

REAL ESTATE REGULATION AND INSOLVENCY: THE CLASH BETWEEN HOMEBUYER PROTECTIONS AND CREDITOR RIGHTS IN INDIA

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ABSTRACT

Insolvency and Bankruptcy Code (IBC) and Real Estate (Regulation and Development) Act (RERA), both of which were introduced in 2016, are at odds with one another, and this conflict affects India's real estate industry. While the IBC concentrates on monetary recovery for creditors, RERA seeks to safeguard homeowners by guaranteeing responsibility and transparency in real estate transactions. Conflicts have arisen because Section 238 of the IBC, which gives it superintendence, has occasionally disregarded RERA's safeguards for homebuyers in bankruptcy proceedings. By enabling project-specific resolutions and enhancing financial transparency, recent judicial and regulatory initiatives, such as Project-wise Corporate Insolvency Resolution Processes and CIRP regulation modifications, aim to resolve these problems. Through a more integrated approach to real estate insolvencies and proper attention to project completion and financial recovery, these developments seek to strike a balance between the interests of creditors and homebuyers.

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In the ever-evolving landscape of India's economy, the real estate sector balances the interests of creditors, developers, and purchasers in a perilous way, serving as both a pillar of development and a house of cards. Prior to 2016, homebuyers were essentially powerless against irresponsible builders and faced a situation akin to being trapped in a maze from which there was no way out. The only options left to them were protracted legal lawsuits or a claim for damages under the Consumer Protection Act, 1986,¹ neither of which could guarantee the delivery of their long-awaited homes.

The introduction of the Real Estate (Regulation and Development) Act (RERA) in 2016² marked a turning point, ensuring greater fairness and transparency for prospective homeowners. This was further bolstered by the Insolvency and Bankruptcy Code (IBC) of 2016, which after significant revisions acknowledged homeowners as financial creditors—akin to giving them a safety net in a high-wire act.³ Because of their categorization under the IBC, homeowners can file for bankruptcy against developers who are in default, ensuring their spot in the creditor's queue.

Yet, even this seemingly progressive framework is not without its cracks. Stakeholders are frequently left in a state of legal confusion by the ongoing tug-of-war between the creditor-centric approach of the IBC and the homebuyer-centric safeguards of RERA, with Section 238 of the IBC making efforts to integrate the two statutes more difficult. The industry is seeing a

¹ Consumer Protection Act 1986.

² Real Estate (Regulation and Development) Act 2016.

³ Jyoti Singh and Vishnu Shriram, *Insolvency and Bankruptcy Code, 2016: Concepts and Procedure* (Bloomsbury 2017).

piecemeal settlement of real estate insolvencies—an attempt to reestablish confidence brick by brick—as the judiciary steps in with creative solutions like Project-wise Corporate Insolvency Resolution Process (CIRP). But the path to recovery is still long and convoluted, with over 7,000 corporate insolvency cases documented as of September 2023 and an astounding amount of real estate projects that have stopped.

II. UNRAVELING THE STALEMATE: IBC AND RERA'S POWER STRUGGLE IN REAL ESTATE

The continuing battle for dominance in India's complex real estate market between the Real Estate (Regulation and Development) Act (RERA) and the Insolvency and Bankruptcy Code (IBC) is akin to a battle between two titans. In 2024, the conflict is still as vital as ever, with both laws vying for supremacy in deciding who gets the keys to justice in cases involving financially distressed developers. The struggle between these regulations not only draws attention to legal issues but also emphasizes the practical ramifications for creditors, developers, and purchasers who are caught in the crossfire.⁴

A major point of friction stems from Section 238 of the IBC which states that “*the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*”⁵ Hence, this provision gives the Code an overriding effect over any other law in case of conflict. Consequently, its provisions acquire primacy, and cannot be read as subordinate to the RERA Act. This has made it difficult to fully integrate IBC

⁴ Vidushi Puri and Kandarp Jha, ‘Empowering the Revival of the Real Estate Sector: The Transformative Impact of the Insolvency and Bankruptcy Code’ (*IBC Laws*, 7 March 2024) <<https://ibclaw.in/empowering-the-revival-of-the-real-estate-sector-the-transformative-impact-of-the-insolvency-and-bankruptcy-code-by-vidushi-puri-kandarp-jha/>> accessed 13 September 2024.

⁵ Insolvency and Bankruptcy Code 2016, s 238.

and RERA, as insolvency proceedings often halt the remedies that RERA provides to homebuyers. Despite their recognition as financial creditors under IBC, homebuyers' claims can be sidelined when creditors' recovery takes center stage.⁶

In response, courts have adopted creative solutions like the Project-wise Corporate Insolvency Resolution Process (CIRP). This project-specific approach allows incomplete real estate projects to be completed even as broader insolvency processes for developers continue. These judicial innovations aim to restore confidence in the sector, but the tussle between IBC and RERA continues, with Section 238 often tipping the scales in favor of insolvency over regulatory protections.⁷

At the heart of the conflict lies the question: Which law should prevail? Oftentimes, IBC puts liquidation ahead of project completion, serving as the creditors' guardian angel and concentrating on cash recovery through corporate insolvency resolution.⁸ By guaranteeing the delivery of homes and providing compensation for delays, RERA, on the other hand, advocates for the interests of homebuyers. IBC stresses prompt resolution, whereas RERA offers protection; yet, the two are not necessarily complementary. It's like two sides of the same coin.

Even while courts have decided that in cases of dispute, the Insolvency and Bankruptcy Code (IBC) takes precedence over other legislation, actual

⁶ Dr. Anup P. Shah, 'IBC or RERA? And the Winner is...!' (2019) Bombay Chartered Accountant Journal <<https://bcajonline.org/journal/ibc-or-rera-and-the-winner-is/>> accessed 13 September 2024.

⁷ Devashish Bhattacharyya, 'Reimagining Insolvency Resolution: Reverse CIRP A Game-Changer For India's Real Estate Sector' (*LiveLaw*, 28 October 2023) <<https://www.livelaw.in/articles/reimagining-insolvency-resolution-reverse-cirp-a-game-changer-for-indias-real-estate-sector-241056>> accessed 13 September 2024.

⁸ Winnie D'Monte, 'Homebuyers under the Insolvency and Bankruptcy Code, 2016' (2022) 3(1) Jus Corpus Law Journal <<https://www.juscorpus.com/wp-content/uploads/2022/10/46.-Winnie-DMonte.pdf>> accessed 13 September 2024.

home has frequently been reduced to an unending game of snakes and ladders, where every advancement is followed by a fall back to the starting point due to delayed projects, stalled development, and dishonest business methods.

Unfortunately, a lot of vulnerable homebuyers are forced to engage in drawn-out legal fights in consumer forums in an attempt to make up for the lack of service. Further, due to the conflict between IBC and RERA, which both give priority to different stakeholders, there is a complex web of legal and practical issues that continue into 2024.¹²

A. The Evolving Status of Homebuyers under the IBC

The Indian Bankruptcy Code (IBC) categorizes creditors into two groups: financial and operational. Under Section 9, operational creditors, such as suppliers of goods or services, can initiate the Corporate Insolvency Resolution Process (CIRP).¹³ Section 7 allows financial creditors, typically lenders, to initiate the process.¹⁴ Initially, real estate buyers were not directly included in these categories and were merely spectators in the insolvency proceedings, as their legal status remained ambiguous under the IBC framework. The NCLT ruled in early cases such as *Col. Vinod Awasthy v. AMR Infrastructure Ltd.*¹⁵ that homeowners were not eligible to be considered operational creditors, so directing them to pursue remedies under consumer protection legislation. This decision highlighted the uncertainty surrounding homebuyers' status in insolvency proceedings.¹⁶

¹² Shreyas Kulkarni and Rajvardhan Pathak, 'Analysis of Overlapping Provisions in RERA and IBC' (2024) 2(16) White Black Legal International Law Journal <<https://www.whiteblacklegal.co.in/details/analysis-of-overlapping-provisions-in-rera-and-ibc-by---shreyas-kulkarni-rajvardhan-pathak>> accessed 13 September 2024.

¹³ Insolvency and Bankruptcy Code 2016, s 9.

¹⁴ Insolvency and Bankruptcy Code, 2016, s 7.

¹⁵ *Col. Vinod Awasthy v AMR Infrastructure Ltd.* [2017] SCC OnLine NCLT 16278.

¹⁶ Hariharan Venkateshwaran, 'Financial Creditor, Operational Creditor and An Overview on Home-Buyers under Indian Bankruptcy Code' (2020) 15 Supremo Amicus Journal

The winds of change began to blow with the case of *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd.*,¹⁷ the NCLT initially ruled that homebuyers were not financial creditors, reasoning that their transactions did not involve the "time value of money." Instead, the NCLT viewed these as simple sale transactions.¹⁸ However, the NCLAT overturned this decision, holding that funds invested by homebuyers should be treated as financial debts under Section 5(8)¹⁹ of the IBC and money obtained from homebuyers through guaranteed return programs had the commercial flavor of borrowing, making them eligible to receive Section 5(7)²⁰ of the IBC compensation as financial creditors. This ruling marked a significant shift, acknowledging that homebuyers are indeed financial creditors.²¹

This principle was further reinforced in *Anil Mahindro & Anr. v. Earth Iconic Infrastructure (P) Ltd.*²², where the NCLAT again emphasized that homebuyers who had been promised assured returns would qualify as financial creditors. However, this led to confusion regarding the status of homebuyers not assured of returns, as they were not classified as financial creditors or operational creditors under the Code.²³ At this stage, homebuyers could only file claims as "other creditors," without the ability to initiate insolvency

<<https://supremoamicus.org/wp-content/uploads/2020/01/A11.v15.pdf>> accessed 13 September 2024.

¹⁷ *Nikhil Mehta and Sons (HUF) v AMR Infrastructure Ltd.* [2017] SCC OnLine NCLAT 219.

¹⁸ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (March 2018) <http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf> accessed 13 September 2024.

¹⁹ Insolvency and Bankruptcy Code 2016, s 5(8).

²⁰ Insolvency and Bankruptcy Code 2016, s 5(7).

²¹ *Yadubir Singh Sajwan & Ors. v Som Resorts Private Limited*, Company Petition No. (IB)-67(ND)/2022 (National Company Law Tribunal, 2 August 2022).

²² *Anil Mahindro & Anr v Earth Iconic Infrastructure (P) Ltd*, Company Appeal (AT) (Insolvency) No. 74 of 2017 (National Company Law Appellate Tribunal, 2 August 2017).

²³ Pratik Datta, 'Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 2016' (2018) NIPFP Working Paper Series, No. 247 <https://www.nipfp.org.in/media/medialibrary/2018/12/WP_247.pdf> accessed 13 September 2024.

proceedings.²⁴ To address this issue, the Insolvency and Bankruptcy Board of India (IBBI) introduced Form CA in 2017, allowing homebuyers to file claims within a specialized framework.²⁵

B. Judicial and Legislative Milestones

The judiciary's role as a knight in shining armor for homebuyers was further cemented by the Supreme Court in *Chitra Sharma v. Union of India*.²⁶ In a historic ruling, the Court recognized homeowners as financial creditors and designated a senior attorney to protect their rights before the Committee of Creditors (CoC).²⁷ With this landmark decision, homebuyers were guaranteed to take an active role in the insolvency resolution process rather than being passive observers.²⁸ Additionally, in *Jaypee Orchard Resident Welfare Society v. Union of India*,²⁹ the Supreme Court reassured homebuyers by affirming that the Court would do everything in its power to protect their interests.

Quickly after, legislative changes were made. A clarification was added to Section 5(8)(f) of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which states 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*”, so the funds raised from homebuyers in real estate projects would be regarded as having the commercial effect of borrowing.³⁰ With the help of this legislative change, homeowners' rights as creditors were

²⁴ *Rubina Chadha & Anr. v AMR Infrastructure Ltd.*, Company Appeal (AT) (Insolvency) No 8 of 2017 (National Company Law Appellate Tribunal, 21 July 2017).

²⁵ Insolvency and Bankruptcy Code 2016, Reg 8A; Form CA.

²⁶ *Chitra Sharma v Union of India* [2018] 18 SCC 575.

²⁷ Insolvency and Bankruptcy Code 2016, s 21(2).

²⁸ Insolvency and Bankruptcy Code 2016, s 30(4).

²⁹ *Jaypee Orchard Resident Welfare Society v Union of India*, Writ Petition (Civil) No 854 of 2017 (Supreme Court, 18 September 2017).

³⁰ Insolvency and Bankruptcy Code 2016, s 5(8)(f).

strengthened, and developers were held responsible for any delays or defaults.³¹ However, the amendment did not escape scrutiny. In *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*,³² the Supreme Court upheld the amendment's constitutionality, ruling that it merely clarified existing provisions rather than undermining any fundamental legal principles. This marked yet another victory for homebuyers in the judicial arena and further solidifying their position in insolvency proceedings.

The evolution of this legal battleground continued with *Vishal Chelani and others v. Debashis Nanda*,³³ where the Supreme Court decided that homebuyers could not be treated differently from other financial creditors under the IBC, even if they had received favourable verdicts under RERA. This decision marked the continuation of the growth of this legal conflict. By guaranteeing that RERA orders wouldn't impair homebuyers' standing under the IBC, this ruling upheld the equity between them and other creditors. Similarly, in *Tarun Ahuja & Ors. v. Puri Construction Private Limited*,³⁴ the NCLT Delhi reaffirmed that homebuyers' status as financial creditors under Section 5(8)(f) of the IBC remained intact, regardless of whether they had previously sought remedies through RERA or the National Consumer Disputes Redressal Commission (NCDRC).³⁵

³¹ Ministry of Corporate Affairs, 'President Approves Promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018' (*Press Information Bureau*, 6 June 2018) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1534497>> accessed 13 September 2024.

³² *Pioneer Urban Land & Infrastructure Ltd. v Union of India* [2019] 8 SCC 416.

³³ *Vishal Chelani & Ors. v Debashis Nanda*, Civil Appeal No 3806 of 2023 (Supreme Court, 6 October 2023).

³⁴ *Tarun Ahuja & Ors. v Puri Construction Private Ltd.*, Company Petition (IB) No. 755/PB/2020 A/W IA No 6091/ND/2022 (National Company Law Tribunal, 24 January 2024).

³⁵ Aryan Raj, 'NCLT Delhi: 'Homebuyers' Seeking Redressal Through 'RERA' Or 'NCDRC' Prior To Approaching 'NCLT' Retain Their Status As Financial Creditors' (*LiveLaw*, 27 August 2024) <<https://www.livelaw.in/ibc-cases/nclt-delhi-homebuyers-seeking-redressal-through-rera-or-ncdrc-prior-to-approaching-nclt-retain-their-status-as-financial-creditors-248297>> accessed 13 September 2024.

C. The Dual Implications of Financial Creditor Status

The recognition of homebuyers as financial creditors has indeed equipped them with a powerful tool to hold developers accountable, yet it has simultaneously woven a complex web of challenges. Homebuyers can now put pressure on developers, but they are now in direct rivalry with bigger financial players inside the Committee of Creditors thanks to their unique standing. Due to their emphasis on financial recovery, banks and other institutional creditors could prefer liquidation in order to recover their investments, while purchasers understandably want to see the project completed.³⁶ All parties involved must carefully navigate the delicate balancing act of aligning these frequently at odds interests, which makes achieving harmony and a successful resolution a huge and ongoing struggle.

The primary question still stands: which should come first, the IBC or RERA? This legal battle was made very clear in the *Jaypee Infratech case*,³⁷ when the Supreme Court raised serious concerns in *Chitra Sharma v. Union of India* about the potential for egregious unfairness if the IBC's waterfall mechanism put homebuyers at the bottom of the creditor hierarchy.³⁸ The Court issued a dire warning, stating that making house buyers into nothing more than puppets in the bankruptcy proceedings would tip the scales against justice. While the IBC's overriding provisions often cast a shadow over these protections, RERA is intended to safeguard homebuyers by guaranteeing project completion and compensating for delays, creating a complex legal environment for all parties involved.³⁹

³⁶ Shweta Bharti and Jatin Chadda, 'Journey of Home Buyers under IBC' (*Bar and Bench*, 7 May 2024), <<https://www.barandbench.com/law-firms/view-point/journey-of-home-buyers-under-ibc>> accessed 13 September 2024.

³⁷ Ministry of Corporate Affairs (n 31).

³⁸ Insolvency and Bankruptcy Code 2016, s 30(4).

³⁹ L Viswanathan, Srideepa Bhattacharyya, Aditya Marwah & CAM Disputes Team, 'Resetting the Clock: Supreme Court Sends Jaypee Infratech Limited Back to NCLT for CIRP'

As the tension between RERA and IBC persists, the CIRP is tasked with managing these competing interests. In the CIRP, homebuyers' role—now acknowledged as financial creditors—has grown in importance. Nevertheless, managing insolvency with institutional creditors presents unique difficulties since it necessitates a careful balancing act between project completion and financial recovery.⁴⁰

D. Homebuyers as Secured or Unsecured Financial Creditors

The difference between secured and unsecured debt is not merely a legalese quirk; it has important implications for homebuyers. In the language of finance, a "secured creditor" is a person who has a security interest, a legal lifeline over property, to ensure that a debt or loan is repaid. This security interest may be represented by any kind of encumbrance on the property, such a mortgage, charge, hypothecation, assignment, or other. The party who gains from this charge is known as the "secured creditor," and the property that is subject to it is called "security."⁴¹

A landmark decision was rendered by the National Company Law Appellate Tribunal (NCLAT) of New Delhi in the landmark case of *Flat Buyers Association v. Umang Realtech Pvt. Ltd.*⁴² It stressed that the corporate debtor (CD) builds the units or infrastructure in a real estate project with the

(Cyril Amarchand Mangaldas, 27 August 2018) <<https://corporate.cyrilamarchandblogs.com/2018/08/resetting-clock-supreme-court-sends-jaypee-infratech-limited-back-nclt-cirp/>> accessed 11 September 2024.

⁴⁰ Ms. Mehreen Garg & Prof. Arjya B. Majumdar, 'The Homebuyers' Conundrum in Real Estate Insolvency' (*Insolvency Law Academy*) <<https://insolvencylawacademy.com/the-homebuyers-conundrum-in-real-estate-insolvency/>> accessed 11 September 2024.

⁴¹ Aditya Khadria and Sivaprakasam Babu, 'Are Home Buyers Secured Financial Creditors or Unsecured Creditors under IBC?' (*The Economic Times*, 10 August 2018) <<https://economictimes.indiatimes.com/wealth/real-estate/are-home-buyers-secured-financial-creditors-or-unsecured-creditors-under-ibc/articleshow/65332287.cms>> accessed 11 September 2024.

⁴² *Flat Buyers Association Winter Hills v Umang Realtech Pvt. Ltd. and Ors.* [2020] 10 SCC 549.

intention of selling them to homebuyers. They cannot get these assets, which are technically collateral for secured creditors.⁴³ Rather, they have to be distributed to the allottees, or homeowners, who fall under the category of unsecured creditors. The truth is that banks would usually prefer not to have their loans secured by the property of houses or apartments. On the other hand, purchasers who lack secured credit have a legitimate interest in these properties. *Rajesh Goyal v. Babita Gupta*, the case that followed, confirmed and reinforced this interpretation.⁴⁴

Upholding the Rajasthan High Court's position, the Supreme Court weighed in on this matter in *Union Bank of India v. Rajasthan Real Estate Regulatory Authority*⁴⁵. The court confirmed that RERA complaints are still eligible to be filed even in cases when a bank seizes a project as a secured creditor under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) because of a promoter's delinquency.⁴⁶ The court made the sensible decision to uphold RERA's provisions in recovery proceedings if they conflict with those of the SARFAESI Act.⁴⁷ In the High Court's ruling, the provisions of RERA were also covered. After a promoter enters into an agreement to sell an apartment, they are not allowed to mortgage the property or place any kind of charge on

⁴³Harshit, 'Homebuyers as Financial Creditors under IBC: An Analysis of Pioneer Urban Case' (*Centre for Business and Financial Laws*, 19 July 2023) <<https://www.cbflnludelhil.in/post/homebuyers-as-financial-creditors-under-ibc-an-analysis-of-pioneer-urban-case>> accessed 11 September 2024.

⁴⁴*Rajesh Goyal v Babita Gupta*, Company Appeal (AT) (Insolvency) No 1056 of 2019 (National Company Law Appellate Tribunal, 19 November 2019).

⁴⁵*Union Bank of India v Rajasthan Real Estate Regulatory Authority*, Civil Writ Petition No 13688/2021 (High Court of Rajasthan, 14 December 2021).

⁴⁶'RERA Can Entertain Complaints Filed by Home Buyers Against Banks' (*India Law*, 18 February 2022) <<https://www.indialaw.in/blog/real-estate/rera-can-entertain-complaints-filed-by-home-buyers-against-banks/>> accessed 11 September 2024.

⁴⁷Moneylife Digital Team, 'Unity amongst Home-buyers is Important in Insolvency Cases' (*Moneylife*, 16 August 2021) <<https://www.moneylife.in/article/unity-amongst-home-buyers-is-important-in-insolvency-cases/64874.html>> accessed 11 September 2024.

it, as per Clause (h) of Sub-section 4 of Section 11 of the RERA Act, 2016.⁴⁸ The allottee's rights and interests who have already secured or agreed to secure the apartment or flat cannot be compromised by any such mortgage formed later.⁴⁹

In many cases, homebuyers take out loans to purchase their flats and mortgage these properties to the lending bank. While they are generally considered unsecured creditors, it is crucial to ensure their interests are not left hanging in the balance.⁵⁰ This protection is often secured through judicious judicial interpretations of relevant statutes, which help in defending homebuyers' rights robustly.

E. Reconciling RERA and IBC in Insolvency Law

The 2020 Amendment to the IBC introduced a threshold for homebuyers to initiate insolvency proceedings.⁵¹ This requirement was upheld by the Supreme Court in the case of *Manish Kumar v. Union of India*, and it required at least 100 homebuyers, or 10% of allottees, to combine to file an application.⁵² To promote equitable treatment, the NCLAT's decision in *Puneet Kaur v. K V Developers Private Limited*⁵³ guaranteed that even homebuyers' unfiled claims would be taken into account in the corporate debtor's information memorandum, if it was recorded.⁵⁴

⁴⁸ Real Estate (Regulation and Development) Act 2016, s 11(4)(h).

⁴⁹ G S Bajpai and Neha Kapur, 'The Primacy of Homebuyers over Financial Institutions: The RERA and SARFAESI Conundrum' (*The Leaflet*, 19 June 2022) <<https://theleaflet.in/the-primacy-of-homebuyers-over-financial-institutions-the-rera-and-sarfaesi-conundrum/>> accessed 11 September 2024.

⁵⁰ *Hadley v Baxendale* [1854] 9 Exch. 341.

⁵¹ Insolvency and Bankruptcy (Amendment) Act 2020.

⁵² *Manish Kumar v Union of India* [2021] SCC OnLine SC 30.

⁵³ *Puneet Kaur v K V Developers Private Limited*, Company Appeal (AT) (Insolvency) No. 390 of 2022 (National Company Law Appellate Tribunal, 1 June 2022).

⁵⁴ Mitali Ingawale and Sumit Kulkarni, 'Deconstructing the Threshold Requirements for Homebuyers under IBC' (*SCC Online*, 20 June 2021)

The difficulty of reconciling the goals of RERA and IBC highlights how intricate India's real estate regulatory environment is. The ruling in *Bikram Chaterji v. Union of India*⁵⁵ by the Supreme Court emphasizes the continuous necessity of striking a balance between these conflicting interests. Given this context, a thorough grasp of the bankruptcy landscape necessitates an awareness of how CIRP handles these problems.

IV. PROJECT-WISE CIRP: AN INNOVATIVE JUDICIAL APPROACH

The Corporate Insolvency Resolution Process ('CIRP') as given in the Insolvency and Bankruptcy Code (IBC), 2016 is a mechanism for the recovery of debts from the corporate debtors to the creditors. Earlier, when the CIRP of a real estate company was initiated then all the projects of that company were stalled for the CIRP process. This process would inevitably uncover cash flow problems; drive out possible resolution applicants; and cause homebuyers even more suffering. Moreover, the resolution applications would have to make huge financial commitments in order to succeed. Hence, there were some inherent issues in the regular CIRP process which would not work in every case of real estate insolvency when the resolution process was initiated.

This position changed in the case of *Flat Buyers Association v. Umang Realtech Pvt. Ltd.*⁵⁶ wherein for the first time, the National Company Law Appellate Tribunal (NCLAT) introduced the concept of project-wise CIRP.⁵⁷

<<https://www.sconline.com/blog/post/2021/06/20/homebuyers/>> accessed 11 September 2024.

⁵⁵ *Bikram Chaterji v Union of India* [2019] SCC OnLine SC 901.

⁵⁶ *Rajesh Goyal v Babita Gupta* (n 44).

⁵⁷ Sumite Chatterjee, 'Reverse CIRP Under the Insolvency and Bankruptcy Code: NCLAT's Innovative Approach to Protect the Interests of Homebuyers' (January, 2023) *Indian Journal of Projects, Infrastructure and Energy Law* <<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 13 September 2024.

The court's reasoning was that in order to secure the interest of the allottees as well as the real estate companies and also, to not hamper the completion of other projects that also provide a large number of jobs, the reverse CIRP has to be followed in that particular case. This concept was further reiterated in the case of *Manish Kumar v. Union of India*⁵⁸ wherein the court explained that project-wise CIRP would be at different stages of completion. Hence, it would be burdensome to include all the projects in the CIRP process. However, in the case of *N Kumar v. M/S Tata Capital Housing Finance Limited*,⁵⁹ the NCLT held that the mechanism that was adopted by NCLAT in the Flat Buyer's Association case was based on the facts and circumstances of that particular case and it cannot be applied in the present case. But again, in the case of *India Bulls Asset Reconstruction Company Limited v. Ram Kishore Arora and Ors*,⁶⁰ the court supported the concept of reverse CIRP. It said that instead of ordering the CIRP of all the ongoing projects which will lead to the stoppage of these projects, it is better to find a solution which is viable as well as beneficial to all. And the solution is project-wise CIRP. Moreover, if the court orders the CIRP of all the projects, it will cause injustice to the parties especially because it will affect the homebuyers because the ongoing projects will not be completed.

In *Rajesh Goyal v. Babita Gupta and Ors*,⁶¹ the corporate debtor's operations were managed as a continuing concern in order to finish the defaulted project and deliver it to the allottees. The Supreme Court subsequently noted in *Anand Murti v. Soni Infratech Private Limited and*

⁵⁸ *Mitali Ingawale and Sumit Kulkarni* (n 54).

⁵⁹ *N Kumar v M/S Tata Capital Housing Finance Limited*, Intervention Application (I.B.C) No. 1245(CHE)/2020 (National Company Law Tribunal, 25 April 2022).

⁶⁰ *India bulls Asset Reconstruction Co. Ltd. v Ram Kishore Arora & Ors.* [2023] SCC OnLine SC 436.

⁶¹ *India Law* (n 46).

*Anr.*⁶² that the corporate debtor's promoter's project completion proposal will 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 escalations in a third-party Resolution Plan if regular CIRP was carried out. Thus, the promoter was subsequently given permission to invest in and finish the ailing housing project while being watched over by the Resolution Professionals and the Court. This shows the courts' solution-oriented approach of the sectoral concerns.

Further, the Supreme Court in *Swiss Ribbons Private Limited and Anr. v. Union of India and Ors.*,⁶³ opined that the Insolvency Code is a piece of legislation that addresses economic issues and, more broadly, the national economy and thus, it is extremely important to continue economic experimenting, and denying someone the freedom to do so could have dire repercussions for the country. All these recent judgements show the judicial support for the concepts such as project-wise CIRP.

The Insolvency and Bankruptcy Board of India (IBBI) proposed amendments to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 through two consultation papers in November, 2023. These two papers addressed the issue of real estate insolvency⁶⁴ and measures to be taken to streamline the corporate insolvency resolution process (CIRP)⁶⁵ respectively. Then, finally in February 2024, some of the proposals

⁶² *Anand Murti v Soni Infratech Private Limited & Anr.* [2022] SCC Online SC 519.

⁶³ *Swiss Ribbons Private Limited & Anr. v Union of India & Ors.* [2019] SCC Online SC 73.

⁶⁴ Insolvency and Bankruptcy Board of India, *Discussion Paper: Real-Estate Related Proposals – CIRP & Liquidation* (November, 2023), <https://ibbi.gov.in/uploads/public_comments/Discussion_Paper_Real_Estate_November2023_Final.pdf> accessed September 13, 2024.

⁶⁵ Insolvency and Bankruptcy Board of India, *Discussion Paper on Amendments to Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Process) Regulations, 2016* (November, 2023), <<https://ibbi.gov.in/uploads/whatsnew/b70daeb0fbec8cc61d1afc52e9e9fbb8.pdf>> accessed September 13, 2024.

that were mentioned in these consultation papers were incorporated in the CIRP regulations⁶⁶ through a notification by the IBBI. One of the effects of the amendment is that separate bank accounts would be maintained for each real estate project by the Interim Resolution Professionals (IRP) or Resolution Professionals (RP) which is given in the newly inserted Regulation 4-D of the CIRP Regulations.⁶⁷ This is in line with the Real Estate (Regulation and Development) Act, 2016. There will be a separate record of financial transactions and other such details of each real estate project. This will help in tracking the records of each project including the receipts and payments.⁶⁸ Furthermore, it will help in checking the issues if there are any and will further improve the decision-making process. It will also bring accountability.

Another amendment with respect to the CIRP is Regulation 36-A (1), which says that there may be a separate resolution plan for each real estate project or group of projects of the corporate debtor.⁶⁹ This amendment takes into account the fact that a real estate company may have different projects going on at the same time and they may be at different stages of completion. Hence, project wise CIRP would be a better approach as it would be justice for the homebuyers as they would want the possession of the house as early as they can get rather than it being delayed.

The Amendment is a reflection of a continuous endeavour to hone and enhance the insolvency resolution process in order to fulfill its goals of openness, value maximization, and equitable treatment of stakeholders. It

⁶⁶ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations 2024.

⁶⁷ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations 2024, Regn. 4-D.

⁶⁸ Satyasrikant Vutha and Vaidehi, 'Real Estate: IBBI Notifies Project Wise Resolution Rules' (*Lexology*, March 21, 2024) <<https://www.lexology.com/library/detail.aspx?g=4d79aaaa-3ca1-45de-8db5-eb5dd04501e8>> accessed September 13, 2024.

⁶⁹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations 2024, Regn. 36-A (1).

emphasizes taking a proactive approach to improve the CIRP's efficacy and efficiency. With a focus on filling in gaps in the insolvency resolution process across the country, these amendments 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. But there are still important factors to take into account. For insolvency resolution in India to be effective and efficient, more clarification and changes are required.

V. CHALLENGES OF DELAYS AND RESOURCE CONSTRAINTS: THE SYSTEM'S BOTTLENECKS

IBC is a complex process because of multiple stakeholders, resolution plan which in itself is a long process, legal proceedings and timelines. This adds to the financial and emotional suffering to the homebuyers. Section 7 of the IBC states three ways in which a financial creditor which includes homebuyers can initiate the CIRP. These are either by itself, jointly with other financial creditors or any other person on behalf of the financial creditor.⁷⁰ This enabling provision allowing the financial creditor itself to initiate the CIRP by filing an application for it was a welcome provision until the 2020 Amendment. The amendment added the proviso which prescribes that the minimum number of creditors should either be hundred or ten percent of the total creditors of the same class whichever is less.⁷¹ This took away the right of the financial creditor to file an application by itself for initiating CIRP proceedings against the corporate debtor as now a certain number of creditors are required to do so. This is a clear violation of the right of a homebuyer to recover the debt as the proviso further complicates the process and causes distress to him who is already struggling to get justice.

⁷⁰ Insolvency and Bankruptcy Code 2016, s 7.

⁷¹ Insolvency and Bankruptcy (Amendment) Act 2020.

In the case of *Pankaj Mehta v. M/s. Ansal Hi-tech Township Limited*⁷², the NCLAT held that CIRP cannot be initiated because the petitioners in this case are from different projects of the corporate debtors and hence, they fail to establish their case as creditors of a class and fulfil the minimum requirement given under Section 7 of the IBC. In this case, the project was not completed even after twelve years. Hence, the homebuyers wanted the recovery of their debt. However, since the minimum requirement for initiating CIRP was not fulfilled, they were not allowed to initiate the proceedings.

Every law is created with practical concerns and implementation-related risks in mind. It is very impractical to expect a homebuyer who wants to initiate CIRP to collect ninety-nine more such persons or ten percent of the total creditors with the same interest and that too of the same project.⁷³ It is very uncertain that the homebuyer would be able to collect such number of creditors as it is difficult to get the information of such creditors. This is also because generally, such information is with the corporate debtor and there is no reason for keeping information of other creditors. There may also be the case that a single homebuyer has the grievance and other creditors might not be interested in assisting or helping him. Hence, convincing them to file an application for beginning the CIRP against a Corporate Debtor is both unnecessary and unrealistic.

Homebuyers are categorized as unsecured creditors under IBC as evident by various judgements of the court. They are placed below secured creditors in the priority list of debt repayment or proceeds of asset sale. Moreover, IBC also does not prescribe the order of repayment among secured creditors.

⁷² *Pankaj Mehta v M/s. Ansal Hi-tech Township Ltd.*, Company Appeal (AT) (Insolvency) No. 248/2023 (National Company Law Appellate Tribunal, 1 April 2024).

⁷³ Shweta Bharti and Jatin Chadda (n 36).

An additional source of strain on the system is the lack of benches and judges in the courts, which causes delays in the resolution of bankruptcy cases.⁷⁴ Due to backlogs caused by this lack of judicial resources, homeowners' misery is exacerbated when the settlement process takes longer than expected. Despite the IBC's goal of streamlining insolvency procedures, homebuyers frequently find themselves on the receiving end of the system's current design.⁷⁵ The 2020 Amendment, judicial resource limitations, and procedural hold-ups combine to make the supposed recovery process into a hard and protracted battle. Legislative and procedural changes are therefore desperately needed to address these issues and enhance the protection of those homebuyers who are in the last stages of bankruptcy.

VI. CONCLUSION

Homebuyers' experience under the Insolvency and Bankruptcy Code (IBC) has been marked by both advancements and difficulties. The recent amendment of 2024 by incorporating project-wise CIRP is a welcome step. However, there are many other challenges and uncertainties that IBC and RERA face. Therefore, it is not the end here. There is a need to bring a few more amendments that cater to the needs of homebuyers and also address other challenges that are currently present in the acts. One such amendment can be to settle the position of the homebuyers as primary secured creditors so that

⁷⁴ Shweta Bharti and Aeshwarya Sisodia, 'IBCs Efforts to Accommodate Real Estate Sector Challenges' (*Mondaq*, February 9, 2024) <<https://www.mondaq.com/india/real-estate/1422364/ibcs-efforts-to-accommodate-real-estate-sector-challenges>> accessed September 13, 2024.

⁷⁵ Aastha Roy and Rohan Mitra, 'Navigating Crossroads of IBC and RERA: Are We There Yet with Addressing Homebuyers Woes?' (*Mondaq*, June 7, 2023) <<https://www.mondaq.com/india/insolvencybankruptcy/1326206/navigating-crossroads-of-ibc-and-rera-are-we-there-yet-with-addressing-homebuyers-woes>> accessed September 13, 2024.

their interest is protected and they do not suffer because of the corporate debtors.

The principle of *Pari Passu*, which suggests that creditors in a bankruptcy proceeding be treated equally, is one of the main goals of insolvency proceedings. The tension between secured and unsecured debt in the context of India's real estate sector reveals deep-seated complexities that impact both financial institutions and homebuyers. Legislative amendments should be introduced to harmonize the IBC and RERA, ensuring that both secured creditors and homebuyers' interests are fairly represented. Developing detailed judicial guidelines can help courts balance these interests consistently. Additionally, creating a specialized insolvency mechanism for real estate projects, enhancing RERA's provisions to address insolvency scenarios, and improving coordination between regulatory bodies can provide more equitable outcomes.

In this way, a more safe and successful future for the real estate industry can also be imagined by proactively removing current obstacles and encouraging cooperation between all parties involved, including developers, homebuyers, and regulatory agencies.