VIII. RE-CONSTRUCTING THE LIMITATIONS UNDER SECTION 7 OF IBC: A CRITICAL ANALYSIS OF THE STATUS OF HOMEBUYERS UNDER INDIAN INSOLVENCY REGIME

- Pranay Agarwal*

ABSTRACT

The Insolvency and Bankruptcy Code, 2016 was enacted with the motive of economic development of the country and in its furtherance, for providing the most efficient and justifiable solution to corporate insolvency. But when it comes to the insolvency of real estate companies and builders, the approach of the Code was shy in the initial years, thus relying majorly upon the judicial precedents and interpretations. With the coming of the amendments of 2018 and 2020, the contentious debate on the status of homebuyers was sought to be put to rest by the Parliament. However, the amendment of 2020, being in contravention to the earlier judicial reasoning raised new questions on the status of the homebuyers. The addition of the second proviso to Section 7 though settled the legal position on the procedural aspect, but new challenges in the light of socio-economic advancements highlight the need to critically analyse the status of the homebuyers with respect to both the substantive and procedural aspects of Section 7. In this article, the author has attempted to resolve this dilemma and has tried to fill the lacunas left in the code and its amendments for the purpose of reconstructing the limitations imposed by Section 7 of the code.

Keywords: Section 7, IBC, RERA, Homebuyers, Financial creditors, Real estate sector, Harmonious construction, public interest

* The author is a third-year student of B.A. LL.B. (Hons.) at Gujarat National Law University, Gandhinagar. Views stated in this paper are personal.

I. INTRODUCTION

The debt recovery laws in India have been multilayered, giving debt relief frameworks for both individuals and companies. While the object of these frameworks has been changing in the past five millennia,[1] the new insolvency and bankruptcy laws are designed with the aim of promoting efficiency in the corporate market and stimulating economic development and private investments in the country.[2] With this broader objective, the Insolvency and Bankruptcy Code, 2016 (**"IBC/Code"**) was enacted by the Parliament to completely overhaul the insolvency regime in India and provide rather smooth and more beneficial legislation to both the Corporate Debtor (**"CD"**) and its creditors. The most peculiar feature of the law, however, remains its introduction of the Corporate Insolvency Resolution Process (**"CIRP"**), which is one of the methods through which the Code seeks to achieve its objectives.[3]

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[1]Jason Kilborn, 'The 5000-Year Circle of Debt Clemency: From Sumer and Babylon to America and Europe,' (2012) Islamic Law & Law of the Muslim World eJournal < https://www.semanticscholar.org/paper/The-5000-Year-Circle-of-Debt-Clemency%3A-From-Sumer-Kilborn/0d66a18d3da7f841c5eaa8407426528a4f4b4831> accessed 02 March 2023.

[2]Bankruptcy Law Reforms Committee, *Report of the Bankruptcy Law Reforms Committee, Volume 1: Rationale and Design* (November 2015) [3.5] (BLRC Report).

[3]BinoyKattyadiyil and Peer Mehboob, 'Corporate Insolvency in India and Other countries – A comparative study,' [2020] 9 [7(9)] Int'l J. Multidisciplinary Educational Research 149, 151-160

While the Code was in itself complete, some lacunas were left with respect to the position of the Operational Creditors in the CIRP proceedings and the status of homebuyers in the insolvency proceedings of a Real Estate company. In this respect, there have been attempts to incorporate homebuyers and real estate investors in the category of financial creditors and thus into the insolvency regime. The amendment which came in 2018, inserted the explanation to Section 5(8)(f) to give the amount of allottees status of financial debts, thus clarifying the position by giving statutory effect to the wide judicial interpretations previously given.[4] However, the intention of the lawmakers again came into question when limitations were imposed under Section 7 on the filing of an application for CIRP before the National Company Law Tribunal (**"NCLT"**) by the amendment of 2020 as per which the initial application of CIRP has to be jointly filed by 100 or 10 percent of the homebuyers whichever is less.[5]

Moreover, the confusion was added by the varied interpretations given by the NCLT in different cases, which have made its application even vaguer. This is evident through the decision of the NCLT Chennai in the recent case of *N. Kumar v. Tata Capital Housing Finance Ltd.*[6] where a narrower interpretation of the provision has led to an ambiguity in the relationship between the insolvency regime and the real estate market in India.

The author through this paper attempts to bring out the legal ambiguity, which has become more prevalent in recent times and needs careful consideration. The author in this respect will also delve into the status of the homebuyers in the insolvency regime of the country and seeks to resolve the

[4]Insolvency and Bankruptcy Code 2016, s 5(8)(f) (IBC).
[5] Insolvency and Bankruptcy Code (Amendment) Act 2020, s 3 (2020 Amendment).
[6]*Mr. N. Kumar v M/s Tata Capital Housing Finance Ltd*, IA(I.B.C)/1245(CHE)/2020 In CP(IB)/889(CHE)/2019.

ambiguities through the proper determination of the legislative intent of the law and the socio-economic needs of the country, in order to put forth contentions against the limitations imposed by Section 7 of the IBC and the confusion created by the parochial interpretation of the NCLT.

The paper for that purpose has been segregated into five parts. The first part deals with the status of the homebuyers as financial creditors under Sections 5 and 7 of IBC and has analyzed this in the context of the judicial precedents before the 2018 amendment and the incoming of the amendment in the insolvency law. The second part offers a critical analysis of the second proviso to Section 7 and the limitations imposed by it on the filing of the CIRP application. In this context, the problem is seen from a socio-economical perspective and a comparative view of both foreign and domestic laws of a similar kind. The third part deals with the determination of legislative intent behind such amendments in the IBC with respect to the real estate protection laws, thus providing relevant findings in favor of the raised contentions. In the penultimate part, the paper attempts to solve the legal ambiguities created by the NCLT Chennai through its recent order with the help of the contentions and findings of the previous parts of the paper. In the final part, the paper summarises its findings and gives useful insights in relation to the status of homebuyers in the insolvency regime.

II. HOMEBUYERS AS FINANCIAL CREDITORS

A. Position before the 2018 Amendment

The financial creditors are being given utmost priority over any other stakeholders in not only CIRP proceedings but in most of the aspects of the IBC. This is more evident from the treatment given to the operational creditors, who are still deprived of their rights of voting in the Committee of

Creditors (**"CoC"**) on the resolution plans and therefore have a mere virtual presence in the proceedings.[7] While many contentions have been raised since the enactment of the Code on such unjust treatment, the Bankruptcy Law Reforms Committee (**"BLRC"**) tried to provide ample reasoning to justify such move of the Parliament on the presumptions of financial reliability and credibility of the financial creditors.[8] Moreover, the presumption was also reiterated by the Supreme Court in the *Swiss Ribbons case*,[9] thus highlighting the immense significance of the status of financial creditors in the Indian insolvency regime.

However, when it comes to the status of the homebuyers in a defaulting real estate company as financial creditors, the same was interpreted by the NCLTs and NCLAT from a wider perspective. The question first came before the NCLAT in *Nikhil Mehta & Sons (HUF) v. AMR Infrastructure Ltd.,*[10] where the importance of purposive construction of the term "Financial Debt" under Section 5(8)(f) in the light of facts and common practice was recognised. The NCLAT took note of the fact that

> From the 'Annual Return' of the Respondent and Form-16A, the 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their commercial purpose treating at par with 'loan' in their return. Thereby, the amount invested by appellants come within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of I & B Code, 2016 subject to satisfaction as to whether such disbursement against the consideration is for time value of money.[11]

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[7] IBC, s 21(8).
[8] BLRC Report (n 2) Chap. 4.
[9] *Swiss Ribbons (P) Ltd. v Union of India*, (2019) 4 SCC 17 [50], [51], [119].
[10] [2017] SCC OnLine NCLAT 859.
[11] ibid 23.

The position was then reiterated by the NCLAT in its subsequent decision in *Anil Mahindroo v. Earth Iconic Infrastructure (P) Ltd.,*[12] where the buyer was treated as an investor and the purchase amount as the 'financial debt'. However, the test for "time value of money" became pertinent to qualify for a wider interpretation of the term 'financial debt'. The test though was first laid down in the *Nikhil Mehta case*, it was subsequently explained in *Kamal Dutta v. Anubhuti Aggarwal,*[13] where the importance of the test was highlighted. The test as was explained implies that the disbursement of the due amount should be against the consideration of the time value of money, for instance, interests on loans and other charges which may have been gained by the individual if had not invested in the company.[14]

From a historical perspective, the jurisprudence in India has been constantly in favour of the "allottees" in real estate cases, thus including them in the broad category of financial creditors.[15] However, it is pertinent to understand that two essentials have to be satisfied for such a wide interpretation of the term.

1. Time value of Money

Though the test of "time value of money" has been subjected to different constructions over the period of time, the consistent position which can be inferred indicates the importance of the intention behind the agreement and the resultant status which has been conferred on the amount paid or invested. While such an attempt was made in *Mahesh Kumar Panwar v.*

[12][2017] SCC OnLine NCLAT 216, (2017) 4 BC 128.
[13][2018] SCC OnLine NCLAT 319.
[14]ibid 6; *Nikhil Mehta* (n 10) 17.
[15]*Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, AIR 2017 SC 4084 (Nariman J); *Mobilox Innovations Pvt. Ltd. v. Kirusa Software*, (2018) 1 SCC 353 (Nariman J).

Neelam Singh,[16] where the interest component in the terms of agreement convinced NCLAT of the question of the "time value of money", the order cannot be taken as the supreme authority and therefore has to be decided on a case-to-case basis.[17]

2. Application under correct procedure and law

Following the correct and proper procedure as prescribed by the law is a necessary requirement in not only criminal and constitutional cases but also in commercial and industrial cases.[18] In this regard, it is pertinent to note that the status of the homebuyers is often equated with the 'financial creditors', however, the status of the 'operational creditors', being in stark contrast, cannot be applied to the homebuyers and investors in the real estate market.[19] This was also clarified in *Gurucharan Singh Soni and Kuldeep Kaur Soni v. Unitech Ltd.*,[20] where although the claim and contentions of the applicant were valid and legally justified, the same was not accepted under Section 9 of IBC.

While the amendment of 2018 has given a statutory effect to the position, the jurisprudence given by the NCLAT has not been rendered futile and is still relevant for filling the lacunas of the law and understanding the legislative intention behind the same. In this respect, it is important to understand that the investors are also given the same status as was given to homebuyers.[21] This is further clarified by the observations given in *Raman*

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[16]2018 SCC OnLine NCLAT 596 [4].
Atul Mittal v. Khushal Infratech (P) Ltd., 2018 SCC OnLine NCLAT 598.
[18]*AK Gopalan v. State of Madras*, AIR 1950 SC 27.
[19]*Pawan Dubey v. JBK Developer (P) Ltd.,* 2017 SCC OnLine NCLAT 865.
[20]2017 SCC OnLine NCLAT 384.
[21] Gunjan Nandu and Bhoomi Dave, 'Legitimizing Balance of Interests – Investors Vis – `A – Vis Homebuyers' (*Mondaq,* 23November 2021), <https://www.mondaq.com/india/real-estate/1133784/legitimizing-balance-of-interests-investors-vis-vis-homebuyers> accessed 28 October 2022.

Puri v. Pallavi Joshi Bakhru,[22] where the investment, was treated as "commercial borrowings". However, at the same time, it can be inferred from such precedents that more value is given to the effect of the agreement, which is to secure high returns on investment, than to the original intention of the allottee and the builder.[23]

B. Amendment of 2018 and its Impact

The amendment of 2018 was very crucial in terms of the various facets it introduced and reformed in the insolvency regime in India. One of the facets that were introduced was the inclusion of the purchase amount of the real estate property and investments within the definition of "financial debts" under Section 5(8)(f) of the IBC.[24] While the jurisprudence given by the NCLAT in the above cases serves as a valid precedent, thereby providing adequate clarity on the issue, it is pertinent to take note of the reasons in order to understand the intention of the legislators behind such reforms.

If seen from the socio-economic perspective, the then-existing real estate sector of the Indian economy has to be understood as a degrading area due to several legal and economical constraints. The delay in the completion of the under-construction apartments had become a norm. This is more evident by the fact that according to the Ministry of Statistics, 215 projects out of 782 were delayed in 2018,[25] which was also confirmed by the ASSOCHAM.[26]

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[22]2018 SCC OnLine NCLAT 895.
[23]*Ranjan Goyal v. Sharad Vadhera*, 2019 SCC OnLine NCLAT 1129.
[24]Insolvency and Bankruptcy Code (Second Amendment) Act 2018, s 3, cl (ii) (2018 Amendment).
[25]Khyati Rathod and Niharika Dhall, 'India: Delays in Construction Projects' (*Mondaq,* 24 January 2017), <https://www.mondaq.com/india/construction-planning/562100/delays-in-construction-projects> accessed 27 October 2022.
[26]LavinaMulchandani, 'Why are Housing Projects Delayed? Industry, Buyer Groups Hope to have Answers Soon' (*Hindustan Times,* 6 May 2017) <https://www.hindustantimes.com/real-estate/why-are-housing-projects-delayed-industry-buyer-groups-hope-to-have-answers-soon/story-abMs34y2V7h8G92aVur9SJ.html> accessed 27 October 2022.

While the delay in projects was not a new phenomenon, the discriminatory treatment could be seen in the real estate sector, where the buyers were not able to get the benefit of the insolvency law otherwise applicable to other sectors.

The immediate cause, however, should be considered as the *Jaypee Builders case*,[27] where the homebuyers moved the Supreme Court after the admission of the CIRP application by the NCLT against the builder-debtors. While this was not a new instance where the rights of the homebuyers were in contention, the case established the homebuyers as a separate legal party that should be included in the voting process of the CIRP proceedings. In the subsequent case of *Chitra Sharma v. Union of India*,[28] directions were also passed by the Apex Court, thus interpreting the provisions of the IBC while keeping in mind the interests of the homebuyers. The most important observation, though was to provide for a representative in the CoC to safeguard the interests of the homebuyers only, irrespective of their status as financial creditors, as was established in the *Nikhil Mehta case*.[29]

Nevertheless, several lacunas remained unfilled with respect to the status of the homebuyers in certain peculiar situations which still required clarification in times to come. Moreover, the resolution process which was assured by the Supreme Court was a court-monitored process and therefore had no legal backing in the practical sense. As was also highlighted by the Insolvency Law Committee (**"ILC"**) in 2018, the judgment has rather aggravated the confusion instead of solving it, which was pertinent from the aftermath statements of the IBBI and its reluctance to accept the verdict of the

[27]*IDBI Bank Ltd. v Jaypee Infratech Ltd.,* 2017 SCC OnLine NCLT 12613.
[28](2018) 18 SCC 611.
[29] ibid 8.1.

court regarding the position of law.[30] The relevant contention which was given in this regard was in reference to the other judgments of the tribunals and the Supreme Court where in the earlier instances, the current position was rejected, thus working against the interests of homebuyers.[31]

In the chaos that ensued, the committee in its report suggested giving legal clarity to the proposition by conferring the status of financial creditors to the homebuyers, while preserving their unique nature by falling them under the residuary entry to cover such debt transactions. The reasoning which was given by ILC was that

> Not all forward sale or purchase are financial transactions, but if they are structured as a tool or means for raising finance, there is no doubt that the amount raised may be classified as financial debt under section 5(8)(f). Drawing an analogy, in the case of home buyers, the amounts raised under the contracts of home buyers are in effect for the purposes of raising finance, and are a means of raising finance. Thus, the Committee deemed it prudent to clarify that, such amounts raised under a real estate project from a home buyer fall within the entry (f) of section 5(8).[32]

However, the reasons which were given by the ILC and the courts in various instances indicated significant reliance upon the principles of natural justice and the larger public interest in favour of the homebuyers and investors, thus giving them a sense of justice. If seen from this perspective, the objective behind the inclusion of homebuyers in the insolvency regime as financial creditors is not solely based on the consolidation and clarification of the legal

[30]Vallari Dubey, 'Home buyers breathe a sigh of relief' (*Vinod Kothari Consultants,* 18 August 2017) <https://vinodkothari.com/2017/08/home-buyers-breathe-a-sigh-of-relief/> accessed 17 October 2022.
[31] Ibid.
[32] Ministry of Corporate Affairs Government of India, *Report of the Insolvency Law Committee* (March 2018), 15 (ILC Report).

position but also was motivated by the promotion of the welfare of homebuyers and giving lesser scope to judicial discretion to avoid any legal ambiguity in the area.

III. SECTION 7 OF IBC AND LIMITATION ON THE STATUS OF HOMEBUYERS

Section 7 of IBC[33] is known by the practitioners and other stakeholders in the area of insolvency as the most relevant provision to initiate the CIRP proceedings against the corporate debtor, giving the rights to the financial creditors to file the application before the adjudicating authority. While the prior amendment of 2018 in the IBC had already conferred immense powers on the homebuyers and real estate investors to initiate the insolvency proceedings against the builder-debtor, an alteration in the position of law was seen by the enactment of the amendment of 2020.

The amendment is known for the imposition of limitations over the small claimants, such as debenture holders and homebuyers, from knocking on the doors of the adjudicating authority by mandating a minimum threshold requirement of "at least 100 of such creditors in the same class or not less than 10 percent of such total number of members in the class, whichever is less; to invoke the provisions of the IBC."[34] The addition of the proviso therefore can be seen from both positive and negative perspectives.

Arguing for the amendment, it is pertinent to highlight that since the 2018 amendment, various speculations have been made regarding the violation of the true intention of the legislature in construing the term financial

[33] IBC, s 7(1).
[34] 2020 Amendment, s 3.

creditors.[35] The financial creditors are always put on a higher footing than other stakeholders in the Code, thus implying the original intention of the legislature was to give effect to the same. However, it has been contended that the amendment which instead in an effort to broaden the definition in the name of public interest and justice, stood in complete contrast with the true legislative intention of the IBC due to its idea of giving extensive rights to the small-claimants like homebuyers.[36]

Another interesting point that was raised is regarding the exclusion of the IBC from the welfare functions which should rather be secured through welfare legislation like the Consumer Protection Act, 1986.[37] In this aspect, the IBC is instead a commercial legislation dealing with stakeholders who have invested in the companies with the sole objective of earning profits and not for consumption and welfare purposes.

While such averments hold water when seen from the purposive interpretation of the statute, the precedents which conferred the status of the financial creditors to the homebuyers and the real estate investors should be taken into account. Moreover, it is also important to highlight that it is long established that the construction of the law should not only be influenced by the original intention of the lawmakers but also for the purpose of serving society as a "social engineer".[38] In this aspect, it is pertinent to analyze the validity of the section from not only the legal aspect but also from the social,

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[35]*Bikram Chatterji v. Union if India*, WP (C) No. 940 of 2017; *Ashutosh Kumar v. Amrapali Centurian Park (P) Ltd.,* WP (C) No. 1397 of 2018 [60]; Vijay Singh, 'Opinion | Homebuyers must be cautious when approaching NCLT' (*LiveMint,* 2 July 2019), <https://www.livemint.com/money/personal-finance/opinion-homebuyers-must-be-cautious-when-approaching-nclt-1562083251326.html> accessed 25 October2022.

[36]Akaant Kumar Mittal, *Insolvency and Bankruptcy Code, Law and Practice* (1st edn, EBC 2021), 393.

[37]*Pramod Kumar Arora v. DLF Homes Panchkula (P) Ltd.,* 2015 SCC OnLine NCDRC 3098.

[38] Roscoe Pound, *Social Control through Law* (1st edn, Taylor and Francis 1996), 559-560.

economic, and other comparative aspects for clarifying the correct position of law suitable to both the purpose of law and socio-economical needs.

A. Social and Economic Impact

Real estate as a sector has been a major investment area in India, carrying investments from not only high-income class groups but also middle-income class groups who are seeking it as a prospective investing opportunity. While this may be termed as rather speculation, the surrounding facts should be given due consideration before making any investment decision.

If seen from the investments, construction constitutes the third largest sector in terms of FDI inflow, which stood at 54.17 Billion USD from FY 2000 to 2022.[39] Moreover, the country saw a growth of 52 percent in investments in real estate compared to the previous financial year.[40] The surge in investments gives ample proof of the rising demand in the sector and its future potential as a favourable investment option.

Furthermore, since society and social behaviour are closely connected to the economic sphere in contemporary times, the economic importance of the sector gives an indication of the social significance that it has. If seen from the light of above-mentioned figures, the impact of the 2020 amendment on the sector and its exclusion of the investors to initiate insolvency proceedings

[39]ET Infra, 'Construction sector third largest in FDI inflow: DPIIT' (*The Economic Times,* 30 December 2021) <https://infra.economictimes.indiatimes.com/news/construction/institutional-investments-in-real-estate-sector-a-boon-for-realty-says-pankaj-bansal/88588133> accessed 25 October 2022.

[40]Harish Kumar Jain, 'What does the real estate sector look like in 2023?' (*Financial Express,* 25 October 2022) <https://www.financialexpress.com/industry/what-does-the-real-estate-sector-look-like-in-2023/2736923/> accessed 26 October 2022.

will be quite adverse on the investing sentiments which are otherwise on a rising level.

From a social perspective, the rising demands in the real estate industry can be construed to be from either homebuyers or speculative investors. While it has been contended in various instances that speculative investors are different from genuine buyers with respect to their ultimate motive, it is pertinent to note that such a line of difference fades away from the sociological perspective. In this respect, the reasons behind the rising demand in the real estate sector and growing urbanization can be held to be similar which are the growth of nuclear families and purchasing power of the people.[41]

This holds true for investment as well, where due to the high transparency and returns, the middle-income families are inclined towards the sector not only as social welfare but also as an attractive opportunity. This is evident by the speculative report of Savills India, as per which real estate demand for data centers is expected to increase by 15-18 million sq. ft. by 2025.[42] Moreover, the real estate sector is given priority by the state as well which rather saw it from the welfare function by giving low-interest home loans and low mortgage rates.[43]

The amendment being adverse to not only investors but also homebuyers will have a negative implication on the otherwise rising demand. In this regard, it is also important to highlight that the demand was not only created by the investing sentiments but also by growing societal needs thanks

[41]Kundan Kishore, 'Is the Real Estate Sector on the Cusp of High Growth?' (*Outlook,* 4 June 2022) <https://www.outlookindia.com/business/is-the-real-estate-sector-on-the-cusp-of-high-growth--news-200290> accessed 25 October 2022.
[42]Jack Harkness, Simon Smith and Nancy Wong, 'Asia Pacific Data Centres Spotlight June 2022' (*Savills India,* 31 May 2022) <https://www.savills.in/research_articles/165611/207179-0> accessed 27 October 2022.
[43]Kundan Kishore (n 41).

to the rising population and nuclear families. The impact on the social demand, though will be lesser due to the shelter being a basic necessity, the IBC will nevertheless fail to achieve its objective to balance the interest of every stakeholder in the proceedings.[44]

B. A Comparative Analysis of the Law with Foreign Jurisdictions

While Section 7 of the IBC and amendments made to it regarding the status of the homebuyers have been held valid by the Supreme Court,[45] it may also be contended that the foreign laws and judgments may not be relevant in solving contemporary problems, which are unique in themselves. However, the legal justification of the limitation as well as the correct interpretation of contemporary social and economic advancements require a comprehensive understanding of the laws of other countries with similar insolvency procedures. Moreover, it is also noteworthy that the IBC was drafted while considering the insolvency codes of the USA (moratorium), UK (creditor-centric model), and Singapore (scheme of arrangement), thus setting an example of the commercially developed nations whose laws have a decisive influence on the commercial jurisprudence in India.[46]

1. United States of America ("U.S.A.")

The US insolvency and bankruptcy laws are majorly codified in the form of the Bankruptcy Code, 1978. The most striking feature of the US insolvency laws can be said to be the "Debtor in Possession" principle, which

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[44]BLRC Report (n 2) 7.

[45]*Manish Kumar v. Union of India*, Writ Petition (C) No.26 of 2020.

[46] Ernst & Young, 'How Does the Corporate Insolvency Code in India Measure with the UK? –Insolvency/Bankruptcy/Re-Structuring – India' (*Mondaq*, 8 December 2016) <https://www.mondaq.com/india/insolvencybankruptcy/551286/how-does-the-corporateinsolvency-code-in-india-measure-with-the-uk> accessed 14 October 2022.

indicates its "debtor-centric" approach.[47] While the American approach seems divergent from the "creditor-in-control" principle as enshrined in the IBC, the principle is incorporated in a modified form as the main purpose of the Code to safeguard the existence of the Corporate Debtor.[48] The American approach can also be differentiated from the Indian laws with respect to the division of the creditors into "secured" and "unsecured", which was followed even by the Indian laws prior to IBC. However, a similarity can be drawn from the essence of the laws as well as the procedure which is being followed to resolve the insolvency.

However, the American insolvency laws do not specifically provide for real estate companies and homebuyers, thereby considering them within the broad ambit of the two categories. In this respect, it is important to note that the unsecured creditor though not defined in the Bankruptcy Code, is given a plain interpretation to mean creditors with no security interests in the assets of the debtor.[49] There has been ambiguity as to the position of the homebuyers with respect to their secured status which was prevalent even in India before the 2018 amendment. Nevertheless, the status of the creditor is not a matter of concern when it comes to the eligibility in filing the application to initiate the insolvency proceedings.

In this regard, it is pertinent to note that the Bankruptcy Code provides for both voluntary (by Corporate Debtor) and involuntary (by creditors) initiation of the insolvency proceedings, thus giving creditors the right to

[47] Bankruptcy Code 1978, s 1101 (US).
[48] IBC, Preamble.
[49] James Chen, 'Unsecured Creditor' (*Investopedia,* 26 September 2022) <https://www.investopedia.com/terms/u/unsecuredcreditor.asp#:~:text=An%20unsecured%20creditor%20is%20an,borrower%20default%20on%20the%20loan> accessed 14 October 2022.

initiate insolvency proceedings.[50] However, certain conditions have to be fulfilled for availing of such a right, and therefore the right is curbed by two limitations. Firstly, the debt must amount to at least 18,600 USD and the creditor must demonstrate that the debtor is generally not paying debts as they become due.[51] Secondly, and more relevantly, if a debtor has 12 or more creditors, at least three creditors must join an involuntary petition.[52] Thus, it can be deduced that the Code imposes practical limitations on the filing of the application for insolvency proceedings, similar to Section 7 of the IBC. However, as compared to the Indian laws, the limitations imposed by the American laws are more relaxed and justified, where the minimum threshold has been kept at a pragmatic level of three creditors.

2. United Kingdom ("U.K.")

Indian laws are majorly influenced by English laws and the common law jurisprudence, which continue to govern every legal aspect of the country till today.[53] Therefore, it will be wrong to disregard the English position in the commercial sector like insolvency in construing the Indian position. In this regard, it is also pertinent to note that the Companies Act, 2006 does not deal with exclusively giving the rights to homebuyers. However, at the same time, homebuyers are not completely ignored by the insolvency and bankruptcy laws of the UK due to their major role in the English Bank crisis,[54] thus indirectly providing relief through common law jurisprudence.

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[50] Bankruptcy Code, Ch 11 (US).
[51] Bankruptcy Code, s 303 (US).
[52] Bankruptcy Code, s 303 (US).
[53] Andrew Green and Albert Yoon, 'Triaging the Law: Developing the Common Law on the Supreme Court of India' (2017) 14(4) *J Emp. Leg. Stud.* 683, 705-715.
[54] Committee on the Global Financial System, *Structural Changes in Banking after the crisis* (CFGS Paper No. 60, 2018), 5-7.

In this respect, it is important to highlight the significance of the "failure of consideration" principle which was also applied by the Supreme Court in the *Pioneer* case observing that "Failure of the consideration (money) which on the basis of trust law, ought to revert to the depositors, with a default interest rate which by that very fact qualified their debts as financial."[55] The principle in this regard finds its roots in the common law doctrine of equity, which is enshrined in the commercial laws of the UK – the Companies Act, 2006, and the recent Corporate Insolvency and Governance Act, 2020,[56] thus implying the incorporation of the homebuyers in the broader ambit of creditors and giving them equal status with the secured creditors.

Moreover, if seen from the perspective of the application filing threshold, the UK laws are even more flexible, where a single creditor can also file an application to initiate the proceedings under Section 124 of the Insolvency Act, 1986, if the debtor company owes more than £750 and the debt is not disputed (Compulsory Liquidation).[57]

3. Singapore

Singaporean laws are often taken as the epitome of efficient commercial laws in both substantive and procedural senses, due to the nation's high commercial value owing to the successful implementation of the laws.[58] The insolvency proceedings in Singapore are governed by the Insolvency, Restructuring, and Dissolution Act, 2018 (**"IRDA"**) along with the Singapore

[55] Williams C. Iheme, 'Remedying the Defects in India's Credit and Insolvency Frameworks with Adapted Solutions from the Anglo-American Legal Scholarships' (2020) 11 Union UL Sch Rev 580, 597-98.
[56] William Goodhart and Gareth Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law' (1980) 43(5) Mod L Rev 489, 508.
[57] Insolvency Act 1986, s 124 (UK).
[58] Corinne Montineri, 'The United Nations Commissions on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation' (2019) 20 Cardozo J Conflict Resol 1023.

Companies Act. While the concept of the CIRP is not followed in Singapore, a similar concept of the Scheme of Arrangement is prevalent.[59]

In this respect, while the Singaporean laws classify the creditors as secured and unsecured like that of the US laws, nevertheless it is pertinent to note that Part 5 of IRDA provides that the application can be made by any creditor for the initiation of the Scheme of Arrangement.[60] If seen from the perspective of the homebuyers, it is submitted that the law does not provide for the real estate companies specifically. Nevertheless, it would be wrong to deduce that the law ignores this aspect. The IRDA in this aspect follows the interpretation which is prevalent in the American jurisprudence to give a wider construction to the term "creditors" to include homebuyers in the case of real estate companies and builder debtors.

4. Australia

While Indian constitutional and administrative jurisprudence is heavily influenced by the Australian legal system,[61] due to its English nature, little can be deduced from the Australian commercial legislation. However, Australian jurisprudence still holds relevance due to its successful transplantation of English and American commercial laws. In this respect, insolvency and corporate restructuring in Australia are governed by the Corporations Act, 2001.

Under the Australian insolvency regime, the company is presumed to be declared insolvent on the occasion of not serving the statutory demand

[59]Junxiang Koh and Prakash Pillai, 'Singapore: Schemes of Arrangement under the Insolvency, Restructuring and Dissolution Act' (*Mondaq,* 12 August 2020) <https://www.mondaq.com/insolvencybankruptcy/975690/schemes-of-arrangement-under-the-insolvency-restructuring-and-dissolution-act> accessed 18 October 2022.
[60] Insolvency, Restructuring and Dissolution Act 2018, Part 5.
[61]H M Seervai, *Constitutional Law of India,* vol 1 (4th edn, Univ Law Publ 1991) 158.

under Section 459E of the Corporations Act instead of filing the application.[62] Though this procedure seems incompatible with what is followed in the Indian insolvency regime, it is pertinent to note that the statutory notice upon a defaulting company can be served by any creditor, irrespective of its class,[63] while only "secured" creditors are allowed to carry on the restructuring process.[64]

Comparing it with the CIRP proceedings in India, the same seems similar with reference to the rights of the operational and financial creditors. However, the homebuyers who are also not covered by the Australian legislation are attempted to be incorporated under the broad category of the "creditors", thereby borrowing from the Anglo-American jurisprudence.

From a broad and detailed perusal of the insolvency laws in various jurisdictions, it can be inferred that the limitations imposed upon the homebuyers and the degrading of their status from financial creditors to small claimants are not only contradictory to the principles followed in the developed nations, which influenced the formation of IBC but is also based on the flawed reasoning and misapprehensions. Moreover, such taking of the rights is in direct violation of the principles of natural justice and the common law norms of equity and justice which serve as the basic foundation of Indian laws over the centuries.

In this regard, while it can be contended that the insolvency regime is majorly depended on the socio-economic conditions of the country, the basic principles remain the same. From this perspective, the status of homebuyers as a 'small' or 'insignificant' financial creditor contradicts the very objective

[62] Corporations Act 2001, s 459E (Aus).
[63] Corporations Act, Part 5.4, Div 2 and 3 (Aus).
[64] Corporations Act, s 436A (Aus).

of the insolvency laws at large. Furthermore, the object of preventing cases on trivial claims can be reasonably achieved through making the threshold flexible while also introducing the pecuniary threshold as has been demonstrated in other nations.

C. Comparing with the other domestic laws

The objective behind the Section 7 of IBC has been a clear position of law since the *Swiss Ribbons* case. While such a position seems to be applicable to the enactment of the 2020 amendment as well, the broader objective of such limitation has to be understood from similar legislations in the domestic sphere. In this respect, it is pertinent to highlight that the commercial laws in India provide for such restrictions in certain cases. However, a comprehensive understanding of the objective behind such restrictions has to be given before commenting on the legal justification of the limitations imposed by the amendment.

1. Companies Act, 2013

The Companies Act provides for a minimum threshold requirement for the filing of the application in two instances. The first is the case of Oppression and Mismanagement and the second is the case of Sick Companies. The limitation in the first case is quite similar to that imposed on the homebuyers and requires a minimum of 100 shareholders or shareholders holding an aggregate of 10 percent of the stakes to file the application against the company.[65] While the threshold as given under Section 244 can be construed from a positive view, allowing people with the same injury to jointly file the suit, the contention is irrelevant with respect to Section 245 of the Act.[66]

[65] Companies Act 2013, s 244(1) (Companies Act).
[66] Companies Act, s 245.

The reason for such limitation is to prevent the filing of trivial cases by minority shareholders, which may hinder the functioning of the company. In this regard, NCLAT in *Brookefield Technologies Pvt. Ltd. v. Shailaja Iyer* observed that

> To determine whether the petition filed under sections 241 and 242 of the Companies Act, 2013, the Tribunal has to examine only the averments mentioned in the petition. The concept of 'oppression' is larger than the idea of 'legal rights' and indeed, the term 'interests' is wider than rights. As a matter of fact, the law does not define an 'oppressive act'. Whether an act is oppressive or not is fundamentally a question of fact. The law relating to 'oppression' is cemented on the principles of equity and fair play as against the strict compliance of law.[67]

Thus, in order to uphold the principles of justice, the proviso to the section provides for the power of the tribunal to waive the condition in certain circumstances it may deem necessary.[68] Though such circumstances have not been defined anywhere, leaving it to the discretion of the courts, the waiver has been given in the cases where the question was of serious injury to the principles of natural justice,[69]the substantial interest of the company,[70] and dilution in shareholding because of oppression.[71]

From such a wide interpretation of the section and its limitation, it is evident that the principles of natural justice and the doctrine of equity, justice, and fairness have to be given supreme importance, irrespective of the nature of the legislation and thus, the provision serves as a right example of upholding

[67] Company Appeal (AT) No. 110 of 2020 [36].
[68] Companies Act, s 244(1) proviso.
[69]*Sri Krishna Tiles and Potteries v. The Company Law Board & Ors*, 1979 49 CompCas 409 Delhi, ILR 1979 Delhi 105.
[70]*Cyrus Investments Pvt. Ltd. v. Tata Sons Ltd*., (2017) SCC OnLine NCLAT 261.
[71]*Manoj Bathla v. VishwanahBathla*, (2019) SCC OnLine NCLAT 198.

the needs of the social justice and commercial interests instead of sticking to the line.

The limitation was also imposed on the filing of an application for a declaration of a company as "sick" under Section 253, where at least 50 percent of the secured creditors should raise demand for the amount invested in the company's shares.[72] While the section itself is omitted by IBC,[73] it is pertinent to note the status of sick companies for a proper understanding of the object behind the threshold. In this respect, the declaration of a company as 'sick' though is largely similar to that of insolvency, it constituted a major failure of a company.[74] The difference can be understood as a reference to the SICA Act where it is defined as a situation where the accumulated losses equalled or exceeded its net worth.[75]

Nevertheless, the provision allowed the filing of an application by any individual secured creditor. Moreover, declaring a company "sick" is quite different from declaring it "insolvent" under IBC which does not have far-reaching consequences as compared to the former, thereby making the restriction imposed quite irrelevant in the present analysis.

2. Insolvency and Bankruptcy Code, 2016 ("IBC")

The other provisions of the IBC also provide for the minimum threshold requirement apart from the contentious Section 7. In this regard, it is pertinent to note that Section 24 of IBC provides for such requirements by imposing limitations on the operational creditors from participating in the proceedings and barring them from the membership and voting procedure of

[72] Companies Act, s 253.
[73] IBC, s 255 r/w 11th sch.
[74] Companies Act, s 253(1).
[75] Sick Industrial Companies Act 1985 (repealed), s 3(o).

the CoC.[76] Moreover, Section 30 of IBC imposes a sort of limitation by requiring a minimum threshold of 67 percent of the votes to approve a resolution plan.[77]

However, such limitations do not transcend the filing of the application and its procedural requirement. In this respect, it is important to highlight that an individual operational creditor can file an application for CIRP under Section 9 of IBC if he does not receive payment even after ten days of the Section 8 notice of the unpaid debt.[78]

A comparative analysis of the laws in India as well as in other jurisdictions, along with the perusal of the socio-economic significance of the real estate sector and its investors, shows that the limitations imposed by the Section 7 of IBC is not only legally contrary and unjustified but also incompatible to the existing legal, social and economical environment of the country. Moreover, such restrictive construction of Sections 5(8)(f) and 7 of IBC ignores the basic objective of the legislation as well as the common law foundation of the legal system of India.

While the contention against such reform will continue to sustain on the ground of the commercial nature of the law, the welfare motive inherent even in the commercial legislations can be inferred in not only Indian but foreign laws as well, thereby negating such contentions. Therefore, as has been suggested in the later parts of the article, it is suggested that the legal position should be changed by giving more flexibility to the threshold and instead introducing an additional threshold criterion on the basis of the claim. For that purpose, it is important to give a purposive interpretation of the law with

[76] IBC, s 24(6).
[77] IBC, s 30(4) and 28(3).
[78] IBC, s 9(1).

respect to the laws prevalent in India as well as the insolvency regimes in other nations. However, a comprehensive analysis of the welfare legislation in relation to the IBC is still required for sustaining the contentions made by the author which has been dealt with in the next part of the paper.

IV. SECTION 7 OF IBC AND RERA

A. Relevance of RERA in the Insolvency Regime

The Real Estate (Regulation and Development) Act, 2016 (**"RERA"**) is a legislation that was enacted with the purpose of protecting the interests of real estate buyers and investors.[79] The applicability of the act has been questioned in various instances, and the courts and tribunals have tried to give a limited application to the legislation in light of the existing provisions of the IBC. Therefore, it is pertinent to note that the relevance is rather given to the interests of the homebuyers in order to determine the prevalence and applicability of RERA in the Indian insolvency regime.

An instance can be taken of the recovery certificates issued by the authority under RERA.[80] However, it has been a settled position that the claim based solely on the recovery certificate cannot be sufficient to initiate CIRP proceedings under Section 7 of IBC as such will not fall within the definition of "financial debt" under Section 5(8)(f).[81] One of the major reasons behind such a restrictive position is the basic principle of the insolvency laws to prevent any fraudulent or malicious initiation of the insolvency proceedings for a purpose other than for the resolution of insolvency.[82]

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[79]Ajar Rab, *Real Estate (Regulation and Development) Act, 2016* (1st edn, EBC 2019), 5-11; *Belaire Owner's Association v. DLF Ltd.,* (2011) SCC OnLine CCI 189.
[80] Real Estate (Regulation and Development) Act 2016, s 40(1) (RERA).
[81]*Sushil Ansal v. Ashok Tripathi*, (2020) SCC OnLine NCLAT 680.
[82]*G. Easwara Rao v. Stressed Asset Stabilisation Fund,* (2020) SCC OnLine NCLAT 416.

From a different perspective, the relevance of the RERA in the insolvency regime can be implied from Section 30(2)(e) of IBC[83] which is even applicable to the provisions and objectives of RERA which was enacted before the enactment of the Code. This was also highlighted by the ILC, where, while proposing to protect the rights of the homebuyers, the committee observed that

> Section 30(2)(e) of the Code provides that all proposed resolution plans must not contravene any provisions of law in force, and thus, the provisions of Real Estate (Regulation and Development) Act, 2016 ("RERA") will need to be complied with and resolution plans under the Code should be compliant with the said law.[84]

However, it is important to understand that the non-contravention of the existing provisions of RERA does not mean an overriding effect over the provisions of IBC. This was made much clearer by the Supreme Court in the *Pioneer* ruling[85] where while interpreting Section 88 of RERA,[86] the NCLAT denied any overriding effect of RERA over the IBC and its provisions. However, giving effect to the Section 30(2)(e) of IBC as well, it was further held that the RERA laws and rules can be used to safeguard the interests of the homebuyers by establishing default on the part of the real estate companies.[87]

However, while giving a broader meaning to the term "financial creditors" to include homebuyers within its ambit, the ruling has given a restrictive meaning to the term "allottees". As was observed by the court,

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[83] IBC, s 30(2)(e).
[84] ILC Report, (n 32) [1.8].
[85] *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416.
[86] RERA, s 88.
[87] *Pioneer* (n 85).

> Under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it.[88]

If seen from the legal perspective, the position seems right with RERA providing for the actual homebuyers who want to purchase a home or flat for consumption purposes. In this respect, the position is also in line with the Consumer Protection Act, 1986, which rather tenders a restrictive interpretation of the term "allottees".[89] However, it is pertinent to note the difference between the nature of the two laws through a comprehensive understanding of the transactions and cases they deal with. While the Consumer Protection Act is welfare legislation for the protection of the common man, the inherent nature of the IBC is commercial.

The same can also be deduced by the intention behind both the IBC and the amendment of 2018, which was further highlighted by the BLRC while interpreting the term "financial creditors" and taking note of the problems under the existing regime. If seen from this perspective, it is important to note the observation of the committee that

[88] *Pioneer* (n 85) [16].
[89] *Pramod Kumar Arora* (n 37) [4].

> As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say… When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. Hence, lending in India is concentrated in a few large companies that have a low probability of failure.[90]

The investors in the real estate market are also creditors whose money has been put to use in the development of the companies in the sector. If going by the reasoning of BLRC and looking at the socio-economic environment of the country, the exclusion of the investors from the wide ambit of "allottee" will rather be against the public policy and justice, thereby violating the basic objective of both RERA and IBC. In this respect, a harmonious construction is required of both the legislations for not only giving proper application to RERA in the Indian insolvency regime but also practically achieving the objectives of both laws.

B. Harmonious Construction of IBC and RERA

The need for the harmonious construction between both legislations was first signified in the *Pioneer case,* where the Apex Court highlighted that

> RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of a conflict that the code will prevail over RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, 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.[91]

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[90] BLRC Report (n 2) Chap. 2.
[91] *Pioneer* (n 85) [86].

The harmonious construction, which is being attempted in this paper to bring out the legislative intention behind both the laws and determine the legal validity of the limitations imposed by the amendment of 2020, a comprehensive analysis of their objectives is a necessity for such construction. In this aspect, the objective of RERA can be inferred as "to protect the interests of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal," thus signifying it as welfare legislation.[92] On the other hand, the Code focuses more on the commercial aspect and has the ultimate objective of preventing the closures of businesses on the ground of inability to pay the debts.[93]

By harmonizing the two laws, it can be deduced that the supreme objective of the laws should be to promote and safeguard the interest and welfare of the allottees, as is referred to under Section 2(d) of RERA.[94] However, while securing such interest, the note should also be given to the businesses and the real estate companies to prevent any further loss to them. In this respect, it should be understood that the CIRP is often termed as a 'group solution' which was introduced to ensure the welfare of every stakeholder.[95] The conferring of the status of financial creditors to the allottees, therefore, can fulfil both the welfare and commercial purposes of the respective laws, thus harmonizing them, and is thus in conformance with the purpose and provisions of RERA.

However, when it comes to the limitations imposed by the second proviso of Section 7 of IBC, the same can be said to be legally justified and

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[92] RERA, St. of Objects and Reasons.
[93] IBC, Preamble.
[94] RERA, s 2(d).
[95] I. Kokorin, 'The Rise of 'Group Solution' in Insolvency Law and Bank Resolution' (2021). 22 EurBus Org Law Rev, 781–811 <https://doi.org/10.1007/s40804-021-00220-4> accessed 23 October 2022.

valid under Section 88 of RERA. While such introduction of the limitations on the existing rights can be said to be in violation of the principles of natural justice, the harmonious balance will be maintained as long as the limitation serves the larger purpose of CIRP and IBC and safeguards the interests of other stakeholders.

V. *N. KUMAR V. TATA HOUSING* CASE AND LEGAL AMBIGUITY

The ambiguities around the legal status of the homebuyers, have though been contended several times, with courts trying to find a middle path, and has subsequently been put to rest by the additions made in Section 5 and Section 7 of the IBC. Though the positions cannot be called settled with the Supreme Court[96] and NCLAT[97] are still dealing with the cases pertaining to the welfare of the homebuyers and giving effect to the 2020 amendment, some clarity was there regarding the procedural aspect of the law. However, the ambiguity again arose with the recent order of the NCLT Chennai in *N. Kumar v. Tata Capital Housing Finance Ltd.,*[98] where the provision was constructed in a contradictory and restrictive manner.

In this case, the applicant is actually the resolution professional for M/s Sheltrex Developers Pvt. Ltd. (Debtor) which was undergoing the resolution proceedings. The debtor had two projects on which the insolvency proceedings were initiated by a separate set of homebuyers. In furtherance, the debtor contended that each project should be treated as a separate entity under the principle of reverse CIRP, thus validating its action of classifying creditors on the basis of their investment in the project. In this respect, the author seeks

[96]*Manish Kumar* (n 45).
[97]*Anand Murti v. Soni Infratech Pvt. Ltd.*, Civil Appeal Nos. 7534 of 2021.
[98]*N. Kumar* (n 6).

to clarify that the vagueness of the decision is being propounded on not only the aspect of contradiction with the established principles but also the wrong interpretation of the principle to reach an erroneous outcome.

While construing the procedural requirements enshrined under Section 7, it is important to understand the position prior to the order of the NCLT. In this respect, the NCLAT in *Flat Buyers Association Winter Hills v. M/s Umang Realtech Pvt. Ltd.,*[99] gave the concept of "Reverse CIRP" relevant for only real estate companies. While such an interpretation of Section 29A of IBC[100] means going beyond its scope, the same was made in consideration of the maintenance of balance between the stakeholders (allottees and CDs) while ensuring the successful completion of the running projects.

The NCLAT in this regard resorted to a constructive interpretation of the provision in order to make it not only operational but also in conformance with the objective of the law and needs of the society. As was rightly observed in its judgment,

> In Corporate Insolvency Resolution Process against a real estate, if allottees (Financial Creditors) or Financial Institutions/Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where the separate plan(s) are approved by different authorities,... The asset of the company (Corporate Debtor - real estate) of that particular project is to be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate

[99]CA AT (Insolvency) No. 926 of 2019.
[100]IBC, s 29A.

> Insolvency Resolution Process should be project basis, as per approved plan by the Competent Authority.[101]

From a basic perusal of the judgment, it can be deduced that the NCLAT, though respecting the limitations imposed by the Section 7 of IBC tried to give a purposive interpretation to the provision to secure the welfare of the homebuyers and real estate investors and avoid any discrimination between them and other speculative investors who can instead initiate the CIRP proceedings.

However, a more important observation that was given by the appellate tribunal was its consideration of the procedural aspect of the filing of the application, where it treated the different projects as different businesses with different creditors, requiring the filing of separate applications.[102] The position was also reiterated in the subsequent cases, which settled the legal position on the procedural aspect of the filing of the application by the homebuyers under Section 7.[103] Nevertheless, the disturbance which is created by the latest order in *N. Kumar v. Tata Housing case* needs a critical analysis to remove ambiguities in this area.

In this regard, the order of the NCLT Chennai is considered a legal blunder due to its incorrect construction in two aspects. The first aspect deals with the disregard of Section 60(5) of IBC[104] in which the case was filed in the first instance. The NCLT being an adjudicatory authority in this respect has jurisdiction to entertain such cases where the CIRP or liquidation application was filed against the CD or if there is any question of priorities or

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[101] *Winter Hills* (n 99) [21].
[102] *Winter Hills* (n 99).
[103] *Rajesh Goyal v. Babita Gupta*, I.A. No. 2166 of 2020 In Company Appeal (AT) (Insolvency) No. 1056 of 2019; *Bijay Pratap Singh v. Unimax International*, Company Appeal (AT) (Insolvency) No. 1273 of 2019.
[104] IBC, s 60(5).

laws or facts arising out of the insolvency proceedings. However, giving effect to such provision in the order itself but not understanding its essence of not only conferring jurisdiction but also highlighting the need for providing a detailed reason behind the stance taken is in clear violation of the principle of audi alteram partum.

From the second aspect, the NCLT considered the proposition given in the *Pioneer* case, where the principle of a "Clean Slate" was propounded as one of the objectives of the IBC.[105] In this regard, however, it is equally important to note that the approach of IBC is "creditor-centric" rather than the "debtor-centric" approach of US laws. This is also highlighted in the statements of objects and reasons of the Code where maintaining the balance between the stakeholders is one of the three purposes of the legislation,[106] thus clearly erring in interpreting the code itself.

While the order has been in limelight due to its erroneous approach and disregard of the precedents without any justifiable rationale, the chaos and ambiguities in the legal position which has been created are going to have huge repercussions on the relationship between the real estate industry and the insolvency regime. Though the contentious order is given by the NCLT and therefore is subjected to easy rectification by the appellate authorities, the legal position of the homebuyers and investors has to be made certain for the larger public interest and socio-economic benefits to the country.

VI. CONCLUSION AND RECOMMENDATIONS

Homebuyers are considered as on equal footing as the common people who save their lifetime earnings in purchasing houses or properties. Even

[105]IBC, s 32A(1).
[106]IBC, Preamble.

more, the surging demand in the real estate sector can be attributed to the investments made by the general public due to its high returns and transparent conduct of the business. If seen from this perspective, discriminating the homebuyers and investors in the real estate sector from the shareholders or investors in any other sector would be in contravention of not only the principles of equity and fairness but also the objectives of the insolvency laws in India.

Despite the broader objective of the IBC to ensure economic advantage to the nation, as well as secure equitable interests of the stakeholders, the legislators, and the courts seem to have been blinded by the misconception about the nature of investors and the commercial purpose of the Code.[107]While such a limitation is imposed with a benign objective to uphold the true intention of the lawmakers, considering homebuyers as small claimants who may file trivial cases is not based on any material reasoning. Further, curbing the status of the financial creditors as was conferred in the *Nikhil Mehta case* is also in clear disregard to the reasoning as well as the purposive interpretation of the definition of "financial debt" given in the case. Moreover, though it may be argued that the interests of the homebuyers may be secured through other welfare legislation, it is pertinent to note that welfare legislation like the Consumer Protection Act will provide for e damages only if the homebuyer has suffered some financial injury because of the deficiency in the service.[108] Also, the law will provide this relief on an individual basis depending on the

[107]Pareekshit Bishnoi and Parveen Kumar Aggarwal, 'Weighing the effect and need of the 'minimum threshold' on the home-buyers' (*SCC Blog,* 14 November 2020) <https://www.scconline.com/blog/post/2020/11/14/weighing-the-effect-and-need-of-the-minimum-threshold-on-the-home-buyers/> accessed 28 October 2022.

[108]*Pramod Kumar Arora* (n 37) [3]; *Ved Kumari v. OmaxeBuildhome (P) Ltd.,* (2014) SCC OnLine NCDRC 120; and *New Okhla Industrial Development Authority*, MANU/CF/0089/2014, Consumer Complaint No. 143 of 2013.

quantum of injury received, thereby leading to an increase in the litigations and differentiation between the stakeholders.

In this respect, it is therefore contended in this paper that the limitations imposed on the homebuyers should be relaxed to the extent that the same serves the larger public interest and national interest while respecting the supreme status of the financial creditors. For that purpose, the paper summarises the following findings derived from the above analysis of the status of the homebuyers, along with the proposed suggestions for removing the ambiguity in this area. *Firstly,* the status of the homebuyers, as well as investors in the real estate industry as the financial creditors with equal capacity and privileges under Section 7, should be re-established. This is not only necessary in light of the earlier precedents and the contemporary socio-economic conditions but also in conformance with the recommendation of ILC, which also highlighted the significance of the homebuyers in the Indian insolvency regime.[109] For that purpose, it is recommended by the author that additional criteria of monetary threshold can be included as an alternative option through either notification or amendment. This will not only lead to solving the current problem of under-representation but also will keep the objective of preventing initiation of the proceedings on trivial claims intact.

Secondly, the erroneous order of the NCLT Chennai in the *N. Kumar case* should be rectified by the High courts on a suo moto basis. In this regard, it is pertinent to note that such power of taking suo moto cognizance of the matter is constitutionally mandated under Article 227 in the larger public interest.[110] While the order of the NCLT cannot be said to be strictly in

[109]ILC Report (n 32) 17.
[110]Constitution of India 1950, art 227(1); *L. Chandra Kumar v. Union of India,* (1997) 3 SCC 261; *State of Orissa v. Bhagaban Sarang*i, (1995) 1 SCC 399.

violation of "public interest", the ruckus which has been caused due to erroneous interpretation should be rectified for defining the correct position of law and remove procedural hindrances in the filing of the application for the initiation of the insolvency proceedings.[111] Further, the legal position with respect to the "Reverse CIRP" in the insolvency proceedings of real estate companies and its relation to the scope of the IBC also needs to be clarified.

Thirdly, a harmonious construction has to be given to not only IBC but all the commercial laws of the country with respect to welfare legislation in order to bridge the gap between the two and achieve the objectives of both kinds of legislation. As was also reiterated in the *Pioneer case*, the harmonious construction will lead to the serving of the original purpose of the commercial legislation in India to promote national economic interests and commercial interests, which is evident by the close connection between the social and economic spheres of the country.

The findings, along with the relevant suggestions as has been proposed by the author in the paper are believed to be serving both the commercial interest and welfare of society, thus achieving the true objective and efficiency of the insolvency laws. However, though the above proposals are being made while giving due consideration to the social, economic, normative, and legal factors, detailed thinking has to be given to the amendment of 2020, and the reduction of the status of the homebuyers to small claimants have to be reconsidered from both contemporaneous exposition and contemporary needs. In this respect, it is believed that as long as the limitations are justified by the interests of the larger public while balancing the interests of all the stakeholders of the insolvency proceedings, such considerations are irrelevant. Nevertheless, given the economic boom in demand in the real estate sector in

[111] *N. Kumar* (n 6) [9].

recent years with the ambiguities regarding the status of homebuyers still looming over the insolvency regime, clearly, the lawmakers and the judiciary have to reconstruct Section 7 and its limitations to give the justified position of law.