
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

NAVIGATING IBC AND REAL ESTATE REGULATIONS- Ayush Gupta¹**Brief Background**

The Real Estate (Regulation and Development) Act 2016 was enacted with many objectives and one of the main objectives was to protect the interests of consumers in the real estate industry. RERA has been implemented across the country apart from a few states and a National RERA authority has been established which is fully functional and aims to solve the problems faced by the homebuyers. The verification sample of various state RERA sites will show application status, actions, waivers granted, directions given, etc. The law has been slowly and steadily forming as one of the major legislations that has been beneficial to both developers and home buyers.

The Insolvency and Bankruptcy Code 2016 was enacted to consolidate the restructuring and bankruptcy resolution laws of companies, partnerships, and individuals in a time-bound manner. The need for this code was felt as there was a huge increase in the loans of the banks and people were taking advantage of the banks by delaying the process of debt settlement.

Under the code, when there is a default in payment, the creditors obtain control of the debtor's assets and they must make the important decisions to resolve the insolvency and the debtor and the creditor can institute recovery proceedings against each other. Whenever there is a default, the debtor or the creditor has the power to institute the insolvency resolution process. A professional who has the proper knowledge manages the resolution process. The professional makes the necessary financial information of the debtor available to the creditor so that he can manage the debtor's assets and yield the maximum revenue out of it. This process may go on till 180 days and a moratorium is imposed by the court against the debtor in this period.

¹ Student at United World School of Law

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

With the introduction of RERA, there has been an increase in the compliances on the real estate developers. The developers now must complete the construction and give possession of the projects on time. The IBC has played an instrumental role in the real estate sector by providing relief to the home buyers against the developers in cases related to insolvency proceedings.

Clash between RERA & IBC

The introduction of these laws did not particularly help the real estate sector, as they were implemented at a time when most players were facing a serious liquidity crisis and increasing delivery pressures and the consumer courts were flooding with the complaints of delay in possession against the developers.

Since both the laws were relatively new in nature and provided for a strict compliances and timeframes for the resolution of the disputes. This led to the consumers shift their approach from the consumer forums to the National Company Law Tribunal (NCLT). RERA provides for the complaints against a developer for delays, false declarations, unfair practices, and irregularities. If RERA is of the opinion that these violations are significant enough to cancel the registration, it can transfer the project to another developer.

Likewise, the IBC with its recent amendment allows the buyers to file claims with NCLT against the defaulting developers and give them the power to initiate insolvency proceedings as a financial creditor. Both are special and override any other law in force. But situations of their inherent inter-play, applicability, or relevance especially in cases wherein the rights of the home buyers are concerned, is still untested.² But even after the introduction of RERA, the homebuyers give more preference to the IBC for solving their problems.

The Supreme Court in the case of Anuj Jain, IRP for Jaypee Infratech Ltd v. Axis Bank Ltd and Others³ held that, the mortgagees in a third-party mortgage transaction cannot be considered as the financial creditors. The brief facts of the case were that Jaypee Infratech

² Avnish Sharma & Gautam Bhargava, 'Balancing RERA & IBC' (The Hindu, 30 November 2018) <<https://www.thehindu.com/life-and-style/homes-and-gardens/balancing-rera-ibc/article25634438.ece>> accessed 19 November, 2020

³ Civil Appeal Nos. 8512-8527 of 2019 with Civil Appeal Nos. 6777-6797 of 2019

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

was given the tender to develop and maintain the Yamuna Expressway that connects Uttar Pradesh, Noida & Delhi. It was also given the responsibility to develop the land around the expressway for residential and commercial purpose.

The company started the construction activities near Noida and launched many projects in 2008 and 2009. These projects were to be completed by the developers by 2012. Most of the projects were sold out. But the developers failed to provide possession and deliver the projects on time. The developer also started defaulting on the repayment of the bank borrowings. After the IBC was enacted, the IDBI bank led consortium filed a case against Jaypee Infratech in 2017 for the repayment of loan. It was due to this case that the major amendment ordinance in IBC⁴ on 6 June 2018 where the homebuyers were given the rights as financial creditors. The case has reached the final stage. The National Buildings Construction Corporation Ltd. & Suraksha Realty have submitted their final bids for the completion of the remaining projects. The Committee of Creditors (CoC) had to decide between the two companies for the completion of the project. The Coc chose NBCC for the completion of the remaining projects.

These cases may undermine the value of RERA as though it is an equivalent legislation, if the insolvency proceedings are instituted against a company and the same company has a complaint pending before the RERA made by a homebuyer, it is possible that bidders will seek to limit their obligations only in relation to the claims filed with the resolution professional and seek to cancel the obligations that may arise from complaints and pending issues.

But there are some issues that RERA addresses that IBC cannot solve. RERA can be very important to solve the problems of individual homebuyers whereas the IBC only deals with cases where the company is huge and there is no option other than selling the company. The ambiguity on classification of homebuyers as ‘financial creditors’ or ‘operational creditors’ pointed out in the Jaypee case, prompted the Insolvency and Bankruptcy Board of India (“IBBI”) to amend the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“CIRP Regulations”) to introduce the concept of ‘other creditors’, i.e. a class of creditors other

⁴ ‘The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018’ (PRS India, 2 December,2020) <<https://www.prsindia.org/billtrack/insolvency-and-bankruptcy-code-amendment-ordinance-2018>> accessed 19 November,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

than financial creditors or operational creditors.⁵ Thus, there is a balance between both the acts, and they are interlinked in nature.

Balance between RERA & IBC

The Supreme Court through various cases under the RERA laws, under Section 88 of RERA stated that the provisions were in integration to and not in derogation of the provisions of any other law prevalent at that time. And as per Section 89, RERA is to have effect notwithstanding anything inconsistent contained in any other law for the time being in force. But according to Section 238 of the IBC, it states that if there is any inconsistency within the existing laws then IBC shall prevail.

Moreover, RERA was introduced to ensure transparency and accountability among the homebuyers so that they have faith within real estate, but the IBC was introduced to address the issue of liquidation and insolvency of the companies and the resolution of such issues. Also, Section 30(2)(e) of IBC clearly stipulates that the 'Resolution Plan should not contravene any provisions of law for the time being in force'. Thus, upon invocation of IBC the insolvent company does not become immune from other applicable laws. In case of real estate companies RERA, Construction Workers Welfare Cess Act, Municipal Laws, GST, Income Tax etc. would continue to apply.⁶

If the resolution plan suggests bringing in a third party instead of the original developer, the CoC and IRP would have to adhere to Section 15 of the RERA, which requires the prior written consent of two third-party buyers.

Under section 52, "secured creditors" have the first claim on the mortgaged assets while a company is liquidated and only when they waive their rights would the distribution be under section 53. In order to be a secured creditor, one must have a security interest in his favor. All financial creditors cannot be called as secured creditors and thus in case of liquidation the buyers would not be benefitted as they are at a lower level in the chain.

⁵ Aastha, Debopam Dutta, Abhay Jain & Vaibhav Ailawadi, 'Homebuyers as Financial Creditors' (Argus Partners, 26 June 2018)

<https://www.argus-p.com/papers-publications/thought-paper/homebuyers-as-financial-creditors/#_ftnref4>
accessed 20 November, 2020

⁶ Nagendra Goel, 'Conflict between RERA and IBC - Not really' (ET Realty.com, 6 May 2018)

<<https://realty.economictimes.indiatimes.com/realty-check/conflict-between-rera-and-ibc-not-really/3019>>
accessed 20 November, 2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

But the court has observed that the homebuyers should be treated as primary secured creditors which would help in preventing the conflicts and a situation of double mortgage would be eliminated.

Further RERA has a non-obstante clause which says that RERA is in addition to and not in derogation of the provisions of the any other law and it means that the remedies available with RERA are not exclusive remedies but are additional remedies and there is no compulsion to follow the remedies given under RERA. When dealing with two acts which have non-obstante clause, the later act should be given way to the earlier act, for the reason, that it is postulated that the Parliament is vigilant of the former act when making the later act and the later act must be given precedence.

Additionally, presence of Section 88 in RERA which states that remedies available under RERA are in addition to and not in derogation of other acts would make it clear, that the code would prevail over RERA. Thus, held that even by a process of harmonious construction, RERA and the code must be held to co-exist and, in event of clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute, which, in case of conflict, would override the general statute, the Code.⁷

The Creditor Status

The IBC lays down two types of creditors when a company is liquidated. One of them is an operational creditor and the other one is a financial creditor. The financial creditor is a person to whom a company owes a financial debt which may be in the form of debentures, loans etc. Whereas an operational creditor is a person to whom the company owes an operational debt that arises from the goods and services provided by them to the company.

One of the major issues under RERA & IBC is that whether homebuyers can be considered as an operational creditor in case of any default on the part of the promoter. There has been a confusion among the people whether the homebuyers can be considered as an operational creditor or a financial creditor.

⁷'Clash of IBC and RERA Laws - IBC Wins' (SBS & Company LLP, 12 August,2020)

<<https://www.sbsandco.com/blog/clash-of-ibc-and-rera-laws-ibc-wins>> accessed 21 November,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

Section 21 of the IBC requires the CoC to include "financial creditors" with voting rights on the "Resolution Plan". Section 24 provides that "operational creditors" can attend CoC meetings but not vote. In such a situation section 4(2)(1)(D) and section 7(4)(c) of RERA comes to their rescue. The former section provides for the mandatory deposit of 70% of the money collected from the homebuyers to be kept in a separate escrow account and the latter section gives the power to RERA to freeze the account of the developers whenever there is a default.

Homebuyers as operational creditors

It was held in the case of Col. Vinod Awasthy v. AMR Infrastructure Limited⁸ it was held that while considering the question whether the homebuyers can be considered as operational creditors it was observed that the operational debt is a type of debt that arises out of the provision of goods and services. In this case there was a sum of money that was to be paid by the homebuyer at regular intervals, which he failed to pay. It was held that the homebuyer did not have to take any sum of amount but only had to take the possession of the flat. Hence it was held that the homebuyer could not be considered as an operational creditor.

But As compared to other cases, in real estate contracts the developer is considered as a debtor as he supplies the flats, and the homebuyer is considered as the creditor. Also, the homebuyer is a person who is concerned with the financial soundness of the developer whereas the operational creditor is concerned with the money that the developer owes to him. Also, in these projects the money is raised before the construction starts and the essence of time is important has the interest accrues on such deposit. Whereas in operational debt the person is not concerned with the time involved, as he just wants his money back. Thus, in many cases the court held that homebuyers were allottees of the flats and thus they cannot be operational creditors. But since the homebuyers made payments at regular intervals to the developers they could be considered as financial creditors.

Homebuyers as financial creditors

⁸ C.P. No. (IB)-10(PB)/2017

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

According to the Insolvency Law Committee Report⁹, the homebuyers were to be included among the financial creditors as the homebuyers contribute a fixed amount at regular intervals to the developers which help them finance the construction activities. Also, the financial creditors can be represented on the CoC and have a right in the major decisions to be taken relating to the developer's assets. The supreme court after proper analysis held that the sale deed signed by the developers and the homebuyers shall have the effect of a borrowing and since the definition of financial creditor includes the element of financial debt that can be transferred, the homebuyers can be known as financial creditors.

Further it was said that both the parties had financial interest in each other's activities as the homebuyers would get possession after the payment of all the instalments and the developers would make a good amount of profit from this sale. So, it would be unfair to not include the homebuyers under the scope of financial creditors. Having said that, the Supreme Court has cleared the dust from retrospective applicability of the Amendment Act by holding that home buyers were included in the main provision, i.e., Section 5(8)(f) of the IBC with effect from the inception of the IBC. It has further clarified that the explanation was added later in the year 2018 only to clear up any doubts that had arisen in its implementation.¹⁰

The Problem of Forum Shopping

Forum Shopping is a situation wherein the litigants approach the courts very frequently for redressal of their disputes. The litigants approach the court where there is a higher chance of winning the cases and these suits are often plaintiff friendly. The litigants approach the courts even when there is no connection between the issue of the suit and the jurisdiction of the courts. A person is said to be forum shopping when even though he has a remedy available under the specified law, he opts to bring the case to the jurisdiction of the other laws.

⁹'Insolvency Law Committee Report' (PRS India, 2 December 2020)

<<https://www.prsindia.org/report-summaries/insolvency-law-committee-report>> accessed 22 November,2020

¹⁰Abhilash Pillai & Tarun Agarwal, 'Home Buyers = Financial Creditors: Supreme Court Reigns' (Mondaq.com 15 August,2019)

<<https://www.mondaq.com/india/real-estate/837088/home-buyers-financial-creditors-supreme-court-reigns>> accessed 22 November,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

Forum Shopping can also be divided into two categories mainly domestic forum shopping and the transnational forum shopping. The former is a situation where in the plaintiff selects two of the courts within the jurisdiction of a particular country whereas the latter is a situation wherein the plaintiff selects two of the courts, one of that court being in the jurisdiction of the other country.

The courts have over the time made it clear to the litigants that they cannot abuse the law by doing forum shopping and it has been highly criticized by the judges. Before the introduction of RERA, the consumers had only two options- the consumer forums and the NCLT. But due to the continuous delays and incompetency on the part of the forums the homebuyers approached the Company law courts.

So, to solve this problem, RERA was introduced. But even though after the introduction of the act people have shown no confidence in RERA and have still approached the consumer forums and NCLT to get remedy. It is due to these activities of forum shopping the remedy under RERA is undermined and people have no confidence in the newly enacted legislation. It is high time the people should shift their focus and approach RERA for such disputes. This act also provides the party to withdraw its case from the consumer forum and seek remedy with the tribunal.

According to Maharashtra Real Estate Regulatory Authority Chairman, Gautam Chatterjee, "Before admitting a real estate case, the National Company Law Tribunal (NCLT) should first refer it to the respective regulatory authority, rather than trying to resolve it. The NCLT must confirm with the RERA regulators whether the case can be resolved within three to four months or else the NCLT can take it over."¹¹

Amendments in IBC

The IBC & RERA have been interlinked since the increasing cases in the real estate sector and how courts have interpreted the role of IBC in real estate matters. There has been an increase in the number of cases related to insolvency proceedings by the homebuyers against the developers since there was a confusion among the people whether to approach the RERA, consumer forums or the NCLT.

¹¹ Tarun Raheja, 'What is Forum Shopping?' (99 Acres.com, 22 February 2019)
<<https://www.99acres.com/articles/what-is-forum-shopping.html>> accessed 23 November, 2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

Section 18 of RERA was widely misused by some of the homebuyers. It states that if the promoter delays in giving possession to the allottee then the allottee may withdraw from by project by demanding a refund or may claim interest for every month of delay until the possession is finally given. This section has been applied retrospectively, thereby favoring many erroneous home buyers' complaints under Section 18, placing a further burden on the Promoter to arrange for booking / advances to be returned to such attendees. Section 18 should have given the promoter an opportunity, or a last chance, to complete the ongoing project within the stated proposed completion date, and only then the complaints under Section 18 should have been taken in case of further delays.

On the other hand, Section 18 became an easy tool even for those allottees who had a change of mind and wanted to voluntarily withdraw from the project and claim refund of their booking amount and also earn interest on such amounts. While contesting these complaints before the Regulatory Authorities, the promoters, whether rightly or wrongly, cited the above external factors which delayed their projects to some extent. However, the Regulatory Authorities put the onus on the promoters and termed such delays due to external factors as a “business risks” which a promoter should have ordinarily foreseen before committing a timeline to its allottees for completion of the project.¹²

The Jaypee case was one of the first cases in which insolvency proceedings were filed against a real estate developer. Due to this judgement, there was a major amendment in IBC by the way of IBC Amendment Ordinance that was issued on 6 June,2018. After this there were several cases filed against the real estate developers before the NCLT. Due to this there were some changes made to the original amendment ordinance. The Insolvency and Bankruptcy (Second Amendment) Bill,2018¹³ was introduced in the Lok Sabha that replaced the old ordinance.

One of the significant recommendations is the inclusion of homebuyers within the ambit of financial creditors. The definition of financial debt under section 5(8) of the IBC has been broadened by specifically including within it any amount raised from an allottee

¹² Amit H Wadhvani, “RERA 2018: A Work in Progress” (Bar & Bench, 17 January,2017)
<<https://www.barandbench.com/columns/rera-2018-a-work-in-progress>> accessed 23 November,2020

¹³The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018
<[https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20\(Second%20Amendment\)%20Act,%202018_2018-08-18%2018:42:09.pdf](https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Aug/The%20Insolvency%20and%20Bankruptcy%20Code%20(Second%20Amendment)%20Act,%202018_2018-08-18%2018:42:09.pdf)>

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

under a real estate project, being an amount having the commercial effect of a borrowing and thus falling within the purview of clause (f) of this sub-section which includes all amounts raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.¹⁴

This bill has also laid down some changes in the voting structure. For key decisions of the CoC the voting threshold has been lowered from 75% to 66% and for other decisions of the CoC the threshold has been lowered from 75% to 51%. It also prohibits the person from submitting a resolution plan if his asset is identified as a nonperforming asset for more than one year. It also lays down the withdrawal procedure of an application that is subject to be passed with 90% vote of the CoC.

There have been situations where the homebuyers have approached the courts relating to very trivial matters which led to the stoppage of many projects. The homebuyers started the practice of forum shopping which hampered the progress of the projects. Even a single allottee could approach the NCLT and due to the insolvency proceedings, the construction and other activities that were going on the project had to be stopped. Thus, there have been many instances where the remedy under the IBC was misused by the homebuyers which hampered the progress of the whole project.

This led to an outrage among the developers and they insisted on bringing an amendment so that such undue advantage of the code shall not be taken by the homebuyers. So, after analysis and recommendations on 29 December, 2019 an ordinance¹⁵ was issued by the Insolvency & Bankruptcy Board. On 5 June, 2020 the Insolvency and Bankruptcy Code (Amendment) Act, 2020 was promulgated.

A proviso was inserted in section 7 of IBC wherein the creditors under a real estate project who wanted to initiate corporate insolvency process against the debtor shall be filed jointly by hundred or more or ten percent or more of the total number of such allottees under the same real estate project.

¹⁴ Garima Mehra & D Sharma, 'IBC Amendment Ordinance 2018: At Crossroads With RERA' (Indiacorplaw.in, 14 June 2018) <<https://indiacorplaw.in/2018/06/ibc-amendment-ordinance-2018-crossroads-rera.html>> accessed 24 November, 2020

¹⁵ The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 <<https://www.ibbi.gov.in/uploads/legalframework/d6b171ec9b9ea5c54f7423bc36f92977.pdf>>

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

The Code allows the corporate debtor as well as its creditors to initiate insolvency resolution process. But due to COVID-19, The Ordinance provides that for defaults arising during the six months from March 25, 2020 (extendable up to one year), no insolvency proceedings can ever be initiated by either the corporate debtor or its creditors.¹⁶

With the recent cases in the real estate sector relating to the promoter-allottee disputes there has been an increasing need of IBC in this sector. The allottees should prefer knocking the doors of RERA before going to IBC as under RERA the allottees have a chance to get refund of the principal amount along with interest and get the projects completed on time.

The buyers should go to the IBC only as a last resort when there are not many options available with him. The IBC and RERA are interlinked in nature and IBC comes into play only when a real estate company defaults in payments to its creditors, while RERA continues to be in operation throughout.¹⁷ Thus, both the sectors are interlinked and are set to co-exist with each other. In the event of conflict, the IBC shall always prevail over RERA.

Interplay of IBC & RERA through Judicial Decisions

The Pioneer Case

The Supreme court in Pioneer Urban Land and Infrastructure v Union of India¹⁸, upheld the constitutionality of the Insolvency Code (Second Amendment) Act of 2018. In this case the developers challenged the amendment which provided the homebuyers the status of 'Financial Creditor' under Section 5(8)(f) of the code. The ground for the challenge was that the classification given to the homebuyers was discriminatory in nature and it violates the Article 14 and 19(1)(g) of the Indian Constitution.

¹⁶'The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020' (PRS India, 2 December 2020) <<https://www.prsindia.org/billtrack/insolvency-and-bankruptcy-code-amendment-ordinance-2020>>

¹⁷Ashwini Kumar Sharma, 'Should IBC keep entertaining complaints of individual buyers?' (livemint.com, 25 November 2019)

<<https://www.livemint.com/money/personal-finance/should-ibc-keep-entertaining-complaints-of-individual-buyers-11574676741955.html>> accessed 25 November, 2020

¹⁸ (2019) 8 SCC 416

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

More than 150 builders, developers, real estate companies challenged the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (Second Amendment Act) which inserted two explanations in Clause (8) (f) of Section 5 of the Code. Pursuant to the first explanation, any amount raised from an 'allottee' of a 'real estate project' (i.e., a homebuyer) shall be deemed to be an amount having the commercial effect of borrowing, and resultantly he is a financial creditor under the Section 7 of the IBC. (Which allows financial creditor(s) to file an application in NCLT for initiating the corporate insolvency resolution process against a defaulting company). The amendment had further allowed the homebuyers being financial creditors to have representation in the Committee of Creditors through an authorized representative and have voting rights.¹⁹

The contentions on behalf of the developers were that on a complaint made by a single homebuyer, the well-established developer could be easily removed from his own project and the funds infused him to complete the project would be worthless and could result in the death of a financially sound company. Also, if the resolution plan fails to pass the approval of the committee of the creditors then it would cause a great harm to the allottees and hamper the progress of the project. It was also argued that the allottees have gained the time value by giving the money in instalments and did not have to pay the full advance money. But the courts found that there is no benefit on the part of the homebuyers as they could not have benefited much by the time given and the only benefit, they had was a better deal on the flats.

The main issue of the developers was that the homebuyers have already been guaranteed a remedy under RERA and the consumer forums. So, to prevent the duplicity of proceedings they should not be granted remedy under the code.

The contentions of the homebuyers were that instalments paid by the allottee to the developer shall be given the effect of commercial borrowing and shall be considered as a financial debt. The provisions of the RERA are additional remedies and not exclusive so the homebuyers shall enjoy the protection under the code as well. The homebuyers also argued that they should be considered as operational creditors also as like other creditor's

¹⁹Devesh Saxena, 'Analysis of Judgment of The Supreme Court Upholding the Legality and Constitutionality Of Section 5(8)(F) Of IBC, 2016' (Centrik.com, 13 August 2019)
<<https://www.centrik.in/analysis-of-judgment-of-the-supreme-court-upholding-the-legality-and-constitutionality-of-section-58f-of-ibc-2016/>>accessed 26 November,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

they have advanced the amounts to the developers and that they are financing the project. They also wanted the status of financial creditors as they had paid the consideration and the time value of money was also present.

The code when triggered by a homebuyer, there is a risk of the project not being completed by the developer. Once the homebuyers knocks the door of the code, he will have to wait for all the process to be completed and also would have to wait for his turn to get the homes completed among the other creditors.

The Insolvency Law Committee has in fact discovered that delayed completion of flats / apartments has become a common phenomenon and amounts collected by home buyers contribute significantly to the construction of such flats / apartments. Therefore, it was important to clarify that homebuyers are treated as "financial creditors" so that they can approach the Code and have their rightful place on the creditors' committee.

If Petition is admitted under the Code the beneficiary can never get the entire principle refunded, not to mention the interest due to an elaborate insolvency resolution process. On the other hand, if such a beneficiary were to approach RERA it is more than likely that the project will be completed early and the allottee may even get the full amount of reimbursement and interest with compensation and penalties.

The code shall be considered as a last resort by the homebuyers and should not be approached for trivial matters or else the progress of the project would come to a stop.

The court held that the amendment was constitutional and did not violate the article 14 & 19(1)(g) of the Constitution of India. It also held that RERA shall exist and be read harmoniously with the code and in case of any conflict the code would always prevail over RERA.

The Amrapali Case

The Supreme Court on 23rd July, 2019 passed a judgment (Bikram Chatterjee & Others v. Union of India)²⁰ in favor of the 42,000 aggrieved home buyers that has changed the perspective of the promoters who are offering housing schemes and engaged in the Real Estate Sector. This judgement may be treated as a precedent under the newly enacted

²⁰(2019) SCC OnLine SC 901

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

RERA Act as it is a slap on the face of the Promoters who have not completed the projects according to the deadline prescribed, Banks and the authorities for acting in collusion with the promoters.

The Noida Authorities had given the Amrapali group large parcels of land on lease and the Banks had given loans to the group against mortgage of the leased land. After the Insolvency Proceedings all the parties jumped in to secure their interests. The Noida Authorities had claimed the payment of the lease amount along with interest on the lease, the banks claimed for the recovery of their loans and enforcement of the mortgage and the home buyers claimed possession of the flats.

Issues Involved:

- The question before the court was whether the builders and promoters can be permitted to usurp and divert the money of home buyers and can the home buyers be left in the lurch as a silent spectator.
- Whether the claim of the authorities over the project is valid?
- Whether the claim of the bankers over the project is valid?

Facts of the Case:

The Amrapali Group in 2011 proposed to construct 42,000 flats in Noida and Greater Noida Region with an assured delivery of possession within 36 months. Various buyers had booked their flat under this scheme between 2010-2014 by paying 40-100% of the total consideration. The downfall of this scheme started in 2017 when Bank of Baroda filed a petition before the National Company Law Tribunal under Section 7 of the Insolvency and Bankruptcy Code, 2016 for triggering Corporate Insolvency Resolution Process against the Amrapali Group.

After this petition the home buyers were in a jittery as they had invested all their life savings for buying their dream house and the group liable for completion of the project has a suit of bankruptcy pending against it. After the suit was filed, the NCLT declared a moratorium, restricting the institution of any suits against the Amrapali Group.

The Supreme Court on an application made by Bikram Chatterjee passed an order on 22 November, 2017 directing the builders to deposit 10 percent of the dues to the Noida

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

Authorities, give possession of the flats having Occupancy Certificate and Non-Objection Certificate and complete the remaining flats. On 27 March,2018 the Amrapali group assured the court that they are ready to undertake the completion of the remaining flats and requested the NCLT not to proceed with the suit.

The apex court on 17 May,2018 passed an order directing the Group to deposit an amount of Rs 250 crores in an escrow account to be opened in the UCO Bank, Supreme Court Branch. In this order an admission was made on behalf of the Amrapali Group that money to the extent of Rs 2,765 crores had been transferred to the other projects. But this order was not complied with and the courts had lost confidence in the Group due to their unfair conduct and the shifting of their stand.

On 1 August,2018 the court passed an order wherein the individual bank accounts of the Directors of all the 40 bogus companies were to be frozen and there was also a restriction on alienation of the properties in the name of the directors. On 12 September,2018 an order was passed where the National Building Construction Corporation Ltd. had been appointed for the completion of the remaining construction.

On 26 September,2018 the court passed an order directing the group to submit all the documents including the financial statements of the group from 2008 to 2018 but the group failed to submit the documents. Due to the series of non-obeyance of the orders passed, the court passed an order on 9 October,2018 directing the police to seize all the documents of the 46 companies and hand them over to the Forensic Auditors. On 28 February,2019 the court directed the Delhi Police to take into custody the Directors namely Anil Kumar Sharma and Shiv Priya.

Summary of the Report of the Forensic Audit:

After the institution of Insolvency proceedings by Bank of Baroda and other banks and the petition filed by the home buyers the supreme court on 6 September,2018 appointed Mr. P.K Agarwal and Mr. Ravi Bhatia as the joint forensic auditors to audit into this matter. On 26 October,2018 the Forensic Auditors submitted an Interim Report highlighting the wrongful acts done by the Amrapali Group and the 46 of its bogus companies from 2011 to 2018.

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

The Group had bought gold bars worth 5.88 crores and booked them under festival expenses. The Banks and the Noida Authorities acted in collusion with the Amrapali Group in the diversion of funds. The Bankers turned a Blind Eye to the various transfers done by the groups. The banks ought to have monitored the huge amounts that were being transferred to different accounts by the Group and if they had been vigilant, they could stop the diversion of funds.

Several dummy companies were formed which were created in the name of peons and office boys. These companies were solely incorporated for the routing of funds of the group. Some companies were also made for building up assets of the group without any contribution from the promoters.

The directors received a huge amount of funds in the form of professional fee and salary. This was another unique way to divert the funds of the home buyers. The directors spent the funds on lavish weddings, foreign travels, expensive watches, luxury cars and foreign trips. The group companies have failed to file the annual returns and statements after 31 March,2015. The Registrar of Companies had already disqualified the directors of the group.

The companies had also not paid the TDS and Service Tax from 31 March,2015. There was not only diversion of funds but there was also siphoning of funds by way of booking undervalued transactions in respect of sale of flats and making purchases from bogus suppliers. There were also cases of double booking of flats.

There was even involvement on the part of JP Morgan in aiding the diversion. JP Morgan had prior knowledge that Amrapali has paid the money received from the home buyers to the other group companies. JP Morgan was getting a return of more than 20 percent on its investment of Rs 85 crores. JP Morgan later sold the shares of the group to the dummy companies owned by the office boy and nephew of the Amrapali auditor for 140 crores.²¹

It was a unique way of buying back of shares through dummy companies, fake bills and overvaluing of shares that are in violation of the Companies Act, FEMA and FDI norms.

²¹Vandana Ramani, 'Amrapali received Rs 85 crore from JP Morgan in violation of FEMA and FDI norms, says Supreme Court' (Moneycontrol.com, 24th July,2019)

<<https://www.moneycontrol.com/news/business/real-estate/amrapali-received-rs-85-crore-from-jp-morgan-in-violation-of-fema-and-fdi-norms-says-supreme-court-4241051.html>>accessed 27 November,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

The group also had sold flats at very low prices as compared to the other flats. The rates were as low as Rs 1,000 – 1,400 per square foot which is less than the cost of construction of the flats.

Even the Noida and the Greater Noida Authorities acted in collusion with the Amrapali Group. The group had only paid the 1st instalment to the authorities and after that the group failed to pay other instalments, but the authorities kept allotting the group, large parcels of land and giving them no objection certificates for the plots. The authorities were in default as they did not even paste a notice at the site for the information of the home buyers that the dues were not paid by the group so that they could be cautious.

Who has a better title over the property?

The Noida authorities claimed that they have a better title over the property as compared to the other parties because every mortgage permission granted by the Noida Authorities in favor of the group, there was a provision stating that the authorities have the first charge over the property. For the mortgage to be valid, the premium and the annual lease rent of the plot must be paid in full. In the eyes of law, no mortgage could have been created as the land was owned by the authorities and the lessees had a right to mortgage only if the conditions imposed by the lessors were fulfilled.

The banks claimed that the home buyers were unsecured creditors, and they had no right over the secured creditors. The agreement between the promoters and the home buyers is unregistered and no right has been created in the immovable property. In the event of insolvency proceedings, the home buyers would be placed below the banks in the hierarchy as they are the unsecured creditors.

The court was of the view that if the real estate business wants to survive in India, it has to be answerable to the public as it is survived by the money invested by the home buyers for purchasing their house.²² The home buyers have put their lives at stake by investing their life savings and hard-earned money in purchasing the flats. The home buyers would

²²Government is obliged to protect the interest of the homebuyers against builders: SC' (Economic Times, 10 May 2019)

<<https://economictimes.indiatimes.com/wealth/personal-finance-news/government-is-obliged-to-protect-the-interest-of-home-buyers-against-builders-sc/articleshow/69262998.cms?from=mdr>> accessed 28 November,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

not only lose their money with accrued interest but become financially crippled for all time to come. In the event of fraud committed by the promoter and the construction is not completed, the home buyers cannot be left in lurch and the prayer on behalf of the authorities and the banks if allowed would amount to unfair treatment of the home buyers.

The authorities and the banks have acted in collusion with the Amrapali group. The authorities have permitted diversion of funds even when they were aware of the default from the beginning. The permission to grant sub-lease of the plots, conditional permission to mortgage without payment of premium etc. was done in an illegal manner. The bankers also permitted diversion of the loan amount without objecting the large number of transfers. The home buyer's money had been fraudulently diverted thus once again a fraud cannot be committed against them by selling the flats.

Involvement of the Supreme Court:

The main reason for the involvement of the supreme court in this case apart from the number of petitions filed by the home buyers is because of the number of FEMA, FDI violations done by the group. The group apart from duping the home buyers engaged into buy back of shares through its dummy companies and defied the provisions of the companies act. In addition to it the group also colluded with the authorities and the banks by diverting and siphoning the funds. This case has been very important for restoring the trust of the general public in the real estate business and as an example for the promoters who have not completed the projects according to the deadlines.

Decision of the Court:

The Supreme Court decided the matter in favor of the home buyers and further ordered that the registration of Amrapali Group of companies under RERA should be cancelled. The lease deeds granted by the authorities in favor of the group shall be cancelled and the authorities shall not have any right to sell the flats of the home buyers for the realization of dues. The NBCC shall be appointed to complete the projects and hand over the possession to the buyers. The home buyers are directed to deposit the outstanding amount and the companies and the directors in whose hands the money of the home buyers is available shall deposit the same within one month. The court also directed the Noida and

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in

<https://www.ijalr.in/>

Greater Noida Authorities to issue completion certificate and registered conveyance deed be executed in favor of the home buyers.²³ This decision is one of its kind and it aims to protect the interest of the home buyers so that there is faith in the real estate industry. This is the first time, the home buyers who were at the bottom of the chain were placed above the secured creditors and the authorities in their claim over the flats.



²³Japnam Bindra, 'SC revokes licence of Amrapali Group in huge relief for stranded homebuyers'(Livemint.com, 24 July 2019)

<<https://www.livemint.com/news/india/sc-revokes-licence-of-amrapali-group-in-huge-relief-for-stranded-homebuyers-1563873658958.html> > accessed 1 December,2020

For general queries or to submit your research for publication, kindly email us at editorial@ijalr.in