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**PROVISIONS OF IBC IN INDIA WITH FOCUS ON REAL ESTATE
SECTOR: REVERSE CIRP**

- Aakash Aggarwal¹

ABSTRACT

As a developing nation, India's real estate sector is at its peak and has the most disputes. Various laws and amendments are constantly implemented to resolve these disputes efficiently. Homebuyers are stuck in long legal battles that drain their hard-earned money, making it difficult to own a house they spent their lifetime savings on. The Insolvency and Bankruptcy Code 2016, in its early stages, has developed a strong system to address the challenges related to the real estate industry. This includes recognizing homebuyers as financial creditors, speeding up the resolution of real estate investments, imposing stricter guidelines on developers regarding homebuyers, ensuring timely delivery, and maximizing the value of distressed assets to increase liquidity. Creditors may launch the Corporate Insolvency Resolution Process (CIRP) against a firm in order to revive it or obtain the highest potential value through liquidation.

The courts noted that the homebuyers were dissatisfied with the standard Corporate Insolvency and Resolution Process (CIRP). In order to protect the interests of the homebuyers, the courts adopted the idea of reverse CIRP in the Indian legal system. The real estate company's promoters were able to avoid being included in the CIRP by agreeing to act as lenders and providing financial support.

This research study examines the progressive development of the Code, particularly in its approach to addressing insolvency within the real estate industry. The readers will receive a fundamental framework about the provisions of insolvency laws pertaining to the rights and obligations of homebuyers and real estate developers, as well as the idea of Reverse Corporate Insolvency Resolution Process (CIRP). The report moreover delineates numerous

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obstacles encountered by the allottees, notwithstanding the adjustments implemented in the Code. This research has identified significant recommendations that can serve as effective measures to address these difficulties.

KEY WORDS: *Insolvency and Bankruptcy Code, Real Estate, CIRP and Reverse CIRP*

INTRODUCTION

The introduction of the Insolvency and Bankruptcy Code (IBC), 2016 aimed to enhance the creditor-debtor relationship. To alleviate the growing load of non-performing assets, many types of reforms were essential. Nevertheless, it was crucial to promptly implement alterations to the Insolvency and Bankruptcy Laws. Therefore, in 2014, “the Ministry of Finance established the Bankruptcy Law Reforms Committee (BLRC), which is chaired by Dr. T. K Viswanathan, to fight for comprehensive bankruptcy reform. The report of this committee was divided into two parts: the first dealt with including logic and design/recommendations, and the second was a comprehensive draught Insolvency and Bankruptcy Bill covering all companies. The paper proposed significant modifications to the current structure. The Insolvency and Bankruptcy Code 2016 is the result of these recommendations.”² Considering the proposal to introduce an Indian Bankruptcy Code that would replace the current legislation and apply to both non-financial corporations and people. The initial version of the Insolvency and Bankruptcy Code was presented in 2015. It comes into effect in December 2016.

The IBC 2016 has established a comprehensive framework for resolving insolvencies in the country, ensuring that all parties involved maintain a careful equilibrium to safeguard the economic worth of the process within a specified timeframe.

The Code has introduced a comprehensive structure to assist ailing enterprises in either liquidating their business or devising a strategy for recovery, as well as enabling investors to withdraw their investments. Significantly, the Code has also granted authority to operational

² “Anjali Krishna- A historical evaluation of Insolvency and Bankruptcy Laws in India, Published on 8th Feb 2023, <https://lawbhoomi.com/a-historical-evaluation-of-insolvency-and-bankruptcy-laws-in-india/>, (Last visited 25th Jan 2024)

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creditors (such as workers and suppliers) to commence the insolvency resolution procedure in the event of default.

Another significant aspect of the Code is its lack of differentiation between the rights of international and domestic creditors or between various classifications of financial organizations. The Code has aimed to achieve a fair distribution of interests among all stakeholders, including modifying the sequence in which government debts are paid. The legislators aim to enact a law that aligns with worldwide norms and is based on the principle that insolvency resolution should be driven by commercial and professional considerations, rather than being dependent on court intervention. Therefore, the primary function of adjudicating authority is to ensure the proper legal procedures are followed, rather than making decisions based on the merits of the insolvency settlement.

The Corporate Insolvency Resolution Process ('CIRP') is a recovery mechanism for the creditors of a corporate debtor. A corporate debtor means a company or Limited Liability Partnership ('LLP') that owes a debt to its creditors. It is a tool for recovering debts from corporate entities. Even if the default is intentional, meaning that the corporate debtor has the ability to pay but deliberately chooses not to, the Corporate Insolvency Resolution Process (CIRP) can still be commenced. Consequently, the primary focus of the IBC is the failure to fulfill a financial obligation.

If a corporation becomes insolvent, the initiation of Corporate Insolvency Resolution Process (CIRP) can be triggered against the corporation. The Code has established a predetermined value for each category, but the government must officially proclaim the final amount that will serve as the threshold for initiating the procedure, taking into consideration the volatility of the economy. It is crucial to emphasize that the specified amount represents a range, rather than a fixed minimum or maximum value of debt default.

It is essential to comprehend that in the event of any breach by a corporate debtor (an individual or entity that has borrowed money from a creditor or bank), the CIRP (Corporate Insolvency Resolution Process) can be commenced by submitting an application to the Adjudicating Authority in the prescribed manner. It is important to mention that CIRP can also be begun by a financial creditor, and there are no restrictions on doing so. Consequently, CIRP can be triggered by either:

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- A financial creditor (FC) is defined under Section 7 of the law.
- An operational creditor (OC) is defined under Section 9 of the law.
- A corporate debtor's corporate applicant as defined by Section 10 of the Code.

The CIRP procedure is a significant measure used to facilitate commercial operations in India. The IBC has included some of the most effective global methods of managing and resolving assets. It offers a respectable means for honest business failures to exit and allows for the release of credit tied up in distressed assets to be allocated more effectively. The implementation of this market-oriented and transparent resolution mechanism enhances trust in the financial system and entices a multitude of new investors to allocate their funds towards Indian enterprises. The IBC has successfully transformed the dynamics of the debtor-creditor relationship, marking a notable accomplishment. Debtors are proactively addressing stress in order to prevent being forced into insolvency.

EVOLUTION OF IBC IN INDIA

The law of insolvency in India is thought to have originated from English law. Initially, the British were involved in trade in “India's three Presidency towns of Bombay, Calcutta, and Madras”. It was in these areas that the understanding of the demand for a legal framework to resolve insolvency emerged. “Sections 23 and 24 of the Government of India Act, which was passed in 1800, the Indian Insolvency Act, which was passed in 1848, and the Presidency-towns Insolvency Act, which was passed in 1909, are where the earliest insolvency rules are defined”.

The Presidency-towns Insolvency Act, which was passed in 1909, is still in effect in Bombay, Calcutta, and Madras. This act regulates the insolvency processes of individuals, partnerships, and groups of individuals. In the year 1828, a statute was enacted that established the first insolvency court in the towns that were part of the Presidency.

In essence, these courts were established to provide assistance to persons who are unable to manage their financial obligations. They performed the duties of independent tribunals as well as archival tribunals. Those individuals who are dissatisfied with the decision that was handed down by the aforementioned court have the option of appealing the decision to the Supreme Court. If the Supreme Court deems a request to be legitimate and substantial, it has

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the authority to assess and transmit the request without further consideration. It is recommended that such petitions or demands be postponed through the courts in order to better handle the financial challenges that the borrower or bankrupt is experiencing.

The Supreme Court delegated the responsibility of managing the insolvency court to its personnel. One of these people was characterized as an "ordinary appointee."

Before 1907, there was no legal framework addressing insolvency in regions beyond the presidency territories. Consequently, the Provincial Insolvency Act was enacted in 1907, and it was later substituted by the Provincial Insolvency Act of 1920.

These two pieces of legislation were in force until recently, when they were annulled by the IB Code. "The Concurrent List of the Indian Constitution issued in 1950 provided definitions for bankruptcy and insolvency, whereas the Union List covered matters related to the incorporation, regulation, and winding up of corporations". The Parliament enacted the Companies Act in 1956, conferring it with this jurisdiction.

Any and all parts of a company's operations, including the liquidation of the corporation, were covered by this Act. When it came to insolvency and bankruptcy, the Act did not establish any definitions; rather, it concentrated on an individual's "inability to pay debts." This Act, which was passed during the early stages of India's efforts to industrialize its economy, gave higher priority to the payment of workers and the government than it did to the payment of secured creditors.

The Companies Act of 1956 had certain measures that may be utilized by the firm or its creditors for the purpose of restructuring, however these provisions were general in nature and not specifically tailored to cases of insolvency or bankruptcy. Unfortunately, these could not be disclosed due to legal concerns.

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This Act encompassed all aspects of a company's business, including its liquidation. The Act did not provide definitions for insolvency and bankruptcy, but instead focused on an individual's "inability to pay debts." This Act, enacted during the initial phases of India's industrialization endeavor, prioritized the payment of workers and the government over the payment of secured creditors.

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As a consequence of this, it was anticipated that these creditors would have direct influence over the management of these businesses. As a consequence of this, there exists a lack of equitable distribution of economic capital. The purpose of the Sick Industrial enterprises Act (SICA), which was enacted in 1985, was to identify instances of "sickness" in industrial enterprises and to revitalize those business entities. For the purpose of providing assistance for the Act, the Board of Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction were also established. Being the first statute that was primarily concerned with corporate reorganization, the SICA was the first statute of its kind.³

It was a limitation of the SICA that it could only be applied to sick industrial firms; as a result, it did not apply to commercial enterprises that were involved in trading, service, or other commercial activities. On the other hand, it was not applicable to non-industrial enterprises or small or ancillary businesses, which was one of the constraints that it had. The SICA was intended to be rendered obsolete by the Companies Act Amendment of 2003. On

³ “Anjali Krishna- A Historical evaluation of Insolvency and Bankruptcy Laws in India, Published on 8th Feb 2023, <https://lawbhoomi.com/a-historical-evaluation-of-insolvency-and-bankruptcy-laws-in-india/>,” Last visited 28th Jan 2024

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the other hand, the notification of this Amendment was hampered by the difficult legal circumstances.

The Reserve Bank of India (RBI) established the Advisory Group on Bankruptcy Laws in the year 2001. At that time, the group presented a number of suggestions for alterations to the bankruptcy rules. An idea that was particularly notable was the consolidation of all of the many bankruptcy court laws into a single code. Despite this, there was no action done.

When the Ministry of Finance established the Bankruptcy Law Reforms Committee (BLRC) in 2014, Dr. T. K. Viswanathan⁹ served as the Chairman of the committee. This was a significant step forward in the fight for a more comprehensive bankruptcy legislation. The order of the BLRC was to specify an Indian Bankruptcy Code that was expected to be applicable to all non-financial related corporations as well as individuals, and it was supposed to replace the system that is currently in place. The aforementioned committee presented the administration with its report as well as a fundamental proposition about the Insolvency and Bankruptcy Code (IBC) in the month of November in the year 2015.⁴

CORPORATE INSOLVENCY RESOLUTION PROCESS

Insolvency is declared when a firm is unable to effectively repay its debts to creditors. There exist two distinct methodologies for assessing business insolvency⁵:

- “The cash-flow test is the company currently or in the future, be unable to pay its debts when they fall due for payment.
- The balance sheet test is the value of the company’s assets less than the number of its liabilities, taking into account future liabilities”.

The business Insolvency Resolution Process (CIRP) is a legally mandated method outlined in the Insolvency and Bankruptcy Code, 2016 (IBC) in India. Its purpose is to deal with the insolvency of business organizations. The Corporate Insolvency Resolution Process is regulated by Sections 7 to 32 of the Insolvency and Bankruptcy Code, 2016. Section 7 of the

⁴ “Hritika Sharma- Evolution of Insolvency and Bankruptcy Laws in India, <file:///D:/Your%20Data%20Don't%20Delete/Downloads/EVOLUTION-OF-INSOLVENCY-AND-BANKRUPTCY.pdf>,” Last visited 27th Jan 2024.

⁵ “Corporate Insolvency resolution process, <https://www.indiafilings.com/learn/corporate-insolvency-resolution-process/>,” Last visited 27th Jan 2024.

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Insolvency and Bankruptcy Code, 2016 outlines the process by which a financial creditor can begin the Corporate Insolvency Resolution Process. On the other hand, Section 9 outlines the process by which an operational creditor can initiate the same process.

The procedure and different phases of the Corporate Insolvency Resolution Process are specified in Sections 12 to 32 of the Insolvency and Bankruptcy Code, 2016. Insolvency resolution is a time-limited procedure designed to promptly resolve financial distress by either reviving the company or liquidating its assets.

The procedure for resolving the financial insolvency of a corporation is referred to as the Corporate Insolvency Resolution Process (CIRP), and it is detailed in the Code. The occurrence of a 'DEFAULT' by the corporate debtor is what sets off the steps of the Corporate Insolvency Resolution Process (CIRP), which is the process that initiates the process.

According to the code, the procedure for insolvency of corporate debtors is applicable in situations where the minimum amount of default is INR 1 crore (INR 10 million). The government, in a notification dated March 24, 2020, raised the minimum amount of default for commencing CIRP from INR 1 lakh to INR 1 crore. Previously, the minimum amount of default was INR 1 lakh.⁶

When insolvency is initiated according to the code, there are two possible outcomes: the revival of the corporate debtor or liquidation. Efforts are undertaken to address insolvency by devising either a restructuring strategy or a new ownership arrangement. In the event that the attempts to resolve the situation are unsuccessful, the company's assets will be liquidated.

The main objective of the code is to restore and preserve the CD (i.e., to resolve any issues). Liquidation only occurs after the failure of the CIRP.

INSOLVENCY IN REAL ESTATE SECTOR

The real estate sector is a highly renowned industry that encompasses housing, retail, hospitality, and commercial properties on a global scale. The exponential expansion of the

⁶ "CIRP, <https://incorpadvisory.in/blog/corporate-insolvency-resolution-process-under-ibc/>," Last visited 28th Jan 2024.

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real estate industry can be attributed to the increasing demand for larger office spaces in both urban and semi-urban areas, driven by the growth of the corporate sector.

It is anticipated that the real estate sector in India would reach a market size of one trillion dollars by the year 2030, which is an increase from the current market size of two hundred billion dollars in 2021. Furthermore, it is anticipated that the real estate sector will contribute thirteen percent to the gross domestic product of the country by the year 2025. In 2022, it is anticipated that Indian companies would raise more than Rs. 3.5 lakh crore, which is equivalent to the amount of 48 billion dollars, through infrastructure and real estate investment trusts. This is in comparison to the amount of funds that have been raised up to this point, which is 29 billion dollars.⁷

The real estate industry in India plays a crucial role in the country's economic framework and has become a substantial contributor to India's economic well-being.

The real estate industry in India is governed by the Real Estate Regulatory Authority (RERA) and is also subject to its own legislation called the Real Estate (Regulations and Development) Act, 2016. Prior to the introduction of RERA, numerous discrepancies occurred within the Real Estate industry, affecting both homebuyers and builders. Prior to the implementation of this Act, the homebuyers were subjected to significant exploitation as a result of these irregularities. The primary challenges encountered by home buyers included project completion delays, contracts favoring builders or developers, absence of specific project completion dates, inadequate disclosure of sanctioned plans, and various other issues that significantly impacted home buyers in the country.

Prior to the implementation of this Act, the Real estate sector suffered from a lack of total openness and accountability. Therefore, in order to safeguard the interests and rights of property buyers and promote transparency in the real estate industry, the Government of India implemented the Real Estate (Regulations and Development) Act, 2016. Prior to the implementation of RERA, home buyers who encountered difficulties or issues with their real estate dealings had to resort to the Consumer Court to lodge complaints against builders or developers. This process involved a lengthy wait for justice to be served in cases of fraud or misconduct. However, with the advent of RERA, home buyers now have the option to

⁷ “Anchal Jindal- Challenges and way forward for real estate insolvencies in india, Published on 10th Nov 2023, <https://insolvencytracker.in/2023/11/10/challenges-and-way-forward-for-real-estate-insolvencies-in-india/>”

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approach the RERA tribunal or authority for a swift resolution to their grievances. The Rules and Regulations of RERA are stringent and more rigorous to prevent any opportunity for builders or developers to exploit house buyers.

In the ever-changing real estate business, the implementation of the Insolvency and Bankruptcy Code (IBC) in 2016 has had a significant impact on the way real estate insolvency is dealt with in the country. The Insolvency and Bankruptcy Code (IBC) has been highly praised for its effectiveness in resolving insolvency and bankruptcy cases, especially in the field of real estate investments. It is specifically designed to simplify and speed up the resolution process, successfully tackling long-standing issues in the sector. The Insolvency and Bankruptcy Code (IBC) plays a crucial role in addressing situations where investors are unable to fulfil their financial responsibilities in real estate projects. It provides a well-organized and transparent framework for resolving insolvency and bankruptcy matters. By serving as a safeguard, it ensures the protection of the interests of both developers and homebuyers, promoting fairness and enhancing the overall strength of the real estate ecosystem in India.

The IBC has to be revised in order to better handle the intricacies of the real estate sector, according to the recommendation of a committee that was established under the chairmanship of Sh. Amitabh Kant to address concerns concerning Legacy Stalled Real Estate Projects. In the Insolvency and Bankruptcy Code, 2016, the following are some of the proposals that have been made regarding the modifications that should be made:

- I. It is necessary for all projects to be pre-registered with RERA. i. CIRP on a project-by-project basis. This can be accepted under the IBC because RERA registration is done on a project-by-project basis.
- II. Transfer of ownership and possession to allottees: The Committee suggests that the IBC should implement a provision that would allow Resolution Professionals (RPs) to transfer ownership and possession of a plot, apartment, or building to the allottees during the resolution process. Additionally, allottees may be provided with the opportunity to acquire such units on a "as is where is" basis or on the condition that they pay the balance that is necessary to finish the unit while the procedure is in progress. For the purposes of the IBC process, houses that are currently in the possession of allottees should not be included.

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III. Registration and transfer of ownership in cases where possession has already been transferred: In cases where possession of a plot, apartment, or building has already been transferred to the allottees, these transactions are required to be formalized through registration during a CIRP or a project-specific resolution process in accordance with the IBC.

INTERPLAY OF IBC AND REAL ESTATE SECTOR

One of the most important engines that contributes to the significant changes that are brought about in the nation's economy and infrastructure is the real estate business. The method that has been recognised as the most beneficial for investors in India is this one. Over the course of the last few years, the real estate market has become mired in a quagmire of deliveries that are both incomplete and delayed. Because of the delays in the completion of projects and plans, investors were discouraged from investing in real estate. This was owing to the fact that their investments were being spread out.

The real estate business was completely unmanaged and had fallen apart for no apparent reason. Because there was a lack of regulatory tools, the real estate market had become extremely delicate.

According to the Insolvency and Bankruptcy Code, 2016 ('IBC'), Homebuyers were in a disadvantaged position in insolvency proceedings since they were not classified as 'Financial' or 'Operational' Creditors. Homebuyers were prohibited from initiating the Corporate Insolvency Resolution Process (CIRP) against a Builder or Real Estate Developer who defaulted on their obligations. Additionally, they were not permitted to participate in the Committee of Creditors (COC). They were not provided with a guarantee of receiving the liquidation value as stated in the Resolution Plan. It was in 2016 when the IBC was first established, and ever since then, it has undergone numerous amendments.

Nevertheless, in the case of *Chitra Sharma and Ors. Vs. Union of India and Ors.*⁸, individuals who have purchased homes or been allocated homes approached the highest court in India to safeguard their financial interests in a legal process involving Jaypee Infratech Ltd., a special purpose vehicle established by the parent business Jaiprakash Associates Ltd. The aforementioned writ petitions were filed before the Supreme Court in accordance with its

⁸ AIRONLINE 2018 SC 1215

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authority under Article 32, with the aim of safeguarding the rights of Home Buyers who were abandoned and had no legal standing in the Corporate Insolvency Resolution Process (CIRP). The process of liquidation would result in the home buyers being confronted with an unpredictable and indeterminate future. The actions in question were initiated to seek many remedies, including a request for the Union of India to take measures to safeguard the interests of home buyers in the broader public interest. In the aforementioned case, the Supreme Court, by its order dated 11th September, 2017, instructed the Insolvency Resolution Professional (IRP) to take necessary measures to safeguard the rights of home buyers.

The Supreme Court determined that at that particular point, it is important to highlight that the Committee of Creditors (COC), established under section 21 of the Insolvency and Bankruptcy Code (IBC), did not have a member representing the home buyers. The Homebuyers were not considered financial creditors under the IBC. The Court developed a mechanism to create a practical arrangement within the existing system, ensuring that the concerns of property buyers would not be disregarded. The Supreme Court evaluated that the Insolvency and Bankruptcy Code (IBC), in its original form, lacked sufficient acknowledgment of the concerns of home buyers in real estate ventures. Home buyers are essential stakeholders. The corporate insolvency resolution procedure directly affects the rights and interests of corporations. However, the initially designed IBC failed to provide protection for them.

According to the Insolvency and Bankruptcy (Second Amendment) Act, 2018, the definition of financial creditors was expanded to include "real estate allottees." As a result of this move, real estate companies were experiencing delays in the execution of their projects, which had become literally "unaffordable." As a result, they filed a challenge against the amendment in question, which ultimately resulted in the Supreme Court upholding its validity.

The Insolvency and Bankruptcy (Ordinance) 2018 was implemented on June 6, 2018, granting homebuyers the status of Financial Creditor. In accordance with the Ordinance, the Hon'ble Court exercised its power under Article 142 of the Constitution to decide a batch of Writ Petitions. The court issued an order on August 9, 2018, providing various directions to the parties involved. These directions included initiating the Corporate Insolvency Resolution Process (CIRP) anew from the date of the order, reconstituting the Committee of Creditors

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(COC), and allowing homebuyers to be included in the COC, taking into account the provisions of the Ordinance.⁹

INITIATION OF INSOLVENCY RESOLUTION PROCESS IN REAL ESTATE

A significant number of writ petitions have been filed before the Apex Court in the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*¹⁰. These petitions challenge the constitutional validity of amendments on the grounds of it being violative of Article 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India, including the amendments that consider allottees of Real Estate Projects as "Financial Creditors." This classification allows them to initiate proceedings under Section 7 of the Insolvency and Bankruptcy Code (IBC) against the Real Estate Developer. Furthermore, as financial creditors, they have the right to be represented in the Committee of Creditors (COC) by duly authorised representatives. Nevertheless, in a significant boost for the rights of Homebuyers, the Supreme Court has confirmed the validity of the Amendment Act, 2018 and determined that the funds invested by Homebuyers, which are used by developers and their promoters, are essentially considered as loans, as defined by the Insolvency and Bankruptcy Code (IBC).

Furthermore, it was contended that allowing home buyers to commence the corporate insolvency process under the IBC would lead to redundant remedies, given they already have recourse to other acts such as the Consumer Protection Act, 1986 and the RERA.

Upon examining the submissions presented by both parties, the Supreme Court ruled in the Pioneer Urban case that the funds collected by developers from homebuyers are intended to generate profit. Consequently, it was determined that this practice has the commercial consequence of borrowing and is therefore encompassed within the definition of 'financial debt' as outlined in Section 5(8)(f) of the IBC.

In conjunction with the Supreme Court's ruling in the Pioneer Urban case, the 2018 Amendment Act confers upon a solitary homebuyer or allottee the authority to commence the corporate insolvency proceedings against a builder who fails to meet its obligations. However, the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 (commonly referred to as the "2019 IBC Ordinance"), which has subsequently been superseded by the

⁹ "Sushil Kumar Antal- Homebuyers under IBC, Published on 5th Feb 2023, <https://taxguru.in/corporate-law/home-buyers-ibc.html>," Last visited 1st Feb 2024.

¹⁰AIR 2019 SC 4055

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2020 Amendment Act, sought to establish a minimum requirement for the number of home buyers to initiate the insolvency process. In order to initiate the resolution process, it was necessary for a minimum of one hundred allottees or ten percent of the total allottees involved in the project to collectively submit the application, whichever amount was smaller. This action aligned with the provisions outlined in the 2019 IBC Ordinance.¹¹

In Manish Kumar Vs Union of India (SC)¹² case pertained to a petition submitted by a corporation that had been classified as a non-performing asset (NPA) by a bank. The bank, acting as a financial creditor, commenced insolvency proceedings against the company pursuant to section 7 of the Insolvency and Bankruptcy Code (IBC). The company disputed the bank's authority to commence legal action on the basis that the full debt had not been settled. The petitioners have submitted a writ petition pursuant to Article 32 of the Constitution of India, 1950, contesting the constitutional legitimacy of section 3 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019. The focus of their challenge is on section 3 of the Ordinance, which adds new requirements to section 7(1) of the IBC and sets extra restrictions for real estate allottees to seek recourse from the National Company Law Tribunal (NCLT). The petitioners contend that the modifications made to sections 11 and 32A contravene Articles 14 and 21 of the Constitution of India.

The corporation said that insolvency proceedings cannot be initiated by a financial creditor unless the total amount has been fully repaid. The corporation depended on the language of section 7, which stipulates that a financial creditor might commence legal action if there has been a default in the repayment of a debt over one lakh rupees. The corporation contended that the inclusion of the term "debt" suggests that the complete amount of debt must be reimbursed prior to the commencement of insolvency procedures. They stated that the provisions of the statute in question are deemed obviously arbitrary and do not adhere to Article 14 of the Constitution of India.

In its ruling, the Supreme Court determined that a financial creditor has the authority to commence bankruptcy proceedings against a delinquent corporation under section 7 of the IBC, even if the full amount has not been settled. The court determined that section 7

¹¹ "Rights of Home Buyers in the ever changing Indian insolvency regime, Published on 21st Oct 2020, <https://www.azbpartners.com/bank/rights-of-homebuyers-in-the-ever-changing-indian-insolvency-regime/>,"

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¹² Writ Petition(C) No. 26 of 2020

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unambiguously states that the trigger for commencing bankruptcy proceedings is a default in repayment of a debt exceeding one lakh rupees, rather than the whole amount of the obligation.

RIGHTS OF HOMEBUYERS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Initially, the homebuyers were not mentioned in the IBC, 2016. However, in the case of *Nikhil Mehta and Sons vs. AMR Infrastructure*¹³, the NCLAT held that homebuyers qualified as “financial creditors” under [Section 5\(7\)](#) of the IBC. Hence, the homebuyers are entitled to invoke CIRP against a defaulting corporate debtor.¹⁴

An allottee in a real estate project, which may include a house buyer who has established themselves as a Financial Creditor in accordance with the Code, is entitled to the following rights in a CIRP situation:

1. When it comes to the role of Financial Creditor, he will be on par with banks and other financial institutions.
2. A right of representation in the Committee of Creditors (CoC) shall be granted to him, either on his own or through an Authorised Representative in a class of creditors.
3. If a property buyer were to become a Financial Creditor, they would be provided with priority above both Government Creditors and Operational Creditors.
4. In the event that a default occurs, he is also able to commence a CIRP case against defaulting promoters by submitting an application to the NCLT in accordance with Section 7 of the Code. This is done in his capacity as a Financial Creditor.

No amendments have been made to the term "default" in the Code. In the event that home buyers initiate bankruptcy proceedings, default may be defined as either the non-delivery of the home or the failure to repay the payment to the buyer along with interest.

¹³*Company Appeal (AT) (Insolvency) No. 7 of 2017 (July 21, 2017)*

¹⁴ “Akhil Gupta- Evolution of the reverse CIRP mechanism under the Insolvency and Bankruptcy Code, 2016, Published on December 8th 2022, <https://blog.iplayers.in/evolution-of-the-reverse-cirp-mechanism-under-the-insolvency-and-bankruptcy-code-2016/>,” Last visited 9st Feb 2024.

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As per Section 18 of the RERA, if the promoter fails to complete or is unable to give possession of an apartment, plot or building¹⁵ –

- a. In compliance with the stipulations outlined in the sales agreement or, where applicable, duly executed by the stipulated date; or
- b. If the developer's business is stopped due to suspension or revocation of registration under the Act, or for any other reason, he will be required to return the amount received to the allottees if they decide to withdraw from the project. This return will include interest at a specified rate and compensation as outlined in the Act. If an allottee does not plan to withdraw from the project, the promoter will pay them interest for each month of delay until they take possession, at a specified rate.

According to Section 19(4) of the RERA¹⁶, if a promoter fails to give possession of the flat, plot, or building as agreed upon in the sales agreement, the allottee has the right to claim a refund of the amount paid, along with interest at a prescribed rate, and compensation as provided by the Act. This claim can also be made if the promoter discontinues their business as a developer due to suspension or revocation of their registration under the Act or its associated rules and regulations.

Homebuyers' submission of claims

The statement indicates that both the courts and the legislature have actively acknowledged and safeguarded the rights of Homebuyers. Various concerns frequently emerge concerning the rights of individuals, and one specific issue pertains to the submission of claims by Homebuyers. Upon admission of a Section 7 application, the adjudicating body is required to issue an order under Section 14 of the IBC, which declares a moratorium and appoints an interim resolution professional ("IRP"). The IRP is obligated to issue a public statement that must specify the deadline for creditors to submit their claims. According to Regulation 6 and Regulation 12 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), creditors have 14 days from the appointment of the IRP to submit their claims. If they fail to do so, they can

¹⁵ "Insolvency and Bankruptcy Code, 2016 Implications for real estate Sector, <https://www.resurgentindia.com/pdf/1339564803Insolvency%20and%20Bankruptcy%20Code%20Real%20Estate%20Sector.pdf>," Last visited 1st Feb 2024.

¹⁶ Real Estate (Regulation and Development) Act, 2016, Section 19(4)

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still submit their claims within 90 days from the start of insolvency. The National Company Law Tribunal (NCLT) has explained in several rulings that rejecting a claim based on a delay beyond the 90-day period is not valid, as the provision in question is just advisory and not obligatory.

While this appears to be settled law, “on June 1, 2022, the Principal Bench of the National Company Law Appellate Tribunal (“NCLAT”), New Delhi, comprising of Justice Ashok Bhushan, Ms. Shreesha Merla, Mr. Naresh Salencha granted further relief to Homebuyers in relation to filing of their claims. In the said case titled *Puneet Kaur v. K V Developers Private Limited*¹⁷, the NCLAT held that even claims of those Homebuyers ought to be included in the information memorandum who did not file their claims, if the same were reflected in the record of the corporate debtor. The NCLAT held that non-consideration of such claims would lead to inequitable and unfair resolution.”¹⁸

The Appellate Tribunal also acknowledged the challenges encountered by Homebuyers when submitting their claims. Typically, “the public announcement inviting claims is made in the location where the corporate debtor’s registered office and corporate office are situated. However, there is a high probability that the numerous Homebuyers, who are usually in the hundreds, are unaware of the Corporate Insolvency Resolution Process (CIRP) and fail to submit their claims within the specified timeframe. The NCLAT noted that the failure to submit claims within the specified timeframe is a prevalent occurrence in the insolvency proceedings of nearly all real estate developments. The Appellate Tribunal determined that once the allocation letters have been provided to the Homebuyers and payments have been received, the real estate business is obligated to deliver possession of the properties together with any associated obligations”. Consequently, the Homebuyers possess full entitlement to assert their claim.

The NCLAT has acknowledged the challenges encountered by Homebuyers, who, as stated in the NCLAT’s ruling on June 1, 2022, typically belong to the “middle class of society”. The majority of these individuals have obtained loans from banks and other financial organisations, resulting in them being burdened with liability. The NCLAT’s actions

¹⁷ Company Appeal (AT) (Insolvency) No. 390 of 2022.

¹⁸ “Angad Verma, Toyesh Tiwari, Mahima Singh- Rights of homebuyers under the IBC, Published on 16th June 2022, <https://www.livelaw.in/law-firms/law-firm-articles-/homebuyers-ibc-dua-associates-201728>,” last visited 4th Feb 2024.

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reinforced the courts' inclination to consider Homebuyers from a fair and just perspective, emphasising the importance of safeguarding them from the intricate formalities and processes outlined in the IBC.

CONCEPT OF REVERSE CIRP MECHANISM

The National Company Law Appellate Tribunal has developed a "Reverse Corporate Insolvency Resolution Process (reverse CIRP)" that is not derived from the Code. This concept was devised to safeguard the interests of the allottees of real estate projects, whose objective of obtaining possession of the unit clashed with the objectives of other financial creditors who prioritized the recovery of their funds. In addition, despite the fact that real estate allottees are now considered financial creditors, the tribunal determined that they lack the necessary commercial acumen to comprehend the feasibility of a resolution plan. In light of the distinctive circumstances faced by purchasers, the National Company Law Appellate Tribunal (NCLAT) introduced this novel approach to support the real estate industry and enhance economic growth. This approach enables a specific project to continue operating regardless of its default status.

The insolvency courts have acknowledged the challenges in carrying out a typical Corporate Insolvency Resolution Process (CIRP) for real estate companies. Since the existing Code does not address the specific issues of this sector separately, the courts have endeavoured to modify and tailor CIRPs to suit the characteristics of the real estate industry. This has been done by introducing concepts like 'reverse CIRP' and 'project-wise CIRP'.

- Project-wise Corporate Insolvency Resolution Process (CIRP) is applicable only to projects where the CIRP has been initiated by the allottees, financial creditors, or operational creditors. It does not affect other projects that have different land owners, financial institutions, or allottees.
- Reverse Corporate Insolvency and Resolution Process (CIRP) is a promoter-led procedure where the promoter collaborates with all stakeholders to settle the unpaid debts and guarantee the completion of the project(s).

The objective of both these forms of Corporate Insolvency Resolution Process (CIRP) is to maximize value for all stakeholders and ensure timely completion of projects, resulting in the prompt delivery of flats to the allottees.

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SUGGESTIONS

The following are the recommended strategies to address the aforementioned difficulties and achieve greater progress in the real estate industry:

Bar on Multiplicity: The current situation allows disgruntled purchasers to concurrently approach RERA, NCLT, and consumer forums to seek remedy against the same real estate developer for the same default, resulting in several proceedings. This could potentially be disadvantageous for the homebuyer, as it has the potential to result in issues, delays, and conflicts between the several parties involved. Enabling homebuyers to choose either forum to enforce their rights in case of the same default will save multiple proceedings and reduce the workload on the adjudicating forums, thereby promoting effective and efficient resolution.

Reverse CIRP is a mutually beneficial solution for both homebuyers and project developers. It ensures that the liquidation of a project does not impact the rights and interests of homebuyers, which are often compromised in many circumstances. Additionally, it does not disrupt the progress of other projects undertaken by developers. It will enable resolution without the need for third-party resolution plan approval. The objective of Reverse CIRP is twofold: firstly, to protect promoters from insolvency, and secondly, to ensure the transfer of possession to the allottees in the project. As Reverse CIRP is now in the experimental phase and addressing multiple challenges faced by homeowners, its true effectiveness will only be unveiled as more real estate insolvencies are resolved by Reverse CIRP over time.

Project-wise Insolvency: The Project Wise Insolvency refers to a situation where a real estate developer carries out multiple construction projects through his real estate company. Nevertheless, defaulting on one project should not be interpreted as the entire company being in default. To protect the interests of real estate investors and preserve assets, it is important that any delays in completing or delivering flats for one project do not impact the progress of other projects undertaken by the real estate developer. To achieve effective resolution, it is recommended to implement project-specific solutions instead of undertaking the laborious and time-consuming task of reorganizing the entire institution as a whole.

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The status of homebuyers as secured or unsecured creditors is not clarified under the Insolvency and Bankruptcy Code (IBC) and the corresponding rules and regulations. This is of utmost importance as it establishes the hierarchy of payments during the process of liquidation. Without any explicit legal explanation, the parties will need to rely on the contract with the real estate developer to ascertain whether the homebuyer is a creditor with collateral or without collateral. Additional regulations or modifications to the IBC are required to offer the necessary clarification in this matter.

Single window Clearance: Currently, real estate developers are required to fulfill numerous license and certification procedures before delivering flats to homebuyers. Implementing a streamlined process for obtaining construction-related clearances will accelerate the construction process and prevent delays and uncertainties. Consolidating and systemizing the real estate sector of India would be facilitated by streamlining permissions based on central and state legislation, as well as multiple departments and ministries.

Robust Insolvency Framework: An effective and strong pre-insolvency framework is necessary to ensure that pre-insolvency procedures are efficient and that the resolution of a firm in financial distress begins at an early stage. The pre-pack procedure can be effectively utilized to address the difficulties encountered in the official insolvency process and to protect the interests of homebuyers on a broader scale and at an early stage.

Alternative Dispute Mechanism: Mediation is often regarded as an effective method for settling conflicts between builders and buyers in the context of Alternate Dispute Resolution. However, it is important to note that there may be a power imbalance if the petitioner is the allottee rather than the lender. However, mediation is widely regarded as an efficient method of resolving disputes because it is both time-efficient and cost-effective.

CONCLUSION

There is no doubt that the theoretical understanding of the process of reverse company insolvency appears to be highly promising. Furthermore, the possibility to seek reimbursement of the whole sum that was not made available to the winning allottees is an essential component of the reverse CIRP. This is a crucial part of the opportunity. However, after the allotment has been offered, the allottee has the option of either requesting that the Interim Resolution Professional/Promoter, who is in charge, locate a third party who is

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willing to purchase the flat or apartment in question and recover the money, or the allottee may find a buyer in the market and ask the resolution professional or the successful resolution applicant to acknowledge the transfer in the records of the Corporate Debtor. The claim of the allottee on the claim of other financial creditors, such as "financial institutions / banks," is also specified in this document. In order to give preference to the allottees for whom the project was approved, these financial creditors will not be given the asset (flat or apartment) in question. In order to fulfill the claims of the allottees, it is necessary to have possession transferred to them.

The real estate sector in India has been significantly impacted by the Insolvency and Bankruptcy Code (IBC), which was passed in the year 2000. Accountability and openness in the industry have been strengthened as a result of the adoption of IBC, which has resulted in increased trust and confidence among investors and homebuyers. One significant effect of the Insolvency and Bankruptcy Code (IBC) on the real estate industry is the recognition of homebuyers as financial creditors. This has empowered homebuyers to participate in the settlement process of bankrupt enterprises and safeguarded their interests. Homebuyers now have the opportunity to be involved in the decision-making process and contribute to the resolution plan, a privilege that was previously unavailable to them. This has fostered trust and confidence among homebuyers, crucial for the development of the real estate industry. The IBC has also resulted in heightened transparency in the real estate industry. Developers must now provide frequent updates on the project's advancement, and homeowners have access to previously unavailable information. This has fostered trust and confidence among homebuyers and investors, enhancing the reputation of the real estate market. The implementation of IBC has also instilled more orderliness in the real estate industry. Developers must ensure that the project is completed within the specified timeline and that they deliver on their promises. This has fostered trust and confidence among homebuyers and investors, while also ensuring developers are held responsible for their activities. The real estate sector has been significantly affected by the rise in liquidation of troubled real estate assets under the Insolvency and Bankruptcy Code (IBC). The resolution procedure under the Insolvency and Bankruptcy Code (IBC) has facilitated the realization of value from

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troubled assets, resulting in enhanced liquidity throughout the industry. This has facilitated the expansion of the sector and has prompted increased investments in real estate.

Taking everything into consideration, the implementation of the IBC has been a big step towards addressing the issues that the real estate market in India is currently facing. As a result of the code, a mechanism that was desperately required for the resolution of real estate insolvency cases in India has been made available, and it has also assisted in protecting the rights of both homebuyers and developers. IBC has also had a favourable impact on the real estate industry, which is another positive consequence. This has been of great assistance in bringing about increased openness, responsibility, and discipline within the industry, all of which are necessary for the sector's continued growth and development. The inclusion of homeowners as financial creditors has also been an important step in preserving the interests of homebuyers and ensuring that developers are held accountable for their actions. This has been accomplished by ensuring that homebuyers are taken into consideration.

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