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EVOLUTION OF RIGHTS OF HOME BUYERS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

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Introduction

The primary function of Insolvency law is to have a timely and effective resolution of the rights of the stake holders and unlocking the asset value of the corporate debtor before eroding the value so that all the stake holders will get the maximum share out of the value. In our Country real estate industry has shown magnificent growth thanks to the support of banks and financial institutions in providing project loans as well as individual home loans. Earlier the real estate industry was unregulated, and the terms and conditions were fixed by the builders unilaterally which needs to be accepted by Individual home buyers. The trend was changed with introduction of RERA Act. As per the provisions of RERA read with the bipartite agreement entered between the builder and buyer the home buyers has a dual remedy i.e. either to receive the property that it had paid for or to have the money returned to them with interest. Now in addition to RERA act the home buyers are empowered under the IBC to have their voice heard in CoC meetings and their rights recognized as financial creditors. The amendments to IBC made in the year 2020 and 2022 is very laudable and it recognized the rights of home buyers. In this paper we analyze the evolution of rights of home buyers under IBC and what are the additional empowerment that is required for the home buyers.

Comparison with RERA

Recently we have noticed that some of the real estate projects are delayed beyond reasonable period and construction is stalled in other cases. Fraudulent act of the builders are becoming more common. Due to these factors' lakhs of home buyers across the country are facing uncertainty concerning their investment and timely delivery of the property.

Under the RERA Act the home buyer is having two remedies – either to have their money returned with interest or to receive the immovable property. Coming to IBC the rights of home buyers are ever evolving. IBC has come as a hope to the home buyer. When we look into the status of home buyers under IBC we notice that there are two categories – financial creditors defined under section 5(7) of IBC and operational creditors stated under section 5(20) of the IBC. There was a confusion as to whether they fall under operational of financial creditor.

Evolution of the Law based on case laws

In the year 2017 Honble NCLAT in the case of Nikhil Mehta v AMR Infrastructure took the view that the amount invested by the home buyers are not mere sale transactions, but would indeed come under the ambit of financial debts under section 5(8) of the IBC. The NCLAT held that the allotees are indeed financial creditors. In the first instance the under IBC the home buyers was neither operational creditor or financial creditor and they can only file the claim under "other creditors". The IBBI amended the regulations in the year 2017 to introduce special form (FORM CA) in which claim would be filed by the allottee. In the year 2018 the Insolvency committee noticed that the funds are provided by the home buyers were made against the delivery of future asset that is the house and upon failure of the project money is repaid based on the time value of money. This has raised the concept of upgrading the position of home buyer under IBC.

In the classic Jaypeetech Case (Jaypee Orchard Resident Welfare Society v Union of India) the Honble Supreme Court has dealt with the aspects of housing project –

Chitra Sharma v Union of India 2018 SCC online SC 874 (Writ petition Civil No 744/ 2017 decided on 09-08-2018) wherein the Honble supreme court expressed apprehension that if home buyer are placed last category of creditors list as per water fall mechanism in the insolvency resolution process, it would amount to gross injustice to the home buyer.

Important Amendment done in the year 2018 – This was done as proposed by the Insolvency Law Committee by Sri Injeti Srinivas.

The absolute need to include home buyer either as financial creditor or operational creditor is due to the following reasons:-

(i) The right of an aggrieved home buyer to initiate corporate insolvency resolution process (CIRP)
(ii) Representation of home buyer on the committee of creditors
(iii) In the event of liquidation of the corporate debtor the guarantee of receiving at least the liquidation value under the resolution plan.

Amendment in the year 2018 wherein pivotal change – Section 5(8)(f) explicitly recognizing home buyers as financial creditors.

This **2018 amendment** conferred upon home buyer

a) To be a representation in the CoC
b) To be a party in taking pivotal decision
c) Formulating a resolution plan
d) Chances of completion of the project
e) Recuperation of their investment

In this regard the relevant section is as noted below:

Section 5 (7) & (8) defines financial creditors and financial debt in the following terms

“ financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to

The amendment of 2018 introduced an explanation below

Section 5 Sub section (8) (f)

“*Any amount raised under any other transaction including any forward sale or purchase agreement having the commercial effect of a borrowing; [Explanation – for the purpose of this sub clause ,--*

(i) Any amount raised from an allotee 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 (16 of 2016)”*

It is thus evident that with the introduction of the explanation home buyers and allottees of real estate projects were included in the class of “financial creditors” because financial debt is owed to them. On a plain reading of section 5(8)(f) no distinction is per se made out between different classes of financial creditors for the purpose of drawing a resolution plan.

In the case of Pioneer Urban Land & Infrastructure Limted & ors vs Union of India & ors (AIR 2019 SC 4055) the 2018 amendment was held constitutionally valid by the Honble Supreme Court. In this case the Supreme Court rejected the challenges and upheld the 2018 amendment Act constitutionality. The Supreme Court observed, based on a reading and interpretation of section 5(8)(f) of the IBC, the homebuyers / allottees were included in the main provision, section 5(8)(f) from the beginning of the code with the explanation being added in 2018 merely to clarify doubts about the status of home buyers. The Supreme Court further held that interest of allottees in the insolvency of a real estate company must be protected.

Further in the case of Bikram Chatterjee v Union of India the Honble Supreme Court noted that “if the real estate business has to survive in India, it has to be answerable to the public and has necessarily to uphold the trust reposed in builders/ promoters” It was the view of the court that the status of the home buyers are paramount installed project. The court observed that majority of the savings of home buyer is invested for the project and it is their interest which is paramount and the same needs to be protected.

Due to the above, compared with RERA we notice that IBC is more preferred by the home buyers for the reason that RERA Act is to protect the customers. They prioritize customers. IBC prioritize creditors. Under RERA compensation is the criteria whereas under IBC completion is the criteria. Under IBC the home buyer is having a representation in CoC and the home buyer is having a say in the completion of the project.

The Concept of reverse Corporate insolvency resolution process.

NCLAT in the case of Flat Buyers Association v Umang Realtech Pvt Ltd applied the principles of reverse corporate insolvency resolution process which allowed the real estate corporate debtor to continue its construction activities in the face of an application under section 7 of the IBC. This was done with the primary interest of protecting the allottees of the home project and the survival of the real estate industry which provided employment to large number of unorganized workmen. In the same case of Umang Realtech the NCLAT gone ahead with the segregation of projects being developed by the same corporate debtor while holding that the corporate insolvency resolution process against one project should not affect the others.

Demerits of treating the home buyers as financial creditors

a) Being unsecured financial creditors they were having limited voting rights
b) They do not possess the expertise to assess the long term sustainability of the corporate debtor
c) Usually the home buyers will be more interested in taking possession of their asset or for the return of their money. Both these eventualities happen only if the process leads to resolution or liquidation which will take its own time
d) In the case of liquidation the allottees will be getting very meagre amount due to the reason that they are treated as unsecured creditors.

Year 2020 Amendment to IBC Act

Here an amendment was introduced to the Act wherein it was stipulated that CIRP against the corporate debtor can be initiated in the case of home buyers jointly by not less than one hundred of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project which ever happens to be less. In the case of Manish Kumar Vs Union of India the constitutional validity of this amendment was upheld by the Supreme Court.

As discussed it can be seen that the present position on the status of allotees within the IBC framework is that of an unsecured financial creditor capable of commencing a CIRP against a real estate corporate debtor as long as that action is collective. To argue otherwise the home buyers are standing behind operational creditors due to the reason that any operational creditor can file application for any default provided it is above one crore. This way home buyers are inferior to operational creditors.

Notification dated 12-02-24 – IBBI (liquidation process) Regulation 2016

There may a situation in which certain home buyers might have taken possession of the property whereas others have not acquired possession. Earlier they were all grouped together and the recourse was to take a refund which resulted in anomaly. In order to address this issue the notification dated 12-02-24 was issued which aim to exclude flats where possession has been granted but conveyance deeds have not been executed or registered from the liquidation estate. This measure is undertaken to alleviate the immense hardships and substantial challenges faced by homebuyers and to offer relief to those who find themselves in difficult situations due to insolvency of the builder.

Recent judgments

In the year 2023 judgment by Supreme Court in Vishal Chalani vs Debashis Nanda it was decided that home buyers cannot be differently treated from other financial creditors under IBC 2016.

In the year 2024 NCLT Delhi decided in the case of Tarun Ahuja & ors v Puri Construction Pvt Ltd even if the home buyers have approached RERA or NCDRC their status as financial creditors under section 5(8) (f) of IBC remain unchanged.

Conclusion

The basic concept of insolvency proceedings is the principle of *pari passu* which recommends similarly placed creditors in an insolvency proceeding to be treated equally. However, in an insolvency proceeding, all the assets of the corporate debtor is given under resolution or put into liquidation pay the claims received and accepted. In such cases the remaining funds of the company may not be enough to cover the claims of the unsecured creditors of the company. From the above discussion it can be seen that after the 2020 amendment the statute stipulates a requirement of certain percentage or number of home buyers to come together to initiate the insolvency resolution process. This is a hindrance as far a smaller projects are concerned. More over the dragging time lines will burn the resources of the ordinary home buyer. Usually it can be seen that majority of the resources are taken away by the secured creditors under the waterfall mechanism thereby leaving very less for others.

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The intention of the law while introducing the 2020 amendment to the IBC was to bring the homebuyers at par with other financial creditors in order for the homebuyers to get a say in approving the resolution. However, even after the 2020 amendment, homebuyers still do not have a seat at the meeting at par with other financial creditors as they remain unsecured creditors. It can be seen that on the very same property for which they have made part payment and taken loan from other financial institutions, the home buyers are not treated at par with secured financial creditors which is an anomaly which needs to be addressed in future amendments.

References

1. Nikhil Mehta v AMR Infra
2. Jaypee Orchard Resident Welfare Society v Union of India
3. Chitra Sharma v Union of India
4. Pioneer Urban Land & Infrastructure Limited v Union of India
5. Bikram Chatterjee V Union of India
6. Flat Buyers Association v Umang Realtech Pvt Ltd
7. Manish Kumar v Union of India
8. Vishal Chalani v Debashis Nanda
9. Tarun Ahuja & others vs Puri Construction Pvt Ltd
10. Insolvency and Bankruptcy Code
11. Insolvency & Bankruptcy Amendment 2018
12. Insolvency & Bankruptcy Amendment 2020
13. IBBI (Liquidation process) Regulation 2016 Notification dated 12-02-2024