



IBC: A RAY OF HOPE FOR THE HOMEBUYERS

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In this piece I will argue about the status of homebuyers as financial creditors and the positive impact of the Insolvency and Bankruptcy Code (Amendment) Bill 2019 on the prevailing Corporate Insolvency Resolution Process in the real estate sector. Right to home is an essential part of Right to Life and enshrined as a fundamental right under Article 21 of the Constitution of India. The primary obstacle faced by the homebuyers before the promulgation of the IBC Ordinance was that they did not fit into the category of either Financial Creditors with the right to vote on the Resolution Plan or Operational Creditor who can attend Committee of Creditors (CoC) but cannot vote. In the present scenario homebuyers are categorised as financial creditors under the “Explanation” clause of Section 5(8)(f) of the IBC, 2016. This would give them representation in CoC and make them an important part of the decision making process. Also at the time of liquidation of the company, the homebuyers were entitled to very less amount since they were not secured creditors like the banks and other financial institutions. As per the present scenario the status of the homebuyers will depend upon the builder-buyer contract and there should be a clause in the contract determining the status of the homebuyers as secured or unsecured financial creditors. For the sake of more clarity, the definition of the secured creditors under Section 2(30) of IBC, 2016 should be altered and must include homebuyers also. The amendment elevated

the status of the homebuyers and gave them the right to participate in the CoC meetings, but when the CoC fails, the homebuyers will be again treated as unsecured creditors. A resolution plan can be approved by 66% votes in favour, while in the Jaypee’s case, homebuyers formed 59.4% of the voting share and hence the agenda got rejected due to constant abstention of the homebuyers. In case there is no agreed interest rate between the parties, the voting share of the creditors will be in proportion to the financial debt, including an interest rate of eight percent per annum. A new section 25A has been inserted in the IBC which talks about the authorised representative (trustee/agent) having the right to participate and vote in the meeting of CoC on behalf of the financial creditors.

There has been no amendment in Section 53, IBC 2016. According to this section the sale proceeds from the liquidated assets will be spent on the Insolvency related costs first, then on the banks and secured creditors, then pay the workmen dues and unpaid wages to the employees, then clear off the unsecured creditor’s financial debt, then government dues, then remaining debts and at the end equity. Homebuyers will now be placed higher than the non-financial unsecured creditors. The law was amended to protect the interest of the homebuyers who are the highest stakeholder in the project. Insolvency and bankruptcy proceedings were started against various builders like Jaypee Infratech Ltd., Amrapali, Unitech, Parsvnath who denied the possession of flats to the creditors, even after accepting the huge investments and in some cases life savings of the homebuyers. Various changes are made to the Insolvency resolution process by the Insolvency and Bankruptcy



Code(Amendment) Bill 2019 including restriction of the Corporate Insolvency Resolution Process (CIRP) to 330 days including the litigation process and the company will be sent to liquidation if the 330 days condition is breached. Ensuring primacy of financial creditors over operational creditors in case of recoveries (waterfall concept) and the Committee of Creditors (CoC) will have the authority with regard to distribution of funds to various class of creditors and the power of liquidation of the corporate debtor.

While Justice S.J. Mukhopadhaya held that both financial and operational creditors must be treated at par with each other in the case of Essar Steel India Ltd. Case relating to the battle between the operational creditors and Essar Steel's financial creditors for the larger portion of settlement amount. Also the application in relation to insolvency resolution has to be responded in writing by the adjudicatory authority within 14 days of its receipt. The Supreme Court cancelled the registration of the Amrapali group projects registered with Uttar Pradesh Real Estate Regulatory Authority Act (UPRERA) and ordered the arrest of Amrapali's managing director, Mr. Anil Sharma and other directors like Mr. Shiv Priya and Mr. Ajay Kumar in connection with the FIR filed by the homebuyers for cheating. This arrest will act as a deterrence for the other builders as well. The Supreme Court entrusted the task of completing the construction of projects to the National Buildings Construction Corporation India Ltd. (NBCC) Enforcement Directorate will investigate alleged money laundering against the Amrapali officials. The

homebuyers can initiate Corporate Insolvency Resolution Process (CIRP) and can approach the NCLT to recover dues from the errant developers under Section 7 of IBC, 2016. Firstly the homebuyers will approach RERA to claim refund or possession of the property, if RERA passes possession order in favour of the claimant and if the developer defaults in complying with the RERA orders then the homebuyers can approach the NCLT.

There is no specific provision relating to the retrospective applicability of the Ordinance. Thus according to the cardinal principle of construction – “Nova Constitutio Futuris Formam Imponere Debet, Non Praeteritis”- a new law ought to regulate what is to follow and not the past, there will be prospective applicability of the Ordinance. “Every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation”¹. The latest amendment to IBC will further improve formalisation of the real estate sector, where only sound and structured developers would remain. This would also curb the entry of fly-by-night operators. The project would be completed in a reasonable time and investors would get their allotment quickly. Insolvency and Bankruptcy Code is in line with RERA which was implemented to bring justice to the aggrieved homebuyers, penalise the developers in case of delay in the projects and correct the default committed by the developers.

¹ Zile Singh v. State of Haryana, (2004) 8 SCC 1