
ANALYZING CHALLENGES IN REAL ESTATE INSOLVENCY MATTERS UNDER THE IBC

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ABSTRACT

This paper aims to collate all information, procedures, and challenges regarding real estate insolvency matters in one place by undertaking a thorough examination of real estate insolvency matters within the framework of the Insolvency and Bankruptcy Code (IBC). Several complexities such as the aspect of limitation, the significance of minimum allottee thresholds, and the different rights afforded to homebuyers have been addressed in the course of this research. The challenges of non-cooperative debtors and the practicalities of executing orders issued by the National Company Law Tribunal (NCLT) have also been examined. Through a study of recent legal developments and case laws, this paper provides practical insights aimed at assisting home buyers in understanding real estate insolvency under IBC. The author's main intent is to provide a clear picture of the rights available to home buyers and a simplified and uniform structure of solutions via precedents of the hurdles faced in the implementation and adjudication of the same.

I. INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC) provides a great deal of resolution for homebuyers who are affected by real estate developers failing to fulfil the promises made by them. To achieve the same, we need to first understand the link between real estate laws and insolvency laws.

Every project needs to ensure compliances of the following as per various RERA regulations¹:

- Uploading of Agreement/Plan/Approval etc in the website of the RERA Authority.
- Quarterly updating of prescribed details regarding the project on the respective State RERA authority's website.
- Separate bank accounts for 70% of receipts into a separate RERA designated account which shall be used only for cost the project
- Comply with prescribed process of booking and allotment
 - Ensure transactions are conducted via an agent registered with RERA.
 - Providing the approved plan to the purchaser.
 - Limiting advance payments to no more than 10% of the unit cost.
- Obtaining required approval and insurance.
- Establishing the association of allottees.
- Ensuring punctual completion and delivery, encompassing communal spaces.
- Assessment of the construction quality.

IBC is a legislation that governs all laws regarding non-payment of debt to creditors. There are mainly two types of creditors under IBC. Section 7 of the Code covers Financial creditors and

¹ P K Chopra & Co., *Compliance under RERA*, TAXGURU.IN, (25/02/2023, 12:08 PM), (https://taxguru.in/corporate-law/compliance-rera.html#Compliance_under_RERA).

Section 9 of the code covers Operational creditors.

As per the Insolvency And Bankruptcy Code (Second Amendment) Act, 2018, the following was inserted in section 5 of the principal Act²:

“(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016;”

Therefore, allottees as defined under the Real Estate (Regulation and Development) Act, 2016³ (**RERA Act**) now fall under the ambit of financial creditor under IBC. This allows for real estate buyers to now file an application at the National Company Law Tribunal (**NCLT**) for seeking redressal of incomplete transactions or non-fulfilment of promises made by real estate projects.

II. OVERVIEW OF REAL ESTATE INSOLVENCY UNDER IBC

With the objective of conducting a critical analysis of the real estate insolvency process, let's begin with gaining a deep and clear understanding of how the insolvency process generally proceeds with all matters regarding corporate entities as a debtor.

A corporate person refers to a legal entity such as a company as defined in the Companies Act, 2013, a limited liability partnership that has been registered under the Limited Liability Partnership Act, 2008, or any other entity incorporated with limited liability under current laws. It excludes financial service providers.⁴ Corporate Debtor (**CD**) is a corporate person who owes a debt to any person. Corporate Insolvency Resolution Process (**CIRP**) is the process of resolving the corporate insolvency of a corporate debtor in accordance with the provisions of IBC. The primary objective of CIRP is to attempt restructuring and continuing of the corporate entity under insolvency as a going-concern.

² Insolvency and Bankruptcy Code (Second Amendment) Act, § 5, No. 26, Acts of Parliament, 2018 (India).

³ Real Estate (Regulation and Development) Act, § 2(d), (zn), No. 16, Acts of Parliament, 2016 (India).

⁴ Insolvency and Bankruptcy Code, § 3(7), No. 26, Acts of Parliament, 2016 (India).

CIRP begins with an application being filed by a group of creditors at the NCLT. The minimum number of creditors required for an application to be considered is 10% or 100 creditors, whichever is less.⁵ The Hon'ble NCLT then hears the application and decides on merit whether to consider the application. Once the application is admitted successfully, the NCLT recommends appointment of an Interim Resolution Professional (**IRP**). It is now the duty of the IRP to take control of the assets of the CD. The IRP also publishes an advertisement in the local newspaper in English and local language to call for creditors. This is done to ensure that all the creditors of that particular CD are aware of the initiation of proceedings and have an opportunity to present a claim before the IRP. The IRP then forms a Committee of Creditors (**CoC**), which includes all the financial creditors of the CD. The IRP makes a preliminary report and files the same at NCLT. The NCLT then gives opportunity to the CoC to appoint an Insolvency Professional as a Resolution Professional (**RP**). Usually, the IRP is reappointed as an RP. The RP then convenes meetings of the CoC and drafts a Resolution Plan. Any major decisions regarding the Resolution Plan go through the approval of the CoC with a 66% majority.⁶ After submission and approval of the Resolution Plan by the NCLT, the RP is given the authority to proceed with implementing the same. If the Resolution Plan fails to receive approval of the CoC, the company may end up having to undergo liquidation.

While correlating these provisions to the realm of real estate law, the most recent and relevant addition is that of the allottee of a real estate project being considered as a financial creditor as per the provisions of the IBC. This therefore implies that if a minimum of 100 allottees or 10% of the allottees (whichever is lesser) come together, they can file an application at the NCLT against the real estate development corporate entity for non-fulfilment of promises or non-delivery and inability to repay the paid amount.

It was held in the matter of *K. Sivasubramanian Vs. Quince liveras Properties LLP*⁷ on 5th May 2020 that in circumstances where the apartment was ready for delivery and handed over, the allottee can't then choose to claim the money back as a Financial Creditor. The right to claim money by the allottee of a Residential Apartment emanates only in the event of non-delivery of the apartment to the allottee.

⁵ Insolvency and Bankruptcy Code, § 7(1), No. 26, Acts of Parliament, 2016 (India).

⁶ Insolvency and Bankruptcy Code, § 28, No. 26, Acts of Parliament, 2016 (India).

⁷ *K. Sivasubramanian Vs. Quince liveras Properties LLP*, [2020] ibclaw.in 04 NCLT.

III. CHALLENGES

A. LIMITATION

The home-buyers need to be vigilant when it comes to fulfilment of promises as the period of limitation for filing an application at the NCLT is 3 years. There needs to be a continuous cause of action. The home-buyers should be up-to-date with the status of construction, and it is always recommended to keep all conversations on record, like e-mail.

In the matter of *Sriram Compounds Pvt. Ltd. v. Shiva Drums Pvt. Ltd. and Ors.*⁸ held on 05.03.2018, the NCLAT held that the provisions of the Limitation Act, 1963 are not applicable to the CIRP application under IBC.

On 11.10.2018, the Hon'ble Supreme Court held in the case of *B.K. Educational Services Private Limited v. Parag Gupta and Associates*⁹ that the Limitation Act is applicable to applications filed u/s 7 and 9 of the IBC since the enactment of the Insolvency and Bankruptcy Code.

For furthering the understanding required in this research, I have reviewed 86 judgements of the NCLAT passed within the past 2 years. The issue of limitation arose in 11 of those matters. The applications were dismissed due to being barred by limitation in 2 of those matters. As per the sample size, the number of cases barred by limitation was 2.32%. As per data provided by the IBBI, the number of cases admitted under the CIRP was 7,325 in the October-December quarter of the financial year 2023 - 24¹⁰. To put things into perspective, we could consider the percentage to be consistent, in which case there could have been losses ranging anywhere around 170 cases in one quarter alone being dismissed due to being barred by limitation.

The number of cases that might be dismissed due to being barred by limitation can cause severe damage to various creditors. While speculating, we may further this avenue of research while studying that the resolution plans for 444 companies have produced a realisable value of Rs

⁸ *Sriram Compounds Pvt. Ltd. v. Shiva Drums Pvt. Ltd. and Ors.*, MANU/NL/0031/2018.

⁹ *B.K. Educational Services Private Limited v. Parag Gupta and Associates*, MANU/SC/1160/2018.

¹⁰ Jinit Parmar, *Insolvency cases rise 18% in Oct-Dec, shows IBBI data*, MONEYCONTROL.COM (22/02/2024, 21:23), www.moneycontrol.com/news/business/insolvency-cases-rise-18-in-oct-dec-shows-ibbi-data-12349201.html.

2.5 lakh crore for financial creditors out of the 4,451 cases that were admitted in the NCLT.¹¹ That amount averages out to about Rs. 560 Crores per resolution plan accepted by the NCLT. If 170 matters are dismissed over the course of a quarter, the creditors could lose anywhere near Rs. 95,200 Crores. This could total up to Rs. 3.8 Lakh Crores in a year. That amount of money being lost by the economy could be detrimental and it is crucial to resolve this kind of a circumstance.

One such solution being provided for easing the challenge of limitation is that the Hon'ble Supreme Court held in the case of *In Re: Cognizance for Extension of Limitation (2022) 3 SCC 117* that the period of 15.03.2020 to 28.02.2022 shall be excluded for the purpose of Limitation¹². This was mainly done due to the various lockdowns ordered by the Central Government as a measure to control the spread Covid-19, which adversely affected various commercial activities during that period.

For resolving such a situation where an application may be time- barred, it is important to constantly stay in contact with the developer regarding updates on construction and to ensure that there is a "cause of action" that is continuous and does not die out while waiting for the developer to fulfil their promises. Cause of action¹³ may be understood as the factual circumstances which led to the dispute arising between the parties. This is often pivotal, as there is an unalienable question of how long an innocent home-buyer can wait before realising that they have been duped by the developer, thereby needing to consider a legal recourse to recover their hard-earned money.

B. MINIMUM NUMBER OF ALLOTTEES

As per Section 7(1) of IBC, there is a threshold required for filing an application before the NCLT.¹⁴ Of the allottees, a minimum of 10% or 100 allottees should file an application together, whichever number is lesser.¹⁵ This provision has henceforth been upheld by the Hon'ble Supreme Court in the matter of *Manish Kumar v. Union of India*¹⁶ on 19th January, 2021. The

¹¹ ETBFSI, *IBC recoveries top Rs 2.5 lakh crore, but value just one-third of admitted claims*, PRSINDIA.ORG, (22/02/2024, 22:47), prsindia.org/articles-by-prs-team/five-years-of-ibc-corporate-insolvency-resolution-process-in-numbers

¹² *In Re: Cognizance for Extension of Limitation*, (2022) 3 SCC 117.

¹³ Civil Procedure Code, § 20, No. 5, Acts of Parliament, 1908 (India).

¹⁴ Mitali Ingawale & Sumit Kulkarni, *Deconstructing the threshold requirements for homebuyers under IBC*, SCCONLINE.COM, (21/02/2024, 17:53), (<https://www.sconline.com/blog/post/2021/06/20/homebuyers/>).

¹⁵ Insolvency and Bankruptcy Code, § 7(1), No. 26, Acts of Parliament, 2016 (India).

¹⁶ *Manish Kumar v. Union of India*, 2021 SCC OnLine SC 30.

Court also reiterated that this provision can be interpreted with the reasoning that a sole allottee should not be given the authority to hinder the entire project, as such an action endangers the interests of all the other allottees.

As already discussed earlier under the Introduction to this paper, after the second amendment to IBC, finances raised from any allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing, and the expressions, "allottee" and "real estate project" shall have the meanings under the Real Estate (Regulation and Development) Act, 2016.¹⁷ The Supreme Court clarified the same in the matter of *Pioneer Urban Land and Infrastructure v. Union of India*¹⁸. The rationale given behind this is that in sale agreements, the advance money has been paid for temporary use to make sure that the apartment can then be transferred to the home-buyer after project completion.

This aspect becomes a challenge when there is an unknown number of allottees or when there is no other way the allottees can find a forum to formulate and discuss in further meetings to initiate an application at the NCLT. As per Section 11(1)(b) of the Real Estate (Regulation and Development) Act, 2016 the promoter has the duty to quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked.¹⁹ This gives the allottees a suitable number to understand as a baseline in order to achieve for the purposes of finding and getting other allottees on board for filing an application at the NCLT. As held in the case of *Mr. Nagappaiya Maiya v. M/s. Apple Spire India LLP*,²⁰ the number of allottees at the time of validity of RERA's registration will be considered for calculating the 'total number of such allottees' as required under Section 7(2) of IBC. In matters where the promoter fails to renew the RERA Registration and continues to allot the property to other home-buyers, such increasing numbers need not be considered for calculating the minimum number of 10% or 100 allottees as required.

The promoter also has the duty to enable the formation of an association or society or co-operative society of the allottees within three months of majority of units being allotted²¹ as provided under Section 11(4)(e) of the Real Estate (Regulation and Development) Act, 2016. The challenge here arises in situations where the majority of units have not been allotted. In

¹⁷ Insolvency and Bankruptcy Code (Second Amendment) Act, § 5, No. 26, Acts of Parliament, 2018 (India).

¹⁸ *Pioneer Urban Land and Infrastructure Limited & Anr v. Union of India & Ors.*, (2019) 8 SCC 416.

¹⁹ Real Estate (Regulation and Development) Act, § 11(1)(b), No. 16, Acts of Parliament, 2016 (India).

²⁰ *Mr. Nagappaiya Maiya v. M/s. Apple Spire India LLP*, C.P. (IB) No.34/BB/2022.

²¹ Real Estate (Regulation and Development) Act, § 11(4)(e), No. 16, Acts of Parliament, 2016 (India).

such circumstances, the promoter does not have the duty to form an association and there are higher chances of default since a lesser number of people have invested in the particular project. The only solution to the allottees in such a matter would be to approach the Real Estate Regulatory Authority to pray for a direction to be issued against the promoter for furnishing the required information²² under Section 37 of the Real Estate (Regulation and Development) Act, 2016.

C. HOMEBUYERS' RIGHTS

A homebuyer has various rights under different legislations, including IBC, RERA, and the Consumer Protection Act, 2019. As held in *Pioneer Urban Land and Infrastructure Limited & Anr v. Union of India & Ors.*²³, all of these mentioned rights are concurrent and a homebuyer has the right to approach the relevant authorities for seeking redressal of all such disputes.

“ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the 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.”

This challenge has therefore been resolved by way of differentiating the kinds of rights available to the allottees and understanding the forum to approach for the specific kind of a right that has been infringed by the developer / promoter.

An allottee can claim their rights as a financial creditor, consumer, and/or an allottee. The rights and procedures for each of those may be summarised as follows:

Financial Creditor

Under the Insolvency and Bankruptcy Code, 2016, a financial creditor can file an application at the National Company Law Tribunal when the issue of non-payment of debt is arisen. The creditors come together and take decisions on resolving the debts of the developer / promoter.

²² Real Estate (Regulation and Development) Act, § 37, No. 16, Acts of Parliament, 2016 (India).

²³ *Pioneer Urban Land and Infrastructure Limited & Anr v. Union of India & Ors.*, (2019) 8 SCC 416.

Consumer

Under the Consumer Protection Act, 2019, a consumer is one who purchases property for non-commercial purposes and experiences deficiency in service and unfair trade practices conducted by the developer / promoter. The consumer may be entitled to compensation in case of deficiency in service and non-fulfilment of promises despite receiving notice by the consumer. The consumer fora follow a pecuniary jurisdiction, where for matters with a value of up to 50 lakh being under the District Commissions, those between Rs. 50 lakh to Rs. 2 Crore under State Commissions, and the matters with a value more than Rs. 2 Crore falling under the jurisdiction of the National Commission²⁴. The consumer fora also follow an appellate system accordingly.

Allottee

As covered earlier, the Real Estate (Regulation and Development) Act, 2016 is a statute that aims to protect the home-buyers by establishing an authority to oversee and regulate developers and promoters of apartments / real estate projects. The Act lays down various guidelines and duties upon the promoter, failing which, can create a right upon the allottee to approach the Authority and seek compensation as provided under the Act.

As enumerated hereinabove, it is now abundantly clear that the home-buyers are well within their rights to approach the respective forum to fight for all of the rights empowering them.

D. NON-COMPLIANT DEBTORS AND EXECUTION OF ORDERS

In every court of law, after an order is passed, an application has to be made for execution for such order in case of non-fulfilment of the same by the judgement debtor. The person in favour of whom the order is passed is called as the decree holder. A form titled “NCLT Form 8” is the format to be followed for execution of an order issued by NCLT. This form includes major information about the order / decree, such as order number, name of parties, date of order, amount with interest due, amount of costs, and name of the person against whom to be executed. Section 424(3) of the Companies Act, 2013 empowers the NCLT to enforce its own

²⁴ Press Release, Ministry of Consumer Affairs, Food & Public Distribution, Centre notifies rules for Consumer Protection (Jurisdiction of the District Commission, the State Commission and the National Commission) Rules, 2021 (Dec. 30, 2021), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1786342>.

order in the same manner as if it were a decree made by a civil court²⁵.

It was held in the case of *Sh. Sushil Ansal Vs Ashok Tripathi and Ors*²⁶ that a decree-holder would not fall within the class of financial creditors even though covered under the definition of creditor²⁷ under Section 3(10) of the Insolvency and Bankruptcy Code (IBC). A decree holder cannot initiate a corporate insolvency resolution process (CIRP) against a corporate debtor with an object to execute a decree.

Another issue that arises in implementation of orders of the NCLT is non-compliance and non-cooperation by the corporate debtor and their personnel. When the NCLT admits an application for initiation of CIRP, it appoints an IRP, whose duty is to take over the books of accounts and assets of the corporate debtor. This can only happen smoothly if the corporate debtor is compliant to the orders of the NCLT and coordinates with the IRP for an easy switch of control of the assets. However, when the application has been made by creditors, the corporate debtors often do not wish to give up control over their assets.

At this stage, the IRP has been conferred with powers under Section 19 of the IBC. As per this provision, all personnel associated with a corporate debtor including its promoters must provide full assistance and cooperation to the IRP in managing the company's affairs. If any personnel fail to cooperate, the IRP can seek direction from NCLT. NCLT may order such personnel to comply and cooperate with the IRP in collecting information and managing the corporate debtor.²⁸ In case of failure of such an order, the NCLT may then direct the IRP to approach and seek assistance from the police for taking over control of the properties of the corporate debtor.

IV. CONCLUSION

Through this research paper, we have studied the ever-changing field of real estate insolvency matters under the Insolvency and Bankruptcy Code (IBC). The aim of this research was to provide a comprehensive understanding of the challenges and procedures involved. Various insights have been critically analysed through a detailed study of legal provisions, recent developments, and pertinent case laws. This paper stressed on the fundamental processes involved in corporate insolvency resolution under the IBC while emphasizing the importance

²⁵ Companies Act, § 424(3), No. 18, Acts of Parliament, 2013 (India)

²⁶ *Sh. Sushil Ansal Vs Ashok Tripathi and Ors*, Company Appeal (AT) (Insolvency) No. 452 of 2020.

²⁷ Insolvency and Bankruptcy Code, § 3(10), No. 26, Acts of Parliament, 2016 (India).

²⁸ Insolvency and Bankruptcy Code, § 19, No. 26, Acts of Parliament, 2016 (India).

of Corporate Insolvency Resolution Process (CIRP) in facilitating the continuation of business operations. It highlighted the important role of various stakeholders including creditors, Interim Resolution Professionals (IRPs), and Resolution Professionals (RPs).

This research also shed light on the unique challenges encountered in real estate insolvency matters. The challenges were pertaining to limitation, minimum allottee thresholds, homebuyers' rights, and non-compliant debtors. The study on limitation highlighted the significance of swift action on the part of homebuyers to reduce the risk of their claims being barred by time. This research also explored the multifaceted rights of homebuyers under various legislations. These included the IBC, Real Estate (Regulation and Development) Act (RERA), and Consumer Protection Act. It stressed on the concurrent nature of these rights which hereby empowers homebuyers to seek redressal through the respective forum based on the nature of their grievances.

This paper addresses the challenges associated with non-compliant debtors and the execution of orders issued by the National Company Law Tribunal (NCLT). It highlighted the importance of cooperation from corporate debtors in facilitating a smooth transition of control during the resolution process. The research overall studies the dynamic and evolving nature of real estate insolvency matters under the IBC. The paper provides a detailed understanding of the legal provisions and procedural intricacies. Through these practical insights and recommendations, the paper seeks to empower homebuyers in navigating the complexities of real estate insolvency thereby ultimately contributing to the efficient resolution of disputes and the protection of stakeholders' interests.