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## The Plight of Homebuyers and The Judicial Intervention with Special Reference to IBC

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*The situation of Indian Homebuyers was pretty bad before 2016. The only relief they had before 2016 was to file civil suits in case of any breach done by the builders, which in itself is a lengthy and tedious process, other than that they could go for relief in the Consumer Protection Act 1986, however, the act is all about compensating the aggrieved customer and not specifically focusing on providing them with their homes. However, the Real Estate (Regulation and Development) Act, of 2016 was the first step towards the protection of interests of homebuyers. After which the Insolvency and Bankruptcy Code, 2016 was also brought into existence, and after two amendments in the act, it started recognising Homebuyers too. However, some lacunas in these legislations still become disadvantageous for the plaintiffs. This article focuses on the reliefs that IBC provides to Homebuyers, the amendments made to the code, Judicial intervention in the same, and the way ahead.*

**Keywords:** *insolvency, corporate insolvency resolution process, homebuyers, allottees.*

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### INTRODUCTION

COVID-19 has affected every kind of business in existence in the world. The Pandemic left everyone in high and dry. However, it's 2024 now, and a total of five years have passed since

the worldwide pandemic, although nations around the world have slowly and steadily gained their pace back, some sectors in India are still struggling, and the real estate sector is one of them.

A real estate company's Corporate Insolvency Resolution Process (CIRP), differs somewhat from those of other industries. The real estate company under stress can be working on several projects in various locations or at different phases of development, necessitating a more adaptable and creative approach to effectively resolve them. Despite acknowledging these differences, the courts have not applied the Insolvency and Bankruptcy Code of 2016 (IBC) in a very technical and rigid manner to corporate debtors in the real estate industry. The innovative interventions done by the courts in these cases have sought to uphold both the spirit of the Code and the interests of real estate project allottees.

As of 30.09.2023, the Insolvency and Bankruptcy Board of India (IBBI) reports<sup>1</sup> there are 7054 cases in which corporate debtors have been accepted into the CIRP. A breakdown of the admitted CIRPs by sector reveals that the construction and real estate industries together account for the second-highest share of contributions, with 33% of the CIRPs filed against corporate debtors in these industries.

According to a report on 'Legacy Stalled Real Estate Projects' released in July 2023 by the Ministry of Housing and Urban Affairs-constituted Committee, there are roughly 4.12 lakh stressed dwelling real estate units with a total of 4.08 lakh crores of investment in the aforementioned units.<sup>2</sup> According to the aforementioned Report, the number of units added to the housing industry will be approximately three lakhs if 75% of the strained units are resolved. In addition to giving the estranged allottees the much-needed break, the settlement of such stressed units is expected to provide a substantial contribution to the nation's economic expansion.<sup>3</sup>

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<sup>1</sup> Sandeep Bhuraria & Parijat, 'The Paradigm of Real Estate Insolvencies: Judicial Trends, Roadblocks, and the Way Ahead' *Live Law* (27 March 2024) <<https://www.livelaw.in/law-firms/law-firm-articles-/paradigm-of-real-estate-insolvencies-judicial-trends-challenges-and-roadblocks-cirp-ibbi-253531#footnote-ref-9>> accessed 15 April 2024

<sup>2</sup> Ministry of Housing and Urban Affairs, *Report of the Committee to examine the issues related to Legacy Stalled Real Estate Projects* (2023)

<sup>3</sup> *Ibid*

The Real Estate Sector is the nation's second-biggest sectoral source of bad debts, insolvency, and delayed recoveries. The manufacturing industry, which is the most stressed sector, will be surpassed by the real estate industry very soon if the present pattern continues. With a focus on judicial trends, amendments introduced to IBC, and supporting regulations, this article examines the origins and characteristics of the insolvency of a corporate debtor in the real estate sector concerning the rights of the allottees.<sup>4</sup>

## INSOLVENCY AND REAL ESTATE SECTOR

The IBC came into force shortly after the RERA 2016<sup>5</sup> was brought to life, with the intention to serve as a specific law for efficient consumer protection and standardization of business practices and transactions in the real estate sector.

**1. Homebuyers/Allottees: Financial Creditors:** Homebuyers were not expressly covered by the definitions of 'financial creditor' or 'operational creditor' in the originally passed Code. This created ambiguity over homebuyers' rights under the Code. In **Nikhil Mehta and Sons (HUF) & Ors v M/s AMR Infrastructure Ltd.**,<sup>6</sup> the National Company Law Appellate Tribunal (NCLAT hereinafter) held that '*Amounts obtained from buyers of the home according to assured return schemes had the commercial effect of a borrowing.*' As a result, homebuyers were deemed to be 'financial creditors' within S. 5(7) of the IBC and could thus request that the corporate insolvency resolution process (CIRP) for the real estate developer be started.

In **Chitra Sharma v Union of India**,<sup>7</sup> the Supreme Court subsequently acknowledged homebuyers as 'financial debtors'. In addition, to guarantee that homebuyers are safeguarded within the Corporate Insolvency Resolution Process (CIRP hereinafter), the apex Court appointed a senior attorney who will represent on behalf of the homebuyers within the Committee of Creditors (CoC hereinafter), the CIRP's decision-making body.

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<sup>4</sup> Sumit Chatterjee, 'Reverse CIRP under the Insolvency and Bankruptcy Code: NCLAT's innovative approach to protect the interests of Homebuyers' (*IJPIEL*, 06 January 2023) <<https://ijpiel.com/index.php/2023/01/06/reverse-cirp-under-the-insolvency-and-bankruptcy-code-nclats-innovative-approach-to-protect-the-interests-of-homebuyers/>> accessed 15 April 2024

<sup>5</sup> Real Estate (Regulation and Development) Act 2016

<sup>6</sup> *Nikhil Mehta and Sons (HUF) & Ors v M/s AMR Infrastructure Ltd.* (2017) 202 CompCas 1

<sup>7</sup> *Chitra Sharma v Union of India* (2018) 18 SCC 575

The legislature then passed the Insolvency and Bankruptcy Second (Amendment) Act, 2018<sup>8</sup>, which brought homebuyers under the Code's definition of 'financial creditors' in order to address the question of their status. Section 3 of the Amending Act 2018 added to Section 5, Clause (8), subclause (f) as an explanation:

*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.<sup>9</sup>*

As a result, any home buyer may invoke the provisions of the IBC in the event that the developer or builder refuses to reimburse funds or delays in delivering the property, increasing their accountability and vigilance towards buyers. In a batch of Writ Petitions titled **Pioneer Urban Land and Infrastructure Limited v Union of India & Ors**<sup>10</sup>, as anticipated, amendments were made subject to judicial scrutiny. The Hon'ble Supreme Court (The Three Judge Bench led by Justice Rohinton F. Nariman) upheld the amendments brought in the Code. The apex court declared the Amendment non-violative of Articles 14, 19 (1) (g), and 300-A of the Indian Constitution.

**2. Limit for Commencement of CIRP by the Homebuyers/Allottees:** The insolvency tribunals were overburdened with individual homebuyers' claims following the 2018 Amendment, some of which were brought up with petty motives or malicious intent. Due to this, **the Insolvency and Bankruptcy Code (Amendment) Act, 2020**<sup>11</sup> was introduced. The 2020 Amendment, among other things, changed Section 7 of IBC and established a minimal threshold for the allottees of a corporate debtor's real estate project to start CIRP proceedings against the said corporate debtor.

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<sup>8</sup> The Insolvency and Bankruptcy Code (Second Amendment) Act 2018

<sup>9</sup> *Ibid*

<sup>10</sup> *Urban Land and Infrastructure Limited v Union of India & Ors* (2019) 8 SCC 416

<sup>11</sup> Insolvency and Bankruptcy (Amendment) Act 2020

It stated that in order to initiate CIRP against the developer, either of the following must be fulfilled:

- at least 100 homebuyers, or
- 10% of all homebuyers from the same real estate project, whichever is lower, have to apply jointly.

In the **Manish Kumar v Union of India**<sup>12</sup> ruling, the Supreme Court contested and affirmed the 2020 Amendment's constitutionality. Consequently, the 2020 Amendment and the important Manish Kumar<sup>13</sup> ruling resolved the extraordinary issue raised by the 2018 Amendment to the Code. They also highlighted the fact that allottees meeting the minimum requirements of the same real estate project may jointly start CIRP proceedings of any real estate company according to Section 7 of the Code, as amended.

### **JUDICIAL INTRUSION FOR THE RELIEF OF HOMEBUYERS/ALLOTTEES**

**Reliefs Among Different Legislative Pieces:** The remedies available to the homebuyers/allottees in case of non-delivery of the promised home are in three different pieces of legislation, The Real Estate (Regulation and Development) Act, 2016 (RERA), IBC, 2016, and the Consumer Protection Act 2019 (CPA). The remedies of RERA provide for the remedies of compensation, refund, and possession of the flat or unit in question, whereas CPA only provides for compensation or refund, as the case may be. When it comes to IBC, the code provides a very narrow scope of remedy to the aggrieved homebuyers, which is of refund (if the threshold limit provided u/s. 7 of the code are fulfilled, the CIRP is initiated and the committee of creditors doesn't accept the recommended resolution plan, or if it, itself suggests that the corporate debtor (developer) goes into liquidation), and the relief of possession of the unit or flat in question if the recommended resolution plan is approved by the committee of creditors and adjudicating authority, the homebuyers/allottees may be able to procure their flat conditional on the terms and conditions that are set by the resolution plan, and all the homebuyers will be bound by them.

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<sup>12</sup> *Manish Kumar v Union of India* (2021) 5 SCC 1

<sup>13</sup> *Ibid*

The question is whether these reliefs in different legislations are mutually exclusive or concurrent. The same was answered by the Supreme Court in the **Pioneer Urban Land and Infrastructure Ltd.** case,<sup>14</sup> while deciding the question the apex court held that: “RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code”.

However, in the matter of **Ireo Grace Realtech Pvt. Ltd. v Abhishek Khanna**,<sup>15</sup> the Supreme Court observed that according to the Doctrine of Election, ‘a homebuyer who simultaneously files a complaint with RERA and requests a refund of his money forfeits his ability to use this remedy under the Consumer Protection Act of 2019.’

## **MECHANISMS CARVED OUT BY THE JUDICIAL BRANCH OF THE COUNTRY TO SAFEGUARD THE INTEREST OF HOMEBUYERS/ALLOTTEES**

**Reverse Corporate Insolvency Resolution Process:** Since the inception of IBC, 2016 it has been amended more than one time for the betterment of homebuyers. Although, even after these amendments it is tough to say that the code now addresses every concern of the homebuyers. At times like this where code is of no help judiciary has come up with a few innovative mechanisms based on the cases before them so that relief could be given to the homebuyers/allottees. One such mechanism introduced by the judiciary is the **Reverse Corporate Insolvency Resolution Process (Reverse CIRP)**, even though the same has no origin in the IBC.<sup>16</sup>

The Supreme Court stated that ‘to halt experimentation in things economic is a grave duty, and deprivation of the right to experiment poses risks with serious consequences to the nation’ in the historic case of **Swiss Ribbons Private Limited and Anr v Union of India and Ors**<sup>17</sup> The

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<sup>14</sup> Ministry of Housing and Urban Affairs (n 2)

<sup>15</sup> *Ireo Grace Realtech Pvt. Ltd. v Abhishek Khanna* (2019) 8 SCC 620

<sup>16</sup> Soumya Modi and Kunal Dave, ‘The Curious Case of Reverse CIRP: A Headway in Insolvency Law?’ (*Centre for Business & Commercial Laws*, 19 May 2023) <<https://cbcl.nliu.ac.in/insolvency-law/the-curious-case-of-reverse-cirp-a-headway-in-insolvency-law/>> accessed 15 April 2024

<sup>17</sup> *Swiss Ribbons Private Limited and Anr v Union of India and Ors* (2019) SCC Online SC 73

NCLAT adopted the idea of Reverse CIRP in **Flat Buyers Association Winter Hills v Umang Realtech Pvt. Ltd and Ors**<sup>18</sup>, taking a cue from the **Swiss Ribbons**<sup>19</sup> ruling. In the case mentioned above, the NCLAT acknowledged that real estate companies' CIRPs are unique and different from those of other sectors. As a result, the NCLAT discussed 'whether a corporate debtor in the real estate industry could be resolved in IBC without the approval of a third-party Resolution Plan.' These discussions opened the door for the highly creative idea of Reverse CIRP, in which the corporate debtor's promoters can get past the obstacle set by Section 29A of IBC and submit a plan to finish and deliver their stalled project, subject to the necessary approval from creditors and stakeholders and under the guidance of a Resolution Professional (RP) and the NCLT.

Under Reverse CIRP, the promoters contributing capital as investors can complete the corporate debtor's stalled projects. This idea protected the rights of all the creditors as well as homebuyers/allottees of the corporate debtor by guaranteeing the fulfilment of their claims through the delivery of the units under the oversight of the RP and NCLT. It also gave the corporate debtor's former management a chance to take back control of the business and rebuild it after all creditors' claims were satisfied.

In the matter of **Rajesh Goyal v Babita Gupta and Ors**<sup>20</sup>, the NCLAT employed the concept of Reverse CIRP. In this instance, the NCLAT, in the exercise of its inherent powers granted under Rule 11 of the NCLAT Rules, 2016, permitted the promoter to make investments in the corporate debtor like a financial creditor from independent sources. In the aforementioned instance, the corporate debtor's operations were managed as a continuing concern to finish the defaulted project and deliver it to the recipients. The Supreme Court subsequently noted in **Anand Murti v Soni Infratech Private Limited and Anr**<sup>21</sup>. that the corporate debtor's promoter's project completion proposal would serve the interests of the allottees. The Apex Court further stated that there is a good chance that the already-estranged allottees would have to pay greater amounts in a third-party Resolution Plan if regular CIRP was carried out. Thus, the promoter

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<sup>18</sup> *Flat Buyers Association Winter Hills v Umang Realtech Pvt. Ltd and Ors* (2020) 10 SCC 549

<sup>19</sup> Chatterjee (n 4)

<sup>20</sup> *Rajesh Goyal v Babita Gupta and Ors Company Appellate* (2019) 14 SCC 201

<sup>21</sup> *Anand Murti v Soni Infratech Private Limited and Anr* (2022) SCC Online SC 519

was once more permitted to invest in and finish the troubled housing project while being watched over by the RP and the Court.

### **Corporate Insolvency Resolution Procedure to be Project-Specific:**

In the case of **Flat Buyers Association Winter Hills v Umang Realtech Pvt. Ltd and Ors**<sup>22</sup> ruling, the NCLAT further stated that the Code should not be used to unjustly resolve other projects that are financially sound and viable or which are not in default, but rather should only apply to 'projects in default'. According to the ruling, the project's assets should be maximized in order to accomplish the Code's goal and balance the needs of the project's creditors.

In the case of **Ambika Prasad Sharma erstwhile Director of Horizon Buildcon Pvt. Ltd. v Horizon Buildcon Pvt. Ltd. & Ors.**<sup>23</sup> NCLAT adopted the project-specific resolution and stated that the process of CIRP should be conducted on a project basis in default.

After this case, this concept of Project Specific Insolvency Resolution Procedure (PSIRP) was followed in many cases related to the real estate sector by the NCLT, like *Anil Kumar and Ors. v Logix City Developers Pvt. Ltd.*<sup>24</sup>, *Ajai Kumar Gupta v Ashwani Kumar Singla*<sup>25</sup>, *M/s Supertech Ltd. v Union Bank of India*<sup>26</sup>, *Indiabulls Asset Reconstruction Co. Ltd. v Ram Kishore Arora and Ors.*<sup>27</sup>

## **RECENT DEVELOPMENTS**

The range of actions being taken to address these issues has been expanded by the Insolvency and Bankruptcy Board of India (IBBI). The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2024 were notified by the IBBI on February 15, 2024. Under the IBC, 2016, the Amendment aims to simplify and close any loopholes present in CIRP for real estate firms. The Amendment prevents the company's solvent projects from being put on hold because of a project default. Due to this

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<sup>22</sup> *Flat Buyers Association Winter Hills v Umang Realtech Pvt. Ltd and Ors* (2020) 10 SCC 549

<sup>23</sup> *Ambika Prasad Sharma erstwhile Director of Horizon Buildcon Pvt. Ltd. v Horizon Buildcon Pvt. Ltd. & Ors* 12 SCC 789

<sup>24</sup> *Anil Kumar and Ors. v Logix City Developers Pvt. Ltd.* (2021) 12 SCC 789

<sup>25</sup> *Ajai Kumar Gupta v Ashwani Kumar Singla* (2023) Company App (AT) (Insolvency) No 41/2023

<sup>26</sup> *M/s Supertech Ltd. v Union Bank of India* (2022) Company App (AT) (Insolvency) No 406/2022

<sup>27</sup> *Indiabulls Asset Reconstruction Co. Ltd. v Ram Kishore Arora and Ors* (2023) SCC OnLine SC 436



amendment, the Committee of Creditors (CoC) can invite and adopt Resolution Plans because there may be several projects in various stages of construction.

**Following are some of the key elements that are introduced through the Amendment of 2024:**<sup>28</sup>

- Requiring the resolution specialist of the company debtor to open a distinct bank account for the CIRP for every real estate project in order to maintain transparency.
- Including clauses in resolution plans for individual real estate developments.
- Requiring the Resolution Professional of the real estate project to obtain the approval of CoC for all costs, including those associated with maintaining the debtor company's activities during CIRP.
- Requiring the CoC to meet once every thirty days in order to keep the CoC informed about the CIRP's advancement at every turn.
- Requiring the CoC to accept the suggested valuation approach before it may be used.

#### **CHALLENGES AND LACUNAE**

- The IBC (Amendment) Act, 2020 required a homebuyer to bring an insolvency petition if they were one hundred or ten percent of the total number of homebuyers, whichever was lower. Meeting this need might be challenging, particularly for smaller projects.
- Timelines can be greatly extended by delayed approvals, legal complexity, and the resolution process's complications, which further strain homebuyers' emotional and financial resources.
- Under the IBC's waterfall method, secured creditors receive the revenues from asset sales first, followed by unsecured creditors. Nonetheless, some secured debt is subordinated to other claims. Furthermore, the order of reimbursement to secured creditors who have different charges is not expressly stated by IBC.

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<sup>28</sup> Insolvency and Bankruptcy Board of India, *Insolvency and Bankruptcy Board of India amends the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* (2024)

- A significant contributing factor to the tribunals' protracted adjudication of cases is their shortage of judges and the smaller number of benches.

Reverse CIRP and project-wise CIRP are two examples of how the standard CIRP procedure has been modified to promote in-time resolution in the sector of real estate without jeopardizing the interests of buyers. Although these procedures appear to be in line with the letter of the IBC on the surface, they are challenged by the particular statutory provision found in Section 29A of the IBC. Not only has the Reverse CIRP jurisprudence not even begun to grow, but it has grown extraordinarily in extreme factual situations. As a result, both the NCLAT and the Supreme Court have had the chance to compare the developing procedures to the statutory enactment; instead, they have limited it to exceptional situations.

## REMARKS AND CONCLUSION

All things considered, the Amendment is a reflection of a continuous endeavours to hone and enhance the insolvency resolution process in order to fulfil its goals of openness, value maximization, and equitable treatment of stakeholders. It emphasizes taking a proactive approach to improve the CIRP's efficacy and efficiency. With a focus on filling in voids in the insolvency resolution process across the country, these modifications demonstrate the IBBI's commitment to addressing issues that impede the efficiency of CIRP in India as well as its awareness of real-world difficulties.

**Following are some recommendations to help improve the appalling circumstances of homebuyers:**

- In order to properly represent oneself in intricate IBC procedures, homebuyers frequently lack the necessary structure and resources. A stronger voice could be achieved by taking steps like granting more voting rights or establishing a specific representative body.
- Long-drawn-out IBC procedures can be difficult for prospective homeowners who could have to pay rent while they wait for their houses. It should be investigated to expedite the resolution of real estate project cases.

- The IBC framework may be modified to take real estate projects' particular characteristics into account. This might be making sure land stays designated for housing or making provisions for alternative developers to finish the project. Tighter rules for real estate projects and developers could stop financial misconduct before it causes bankruptcy.

For now, the recent amendment of 2024 should be given the time to be brought into enforcement properly, there's a need to observe how these are brought into play and what problems they are causing or solving. Only then a definitive stance could be taken in its favour or against it.