the SDC Green Park were adamant for nonpayment of additional maintenance charges therefore the burden of additional maintenance charges was always borne by the respondent-company. Therefore, Respondent Company made several oral reminders to home buyer for payment of additional maintenance charges as agreed by them, but they did not turn up and always spoke to the respondent company to adjust the same from the IFMS. The Respondent had to incur major expenditure in the building several times w.e.f. year 2015 to 2021 as required Clause No. 30(s) of the sale deed. For example, when an earthquake occurred on 25.04.2015, large cracks appeared in many places in the building, for which repair and reconstruction was done for Rs. 6,40,000/- on 29.04.2015, Rs. 2,50,000/- for laying a new cable and reconnecting it immediately when the main electricity distribution cable burst in June 2016, and Rs. 1,00,000/- for repair and reconstruction of the building on 16.11.2016.

4.20 That the major repairs were done on 20.11.2016 which cost of Rs. 4,90,000/-, in October 2017 there was a major leakage in the basement of the building in which some construction and major repairs were done and repainting was also done which cost around Rs. 2,65,000/-, in September 2018, when the main electricity distribution cable broke, new cable was installed and it was reconnected immediately etc. which

cost of Rs. 3,25,000/-, in July 2019, when there was a breakage in the high-tension electric line, the transformer had to be repaired and the main underground cable line of the building was also repaired immediately at many places which cost around Rs. 2,23,000/-, in December 2018, major repairs were done due to fault in the generator and cable which cost around Rs. 1,86,000/- and in October 2021, when the main power distribution cable line was torn, a new cable was installed and connected in which Rs. 2,60,000/- was spent by respondent. A total of Rs. 26,39,000/- has been spent by respondent till date from the contingency fund and not a single home buyer of SDC Greenpark restored the money spent on the said item. The statement of details of the expenditure incurred by respondent Company under the contingency item of SDC Green Park from the year 2015 to October 2021 is Annexure-R5.

4.21 It was reiterated that no amount is due and payable by the respondent to the petitioner society. It is further stated that the since the interest earned on IFMS was not sufficient to meet the maintenance expenses and the allottees were not making payment of additional maintenance charges, the funds had to be taken from IFMS, which was never replenished by the petitioner society and thus, it kept depleting and the interest earned from its kept reducing. As regards the promise of Rs. 3,25,000/- is concerned, it is a vague document and does not signify

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anything. In addition to the above, the President of the society itself had not disputed that all payments were settled.

Findings & Conclusion

5. We have perused the documents on record as well as heard both the counsels at length.

5.1 The Definition of term 'allottee' as defined in Section 5(8) of IBC, 2016 is also defined in Section 2(d) of RERA, 2016 is reproduced below: -

"...(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;"

5.2 When we look into Clause 6 of the Sale Deed, it is clear that amount of Rs. 100 per square foot collected was towards IFMS was basically to maintain the common area services, installations, common passages, entrance corridors staircase and other common facilities and amenities lifts escalators.

Clause 30 (d) of the Sale Deeds, executed between the Financial Creditor and the Corporate Debtor, further states that the Corporate Debtor would utilize the interest earned from the Lump Sum Maintenance Security Charges / Fee of Rs. 2,80,00,000/- to fund the

maintenance of the Society. This arrangement was intended to ensure that the society's upkeep was adequately managed without additional financial burdens on the residents/members of the Society.

5.3 In the present case, it is a fact that the possession has already been handed over to the allottees, and the issue pertains only to the fund which was intended for ensuring the proper maintenance of the project. Therefore, it cannot be held that the primary objective for collecting such a fund was profit-oriented. Therefore, we are of the view that the amount in question is similar to advance / prepayment made to a Service Provider, for maintenance services.

5.4 Hon'ble Supreme Court in their landmark judgment in case of 'Anuj Jain, RP for Jaypee Infratech Ltd. vs. Axis Bank Ltd., Civil Appeal Nos. 8512-8527 of 2019, where it held that:

"...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.”

5.5 In the aforementioned judgment, the Hon’ble Supreme Court has clarified that for an amount to qualify as a ‘financial debt’ only those amounts which has been disbursed against the time value of money can be deemed as a financial debt under Section 5(8) of IBC, 2016.

5.6 Further, the Coordinate Bench of NCLT (Mumbai Bench) in the case of *Innova Premises Co-operative Society Limited v/s Marathon Nextgen Realty Limited, CP (IB) No.1042/MB-IV/2020*, had held as under: -

“...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.”

5.7 Similar view has been taken by Hon’ble NCLT, Hyderabad Bench in case of Vasathi Anandi Owners Welfare Association Vs. Vasathi Housing Limited.

5.8 A combined reading of Section 5(8)(f) of the IBC, 2016, along with the above-mentioned judgments, unequivocally establishes, that the amount advanced for maintenance of society can in no term can be classified as ‘Financial Debt’. Further, the Petitioner herein cannot a claim on the amount of maintenance and thus on that basis cannot be classified as a Financial Creditor, in terms of Section 5(7) of IBC, 2016.

5.9 Thus, the amount of Rs. 100/-per sq. ft. collected towards maintenance from 200 allottees cannot be said to have been raised against the time value of money, so as to qualify as a ‘financial debt’ which is a prerequisite for filing a Section 7. The aforesaid sum was collected for maintenance of the common areas of constructed apartment and the money so collected was not collected for any Real Estate Project. As seen from above, the owners of the apartment who are before us in the form of a registered society also cannot be treated as ‘allottee’, under

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Section 5(8) of IBC, 2016, with respect to IFMS (Interest Free Maintenance Services).

5.10 The Petitioner has referred to the letter dated 31.08.2020. Be that as it may be, since it has already been held that IFMS is not a Financial Debt and thereof it does not strengthen the case of the Petitioner.

5.11 On the basis of above observations, the present Application is not maintainable and the debt so claimed by the Petitioner is not a 'Financial Debt' and the Petitioner is not a Financial Creditor under Section 5(7) of the IBC, 2016 and is not qualified to file a Petition under Section 7 of the IBC, 2016.

5.12 Hence, *CP No. (IB)-76/7/JPR/2024 stands dismissed.*



REETA KOHLI
JUDICIAL MEMBER



KAVITA BHATNAGAR
TECHNICAL MEMBER

M.S.