UNFINISHED HOMES, UNSETTLED RIGHTS: THE LEGAL STATUS AND POSITION OF HOMEBUYERS WITH RESPECT TO REAL ESTATE INSOLVENCY IN INDIA

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ABSTRACT

The Indian real estate sector has grown rapidly in recent years, but this growth has come with persistent financial instability. Developers often depend on homebuyers ’advances to fund ambitious residential and infrastructure projects, especially as institutional investment through private equity and venture capital has shown sharp fluctuations. While homebuyers effectively act as creditors, the legal framework still treats them as unsecured consumers bound by agreements for sale that offer little protection. They lack security over their investments, have no clear timelines for utilisation or refund of their money, and face limited remedies when projects are delayed or abandoned. These weaknesses become most visible during insolvency, where individual buyers are often left without meaningful recourse. This paper examines the legal position of homebuyers in real estate insolvency proceedings, analysing how statutory provisions, contractual practices, and judicial interventions have shaped their rights. It evaluates whether current safeguards are adequate and suggests reforms—such as better protection of buyer funds, clearer priority in repayment, and stronger disclosure norms—to ensure fairer outcomes and timely completion of projects.

INTRODUCTION

The Indian real estate sector is a key part of the nation's economy, given the large scale infrastructural and capital intensive projects it undertakes and the close and direct involvement of home-buyers in its operations, which is one of its unique features unlike other sectors. The Indian real estate sector is on a growing spree, and it is expected to reach a market size of USD 1000 billion by 2030[1] itself but along with this positive rise, there has been a fluctuating infusion of private equity and venture capital investments into this sector, and it has dipped from USD 6.7 billion in 2019 to USD 4.2 billion in 2023[2] leading to a stark problem of undercapitalisation and lack of funds through institutional investments for this sector. In a case like this, real estate companies turn to home-buyers and the advances that they pay for specific projects to meet both their long-term and working capital needs and this over reliance on the hard earned finances of home-buyers to fund huge and ambitious residential and other infrastructural projects later on leads to several issues and problems when things do not go on as planned, which is not a very rare phenomenon considering the fact that even in 2019, housing projects worth a staggering INR 4.51 lakh crores were delayed and pending timely completion.

Since the main focus of this paper shall be on the issues and problems which arise at the insolvency stage or process of these real estate companies, the discussion shall mainly revolve around this theme, although the fact remains that home-buyers face a lot of other hurdles too during their interactions with these companies which go beyond the insolvency stage and in fact, begin right from the stage when they extend their credit to these companies in the form of advances. "In many cases, these funds are invested at the beginning of projects, infusing seed capital and providing financial cushioning to carry out construction. The availability of such alternative funds plays a crucial role in bridging funding gaps & accelerating project timelines, thus minimising delivery delays."[3]

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[1] Faizan Haidar, India's real estate sector is witnessing a shift towards sustainability: Report, THE ECONOMIC TIMES (Feb 2, 2024, 03:47PM), https://economictimes.indiatimes.com/industry/services/property-/-cstruction/indias-real-estate-sector-is-witnessing-a-shift-towards-sustainability-report/articleshow/107357004.cms?

[2] Abhijit Lele, PE investment in Indian real estate down 26% in Apr-Dec 23: Report, BUSINESS STANDARD (Jan 9, 2024, 11:03PM), https://www.business-standard.com/industry/news/pe-investment-in-indian-real-estate-down-26-in-apr-dec-23-report-124010900436_1.html

[3] Niranjan Hiranandani, Evolving funding landscape for Indian real estate, ECONOMIC TIMES REALTY (Nov 3, 2023, 02:40PM), https://realty.economictimes.indiatimes.com/blog/evolving-funding-landscape-for-indian-real-estate/104939405

Since these companies largely rely on these advances to meet their capital requirements it can be safely said that home-buyers fall within the role of creditors of these companies however despite these fact, they have little to no rights against these corporate entities due to the nature of the contract that they enter into with them, which is essentially an agreement for sale, and not per se a sale deed to be registered under the Indian Registration Act, 1908.

Due to the unsecured and vague nature of this form of contract, the home-buyers do not have any security interests over their properties in the project, nor is their any fixed or stipulated deadline within which their advances shall be utilised or refunded in case of the project not reaching its successful completion. The home-buyers also cannot exercise any additional rights over the advances paid by them such as receiving interests on the amount despite paying a majority of the total consideration of their bought property as advances prior to the project's eventual completion.

Even in case of a breach of the agreement for sale, the home-buyers rarely have adequate remedies available to redress the harms suffered and the clear power and resource imbalance between the real estate companies and the home-buyers plays out in different aspects, with the one common feature being that the individual home-buyers suffer the most in the process, as not only do they lose out on their money which they paid as advances, but they also do not get any form of security or adequate compensation in case of the project failing. This leads to a plethora of troubles and hurdles for the home-buyers in case the company is not able to successfully complete the project and a major part of these hurdles play out in the insolvency stage of these companies and their projects, which shall be the main focus of this paper.

This paper shall mainly study the issues, challenges and problems that are faced by both the home-buyers and the real estate companies, especially at the insolvency stage of their projects and shall analyse the existing remedies and measures in place to rectify the same, in order to understand whether they are sufficient to deal with the existing issue or not, along with suggesting necessary changes or modifications to address the existing loopholes and gaps adequately.

RESEARCH QUESTIONS

1. What is the position of homebuyers with respect to the process of insolvency in the real estate sector?

2. What is the impact of the involvement of homebuyers in the insolvency process of the real estate sector?

3. What are some alternative approaches or methods which can be undertaken or implemented to solve the existing issues pertaining to the relationship between homebuyers and the insolvent real estate entity?

HOME-BUYERS AND REAL ESTATE INSOLVENCY

One of the main issues faced by the home-buyers prior to the 2018 amendment in the Insolvency and Bankruptcy Code, 2016 was that they were neither classified as operational nor as financial creditors for the purpose of the Corporate Insolvency Resolution Process (CIRP), instead being categorised as other creditors like normal home-buyers in other sectors while completely ignoring the special and highly important role that they play in financing the real estate sector. This classification adversely affected the home-buyers as they hardly had any active rights in the insolvency process, only having the right to submit their claims like all other creditors during the CIRP. They did not have a crucial right - the right to trigger insolvency proceedings which is available under section 5 of the Insolvency and Bankruptcy Code (IBC). The absence of this right severely impaired their ability to bring any action against the real estate companies even when they understood that something was going wrong with their funds and they had to wait all the way for the other creditors to take action and then participate in the process. However, this situation has changed post the 2018 amendment to the IBC vide the IBC (Amendment) Ordinance, 2018 after which the home-buyers of real estate sector have been rightly classified as financial creditors given their pivotal role in financing large scale projects. This change was brought about following the report of the Insolvency Law Committee in March, 2018 which noted that, "forward sale or purchase agreement having the commercial effect of borrowing, and the ILC deliberated that the amounts so raised are used as a means of financing the real estate project and are thus in effect a tool for raising finance, and on the failure of the project, money is repaid based on the time value of money. Therefore, not all forward sales or purchases 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)."[4] Even the National Company Law Appellate Tribunal (NCLAT) held in the case of *Nikhil Mehta v. AMR Infrastructure* that the amounts invested by the

[4] Insolvency law committee report 2018

homebuyers were not mere sale transactions, but would indeed come under the ambit of financial debts under section 5(8) of the IBC.[5] This was held considering the important role that homebuyers play in financing the real estate sector and its various projects and refuting the notion that their is no consideration for the time value of money since the homebuyers agree in the first place to pay the advances, which often amount to a major portion of the total consideration, on the good faith belief that they would get a reciprocal consideration in the form of a timely and successful completion of the project in itself. Section 3 of the 2018 amendment also provides that the finances of real estate allottees directed towards the failed real estate project would have the same commercial effect as that of a debt due to the fact that they were paid as an advance based on the promise that the real estate project in question would be completed in a timely manner which would serve as the repayment of the debt and failing this successful completion, the homebuyers should have a legitimate right to recover this amount of advance paid.

This position was also upheld in the case of *Jaypee Orchard Resident Welfare Society v. Union of India* which held that it will endeavour to do all in its power to safeguard the interests of the homebuyers,[6] thereby establishing the fact from a judicial standpoint that homebuyers do have a legitimate interest in the real estate project, along with its completion and finances which extends beyond their mere interest as a consumer and since the amounts paid by them to the promoters of this project goes a long way in actually running its operations, there needs to be a comprehensive mechanism and framework in place to protect this interest.

The present classification has afforded them the right to trigger insolvency proceedings against the real estate company when the conditions for doing so are met under sections 7 and 9 of the IBC. The new classification has also provided the power to the home-buyers to vote at the meetings of the Committee of Creditors (CoC) as financial creditors, however this right is not absolute and is proportional to their claims against the company and subject to the primary resolution plans received for the company so while the home-buyers do have the right to voice their grievances and put forth their claims against the defaulting company, there is a possibility they may be eventually unable to recover their advances fully. Also, it is important to note that the home-buyers have only been provided with additional rights and recognition for the resolution process. So, when it comes to the ultimate liquidation, they are still relegated to the

[5] Nikhil Mehta v. AMR Infrastructure C.A. (I.B.) No. 543/KB/2017 arising out of C.P. (I.B.)/170/KB/2017
[6] Jaypee Orchard Resident Welfare Society v. Union of India Writ Petition (Civil) No. 854 of 2017

category of unsecured creditors, thereby having the least priority in the waterfall mechanism after super priority creditors and secured creditors so even if they are able to successfully bring ahead their claims and admit it before the CoC and the Resolution Professional, they will only be eligible for repayment after the admitted claims of all the categories before them have been duly satisfied and hence, there still remains a possibility that they may ultimately not receive the full amount of their claims.

However, a practical difficulty which arose with the increased amount of recognition being given to the homebuyers under the IBC regulations and process was that the efficiency of the overall resolution process was getting hampered and affected and since the homebuyers were essentially laymen with little or no commercial knowledge or awareness, their direct involvement in the resolution process inspite of having little expertise of assessing the commercial viability of the business not only delayed the completion of the process, but also gave them very little effective remedies ultimately because whatever route the fate of the project took, homebuyers were bound to suffer in one way or the other - if the business went into liquidation, the homebuyers, being unsecured creditors, had the least priority in the hierarchy of receiving the distributable funds and hence, there is a reasonable possibility that they would not be able to recover the total amounts they had earlier paid to the business.

In the second scenario, even if the business did not go into liquidation, the ultimate resolution plan for the business may not be preferable to the homebuyers with them having little authority to change that decision because despite getting the status of financial creditors, they have limited voting rights in the Committee of Creditors due to them being of the nature of unsecured creditors and hence if all the other creditors reach at a conclusion which they all agree upon, there is a reasonable possibility that such an outcome may not always be favourable for the homebuyers, who may just want the delivery of their allotted properties unlike the other more commercial oriented creditors who may ultimately desire an outcome which is the most commercially viable for them and in most of the practical instances, the latter is bound to prevail as the viewpoint of the Committee of Creditors of which the homebuyers would only form a part with limited voting rights.

Even in cases where the CoC cannot reach at a consensual decision ultimately regarding the fate of the insolvent business and the resolution plan to be adopted, the IBC provides for the solution of mandatory liquidation of the company in that case so if that happens, then too the homebuyers are bound to suffer because as unsecured creditors in the pre-specified waterfall mechanism of liquidation, there is little that they can expect to get from the process in the end after the satisfaction of the claims of all others including employees, shareholders etc. So, not only does the direct and individual involvement of the homebuyers in the IBC process impact its operational efficiency and promptness thereby causing some issues for the corporate entities involved, it also affects the very same homebuyers which the process seeks to protect by ultimately leading them to practical consequences which may not always be desirable for them. Therefore, in order to balance the interests of both the sides involved - the homebuyers and the real estate companies and to uphold the overall effectiveness of the procedure laid down by the IBC which in itself is based on the principle of speedy redressal of matters, the Insolvency and Bankruptcy Code (Amendment) Act, 2020 was brought about. The amendment, while retaining the powers earlier conferred upon the homebuyers with respect to the IBC process, made some changes to make the process a bit more organised and systematic. Under the amended procedure, only a joint application can be made by aggrieved homebuyers against the real estate company for insolvency, and the application has to be made by either at least hundred such home buyers under the same real estate project or at least ten per cent of the total homebuyers under such same real estate project, whichever is less. This was a step to ensure that frivolous applications almost similar in nature are not brought about by multiple individual homebuyers before the same owner as it not only leads to the addition of an adjudicatory burden upon the tribunals, but it also leads to redundancy as having to decide on the admissibility of so many applications individually leads to redundancy of efforts and distracts the tribunals from their primary tasks and responsibilities, thus harming the entire goal and objective of the IBC in itself. So, a clubbing together of similar grievances and the presentation of them together before the adjuratory body not only streamlines the entire process, but also adds to efficiency and promptness. This amendment was also upheld and declared as constitutionally valid in *Manish Kumar v. Union of India*[7], thus cementing its applicability in the IBC framework and hence, it continues to be the applicable provision for homebuyers willing to opt for insolvency of the real estate projects.

Another important decision which reflected the practical difficulties that homebuyers have to face in bringing about an action of insolvency against the real estate projects was in *Puneet Kaur v. K V Developers Private Limited*[8]. In this case, the court held that even if homebuyers

[7] Manish Kumar v. Union of India 2021 SCC OnLine SC 30
[8] Puneet Kaur v. K V Developers Private Limited Company Appeal (AT) (Insolvency) No. 390 of 2022

fail to register their claims officially when the public announcement inviting claims is made, they shall be admitted in the process and their claims shall be considered provided they reflect in the official records of the corporate debtor, as leaving out such claims would be an arbitrary measure against the principles of equity and justice. This is so because in the practical scenario, the announcements inviting claims are often through newspapers and other print media made in the area where the registered office of the corporate debtor is located. However, the homebuyers, being multiple in number, are spread out across a large geographical area and not necessarily in the location of the real estate company's office. As a result, they often miss out on the announcements and as a result, fail to register their claims despite the validity of the same. It is also the case that the homebuyers are often not aware about the initiation of the CIRP in a timely manner and face a lot of other technical complexities while registering their claims, the net result of which is that there is a high rate of claims being not filed in a timely manner for projects in the real estate sector going for insolvency, as also mentioned in a report of the Insolvency Professional Agency, which stated that, "the time it takes for a resolution plan to be accepted is usually much longer than that. Of the 17 cases, the average time taken to resolve insolvencies stood at 1.8 years."[9] However, recognising the fact that once the allotment letters are issued to them and the advanced money is paid by them to the real estate companies, the latter have an obligation to complete the project and deliver the finished property to the homebuyer, the NCLAT held in this case that in no way can the legitimate claims of the homebuyers against the real estate projects be dismissed merely on technical grounds and considering the practical difficulties that they have to face in the real life to avail of this process, the tribunal held that the strict procedural compliance can be relaxed to some extent in case of the homebuyers in the interest of justice to facilitate their legitimate claims being admitted and adjudicated upon by the tribunals considering their crucial position vis a vis the overall project.

IMPACT OF HOME-BUYERS INVOLVEMENT ON INSOLVENCY PROCESS

Given the fact that homebuyers have been classified as financial creditors under the present IBC regime, it has had some impacts upon the overall insolvency process in case of real estate sector too, which are worthy of consideration.

First of all, homebuyers have been classified as financial creditors under section 5(8)(f) of the

[9] Express News Service, Real estate sector resolution rate under IBC among lowest: Report, THE NEW INDIAN EXPRESS (Dec 7, 2022, 7:35AM), https://www.newindianexpress.com/business/2022/Dec/07/real-estate-sector-resolution-rate-under-ibc-among-lowest-report-2525845.html

IBC, whose debt has, "the commercial effect of a borrowing". This broad interpretation of this particular provision and the subsequent inclusion of homebuyers as financial creditors has the scope of opening the floodgates for such similar demands from ordinary customers in other sectors or businesses as well which majorly rely on advances from them for financing their activities. Given the broad interpretation given to section 5(8)(f), customers in other sectors can also bring in claims that their advanced debts classify them as creditors whose debt has the commercial effect of a borrowing and deciding upon a plethora of these kind of similar but distinct claims will be a time-consuming and hectic process for both the National Company Law Tribunal (NCLT) and the courts, distracting them from other important issues for consideration.

The second issue which may arise is that once the homebuyers form a part of the CoC, they shall be allowed to vote and participate in the decision making processes of the body, however given their large number and their relative inexperience in the nuances of the commercial world, there is a possibility that the proceedings of the CoC would get delayed and there may also be issues in reaching at a consensus given the diverse backgrounds and interests of the involved homebuyers. This is the kind of situation which practically occurred during the liquidation process of Jaypee Infratech Limited (JIL) where although the homebuyers constituted a majority of the CoC of 60%, only a few of them (around 5-6%) actually voted in the meetings held due to which the required threshold of 51% was rarely met which is required to reach at any decision and consequently, the proceedings of the CoC were often kept hanging in the limbo in uncertainty due to the lack of participation of the homebuyers in the overall process. In a case like this, while there is a provision of appointing an authorised representative on behalf of all the homebuyers under section 21(6A) of the IBC, the fact that such a representative has to still act upon the consensual directions and instructions of all the homebuyers keeping all of their interests in mind does not solve the problem and the issue of unnecessary delays in the working of the CoC are a reasonable impact that may occur. Further, the decision making process of the CoC also gets hampered to some extent due to the involvement of the homebuyers, even if it is through the participation of the authorised representative because he/she represents an entire class of creditors hence one representative shall be responsible for consolidating and representing the interests of all the homebuyers irrespective of their individual claims against the company so this process of consolidation of such varied and diverse interests is a largely cumbersome and difficult process and even if its fulfilled successfully, the restriction upon the representative to only act in accordance with the specific instructions of the creditors largely puts a check on his independent authority in assessing the commercial matters discussed at the CoC meetings and in case of a lack of consensus amongst the homebuyers, the representative has no other way but to delay the CoC proceedings until such an agreement is reached, consequently affecting the decision-making process. This shortcoming, however, has been addressed to some extent through an amendment to the IBC which came in the face of the decision in *Maharashtra Apex Corporation Limited*, where the court decided on the issue of class voting and upheld the principle of present and voting for the same in the following words, "If the creditors who have been duly served with notices of the meeting... chose not to be present in the meeting and express their view one way or the other, the only inference that could be drawn is prima facie, they have no objection for the said scheme being approved. Any other interpretation in this regard would make it impossible for any company to get any schemes approved."[10] This rationale has been read into the scope of the IBC too by way of this amendment and hence the current legal position is that in the CoC, amongst a large number of homebuyers, if only a small group is usually present physically and votes during the meetings, then that group shall be empowered to take decisions on behalf of all the homebuyers as a class in the interest of efficiency and promptness.

The third kind of issue that may crop up pertains to the excessive amount of litigation that may follow this process, mainly arising out of aggrieved homebuyers being unable to recover their advances through the insolvency process and thereby resorting to litigation in a bid to claim back their money. There are also ongoing challenges in courts around the country against the classification criteria provided under the IBC for categorising creditors as financial and operational. While the fundamental classification between financial and operational creditors was upheld and reaffirmed in the landmark case of *Swiss Ribbons v. Union of India*,[11] the specific inclusion of homebuyers within the ambit of financial creditors was most notably challenged in the case of *Pioneer Land Infra v. Union of India*,[12] in which this classification was claimed to be in violation of Articles 14 and 19 of the Indian constitution as it arbitrarily discriminates between categories of creditors who are almost placed on similar footing. However, this case clearly upheld the validity and constitutionality of the 2018 amendment to the IBC which brought about this inclusion by holding that homebuyers were included within the ambit of financial creditors from the beginning of the IBC itself and they can be read into

[10] Maharashtra Apex Corporation Limited (2004) SCC Online (Kar) 645-670
[11] Swiss Ribbons v. Union of India (2019) 4 SCC 17
[12] Pioneer Land Infra v. Union of India (2019) 8 SCC 416

the scope of section 5(8)(f) as the amounts advanced by them can be interpreted to be in the nature of a debt and the explanation added by way of the amendment was only to clearly lay down this position, and not to introduce it for the first time, and in the interest of the homebuyers who form a pivotal part of any real estate project, the provisions of the IBC need to be interpreted in a beneficial and broad manner so as to secure them their rights and safeguards. However, this categorisation is still susceptible to judicial challenges due to the lack of clarity in the codified statutes and if any of these challenges are to succeed, then it would alter the very foundation of the IBC and the rights and powers accorded to the homebuyers under the amended IBC would also need to be redacted and modified again due to the fact that they got their new rights in the first place due to the categorisation between operational and financial creditors existing. However, given the recent decision in *Yadubir Singh Sajwan v Ms. Som Resorts*[13], where the NCLT also upheld this classification and affirmed the categorisation of homebuyers as financial creditors and their advances as a financial debt, it is unlikely that this position would change in the coming future too given the visible tendency of the judiciary to rule in favour of the homebuyers and their interests.

REVERSE CIRP - A WAY FORWARD?

Understanding the challenges of the usual CIRP procedure and recognising the peculiar features of the real estate sector and the insolvency matters therein, the judiciary has come up with a novel concept of its own, which despite having no legislative backing, has the scope of addressing the existing issues with insolvency in the real estate sector to some extent. This approach is known as reverse CIRP and it was developed in the case of *Flat Buyers Association Winter Hills v. Umang Realtech Pvt Ltd*.[14] Under this process, the real estate corporate debtor is allowed to be in business and continue its operations in order to complete the pending project successfully instead of stopping all activities altogether in the light of an application under section 7 of the IBC. This approach also provides for a classification of the different projects within a real estate company's portfolio so as to segregate the project undergoing CIRP from the others in a bid to not adversely affect their operations in any way and manner and focus on the specific project in question alone. This concept is founded on the realistic notion that the homebuyers are more interested in securing the delivery of their properties instead of the repayment of the financial debt and keeping their interests in mind, the successful completion

[13] Yadubir Singh Sajwan v Ms. Som Resorts Company Petition No. (IB)-67(ND)/2022
[14] Flat Buyers Association Winter Hills v. Umang Realtech Pvt Ltd. Company Appeal (AT) (Insolvency) No. 926 of 2019

of the pending project assumes more importance than an outright liquidation of the project. This was also noted in a report of the UK Law Commission which opined that, "...homebuyers are also often unaware of the legal situation, and in some cases, conflicting information from administrators further confuses the situation."[15] So, it can be safely understood that the homebuyers being merely homebuyers rarely wish to get involved into the technicalities of the overall resolution process due to lack of resources, knowledge and time and hence, their only desired outcome is the completion of the pending project and the successful delivery of their allotted properties.

In this process, prior to the invitation of a resolution plan for the project, it is first offered to an alternative real estate developer who aids and supports the corporate debtor in completing it while leaving the other projects of the corporate debtor untouched, which can continue to function in their own separate manner at their own pace in a separation of sorts. This approach is purely a form of judicial experimentation which finds no backing in the IBC itself and has been only applied by the courts upon their own discretion to streamline the entire process of insolvency resolution, especially in case of the real estate sector. Consequently, the process has received mixed opinions from the legal fraternity with a particular criticism aimed towards it that the courts and tribunals exceeded their jurisdiction and authority under the IBC in formulating an entirely new procedure on their own without a statutory backing. This approach may also be utilised by homebuyers to ensure that they eventually receive the delivery of their paid for properties even if the real estate company goes for insolvency and the payment of their hard earned advances do not go in vain, cause this entire process has been formulated in the interest of "the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganized workmen".[16]

This approach also has the scope of easing the burden upon the homebuyers of securing their interests in the overall real estate project by trying to ensure the outcome which will not only be beneficial for the homebuyers specifically as they will be able to get the possession of their allotted properties but this will also ensure that the real estate company does not directly go into liquidation upon facing financial difficulties and an opportunity is provided for it to continue as a going concern, as allowing that will secure the livelihood of multiple others too who are employed by the company and will be rendered jobless entirely if the company closes

[15] Tibor Tajti, Unprotected Consumers in the Digital Age: The Consumer-creditors of Bankrupt, Abandoned, Defunct and of Zombie Companies, 1 Tilburg Law Review 24 (2019).
[16] idib

down post insolvency.

HOMEBUYERS AS SECURED CREDITORS - AN ALTERNATIVE APPROACH

Another approach on an academic level which may be taken recourse to involves treating the homebuyers as secured financial creditors, instead of unsecured financial creditors as they are regarded under the current framework.

A secured creditor, as defined under section 3(30) of the IBC, is one in whose favour a security interest is created, whereby the security interest includes any Mortgage, charge, hypothecation, assignment and encumbrance etc. The relationship between the real estate company and the homebuyer is established by way of the builder-buyer agreement, which is essentially a contract under which the builder promises to deliver the completed property in a timely manner while the buyer promises to pay the monetary consideration for the same in the stipulated manner in a quid pro quo relationship. While the agreement is originally of the nature of a sales transaction between the parties, there is a charge created on the property being developed by the real estate company, which is in the nature of a floating charge that is activated on the happening of a specific event, which is the non-completion of the project in a timely manner in this case. By operation of the RERA as applicable on these companies, in case the builder fails to deliver the completed property in a timely manner, it would result in a breach of this agreement and the arrangement would turn into one of debt with the unfinished property acting as a mortgage.[17] A mortgage, as defined under the Transfer of Property Act, is "a transfer of interest in identified immoveable property for the purpose of securing the payment of money advanced, a debt or the performance of an engagement which may give rise to a pecuniary liability".[18] As provided under section 18(1) of the RERA, the homebuyers have a legitimate right to either enforce the delivery of the project's property as had been originally promised to them or get back their invested amount along with the interest that they had paid to the promoters of the property. This arrangement is akin to the nature of a secured creditor who has the right to either get back the amount lent by him or secure the possession of the property kept as security with him.

Irrespective of the fact that the homebuyers more often than not prefer to receive the delivery of their property instead of enforcing the repayment of their debts, the similarity in their rights

[17] Real Estate (Regulation and Development) Act, 2016, section 18
[18] Transfer of Property Act, 1882, section 59

with that of secured creditors makes a case for them to be considered as one. Even the three conditions of a mortgage as has been laid down in the definition are fulfilled by the homebuyers successfully - there is an interest created in favour of the homebuyer in a specific immoveable property which is a part of the overall project being bought, there is a transfer of interest in the part of the overall project which is being bought and upon the delay or non-completion of the project in a timely manner, there is the creation of a pecuniary liability against the builder. Further, it was held in the case of *Flat Buyers Association Winter Hills v. Umang Realtech Pvt Ltd* that "the unsecured creditors have a right over the assets of the Corporate Debtor i.e. flats/ apartment, assets of the Company".[19] So, the homebuyers anyways have a claim and interest over the property of the project once the builder-buyer agreement has been executed and this arrangement of an interest in the property being dependent on the timely payment of amounts which can be later converted into a debt upon default leads to the creation of an encumbrance or lien upon the property which is fit for qualifying it as a floating charge upon the specific property in question, and it will not be affected by the fact that the property may not have been particularly defined as part of the agreement or not yet fully constructed as long as the charge remains on the property and the homebuyer retains the right to secure the delivery of the property that it has paid for.

So, while this approach has not yet received judicial and legislative sanction and hence cannot be applied while deciding matters, this can be utilised as an academic though to guide future legislative policymaking whereby this method can be adopted in order to ascribe the status of secured financial creditors upon homebuyers through a liberal and beneficial interpretation of the provisions of RERA and the IBC together and while under the current framework, the rights of the homebuyers are still limited to some extent, for if "the resolution applicant is giving a certain value to the assets of the company while taking over the company as a going concern, the first claim over the assets would fall to the secured creditors, not homebuyers as unsecured creditors",[20] the determination of them as secured financial creditors would significantly improve their overall status in the IBC framework and this coupled with their existing and solidified position as financial creditors would go a long way in helping them secure their interests and enforce their legitimate claims against the real estate companies which wrong them and later on escape accountability under the garb of insolvency.

[19] supra note 12
[20] Banikiran Pattanayak, Are Homebuyers Secured Financial Creditors, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Nov 20, 2022), https://www.ibbi.gov.in/

CONCLUSION

It can be understood from the discussion undertaken throughout the course of this paper that the judiciary in India is increasingly favouring the safeguarding of the homebuyers' interests in the insolvency process and numerous amendments to the IBC and successive judicial decisions have created many new avenues for homebuyers to seek effective redressal and enforce their claims against the defaulting real estate company.

In conclusion, the study of real estate insolvency in India has provided valuable insights into the challenges and complexities facing the sector. While the real estate sector plays a significant role in the Indian economy, it is also the case that the instances of insolvency within this sector are also quite high and given the capital-intensive nature of this sector, when one such business goes for insolvency, it affects a large number of stakeholders who have various degrees and types of interest in the project - right from the institutional investors to the simple homebuyers but the difference in power dynamics emerges herein because while the secured creditors and other parties like investors and banks have assured claims against the corporate debtor which have been clearly laid down and protected for under the IBC, the homebuyers had not received the same amount of protection and safeguards in the initial days of the IBC, as a result of which there were numerous judicial decisions in this regard which lead to several notable amendments in the laws resulting in the current scenario where the official status of homebuyers vis a vis the resolution process has undergone a significant advancement and under the current regime, they have a lot of powers and authority which they did not have earlier. This paper has explored the various ways in which homebuyers interact with the overall process of insolvency and has traced the entire turn of judicial events in a critical manner to lay down the entire journey upto the present situation and status of homebuyers with respect to real estate insolvency. This paper also highlighted the challenges and issues which arise in the insolvency process due to the increased involvement of homebuyers with it and the impact their presence has on the entire process along with discussing certain ways and means to address the same, some from a judicial standpoint while some from a procedural one.

This paper has also delved upon two novel and unique measures which although not yet legislatively recognised, have the potential of solving a lot of issues pertaining to the process of real estate insolvency and have the scope of significantly empowering the homebuyers in the process, as a form of recognition of their crucial and important role in every real estate project. These approaches serve as an alternative outlook towards the role of homebuyers in the entire insolvency process along with the fate of the project involved and if adopted on a blanket basis, have the potential of being a success to some extent, although it cannot be denied that it has its own limitations too which also need proper analysis and redressal.

Therefore, in conclusion, while real estate insolvency remains a significant concern in India, proactive measures and collective efforts can pave the way for a brighter and more sustainable future for the sector and continued judicial activism coupled with progressive legislative measures have the potential of securing the rights of groups such as homebuyers in the overall insolvency process so that nobody is arbitrarily left out of the process and everyone can go home in the end with at least something of what they deserve.

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