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EFFECTIVENESS OF THE IBC RESOLUTION PROCESS IN REAL ESTATE PROJECTS

AUTHORED BY - DIVYA SHARMA

ABSTRACT

The real estate sector plays a significant role in the economic growth of India by contributing to employment generation, infrastructure development, and investment opportunities. However, the sector has frequently been affected by delays in project completion, financial mismanagement, diversion of funds, and insolvency of real estate developers, resulting in severe hardships for homebuyers. Prior to the enactment of the Insolvency and Bankruptcy Code, 2016, homebuyers faced considerable difficulties in recovering their investments or obtaining possession of promised properties due to fragmented and ineffective legal remedies. The introduction of the Code marked a transformative step in insolvency resolution by creating a consolidated framework for insolvency and bankruptcy proceedings in India. Over time, legislative amendments and judicial interpretations expanded the protection available to homebuyers and recognized them as financial creditors under the Code.

This research examines the effectiveness of the Insolvency and Bankruptcy Code resolution process in real estate projects, particularly from the perspective of homebuyers. The study analyses the legal framework governing insolvency resolution in the real estate sector and evaluates whether the Code has successfully balanced the interests of financial institutions, developers, and homebuyers. The research further explores the interaction between the Insolvency and Bankruptcy Code and other important legislations such as the Consumer Protection Act, 1986, the Real Estate (Regulation and Development) Act, 2016, and the Companies Act, 2013. Special emphasis has been placed on the rights of homebuyers, the role of the National Company Law Tribunal (NCLT), and the evolving judicial approach towards real estate insolvency matters.

The dissertation also undertakes a comparative analysis of real estate regulation laws and insolvency practices in countries such as the United States of America and the United Kingdom in order to identify international best practices that may strengthen the Indian insolvency

regime. The study critically evaluates major amendments to the Code, including the 2018 and 2020 amendments relating to homebuyers, threshold limits, and voting rights in the Committee of Creditors. Further, the research highlights practical challenges such as delays in the Corporate Insolvency Resolution Process (CIRP), excessive haircuts, lack of infrastructure, ambiguity in the status of homebuyers, and liquidation of real estate companies without adequate relief to allottees.

The study adopts a doctrinal research methodology based on analysis of statutes, judicial precedents, committee reports, scholarly articles, and legal commentaries. It concludes that although the Insolvency and Bankruptcy Code has significantly improved the legal position of homebuyers and introduced greater accountability in the real estate sector, several procedural and structural challenges continue to hinder the effective resolution of distressed real estate projects. The research suggests reforms including strengthening institutional infrastructure, reducing judicial delays, improving transparency in asset distribution, and ensuring better coordination between RERA and the IBC framework. The dissertation ultimately emphasizes the need for a more balanced and efficient insolvency mechanism that protects homebuyers while preserving the objective of timely corporate resolution.

Keywords - Insolvency and Bankruptcy Code, 2016, Homebuyers, Real Estate Insolvency, Corporate Insolvency Resolution Process (CIRP), RERA

LIST OF ABBREVIATIONS

SR. NO.	ABBREVIATION	TERMINOLOGIES
1.	AA	Adjudicating Authority
2.	BIFR	Board of Industrial and Financial Reconstruction
3.	BLRC	Bankruptcy Law Reform Committee
4.	CD	Corporate Debtor
5.	CIRP	Corporate Insolvency Resolution Process
6.	CoC	Committee of Creditors
7.	CVA	Company Voluntary Arrangement
8.	DRT	Debt Recovery Tribunal
9.	FC	Financial Creditor
10.	HC	High Court

11.	IBBI	Insolvency and Bankruptcy Board of India
12.	IBC	Insolvency and Bankruptcy Code, 2016
13.	IRP	Interim Resolution Professional
14.	IP	Insolvency Professional
15.	MSME	Micro Small and Medium Enterprises
16.	NCLAT	National Company Law Appellate Tribunal
17.	NCLT	National Company Law Tribunal
18.	NPA	Non - Performing Asset
19.	OC	Operational Creditor
20.	OECD	Organization for Economic Cooperation and Development
21.	PPIRP	Pre - Packaged Insolvency Resolution Process RP
22.	RP	Resolution Professional
23.	SARFAESI	Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002
24.	SICA	Sick Industrial Companies (Special Provisions) Act, 1985
25.	UNCITRAL	United Nations Commission on International Trade Law

LIST OF CASES

SR. NO.	CASE TITLE
1.	Belaire Owner's Association v. DLF Ltd. and HUDA
2.	Bhattacharjee v. Delhi Development Authority
3.	Bikram Chatterji v. Union of India
4.	Dyer v. Dyer
5.	Ferani Hotels Pvt. Ltd. v. State Information Commissioner, Greater Mumbai
6.	Forum for People's Collective Efforts v. State of West Bengal
7.	Ghaziabad Development Authority v. Balbir Singh
8.	Gopeekrist Gosain v. Gungapersuad Gosain
9.	Kamal Sood v. M/s. DLF Universal Ltd.
10.	Keystone Realtors Pvt. Ltd. v. Anil V. Tharthare
11.	Kolkata West International City Pvt. Ltd. v. Devasis Rudra
12.	Lavasa Corporation Ltd. v. Manju Narendra Joshi
13.	Lucknow Development Authority v. M.K. Gupta
14.	Manish Kumar Gupta v. Unitech Ltd.
15.	Murlidhar v. Paramanand
16.	Nahalchand Laloochand Pvt. Ltd. v. Panchali Co-operative Housing Society Ltd.
17.	Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India
18.	Pankaj Agrawal v. DLF Gurgaon Home Developers Pvt. Ltd.
19.	Pioneer Urban Land and Infrastructure Ltd. v. Union of India
20.	Punjab Province v. Daulat Singh
21.	Sanjay Kumar Vij v. Unitech Ltd.
22.	Satish Kumar Pandey v. Unitech Ltd.
23.	Sheikh Bahadur Ali v. Sheikh Dhomu
24.	T.P. Petherpermal Chetty v. Muniandy

25.	Yogesh Sharma v. M/s. Unitech Ltd.

TABLE OF CONTENT

DECLARATION

II

CERTIFICATE OF THE SUPERVISOR

III

ACKNOWLEDGEMENT

IV

ABSTRACT

V-VI

LIST OF ABBREVIATIONS

VII - VIII

LIST OF CASES

IX

CHAPTER 1

1

INTRODUCTION

1

1.1. INTRODUCTION 1

1.2. UNDERSTANDING THE TERM INSOLVENCY 2

1.3. REASONS FOR CORPORATE MOVING TOWARDS INSOLVENCY
4
1.4. INTRODUCTION TO CONSUMER PROTECTION ACT, 1986 AND HOME-BUYERS.
6
1.5. RECOGNITION OF HOME-BUYERS AS CONSUMERS UNDER CONSUMER PROTECTION ACT, 1986:7
1.6. THE HOME-BUYER IS LIABLE TO GET COMPENSATION UNDER CONSUMER PROTECTION
ACT,1986.
8
1.7. THE DEVELOPER IS UNDER CONTRACTUAL OBLIGATION TO COMPLETE THE
CONSTRUCTION:
8
1.8. CONSUMER PROTECTION ACT,1986 AND RERA IS CONCURRENT
9
1.9. CONSTITUTIONAL VALIDITY OF THE JURISDICTION OF CONSUMER FORUM
10
1.10. SCOPE OF STUDY
11
1.11. RESEARCH QUESTION
11
1.12. STATEMENT OF PROBLEM
12
1.13. OBJECTIVE OF THE RESEARCH
12

1.14. RESEARCH HYPOTHESIS 12

1.14. METHODOLOGY FOR RESEARCH 13

1.15. OVERVIEW OF THE EXISTING LITERATURE 13

1.16. CHAPTERIZATION 18

CHAPTER- 2

20

ANALYSIS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

20

2.1. Introduction 20

2.2. Evolving jurisprudence of homebuyers under the Insolvency and Bankruptcy Code, 2016 20

2.3. INTRODUCTION OF HOME –BUYERS AS FINANCIAL CREDITORS 25

2.4. TIME LIMIT FOR RESOLUTION PROCESS 27

2.5. INCREASE IN THE THRESHOLD LIMIT 29

2.6. ANALYSIS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016: THE JUDICIAL

APPROACH
31
2.6.1. POWERS OF NCLT UNDER THE CODE 31
CHAPTER-3

34
THE EFFECT OF INSOLVENCY AND BANKRUPTCY CODEON OTHER EXISTING LEGISLATIONS

34
3.1. THE EFFECT OF THE CODE ON THE COMPANIES ACT, 2013 34
3.2. SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT AND THE CODE
38
3.3. SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 V. THE CODE 42
3 4. RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
AND THE CODE

46
CHAPTER-4

48
COMPARATIVE ANALYSES OF THE REAL ESTATE REGULATION LAWS AND PRACTICES BETWEEN INDIA AND OTHER COUNTRIES

48

4.1. Rights of Home Buyer under Indian Law 48

4.1.1. Consumer Protection Act, 1986 48

4.1.2. Real Estate Regulatory Authority of India Act(RERA Act), 2016 48

Judicial Pronouncements for Shaping Indian Real Estate Market

51

4.1.3. Insolvency and Bankruptcy Code, 2016 56

4.1.4. Competition Commission of India, 2002 56

4.1.5. Bharatiya Nyaya Sanhita, 2023 56

4.2. Real Estate Law in Other Countries 57

4.2.1. The United States of America 57

4.2.2. United Kingdom 58

CHAPTER 5

60

The Homebuyers Conundrum in Real Estate Insolvency

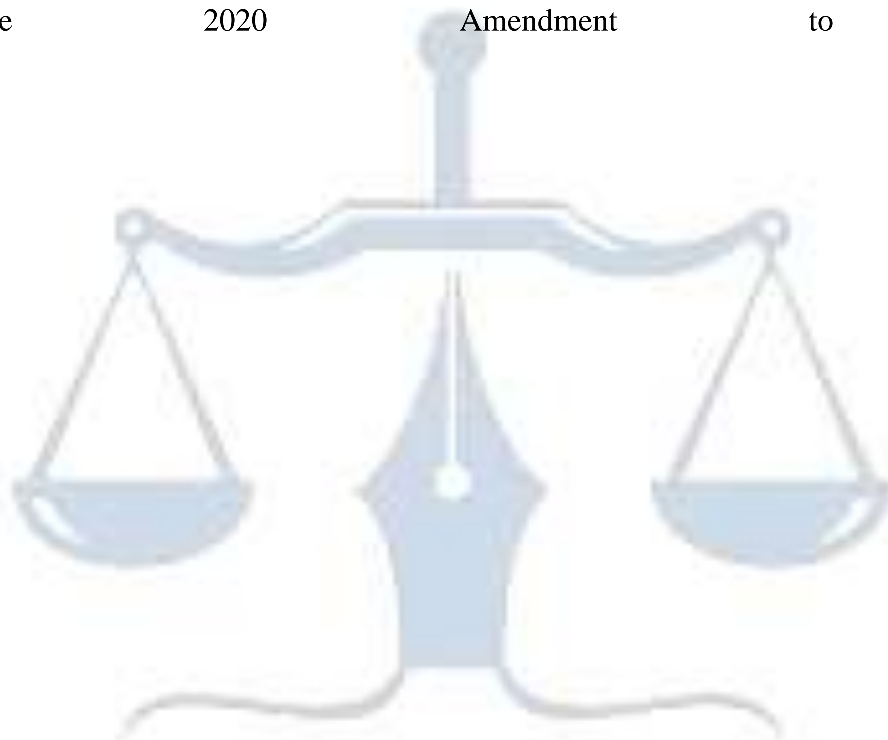
60

5.1. INTRODUCTION 60

5.2. THE RISE OF THE HOMEBUYER 60

5.2.1. The 2018 Amendment to the IBC 61

5.2.2. The 2020 Amendment to the IBC 64



5.3. HOMEBUYERS RIGHTS UNDER THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 65

5.3.1. Background and need for the RERA 65

5.3.2. Salient Features of RERA 66

5.3.3. Rights of Allottees under the RERA 67

5.4. HOMEBUYERS AS SECURED CREDITORS 68

5.4.1. The Homebuyer – Real Estate Developer Relationship 69

5.4.2. The Rise of the Mortgage 71

CHAPTER-6 CONCLUSIONS AND SUGGESTIONS 74

(A) T

.'HE AMBIGUITY WITH REGARD TO DEFINITION OF 'FINANCIAL CREDITOR 75

(B) THE PROBLEM OF HAIRCUTS 76

(C) T

HE ERADICATION OF CORPORATE ENTITIES DUE TO COPIOUS LIQUIDATION 77

(D) THE OBDURATE TIME FRAME 77

(E) INFRASTRUCTURE PROBLEM 78

(F) PROBLEM FACED BY THE INSOLVENCY PROFESSIONALS (IPs) 78

(G) THE QUANTUM OF DEFAULT 79

SUGGESTIONS SCANNER FOR WILFUL DEFAULTERS 79

(A) ADOPTION OF MIDDLE GROUND 79

(B) CREATION OF MARKET FOR DISTRESSED ASSETS 80

(C) DISTINCT DEFAULT AMOUNT FOR FINANCIAL AND OPERATIONAL CREDITORS

80

(D) PROVISION OF HAIRCUT THRESHOLD

80

(E) SALE OF BUSINESS ON GOING CONCERN BASIS

80

(F) CURB THE TIME TAKEN AT INITIAL STAGE OF CIRP 80

(G) MANAGE JUDICIAL DELAY- INCREASE NUMBER OF

NCLTs 80
(H) CREATION OF INSTITUTION OF ASSET MANAGERS 81
(I) AVOID EVER-GREENING 81
(J) LOOK AFTER THE INSOLVENCY PROFESSIONAL (IPs) 81
(K) ACCOUNTABILITY OF THE GOVERNMENT DEPARTMENTS 81
(M) MAKE SALE AND DISBURSEMENT MORE TRANSPARENT 82
BIBLIOGRAPHY **84**
BOOKS 84
ARTICLES AND JOURNALS: 84
REPORTS: 2
SEARCH ENGINES: 2
WEBSITES:

2

ACTS AND STATUTES

3

CHAPTER - 1 INTRODUCTION

"*Only a crisis - actual or perceived - produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes the politically inevitable.*

"Milton Friedman-

1.1 INTRODUCTION

The above quote establishes that when there is an actual situation of crisis, the change is inevitable. Same is applicable to the economy of the country. When the damage is done which becomes beyond repairs through the existing legislations the implementation of new law becomes inevitable.

India has been involved in trade and commerce since time immemorial. Earlier the practice followed for transaction was the barter system as there was absence of currency. Slowly the system of currency was introduced and people entered into commercial transaction by exchange of money for goods. When this exchange was completed on behalf of both the parties the transaction was completed. But sometimes it happened that one party was not able to perform their part of obligation in the transaction. With growth of trade, the business of traders increased and to improve business, the owners started taking loans. Sometimes they were able to pay back these loans and sometimes not. A business which was started with the primary motive of earning profit thus resulted in loss to the owner due to his inability to get the required returns. An entity may be flourishing in the past but may become a liability at any time as business decisions are subject to various risks which exist in the environment where the business functions. When these risks are not well calculated, business falls towards losses and debts remain unpaid. Debt is necessity in today's world for every type of business as it satisfies the needs of funds which is used for expenses or investment. It is referred as bad when the debtor is unable to pay it back on time.

An enterprise engages in debt financing on the basis of the opportunities which they see in the future projects. If these projects do not go as per their expectations then the returns may be low and at times can be nil. When the owners of the business are unable to calculate the risks involved in the business, it starts to fall and slowly becomes prone to debts. This can be due to myriad reasons. Irrespective of the reason, sometimes the person is unable to pay debts and it increases to the extent that no funds are left in the business.

1.2. UNDERSTANDING THE TERM INSOLVENCY

Insolvency is "*when an individual or organization is unable to meet its outstanding financial debt to its lender when the debt becomes due. It means the condition of not having enough money to pay debts, buy goods, etc., or an occasion when this happens*".[1] Insolvency is not a newly evolved term. "The concept existed in ancient times under the popular roman principle of Cessio Bonarum[2]. When a debtor voluntarily surrenders its goods to his creditors it is known as Cessio Bonarum." Under the roman concept, the surrender of the goods was not equal to discharge of the debtor of his debts if the property surrendered was insufficient to satisfy the debts. It was only done to safeguard the debtor from personal arrest. The concept of insolvency is similar to practice of Cessio Bonarum as here the property of the insolvent is attached and is used to pay off his debt. Even after selling everything if the debtor's debts are not satisfied then he is declared bankrupt and he is not bound to pay the debts. Those debts will be written off in the books of creditors as bad debt.

It can also be defined as a situation where a corporate debtor defaults on multiple debts simultaneously, thereby becoming financially distressed.[3] The business can become insolvent but it is not the owner alone who suffers with the insolvency. Every person who has invested funds in the enterprise suffers when the enterprise in unable to pay the money back as their money will be at risk.

The purpose behind any law of insolvency resolution is to distribute these assets and achieve equality amongst the creditors of the insolvent company in case of loss due to his insolvency. After a business undertaking declares insolvency, its assets do not cease to exist but are redistributed to more efficient areas of use. Even though the circumstances may be such that the entire debt of the creditor will not be paid but whatever can be salvaged to save the creditor, that action is undertaken. Absence of insolvency resolution law will result in execution of claims on first come first serve basis, which will create inequality amongst creditors. Insolvency law helps in solving this problem

Further the law of insolvency helps to provide an exit route to the undertakings when they are

[1] Insolvency, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/insolvency (Nov. 21, 2018)

[2] Cessio Bonarum , Encyclopaedia Britannica, https://www.britannica.com/topic/cession-bonorum (Nov. 22, 2018)

[3] J. Armour, Law and Economics of Corporate Insolvency, University of Cambridge, Working paper 197(Nov.24,2018),https://www.cbr.cam.ac.uk/fileadmin/user_upload/centreforbusinessresearch/downloads/working-papers /wp197.pdf

unable to earn profit. The liquidation of these corporate helps in cleansing the corporate society as non – profit entities and sick undertakings are removed and thus space is created for new undertaking. Once a company is recognised as being insolvent, or thinks it may become insolvent there are a number of alternatives available to insolvent corporate and its creditors to maximise returns to the creditors.

In the early primitive society, the needs of people were very less. Only very poor people with no property were forced to take loans. They did not have any financial institutions to provide funds. The rich people use to give loans to the poor. When these loans were not paid, action was taken against them on the basis of prevailing religious customs and sanctions. The general practice was to attach the property of the person. But in the absence of property or any other security, the practice of debt slavery was followed. The person who had taken loan, served as servant of the person who had given loan. Sometimes if the loan amount was huge, even the family members of the debtor were forced to serve as slaves. It was till payment of the loan amount and or it was slavery for life. When the system of slavery was removed, other sanctions were required for getting payment of loan. The execution against person was termed as barbaric. The creditors found it insecure to give loans to people who had no property as there was transition from practice of execution against person to execution against property. Due to lack of insolvency law, sometimes the person who owed debts was equated with a criminal due to his inability to pay debts. A debtor was used to be imprisoned, enslaved or even killed. Europe remained without a well-functioning bankruptcy system for a long time.

Gradually, with the growth of civilization the transactions and exchange of goods/ monies increased. As transactions grew, age old practices were converted into law and since then, the regulation of insolvency has been an integral part of every legal system for proper functioning of the economy.

Legal and formal system for insolvency did not develop until the period of the prosperous Italian medieval commercial towns. An insolvent person was thus dealt with according to common law or according to regulations that had emerged before or outside a bankruptcy system. "The debtor was dealt with in harsh terms and insolvency was thus considered as equal to theft from the creditor."[4] This gave rise to the need for law of insolvency. Historically, there was absence of formal legislation of insolvency during pre- British period in India nevertheless religious sanctions can be traced. The reason can be that although trade and commerce was prevailing and flourishing

[4] Karl Gratzer, The History of Insolvency and Bankruptcy Law from an International Perceptive, 2008 (Nov 28, 2018) https://www.diva-portal.org/smash/get/diva2:15847/FULLTEXT01.pdf.

since time immemorial, it only got its formalised and organised structure during the British period.

After following the religious norms for ages, India got a formalised corporate structure during the British period. The Common law in England which was followed in India did not deal with the subject of insolvency. The law on insolvency was purely a creature of the Statue in England. The British Governors introduced such laws from time to time in India. Post independence, the government followed these laws and also introduced other laws as per the needs of the Indian economy. After the departure of British in 1947, the insolvency as per British law was already deeply rooted in common practices in India.

The corporate sector is very dynamic in nature but the laws related to it cannot be changed frequently. Thus, even though there are new laws introduced by the government from time to time, the problems of corporate sector remained unsolved. Another reason which can be attributed to the want of new legislation is that the legislations are meant to salvage an enterprise in financial difficulties to give it an opportunity for maintaining its viability and continue providing employment opportunities so that its members are protected. Different legal systems have different approach towards a common solution i.e. protecting business and individuals from suffering or collapsing because of financial hardships and thus save the economy.

In the earlier legal framework, the promoters and management of the company continued to have control of the company even after default has been committed.The impact of the weak right of the creditor was that the lenders tend to lend generally to big or established companies to get guaranteed returns. The debt generally consists of secured debts as the creditors safeguard their rights to enforce the underlying security under this kind of debt. The need was to change the mindset and understand that the profit and loss go hand in hand. It is necessary to understand that business failure is also a phase like business flourishing. Also, not all business failures are due to malafide intention. There may be many other circumstances which result in failure of business.

1.3. REASONS FOR CORPORATE MOVING TOWARDS INSOLVENCY

Before moving further into the present research, it would be beneficial to briefly deal with and understand the meaning of the terms “Insolvency”, “Bankruptcy” and “Resolution”. Similarly, “Bankruptcy” is a situation whereby a court of competent jurisdiction has declared a person or entity insolvent, having passed appropriate orders to resolve it and protect the rights of the

creditors. It is a legal declaration of one's inability to pay off debts. Further, "Resolution" of Insolvency and Bankruptcy is the process adopted to revive the company in a time-bound manner and failing which, to wind up the company and liquidate its assets to ensure their maximum valuation to meet its liabilities. Having said that, 'insolvency' and 'bankruptcy' are generally used interchangeably.

Corporate go into insolvency basically due to two broad reasons namely corporate or business failures and financial distress. Business failure stems from flaws in the way a company is financed or there is fault in the capital structure. This is the fault in the roots of the business. It is the fault in the business model of the company that prohibit it from producing the desired level of profit to justify its capital investment. Financial distress is simply a situation where a company's operating cash flows are not sufficient to satisfy current obligations and the company is forced to take corrective action. Financial distress can serve as a company's warning device. The effect of this is that suppliers providing goods and services on credit terms are likely to reduce the generosity of their terms, or halt supplies, if they notice there is an increased chance of the company not being in existence in a few month's time.

Corporate failure occurs when a company becomes insolvent and goes out of business. Companies that fail have obviously performed badly. It is not necessary that the real cause of corporate failure is always due to lack of funds. It can also happen due to many causes which may include poor management, company's inability to retain qualitative staff, loss of big clients and contracts, increase in interest rates, ownership of company in incapable hands, lack of internal controls, poor planning and marketing, lack of innovation etc.

To earn profit, the company must have a balance between debt and equity i.e. the optimum capital structure. The decision to induce and withdraw the type of capital and when to take this step is a very crucial business decision which the management should take with lot of caution. The management or promoters should be aware as to when they should stop infusing funds in the business or whether the project is worth investment at all in the first place.

A company which is facing financial distress might be saved by infusion of funds. Considering all defaults as malafide and all debtors as cheaters will discourage them from taking risk and adversely affect the growth of economy. If such be the considerations, no entrepreneur will be ready to take up new projects with high risks.

Credit availability to all sectors is also one of the welfare functions of the government. Being the second largest country in terms of population, India has the largest young skilled workforce in the world but still the growth is crippled due to the laws which were not only old but can be termed as ancient. For a sustainably developed economy a sound banking system is a must as it

serves as the backbone of the economy. The RBI is the central bank and regulating all the banks, financial institutions and non banking financial institutions comes within its regulatory purview. They play major role in developing the corporate sector of the economy. But in last decade or so, large numbers of frauds have cheated banks and general public of their money. This resulted in an increase in non-performing assets on balance sheet of majority of banks and these assets became dead. A dead asset accumulation can break the backbone of any economy. The need was to have laws that can protect these assets from becoming bad debts and maintain the solvency of the economy.

1.4. INTRODUCTION TO CONSUMER PROTECTION ACT, 1986 AND HOME-BUYERS.

A home-buyer after multiple surveys of property and property sites, collection of pamphlets and brochures of the separate projects and further comprehending them comes to a conclusion of having a Home in a particular Project. The home-buyer puts practically all of his savings into the project, and that's not counting the loan he takes out from the bank, for which EMI payments have already begun. When the project is late or flawed, it brings all of his hopes and expectations crashing down. One can see the anguish and frustration of the average person who wants a place to call "HOME" reflected in a lawsuit filed by a dissatisfied homebuyer.

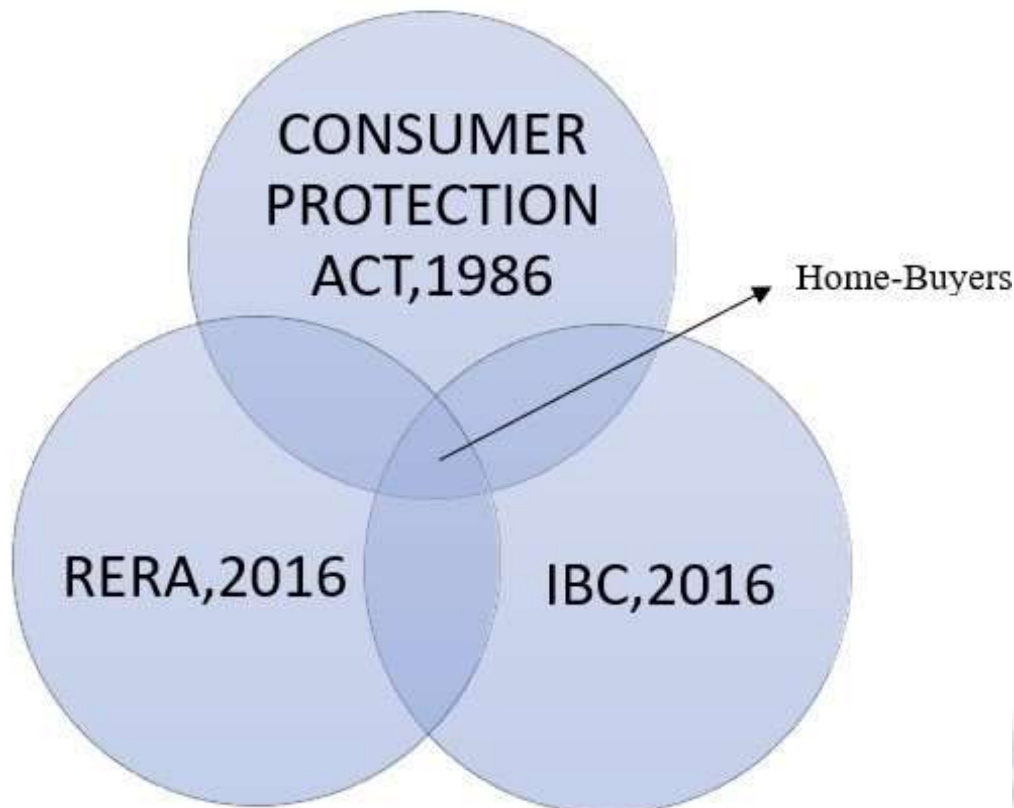
Once upon a time, homebuyers had to rely on the whims of rogue developers in order to take possession of their flats. However, with the advent of social media awareness made possible by advances in technology, homebuyers have begun to take matters into their own hands by going to a consumer redressal forum in order to protect their rights. Additionally, homebuyers were better equipped with an in-the-moment, hands-on understanding of their legal rights because to the availability of material information and online networking opportunities.

There was an upsurge in consumer advocacy after homebuyers and developers repeatedly broke their agreements by failing to hand over control of their units on time. Multiple projects' troubled purchasers sought help from the consumer redressal forum for such delayed developments after years of delays.

When there arises a situation where the Home-buyers are facing problems with respect to the possession or delivery of the house he purchased. We can Look into the three remedies available to us under the Indian Legal System (however the remedies are inclusive and not exhaustive):

1. Consumer Protection Act, 1986.
2. Real Estate (Regulation and Development) Act, 2016.

3. Insolvency and Bankruptcy Code, 2016. (Fresh applications temporarily suspended in the wake of Covid-19).



Homebuyers in a bind had only the Consumer Redressal Forum to turn to before RERA and IBC were passed. The fundamental goal of the consumer protection act is to ensure that consumers' rights are respected and protected. The biggest fear that any Home-buyer would have is that the house in which he has invested will be delivered on schedule or if it is worth the money he pays for. Even while RERA would make it simpler for unhappy homebuyers to seek redress, a legal course of action against the developer as the service provider is still an option.
NCDRC that a developer issue refunds to consumers who had made deposits but had yet to take possession of their apartments. The homebuyers persisted, and the Supreme Court and the National Consumer Disputes Redressal Commission (NCDRC) finally acknowledged their rights as consumers under section 12(1)(c) of the consumer protection act,1986.

1.5. RECOGNITION OF HOME-BUYERS AS CONSUMERS UNDER CONSUMER PROTECTION ACT, 1986:

In the **Jaypee Kalypso Court Case**[5], The complainant's beef was that the developer had

broken the contract by taking four years to hand over possession of the house; the terms and conditions stipulated

[5] Developers Township Property Owners Welfare Society vs. Jaiprakash Associates Limited (Decision Date 02.05.2016 – NCDRC).

that the developer would be liable for 18% interest and Rs.10 per square foot for every month of delay. According to the NCDRC, "Section 12(1)(c) of the Consumer Protection Act,1986 allows a class action lawsuit to be filed on behalf of consumers against a builder or developer for failing to deliver possession of a purchased apartment or plot of land."

The judgment also added that "The claimants must share shared interests or a common grievance in order for their case to be heard and resolved. It is expected that all affected customers will have had the same issue with the product or service that is the subject of the complaint.. Therefore, the

singularity of the interest is analogous to a shared grudge towards a single actor." Despite the supreme

court's stay, the NCDRC's ruling found that homebuyers could file complaints under the Consumer Protection Act of 1986.

1.6. THE HOME-BUYER IS LIABLE TO GET COMPENSATION UNDER CONSUMER PROTECTION ACT,1986.

In the case of **Jitendra Balani v. Unitech**[6], the Home-buyers' complaint was that the developer did not deliver possession of the house within the time frame agreed upon in the agreement (the earliest agreement of one of the complainants was signed on November 13, 2009, and the most recent agreement of one of the complainants was signed on April 4, 2011). So they filed a complaint against the developer asking to either move into another house or get their money back with interest.

The developer responded that the delay was caused by a lack of available workers because of the recession and the need to build commonwealth games infrastructure.

The Hon'ble NCDRC, however, has determined that the developer's justifications are not plausible. So, the court ordered the builder to hand over the keys and pay the buyer 12% simple interest from the delivery date till now. In addition, the developer must return the Home-buyer's initial payment for the flat plus 18% interest starting from the date of the Home-buyer's initial payment.

1.7. THE DEVELOPER IS UNDER CONTRACTUAL OBLIGATION TO COMPLETE THE CONSTRUCTION:

In **Pradeep Narula v. Granite Gate Properties Pvt. Ltd**[7], Complainants and developer entered into an agreement on June 29, 2010; according to the buyer's agreement, the developer was to deliver the house within 39 months from the date of allotment; however, the possession

was delayed and a new date of possession was issued by the builder in July 2014; however, the deadline was again extended to December 31, 2014.

[6] Jitendra Balani v. Unitech (Decision Date 08.02.2016 -NCDRC)

[7] Pradeep Narula v. Granite Gate Properties Pvt. Ltd.(Decision Date 23.08.2016-NCDRC)

Frustrated Home-buyer filed a complaint with the NCDRC after developer failed to fulfil obligations under the contract and provided inadequate service. According to the Hon'ble Commission's ruling, the builder had just 39 months from the allotment date to complete the project and turn over control of the property to the complainants.

The commission added that the builder is obligated by contract to finish the work unless there is a reason beyond the builder's control. In addition, the commission has ordered the builder to finish the project by January 31, 2017, or face penalties of 10% each year from the homeowners.

1.8. CONSUMER PROTECTION ACT,1986 AND RERA IS CONCURRENT

In the case of **Ajay Nagpal v. Today Homes & Infrastructure Pvt. Ltd** [8] **,** Home-buyers in Gurgaon's 'Canary Greens' were promised that their homes would be delivered to them within three years of the date the project's licence was issued, but eight years later, not a single unit had been delivered to them.

As a result of being forced to sign a "Agreement to sell" with clauses that were unjust, one-sided, unconscionable, and totally unfair, the homebuyers (complainants) had lost all faith in the project, as their worst fears had been realised: the partially constructed buildings of the project had been lying in abandoned condition for years; the skeletal structure of the building had been exposed to extreme weather conditions that had harmed it; and so on. As a result, the Home-buyers went to the Hon'ble NCDRC for help, asking for a full refund plus interest and compensation.

One of the primary things the developer argued when they got the complaint notice was that the Hon'ble Consumer Redressal Forum didn't have jurisdiction because, according to RERA, the complaints couldn't be maintained there.

However considering various Supreme Court Judgments, the commission made the following observations:

- The Consumer Protection Act adds nothing to existing law and does not replace it.
- In accordance with the Consumer Protection Act of 1986, any consumer who is dissatisfied with a service or product can file a complaint with the consumer forum.
- A class action lawsuit is also acceptable. The consumer protection act's designated forum is not the civil justice system. Consumer protection can provide redress as indicated under section 14 of the act.
- If a customer has a problem, they should only pursue one solution at a time; they cannot

file the same complaint under two different laws at the same time.

[8] Ajay Nagpal v. Today Homes & Infrastructure Pvt. Ltd Consumer Complaint No. 1764 of 2017 (Decision Date 15.04.2019-NCDRC)

- The fact that a complainant may have recourse to another statute for the same or similar issues does not exclude the complainant's use of the consumer forum established by this act.Despite the fact that the rights and duties of a Home-buyer are explicitly mentioned in the act, this does not limit the right of an aggrieved Home-buyer to approach the authorities under RERA; rather, the Home-buyer can approach the Consumer forum. This is due to the fact that the builder is required to comply with Section 14, 15, 18, and 19 of RERA in addition to other provisions.
- There is no clear or implicit prohibition in Section 71 of RERA from claiming the consumer protection measures. It also allows homebuyers to bypass the consumer court and go straight to RERA with their complaints.
- If a matter is within the purview of the appropriate RERA authorities, it cannot be heard in a civil court under Section 79 of RERA. The provisions of this section do not apply in Consumer Forum because it is not a civil court. However, injunctions can no longer be issued due to Section
79. However, this does not impede the Consumer forums' ability to hear and rule on complaints. Neither the Consumer Protection Act nor the (RERA) stands on its own.

Based on these principles, the commission determined that a consumer forum has the authority to hear and decide homebuyer complaints; no provision of Section 71, Section 79, or Section 89 limits or precludes the consumer forum's jurisdiction.

1.9. CONSTITUTIONAL VALIDITY OF THE JURISDICTION OF CONSUMER FORUM

The National Consumer Forum in the matter of **Ajay Nagpal v. Today Homes & Infrastructure Pvt. Ltd**[9]**,** consumers have been found to have similar remedies under both RERA and the Consumer Protection Act, and Section 79 of RERA essentially bans civil courts from hearing issues that should be handled by RERA's competent authorities. The provisions of this subsection do not apply in the Consumer Forum because it is not a civil court.

The builders appealed the National Consumer Forum's ruling by filing a writ petition with the Hon'ble Delhi High Court under Article 227. The court ultimately resolved their concerns in the case of In the matter of In the matter of In the matter of In the matter of In the matter of In the matter of In the matter of **M/S.M3M India Pvt Ltd. v. Dr. Dinesh Sharma**[10].

In view of the Pioneer Judgement issued by the Hon'ble Supreme Court and the facts presented in the petition and in the arguments presented by the developers and the homebuyers[11]:

“The highest court in the land made a point of noting that RERA's rules should be interpreted

in a way that doesn't conflict with those of the Insolvency Code. If there is a discrepancy between the two

[9] Supra

[10] M/S M3M India Pvt Ltd v. Dr. Dinesh Sharma. (Decision date 04.09. 2019 Delhi High Court).

[11] Supra

laws, the insolvency code will take precedence. It was further noted that the homebuyers' recourses are therefore concurrent remedies.. **Buyers in this situation have recourse to the laws pertaining to (RERA), consumer protection, and the Insolvency Code.**

Remedies for Home-buyers:

- The remedies available under RERA will be supplementary, rather than sole.
- Instances of RERA, Consumer Protection, and IBC remedies shall run simultaneously.

According to the Hon'ble Justice Dasti Prateek Jalani of the Delhi High Court, the pioneer judgement is the law as declared by the Supreme Court under Article 141 of the Constitution of India. This is because the doctrine of stare decisis in Article 141 is binding on all courts. It was decided that the respondents (homebuyers) have rights under both Consumer Protection and RERA, and there is no reason to change the view that was taken.

1.10. SCOPE OF STUDY

The scope of this study focuses on analyzing the impact of insolvency laws, particularly the Insolvency and Bankruptcy Code (IBC), 2016, on the real estate sector in India. It examines how insolvency proceedings affect various stakeholders, including real estate developers, financial institutions, and especially homebuyers, who have been recognized as financial creditors under recent amendments. The study explores the interplay between the IBC and the Real Estate (Regulation and Development) Act (RERA) to assess whether the existing legal framework provides adequate protection and efficient resolution mechanisms for distressed real estate projects. Additionally, the research delves into the role of pre-pack insolvency resolutions and the challenges faced in implementing these reforms. By assessing both legal and financial dimensions, this study aims to provide insights into the effectiveness of current laws and suggest improvements for managing insolvency in the real estate sector.

1.11. RESEARCH QUESTION

The researcher has raised the following research questions in the present research:

1. How has the Insolvency and Bankruptcy Code (IBC), 2016 impacted the resolution of insolvency cases in the real estate sector?
2. What challenges do real estate developers face during insolvency proceedings, and how do these affect ongoing projects and homebuyers?
3. How effective are the amendments to the IBC in recognizing and protecting homebuyers as financial creditors in real estate insolvency cases?

4. In what ways does the Real Estate (Regulation and Development) Act (RERA) interact with the IBC to provide legal safeguards for stakeholders in the real estate sector during insolvency?

5. What is the role of pre-pack insolvency resolutions in addressing financial distress within the real estate sector, and how effective is this approach compared to traditional insolvency processes?

1.12. STATEMENT OF PROBLEM

The real estate sector in India has faced significant challenges due to the increasing instances of insolvency, particularly in the wake of financial distress among developers. Many real estate projects have stalled, leaving homebuyers and creditors in a vulnerable position. Despite the introduction of the Insolvency and Bankruptcy Code (IBC), 2016, and subsequent amendments, there are still gaps in addressing the complexities unique to real estate insolvencies, such as protecting the interests of homebuyers while ensuring the survival of financially distressed developers. The interplay between the IBC and the Real Estate (Regulation and Development) Act (RERA) adds another layer of complexity, as these laws attempt to strike a balance between resolving insolvency efficiently and safeguarding stakeholders' interests. This research aims to address these issues by analyzing the effectiveness of current legal frameworks and exploring potential solutions for improving the insolvency process in the real estate sector.

1.13. OBJECTIVE OF THE RESEARCH

- To analyze the impact of insolvency on the real estate sector in India
- To explore the legal framework governing real estate insolvency, including the role of the Insolvency and Bankruptcy Code (IBC), 2016
- To assess the effectiveness of amendments to the Insolvency and Bankruptcy Code, particularly in protecting homebuyers as financial creditors
- To examine the role of the Real Estate (Regulation and Development) Act (RERA) and its interplay with the IBC in addressing insolvency in the real estate sector
- To identify the challenges faced by real estate developers in resolving insolvency cases and

their impact on ongoing projects

- To evaluate the effectiveness of pre-pack insolvency resolutions in the real estate sector

1.14. RESEARCH HYPOTHESIS

H1: The introduction of the Insolvency and Bankruptcy Code (IBC), 2016 has significantly improved the speed and efficiency of resolving insolvency cases in the real estate sector.

H2: The recognition of homebuyers as financial creditors under the IBC has enhanced their legal protection in cases of real estate insolvency.

H3: The interplay between the Real Estate (Regulation and Development) Act (RERA) and the Insolvency and Bankruptcy Code (IBC) provides a more balanced resolution process for both real estate developers and homebuyers during insolvency proceedings.

1.14. METHODOLOGY FOR RESEARCH

The research methodology for this study follows a doctrinal approach, primarily focusing on the analysis of existing legal frameworks, statutes, case laws, and judicial interpretations related to insolvency in the real estate sector. The study involves a comprehensive review of the Insolvency and Bankruptcy Code (IBC), 2016, and its amendments, along with relevant provisions of the Real Estate (Regulation and Development) Act (RERA).

By examining legal literature, reports from insolvency committees, and judicial pronouncements from the National Company Law Tribunal (NCLT) and higher courts, the study seeks to understand the evolving legal landscape. Secondary sources such as scholarly articles, government reports, and expert opinions will also be analyzed to gain insights into the practical challenges faced by stakeholders during insolvency proceedings in real estate.

The doctrinal research method allows for a critical evaluation of the legal framework governing insolvency in the real estate sector. The study will highlight the gaps, if any, and propose potential legal reforms to enhance the efficiency and fairness of the insolvency resolution process in real estate.

1.15. OVERVIEW OF THE EXISTING LITERATURE

After identification of the problem it is imperative to consult the existing literature on the subject. One of the most important steps in dealing with a problem is to understand the existing literature and review it. Some of the available literature on the present topic which is reviewed is - A Ramaiya in the book “Guide to Companies law”[12] throws light on the provisions of the CA, 2013. There is a detailed analysis of the provisions of the CA, 2013. It not only covers the provisions of the CA, 2013 but also takes into consideration various rules formed under the Act and the guidelines issued by the Ministry of Corporate Affairs (MCA). The book has a comparative study

[12] A RAMAIYA, GUIDE TO COMPANIES LAW, Lexis Nexis Publication, (18th Edn., 2015)

of the provision of the CA, 2013 with the Old Companies Act, 1956 and English law. It acts as an analytical tool in understanding the law applicable to the business entities. It provides detailed case studies under the relevant sections and also the relevant case laws, which were decided in the regime of the 1956 Act.

Akaant Kumar Mittal[13] in "Insolvency and Bankruptcy Code: Law and Practice" covers all the aspects related to the Code like corporate insolvency, personal insolvency, cross border insolvency etc. It also discusses the interplay of the Code with other statues such as SEBI Act, Money laundering Act, CA, 2013 and SARFAESI etc. To explain the Code in detail it has followed a section wise approach which is done by most of the authors. The author documents the journey of the insolvency framework through detailed analysis of the Code and judgments. It has incorporated most of the judgments of the Supreme Court and the NCLT. This commentary provides an entire package of knowledge of transition from old insolvency regime to the new insolvency regime. The commentary represents a comprehensive account of the law in India covering all the amendments to the Insolvency and Bankruptcy Code, delegated legislations such as Rules enacted by the Government or the Regulations notified by the IBBI. The commentary runs into a total of 1,559 pages and is an authoritative literature.

Anirudh Wadhwa and Kapil Wadhwa[14] in "Guide to Insolvency and Bankruptcy Code" have given an exhaustive commentary on the Code. The book is divided into two volumes. The first volume provides comments on various provisions of the Code also along-with the date of enforcement, the extracts from the committee report of the government and references from the UNCITRAL legislative guide. It has also made reference to all the leading judgments by the SC and the NCLT. The book not only covers Indian judgments but also many international judgments which helps in understanding the law of insolvency. The second volume of the book serve as the appendix which contains all the rules, regulations, notifications, circulars, IBBI guidelines and committee reports related to the Code. It also provides text of the allied Acts, relating to insolvency and bankruptcy. The two volumes are complete in itself to provide a thorough understanding of the subject.

Ashish Makhija [15] in "Insolvency and Bankruptcy Code of India" includes the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 and Insolvency and Bankruptcy (Amendment) Act, 2018. The book contains history of all the sections alongwith the notes from various Committee

[13] AKAANT KUMAR MITTAL , INSOLVENCY AND BANKRUPTCY CODE: LAW AND PRACTICE, , Eastern

Book Company, (1st Edn ., 2021).

[14] ANIRUDH WADHAWA & KAPIL WADHWA, GUIDE TO INSOLVENCY AND BANKRUPTCY CODE, Wadhwa Publication, (2nd Edn., 2021)

[15] ASHISH MAKHIJA, INSOLVENCY AND BANKRUPTCY CODE OF INDIA,. Lexis Nexis Publication, (1st Edn ,
2019).

reports also. The judgments of NCLT and Supreme Court which have significant importance in explaining the section have also been incorporated in the book. The book has an added advantage of simple and understandable language which will be easy for layman also. It is good for any person who wants to understand the Code for their day to day purpose.

Avtaar Singh in his book titled "Company Law" [16] has discussed the provisions introduced under the CA, 2013 regarding the business organisation. The book has dealt in detail the practical aspects of the law relating to business entities by giving suitable abstract from the committee report and relevant cases in the past so that no aspect related to business organizations remains untouched. The author has done an in-depth study of the provisions of the CA, 2013 with the help of the case laws to understand their true intent.

Dr. N.V Paranjape[17] in the book "Company Law" has made an attempt to encapsulate the major changes which are introduced by the CA, 2013. The author tries to point out

how the Act provides a better framework for an effective enforcement of law relating to the types of Companies in India. The new concepts have been critically analysed in minute details and judicial pronouncements related to the concerned topic have also been taken into consideration so as to make the subject material more explanatory. The book covers the changes introduced by the CA, 2013.

Sir Dinshaw Fardunji Mulla[18] in "Law of Insolvency in India" has elaborately given details of all the insolvency laws that have been prevailing in the past. This book is a legal classic and well updated by Aparna Ravi. It goes without saying that any book by Mulla has to be a classic and same is correct for this book as well. It is a part of author's Tagore law Lectures. The updated version provides interpretation of sections and provides a comparative analysis of important provisions of the Code and earlier Acts. It enables the reader to understand the position of law of particular section in light of various judicial decisions.

Report of the Working Group on Tracking the Outcomes under the Insolvency and Bankruptcy Code, 2016[19] dated November 10, 2021 was presented under the Chairmanship of G.N.Bajpai. The working group was formed to objectively evaluate the achievements under the Code. The study of the group is limited to corporate insolvency. The working group has pointed out that the Code works on pattern of start early and close early. It points out that the Code, under S.66 (2) makes

[16] AVTAAR SINGH, COMPANY LAW, Eastern Book Company, (16th Edn., 2015).

[17] DR. N.V PARANJAPE, COMPANY LAW,Central Law Agency, (7th Edn., 2016)

[18] SIR DINSHAW FARDUNJI MULLA, LAW OF INSOLVENCY IN INDIA, Lexis Nexis Publication, (6th Edn, 2017)

[19] G. N. Bajpai Working Group, TRACKING THE OUTCOMES UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016, (Nov. 10, 2021), https://www.ibbi.gov.in/uploads/whatsnew/4b74947e21c8b01f95bdcb348635ece5.pdf

directors liable for losses caused during twilight zone. It is very nicely highlighted that the corporate debtors who are stuck in the Chakravyuh of unsustainable business or with idle asset and no business, should exit the market at the very first opportunity. The second part of the Report points out the need for a framework to track the outcomes of the Code. It points out that there should be a metric to find out the benefits of the Code like one used by World Bank Doing Business Report which is a composite metric that studies the time, cost and recovery through insolvency procedure and strength of insolvency framework to arrive at a score for resolving insolvency for an economy. It is stated by the working group in its report that there should be a metric which can measure both quantifiable and non-quantifiable outcome of the Code. The group in its report has pointed out the present strengths of the Code and provided three Es for the framework i.e. Effectiveness, Efficiency, and Efficacy. Lastly, it points out the most important challenge and recommends the design of a national dashboard of insolvency data. The suggestion of the report if accepted will definitely help in better functioning of the Code.

Dr. T.K. Vishwanathan Committee in Bankruptcy Law Reforms Committee Report (BLRC)[20] dated November 4, 2015 inter-alia recommends scrapping of all the old laws of insolvency and overhaul of the insolvency resolution system in the country. The report of the BLRC is divided into two volumes. The First Volume provides the rationale and design and the Second Volume provides the draft Insolvency and Bankruptcy Code (IBC). In the First Volume it points out the present arrangement for resolution of insolvency in India and also the difficulties under it. The report also highlights the intended benefits from reforms of the bankruptcy process. The present Code (IBC) is based on the recommendation of this Committee. The structure of the present Code and the rationale behind the Code is elaborately discussed in this report. The Committee Report also suggested the concept of information utilities. The Report has itself pointed out the source of delays in resolution of insolvency and points the cause as the adjudicatory mechanism. The report while designing the framework of the insolvency law has taken inspiration from the UNCITRAL legislative guide. It has provided for the entire process of how insolvency resolution should be done and the persons involved in it. As the debates helped to look into the minds of framers for better understanding of the Constitution of India, similarly the BLRC Report helps to understand the mindset of the draftsman of the Code.

Dr. J.J. Irani Committee in its Report on Company Law 2005[21] has charted out the road map for a flexible, dynamic and user-friendly company and insolvency law regime for the economy. The

[20] Supra note 13.

[21] Dr .J.J. Irani Committee REPORT ON COMPANY LAW 2005, http://reports.mca.gov.in/Reports/23-Irani%20committee%20report%20of%20the%20expert%20committee%20on%20Company%20law,2005 . pdf

contents of the report has not only helped in forming the new Companies Act, 2013 for the country but has also laid down a very sound base for the growth of corporate and insolvency law in India. The report has been drafted after analysing and drawing reference from the development of countries like the U.K, Australia, New Zealand and Canada. The report extensively deals with the suggestion to reform and update the basic corporate legal framework. The report has made its recommendations to make the corporate and insolvency law simpler and less obscure to enable individuals to work within the corporate framework with easy understanding of law. It suggested attuning the Indian Law with the global reforms taking place in the arena. The Report of the Committee had sought to bring in multifarious visionary concepts, which would really simplify the voluminous and cumbersome Laws in the country.

Vidhi Centre for legal Policy [22] has published a collaborative report with the IBBI named "Understanding the Insolvency and Bankruptcy Code, 2016 – Analysing Developments In Jurisprudence" to analyse the evolving jurisprudence under the Code. Some of the major issues discussed in detail are the constitutionality of the provisions of the Code, its repugnancy with State Laws, concept of dispute and applicability of S.29A. To elaborate on the issues, judgments of various High Courts, NCLTs, NCLAT and Supreme Court have been taken into consideration. It further discusses the different categories of stakeholders who are affected by the Code and what is the impact of the Code on them. It has insights of different people who have undertaken the study under the Code and provide a bird's eye view of the legal position under the Code.

Rohan Kohli in essay titled 'Corporate Resolution and Insolvency Resolution in India: Lacunae in the present and remedy for the future'[23] in a publication by IBBI 'Insolvency and Bankruptcy Code – A Miscellany of Perspective'. The articles touch the various aspects of the Code where it clashes with the CA, 2013. It discusses the impact of the overriding provision under S.238 over the CA, 2013. The author, with the help of judgments given by various authorities tried to highlight how the CA, 2013 is mutated in the name of Amendment. It discusses the transfer of winding up provisions from the CA, 2013 to the Code. It also points out various lacunae in the law which require to be rectified. The article gives details as to how corporate debt restructuring has been affected by the Code. The author has also provided various suggestions for improvement.

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[22] Shreya Prakash and Debanshu Mukherjee, Understanding The Insolvency And Bankruptcy Code, 2016 – Analysing Developments In Jurisprudence, VIDHI CENTRE FOR LEGAL POLICY,2019,(Sept. 15, 2020), https://www.ibbi.gov.in/uploads/publication/190609_UnderstandingtheIBC_Final.pdf

[23] Rohan Kohli, Corporate Resolution and Insolvency Resolution in India: Lacunae in the present and remedy for the future, (2016) 3 (2) RFMLR 97 at Pg. 102.

1.16. CHAPTERIZATION

Chapter 1: <u>Introduction</u>

This chapter introduces the concept of insolvency and explains the growing challenges faced by homebuyers in the real estate sector. It discusses the meaning and causes of corporate insolvency, particularly in the context of delayed or failed housing projects. The chapter further examines the role of the Consumer Protection Act, 1986 in protecting homebuyers and recognizes them as consumers entitled to compensation and legal remedies. It also highlights the concurrent operation of consumer forums and Real Estate (Regulation and Development) Act, 2016 along with constitutional issues relating to jurisdiction. The chapter concludes with the scope, objectives, hypothesis, research methodology, literature review, and chapterization of the study.

Chapter 2: <u>Analysis of the Insolvency and Bankruptcy Code, 2016</u>

This chapter focuses on the framework and functioning of the Insolvency and Bankruptcy Code, 2016 and its impact on homebuyers. It traces the evolving jurisprudence regarding the status of homebuyers under insolvency law and explains how they were recognized as financial creditors through legislative amendments. The chapter also analyses the time-bound resolution process, threshold limits for initiating insolvency proceedings, and the powers of the National Company Law Tribunal (NCLT). Judicial interpretations and landmark decisions are discussed to evaluate the effectiveness of the Code in balancing the interests of creditors, developers, and homebuyers.

Chapter 3: <u>Effect of the Insolvency and Bankruptcy Code on Other Legislations</u>

This chapter examines the interaction between the Insolvency and Bankruptcy Code and other important financial and corporate legislations in India. It analyses the impact of the Code on the Companies Act, 2013, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The chapter highlights how the Code has replaced or overridden earlier mechanisms for debt recovery and insolvency resolution, thereby creating a unified insolvency framework.

Chapter 4: <u>Comparative Analyses of Real Estate Regulation Laws and Practices</u>

This chapter provides a comparative study of real estate laws and practices in India and other countries. It discusses the rights of homebuyers under Indian laws such as the Consumer Protection Act, 1986, Real Estate (Regulation and Development) Act, 2016, Insolvency and Bankruptcy Code,

2016, and the Competition Act, 2002. The chapter also refers to criminal liability under the Bharatiya Nyaya Sanhita, 2023 in cases involving fraud and cheating by developers. Further, it compares Indian real estate regulation with the legal frameworks of countries such as the United States of America and the United Kingdom to identify best practices and regulatory differences.

Chapter 5: The Homebuyers' Conundrum in Real Estate Insolvency

This chapter discusses the challenges faced by homebuyers during insolvency proceedings in the real estate sector. It explains the rise of homebuyers as an important stakeholder category under insolvency law, especially after the 2018 and 2020 amendments to the Insolvency and Bankruptcy Code. The chapter also examines the rights of allottees under RERA, the relationship between homebuyers and developers, and the increasing use of mortgages in housing finance. It critically analyses whether homebuyers should be treated as secured creditors and evaluates the practical difficulties faced by them during the Corporate Insolvency Resolution Process (CIRP).

Chapter 6: Conclusions and Suggestions

This concluding chapter summarizes the major findings of the research and identifies the practical and legal issues affecting insolvency resolution in the real estate sector. It discusses ambiguities in the definition of financial creditors, excessive haircuts, delays in the CIRP process, infrastructure limitations, and challenges faced by insolvency professionals. The chapter also provides several suggestions for improving the insolvency framework, including stricter measures against wilful defaulters, transparent sale mechanisms, creation of distressed asset markets, increasing the number of NCLTs, and improving accountability of government departments. The chapter ultimately emphasizes the need for a balanced and efficient insolvency system that adequately safeguards the interests of homebuyers while ensuring economic stability.

CHAPTER-2

ANALYSIS OF THE INSOLVENCY AND BANKRUPTCYCODE, 2016

2.1. Introduction

The purpose of the Insolvency and Bankruptcy Code (IBC) of 2016 is to make life easier for both creditors and debtors. On May 5th, 2016, the Lok Sabha passed the Indian Business Code, 2016 and on May 11th, 2016, the Rajya Sabha did the same. In 2016, it was approved by India's president, and six months later, in December 2016, IBC went into effect. In line with the Companies Act of 2013, the government set up the National Company Law Tribunal (NCLT) and its appeals body on June 1, 2016, to handle cases involving corporations and limited liability partnerships. Cases involving people and businesses with outstanding debts to banks and other financial institutions will be heard by the Debt Recovery Tribunal (DRT), an adjudicatory body established under the Recovery of Debts Due to Banks and Financial Institution Act, 1993.

Insolvency petitions can be filed by either individuals or businesses. Individual insolvency is known as bankruptcy, while corporate insolvency has a different name. Insolvency occurs when a person or organization has more debt than it can pay off, and its assets are worth less than its obligations.

Laws pertaining to insolvency and bankruptcy predated the 2016 enactment of the Insolvency and Bankruptcy Code (IBC), which consolidated these bodies of legislation. A company has entered insolvency when its financial problems have become too great for it to continue operating normally. Non-performing assets have been rising, placing more pressure on the economy, necessitating various changes to alleviate this issue. It was critical, however, that something be done right away to alter the Bankruptcy and Insolvency Laws. In order to propose a new bankruptcy law for India that would be applicable to both non-financial businesses and individuals, the Bankruptcy Law Reforms Committee (BLRC) was established in 2014 under the leadership of Mr. T.K. Viswanathan, a former Union Law Secretary. In 2015, a proposed revision to the Insolvency and Bankruptcy Code was submitted.

2.2. Evolving jurisprudence of homebuyers under the Insolvency and Bankruptcy Code, 2016 India is one of the fastest-growing major economies of this century due to its increasing population, rising affluence, and rapid urbanisation. As per the World Bank[24], With an average yearly growth rate

[24] https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2020&locations=IN&start=1990

of about 5%, India's GDP increased from USD 37 billion in 1960 to USD 3.18 trillion in 2021[25]. At USD 200 billion in 2021, India's real estate market is the country's second largest economic driver.[26]. A law protecting homebuyers was necessary because, despite the real estate market's rapid growth, the sector was mostly unregulated and unaccountable. The varied levels of implementation amongst states mean that the Real Estate (Regulation and Development) Act, 2016 ("RERA") has not solved the problem of homebuyers' difficulties.[27].

The fundamental goal of the recently established Insolvency and Bankruptcy Code, 2016 ("Code") was to assist in the revitalization of businesses. Its goal was to spare bankrupt businesses from the wrath of their former management and the spectre of liquidation. Individual homebuyers around the country who had been delayed in taking possession of their residences filed petitions for insolvency against the real estate developers who had given them trouble with the National Company Law Tribunals ("NCLT"). The Code has changed dramatically to create a new insolvency procedure to safeguard the rights of homebuyers, who were not originally considered creditors.

Status of homebuyers under the Code

The definitions of "financial creditor" and "operational creditor" in the initially enacted Code did not cover homebuyers. Therefore, prospective homebuyers didn't know their rights under the Act. The National Company Law Appellate Tribunal ("**NCLAT**") in *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure*[28] determined that the "commercial effect of a borrowing" meant that homebuyers who contributed to developers' assured return schemes qualified as "financial creditors" under the Code
and could initiate the developer's corporate insolvency resolution process ("CIRP"). Thereafter, the
Supreme Court in *Chitra Sharma v. Union of India* [29] buyer-creditor status was officially acknowledged. In addition, the Supreme Court appointed a highly regarded attorney to advocate for homeowners' interests before the CIRP's decision-making body, the Committee of Creditors ("CoC"). As a result, the issue of their status under the Code was resolved by the passage of the Insolvency and Bankruptcy Second (Amendment) Act, 2018 ("2018 Amendment"), which added homeowners to the definition of 'financial creditors'[30].It's possible for homebuyers to be a part of the CoC and financially responsible for the CIRP established by the real estate developer. The Supreme Court affirmed the validity of the 2018 Amendment in a decision issued earlier this year in *Pioneer Urban Land and*

[25] GDP growth (annual %) - India | Data (worldbank.org)

[26] India Real Estate Industry Analysis, https://www.ibef.org/industry/indian-real-estate-industry-analysis-presentation

[27] Boston Consulting Group and Omidyar Network India, Five Years On: An assessment of RERA https://www.bcg.com/five-years-on-assessment-of-rera

[28] Nikhil Mehta and Sons (HUF) v. AMR Infrastructure, (2017) SCC NCLAT 859

[29] Chitra Sharma v. Union of India, (2018) 18 SCC 575

[30] Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, Amendment of section 5.

Infrastructure Ltd. v. Union of India[31], where the Supreme Court said that when people buy homes, money is collected without taking into account how much money is worth over time. Time value of money means that the buyer saves money even if the whole price is agreed upon while the flat does not yet exist or is only partially finished.

However, insolvency tribunals have been flooded with claims since the 2018 Amendment, many of which have been filed by individual homebuyers for spurious or malicious reasons. This necessitated the Insolvency and Bankruptcy Code (Amendment) Act, 2020 [32] ("**2020 Amendment**") This stipulated that either one hundred purchasers or ten percent of all purchasers from the same real estate project be in favour of initiating CIRP against the developer. In, the Supreme Court unanimously rejected a challenge to the constitutionality of the 2020 Amendment. *Manish Kumar v. Union of India*[33]. The Supreme Court elaborated on why buyers must all purchase from the same property: to forward the purpose of the Code. Homebuyers in one of a developer's projects may not have many
complaints, whereas buyers in another of their projects may have numerous, significant problems.

Therefore, it makes sense for the applicants to be drawn from the same housing development.

Reverse CIRP – an innovation

In *Flat Buyers Association Winter Hills v. Umang Realtech Pvt. Ltd.*[34] *(**Umang Realtech**)* To protect homebuyers' rights and interests, the NCLAT established a trial "Reverse CIRP" procedure. Some of the buyers in this case filed a CIRP suit against the developer. One of the developer's promoters opted to stay outside the CIRP and play the role of a financer to ensure the success of the CIRP and the homebuyers' capacity to take possession of their flats during the CIRP without third-party involvement. This would allow us to finish the project and deliver the units to the purchasers within the NCLAT-mandated timeline. In addition, the homebuyers' group supported this proposition.

The NCLAT established the framework for Reverse CIRP in this very case.:

- Creditors that are buyers, banks, or operational creditors for a single project can only file a CIRP against the developer for that project. It has no bearing on the developer's other works.
- Buyers, lenders, and operational creditors of one development cannot submit claims with the insolvency expert of another.
- A secured creditor such as a financial institution or bank cannot be given preference with respect to the flat over the homebuyers.

[31] Pioneer Urban Land and Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416

[32] Insolvency and Bankruptcy Code (Amendment) Act, 2020, Amendment of section 7

[33] Manish Kumar v. Union of India, (2021) 5 SCC 1

[34] Flat Buyers Association Winter Hills v. Umang Realtech Pvt. Ltd, (2020) SCC NCLAT 1199

- Some homebuyers may be willing to settle for a different property or a flat in a different tower in exchange for having their claims satisfied. The insolvency expert can then make changes to the agreement with the promoter and the homebuyers' consent. Some buyers will be able to take possession of their homes sooner, saving them money on interest payments to lenders or landlords.
- No refund is allowed to homebuyers.

The interests of homeowners are safeguarded in a Reverse CIRP, and the likelihood of project completion is increased. In short, a Reverse CIRP occurs when a promoter submits a resolution plan that allows a developer to swiftly resolve or complete a project. This promoter must bring in more money from a third party, in the form of a loan. Next, the CoC, which is made up of homebuyers and banks that want to see the project through to the end, will decide if the proposed resolution plan is workable. Third-party resolution applicants are not allowed to submit new resolution plans. The insolvency professional must submit an application requesting disposal of the CIRP when the project has been completed according to the promoter's approved plan. The insolvency practitioner will move forward with the CIRP if, however, the project has not been completed.

It is first highlighted that the Umang Realtech case shaped the Reverse CIRP technique that was developed. Since this is not a typical real estate bankruptcy, it cannot be used as a template for future cases. The decision of whether or not to employ the Reverse CIRP will depend on the circumstances. Insolvency courts have approved the use of Reverse CIRP in *Ram Kishor Arora, Suspended Director of M/s. Supertech Ltd. v. Union Bank of India,* [35] wherein the NCLAT capped the developer's participation in the Reverse CIRP at a single project. The Supreme Court eventually ruled in the matter of *Anand Murti v. Soni Infratech Pvt. Ltd.*[36] reaffirmed the position, directed that the CIRP be put on hold, and granted the former developer's promoter additional time to finish building the real estate housing project. In *Rajesh Goyal v. Babita Gupta*[37], So that everyone's interests, including those of the homebuyers, could be protected, the NCLAT approved the promoter's request for money to finish the project.

Reverse CIRP and the objectives of the Code

Several arguments have been made against reverse CIRP, the most prominent of which are that such a scheme is not authorised by the Code and that it represents judicial overreach. In the recent case of *Mr. N. Kumar v. Tata Capital Housing Finance Ltd*[38]., the NCLT couldn't find any references to

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[35] Ram Kishor Arora, Suspended Director of M/s. Supertech Ltd. v. Union Bank of India, (2022) SCC NCLAT 239

[36] Anand Murti v. Soni Infratech Private Limited, (2022) SCC SC 519

[37] Rajesh Goyal v. Babita Gupta and Others, (2021) SCC NCLAT 4139

[38] Mr. N. Kumar v. Tata Capital Housing Finance Ltd, IA(IBC)/1245(CHE)/2020

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"limited" or "project-specific" CIRP in the Code, so it decided that it didn't have the power to make such agreements. The second main criticism is that the Reverse CIRP plan is illegal since it violates section 29A of the Code. The resolution process cannot include promoters of a defaulting corporate debtor, as stated in Section 29A of the Code. In Reverse CIRP, on the other hand, the project's promoters are obligated to provide funding and participate in its execution.

The Supreme Court has not ruled on Reverse CIRP notwithstanding the challenges. Rather, it has been used in a few specific instances. To clear up any confusion, however, Reverse CIRP must be consistent with the Code's goals of (i) resolving insolvency, (ii) maximising the value of the corporate debtor, and (iii) striking a fair balance between the interests of all parties involved. Therefore, Reverse CIRP must be evaluated in light of the Code's three goals.

In India, real estate transactions typically occur within the context of discrete "projects." Separate bank accounts are mandated by RERA for all of a developer's financial transactions.[39] every job it takes on, and 70% of the money it gets from homeowners has to go to pay for building and land costs. Therefore, it would be simpler and more efficient to settle a developer's insolvency if the process were limited to individual projects. In Umang Realtech, the NCLAT had ruled that Reverse CIRP participants were not eligible for a refund of their fees. Additionally, this would help the corporate debtor stay in business by making sure that the project is finished and that buyers get their flats without the developer having to go bankrupt. Time spent on resolution is minimised by focusing on only a subset of tasks, increasing the value of assets. As a result, it appears that the goals of Reverse CIRP align with those of the Code.

Another important thing to think about is how to set homebuyers apart from other protected financial creditors, such as banks, financial institutions, and non-banking financial institutions. If those loans aren't repaid, the security those creditors have can be used to get what they're owed. This safety is typically provided by the units themselves while they are being built. Homebuyers, meanwhile, would like to take possession of the units they have paid cash for. If this happens, it's possible that the secured creditors would vote against the settlement plans and push for the developer to go bankrupt so that they have first choice in how the assets are distributed under the Code's "liquidation waterfall." They would not try to finish the project. This goes against the spirit of the Code and is not good for anyone buying a house. Reverse CIRP strikes a compromise between the needs of these two types of creditors.

Furthermore, unlike other financial debtors, homebuyers lack the business acumen to determine which resolution option is in their best interest. Reverse CIRP solves this problem

by requiring the promoter to pool resources in order to see the project through to its conclusion.. In the case of *Amit*

[39] Real Estate (Regulation and Development) Act, 2016, Section 4(2)(D)

Katyal v. Meera Ahuja and Ors.[40], The Supreme Court has said that cases where settlement plans call for big drops in claims would be "harsh and unjust" for homebuyers because they are not banks or other financial institutions. In the real estate business, only 72 CIRP cases have led to good resolution plans.[41].

On 18 January 2023, the Government of India proposed certain amendments[42] changing the Code, which includes changes that are meant to make it easier to settle real estate issues. Some people think that if a real estate developer files a CIRP, the NCLT should decide to let the case go forward but only apply the CIRP rules to the projects that are behind schedule. As a result, the CIRP will only apply to the specific projects that will be treated as separate from the developer for the duration of the resolution process. Lenders and purchasers in troubled projects will be safeguarded without any impact on the developer's other work.

2.3. INTRODUCTION OF HOME –BUYERS AS FINANCIAL CREDITORS

The Second Amendment ordinance was brought on June 6, 2018 bringing in sweeping changes in the Code by introducing homebuyers as one of the financial creditors under the Code, thus widening the definition of financial creditors. "Homebuyer is a misnomer in the context of the Code after the amendment. The allottees in real estate project or subsequent acquirers of residential or commercial property including shops, offices, showrooms or godowns are now the financial creditors under the Code."[43] The buyers of the property needed a remedy against the sellers since a long time. The introduced sub section (f) to Section 5 clause 8 reads as follows:

"*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;"*

However, in an amendment to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 'other creditors' have been allowed to file claims during the insolvency resolution process, in addition to operational and financial creditors. Following in the same vein, the questions raised is whether a particular class of creditor will fall within which category to decide the resultant treatment which they will receive as per their rights. The most pertinent example of this and the one that has perhaps affected the largest number of people is the treatment o f home buyers *vis-a-vis* the real estate companies they dealt with. Earlier these homebuyers or allottees invested money in the real estate company but still

[40] Amit Katyal v. Meera Ahuja and Others (2022) 8 SCC 320

[41] The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, July – September 2022

[42] Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016, https://ibbi.gov.in/uploads/whatsnew/7f55e29ae9c0023184a3895f849cd2ef.pdf

[43] Supra note 92

they were not treated as creditors of the company. The only remedy left for them was to go to the Civil Court which did not provide speedy justice.

The SC in the case of *Anuj Jain v Axis Bank Limited* [44] considered the role of homebuyers as the financial creditors under the Code. Code recognises three types of creditors, which are 'financial', 'operational' and 'other'. Each of them has different rights and powers and it is important to determine the types of debt. In simple terms, financial creditors are the ones "whose relationship with the entity isa pure financial contract, such as a loan or a debt security;"

The definition of financial debts as per the Code hinges around the concept of "time value of money," This concept came for examination before the NCLT and the NCLAT in the case of *Nikhil Mehta v AMR Infrastructure*[45] and the appeal therefrom[46].

The case involved buyers booking homes in the respondent company's upcoming project. As per of the booking contract, the buyers were required to pay large parts of the final sale amount for their properties to the developer upfront, in return for which the developer promised not only to make and transfer possession of their homes in a timely manner, but also promised handsome amounts as "assured returns" which were to be paid to the home buyers in case of delay in the construction process and in the transfer of the constructed homes. In terms of the contract, the homebuyers were actually investing in the real estate project, because the developer was using their money for developing the project rather than taking out a loan.

Before the NCLT, the matter revolved around the question whether these prospective homeowners/investors in real estate, who were guaranteed assured returns as per the sale agreements, could be considered financial creditors.

The NCLT opined that such investors could not be considered financial creditors. The NCLT explained the basic requirements of fitting into this category as follows:

"… the first essential requirement of financial debt has to be met viz, that the debt is disbursed against the consideration for the time value of money and which may include the events enumerated in various sub-clauses… The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments

in future...In Black's Law- Dictionary (9th edition) the expression 'Time Value' has been defined

[44] [2020] ibclaw.in 06 SC

[45] Nikhil- Mehta & Sons (HUF) & Ors. v. AMR Infrastructure Ltd., C.P. No. (ISB)-O3(PB)/2017

[46] Nikhil Mehta & Sons v. AMR Infrastructure Ltd., Company Appeal (AT) (Insolvency) No. 07 of 2017.

to mean 'the price associated with the length of time that an investor must wait until an

investment matures or the related income is earned'. In both the cases, the inflows and outflows are distanced by time and there is a compensationfor time value of money…"

The NCLAT, while deciding the appeal arising out of NCLT's judgment, concurred with these observations. The end result is that the homebuyers are now within the scope of financial creditors.

2.4. TIME LIMIT FOR RESOLUTION PROCESS

The earlier provision of S.12 provided that the CIRP should be completed over a period of 180 days or within the extended period of 90 days. The Code then provided a mandatory period of 330 days for completing the entire proceedings including the extension. If the resolution process is not completed within this period of 330 days, the adjudicating authority will initiate liquidation procedure for corporate debtor. This was introduced by the amendment dated August 6, 2019.. The Code provides for the maximum time limit which can be used for insolvency resolution of any corporate debtor and if resolution is not possible the undertaking needs to be dissolved. The judiciary is also, by and large, in support of the time frame provided under the Code as can be seen from the decision in the case of *SBI v. Jet Airways (India) Ltd.*[47] wherein it was held that "*it is also to be pointed out that the IBC provision provides for 180 days for completion of the CIRP..*" This decision clearly lays emphasis on the importance of the time in resolution and clearly affirms that the time frame provided is the maximum possible. The institutions under the Code can complete the process earlier than the provided time frame but cannot go beyond it.

The above judgment discusses the importance of time provided, but there is a set of judgments which show the contrary intention of the judiciary. This new nomenclature can be termed as a roundabout way which the judiciary undertakes to provide extension of time. In the caseof *RBL Bank Ltd. v. MBL Infra Ltd.*[48] the NCLT Kolkata stated that though it cannot extend the timeline, but can 'exclude' the timelines, non-exclusion of which would cause severe prejudice to the applicant.

Further, in the landmark decision of *CoC of Essar Steel India Ltd. through Authorised Signatory v. Satish Kumar Gupta & Ors.*[49] the Hon'ble Supreme Court held that "*while leaving the*

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[47] 2019 ibclaw.in 20 NCLT

[48] Supra note 100

[49] Supra note 63

provision otherwise intact, the term 'mandatorily' is struck down as being manifestly arbitrary under Article 14 of the Constitution of India and as being unreasonable restriction on the litigant's right to carry on business under Article 19(1) (a)of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the CIRP must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. If the delay or a large part thereof is attributable to the tardy process of the AA and/or the NCLAT itself, it may be open in such cases for the AA and/or NCLAT to extend time beyond 330 days." If there is an extra-ordinary situation when the law is silent and there is no guideline in law, certain period can be excluded from the CIRP.[50] In the same judgment the SC has explained the importance of the time in following words:

"*The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation.*"

It is pertinent here to mention the judgment in the case of *CoC of Trading Engineers International Ltd. v. Trading engineers International Ltd. through Resolution Professional*[51] wherein it was held that "*the discretion should have been exercised by the Adjudicating Authority in acceding to the request of the Resolution Professional in extending the time beyond 330 days. We are of the considered opinion that this being a fit case where indulgence of this Appellate Tribunal is warranted for extending the timelines to prevent the Corporate Debtor from being pushed into liquidation and a viable Resolution Plan being approved by the COC, allowing of appeal will promote the interest of justice.*" Additionally, NCLAT in *Pioneer Rubchem Pvt. Ltd. v. Vivek Raheja Resolution Professional, Trading Engineers (International) Ltd*[52] held that "*Section 12 of the IBC, 2016 provides for a time line of 180 days for completion of CIRP and even if we consider extended period it is another 90 days and hence within 270 days the CIRP should be completed. Although it is directory that CIRP can be completed upto a period of 330 days or so which is largely to consider the time taken in judicial process.*

Hence, practically all attempts be made to complete the CIRP within 270 days."

In the case mentioned herein the resolution professional had received two resolution plans and hence there was already compliance with the requirement of competitive bidding. So the NCLAT

[50] Supra note 63

[51] (2021) ibclaw.in 45 NCLAT

[52] [2020] ibclaw.in 60 NCLAT

rejected the application for extension.

The NCLAT's judgment in *Quinn Logistics India Pvt. Ltd. v. Mack Soft Tech Pvt. Ltd.*[53] is an important judgment where the Appellate Authority stated that it is always open to the Adjudicating Authority to 'exclude certain period' for the purpose of counting the total period of 270 days, if the facts and circumstances justify exclusion, in unforeseen circumstances. In this case NCLAT has carved out certain exceptions for counting of the total period of 270 days of resolution process which are:-

1. " If the CIRP is stayed by a court of law or the Adjudicating Authority or the Appellate Authority or the Supreme Court.

2. Absence of Resolution Professional when the CIRP in progress for one or other reason

3. The time passed between the date of order of admission of application and declaration of moratorium is passed and the actual date on which the Resolution Professional takes charge for completing the CIRP.

4. If order is reserved by the Adjudicating Authority or the Appellate Tribunal orthe Hon'ble Supreme Court for some reason.

5. If the CIRP is set aside by the Appellate Tribunal or order of the Appellate Tribunal is reversed by the Hon'ble Supreme Court and corporate insolvency resolutionprocess is restored.

6. Any other circumstances which justifies exclusion of certain period".

In the case of *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr*[54] it washeld that "t*he entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of*
not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so
decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation."

2.5. INCREASE IN THE THRESHOLD LIMIT

Before the Code, it was very difficult to drag a company towards insolvency. It was debtor-in-possession regime. After the introduction of the Code, it has become very easy for the creditor to drag the corporate debtor into insolvency. A small default could be presumption of insolvency

[53] [2018] ibclaw.in 09 NCLAT

[54] Supra note 82.

of a large company. The trigger is simply a default which is above the threshold amount. The amount of default set forth is very crucial as, if, it is very low it will lead to many frivolous litigations and if it is very high than the power given to creditors with small amount shall be lost. The amount of default is provided under S.4 of the Code which readsas follows:

"*4. (1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:*

Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees."

The irony with this amount of default was that the company like flipkart which has a turnover of multi-billion dollar was dragged to NCLT on the alleged defaulted in paymentof Rs. 26.95 crores. Although, the case was stayed by the Karnataka High Court after initially being admitted by the NCLT (the case was eventually dismissed due to failure to prove existence of operational debt by the small vendor creditor). But mere admission of cases shows the power given to the creditors by the Code. Though the threshold was revised by way of executive order to Rs. 1 Cr. during the pandemic, it has not been revised back to Rs. 1 Lac which is still part of the law. Though Rs.1 Cr. as threshold is good enough to discourage frivolous litigations due to the low amount of default provided under the Code, the debate is still on as to whether this should be revised back to Rs. 1 Lac, as can be seen from the following:

"..not revising the minimum amount for triggering insolvency may impact small vendors who have successfully used the insolvency law as a recovery mechanism. For example, a vendor moved an insolvency petition against GlaxoSmithKline Pharma for non- payment of an amount of Rs 8.5 Lac. Once threatened with the insolvency petition, GlaxoSmithKline paid back the amount and the insolvency application was withdrawn.

The background of the revision of threshold is that after the COVID 19 pandemic set in, nationwide lockdown was imposed. It was a big blow to the entire economy as all the commercial activities apart from sale of essential goods came to a halt. This caused inevitable financial distress to various business entities, big and small. The government was aware that this financial distress would result in non payment of debt by many corporate debtors which will open floodgates of litigation under the Code. This increase in threshold was so steep that it completely washed away the hopes of many creditors who could not approach the NCLT.

In the case of *Tharakan Web Innovations Pvt. Ltd. v. National Company Law Tribunal*[55] the question raised for decision was that whether the application related to defaulted amount which is less than Rs.1 Crore, can be filed after Notification S.O. 1205(E). The High Court held that "*the minimum amount of default is statutorily fixed, with power available to the Government to re-fix, upto a sum of Rs.1 Crore. Once the Government has exercised the said power by issuance of a notification fixing the minimum amount of default as Rs.1 Crore, the Section will have to be read by replacing the words* "*one lakh rupees*" *by* "*rupees one crore*"." Once the position of law has been established, the application under Part II will be accepted only in accordance with the amended provisions of law and hence no application can be filed after March 24, 2020 for an amount where the default is less than Rs.1 Crore.

2.6. ANALYSIS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016: THE JUDICIAL APPROACH

2.6.1. POWERS OF NCLT UNDER THE CODE

Para 4.2.1 of the BLRC Report[56] discusses the jurisdiction of National Company Law Tribunals on a firm's insolvency and liquidation, as follows:

"*Under Companies Act, 2013, the National Company Law Tribunal (NCLT) has jurisdiction over the winding up and liquidation of companies. NCLAT has been vested with the appellate jurisdiction over NCLT. Similarly, the Limited Liability Partnership Act, 2008 also confers jurisdiction to NCLT for dissolution and winding up of limited liability partnerships, while appellate jurisdiction is vested with NCLAT. The Committee recommends continuing with this existing institutional arrangement. NCLT should have jurisdiction over adjudications arising out of firm insolvency and liquidation, while NCLAT will have appellate jurisdiction on the same.*"

The provisions for individual and corporate insolvency are different and the authorities also are different for both. The intent behind is to avoid multiple forums dealing with same matter and avoid unnecessary delays in deciding the matter. The Code provides for two different forums. For corporate insolvency it is NCLT and for individual insolvency it is DRT. The Ministry of

[55] Dipak Mondal, Confusion persists over IBC default threshold, NEWS EXPRESS ONLINE, Jun. 20, 2021https://www.newindianexpress.com/business/2021/jun/20/confusion-persists-over-ibc-defaultthreshold-2318756.html.

[56] Supra note 13 at pg 15.

Corporate Affairs vide notification dated June 1, 2016 established the NCLT and NCLAT. Both the tribunals derive their authority and powers from S.408 and S.410 of the CA, 2013 respectively. The tribunals were established with the objective to provide exclusive jurisdiction for cases relating to corporate law and to fast track the case. The time limit can be extended for 15 days with the permission of NCLAT.An appeal from the NCLAT then lies to the Supreme Court.

NCLT has very vital role to play right from the inception of the insolvency proceedings. The territorial jurisdiction of the NCLT will be decided in accordance with the place of the registered office of the corporate entity for insolvency resolution, liquidation etc. In *Spectrum Voyages Pvt. Ltd. v. Fortis Healthcare Ltd*.,[57]the NCLAT held that "*while interpreting Section 60 of the I&B Code 2016, the Adjudicating Authority in relation to* '*insolvency resolution and liquidation for*

corporate persons including corporate debtors and personal guarantors thereof' *shall be the*

National Company Law Tribunal having territorial jurisdiction, where the registered office of the corporate person/ corporate debtor is located. The NCLAT rejected the plea that the jurisdiction is based where the registered office of creditor is situated".

For dealing with the cases under the insolvency law the NCLT and NCLAT are vested with powers of the Civil Courts. Though they are not be bound to follow the procedure laid down in Civil Procedure Code but will adhere to the principles of natural justice. S. 422 of the CA, 2013 provides that the Tribunal is supposed to dispose of the matter expediously taking into consideration the time frame provided within the Code.

The Company Law Board (CLB), constituted under the Companies Act, 1956 stands dissolved with all matters of CLB being transferred to NCLT. Therefore, now both pending and fresh matters in relation to insolvency will be dealt with in accordance with the provisions of the Code and CA, 2013. However, the CA, 2013 carries a saving provision for any decision or order of the CLB that has already been rendered. The Appeal against such orders shall continue to lie with the relevant High Court and not the NCLAT.

Apart from the judicial powers of the NCLT, there are certain supervisory powers which are exercised by NCLT as it plays a vital role in insolvency resolution. The supervisory powers of NCLT areas follows:

The time limit for resolution of insolvency is an important criterion under the Code. The NCLT

[57] CA(AT)(Insolvency) No. 409/2018

will check that the timelines provided under the Code are followed. If the CIRP is not completed within the time frame provided, the NCLT has the power to order for liquidation of corporate debtor;

The power to declare moratorium lies with NCLT;

The IRP is appointed by the IBBI after approval of the NCLT. To continue with the IRP as the resolution professional or replace the IRP and appoint a new Resolution Professional is decided by the CoC with approval of NCLT;

The final approval to the resolution plan of the corporate debtor will be given by NCLT;

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CHAPTER - 3

THE EFFECT OF INSOLVENCY AND BANKRUPTCY CODE ON OTHER EXISTING LEGISLATIONS

3.1. THE EFFECT OF THE CODE ON THE COMPANIES ACT, 2013

The CA, 2013 is majorly affected by the Code as some provisions of both legislations deal with the same subject matter. The Companies Bill was passed by the Parliament in 2013 and received President's assent on August 29, 2013. On August 30, 2013 it was notified with 29 Chapters, 470 Sections and 7 Schedules. It replaced the old Companies Act, 1956. The purpose of the CA, 2013 was to revamp the present corporate law regulations for removal of hassles and for smoother business administration. But it was unable to achieve this objective in its entirety. To achieve this objective in full extent and have ease in promoting business and lighten the restrictions, the Government of India (Ministry of Corporate Affairs) had introduced certain provisions wide Companies (Amendment) Act, 2015. The CA, 2013 was again amended by the Companies (Amendment) Act, 2017 vide notification dated January 3, 2018.

The Code vide its 11th Schedule has made some 36 changes to the CA, 2013. S.255 of the Code provides that the CA, 2013 will be amended in accordance with 11th Schedule of the Code. After the notification dated December 7th, 2016 issued by the Ministry of Corporate Affairs which brings into effect S.255 of the Code, the CA, 2013 will deal
with winding up of company only on grounds "other than inability to pay debts" as enlisted under

S. 271 (a) to (e) of the CA, 2013. S. 271 of the CA, 2013 reads as follows:

*[**271. Circumstances in which company may be wound up by Tribunal**. - A company may,on a petition under section 272, be wound up by the Tribunal,-*

(a) if the company has, by special resolution, resolved that the company be wound up by theTribunal;

(b) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs

of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management

of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(c) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(d) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.]

Thus, it has scrapped a part of the winding up provision as contained in the CA, 2013.The effect of the change is that now the law relating to winding up exists partly in the CA, 2013 and remaining in the Code. This change was also necessary because the Code also provides for insolvency resolution by corporate debtor itself under S.10. The provisions relating to voluntary winding up from S.304 to S.323 under the CA Act are now deleted with the passing of the Code. The question remains that whether these changes were necessary, or it would have been better if the entire chapter relating to winding up could have been scrapped and brought within the purview ofthe Code.

Also, under S.272 which provides for presentation of petition for winding up by the creditors has been amended and no creditor is now eligible to file a petition for winding up. Similarly, the registrar has also been barred from filing a petition on the grounds of company being unable to pay its debt. The provisions relating to company's voluntary winding up and approval of creditors for compulsory winding up has completely been omitted from the CA, 2013. S.255 of the Code has omitted winding up procedure under the CA, 2013 and replaced it with S.7 to S.9 of the Code being initiation of CIRP byfinancial and operational creditors. Hence, the creditor cannot go for winding up directly. Mandatory CIRP has to befollowed before liquidation.

Due to the above change in position of the law the question which has been raised with regard to conflict between the Code and the Act, 2013 is that in case a winding up petition has already been filed and a subsequent application is filed under the Code for CIRP, whether the company will go for winding up or for CIRP under the Code. In the case of *Avani Projects and Infrastructure Ltd.*

v. Ornate Tradcom Pvt. Ltd.[58] the High Court had admitted winding up petition by order dated December 1, 2017 against Avani Projects. In pursuant to admission of winding up order the official liquidator was also appointed. Meanwhile, Devi trading had filed an application under S.7 of the Code against the company before the NCLT. It was held that "*if a High Court retains winding up petition of a company as per the Company (Transfer of Pending Proceedings) Rules, 2016 and*

[58] CA No. 92 of 2019.

upon NCLT initiating CIRP under the Code, the winding up proceedings shall automatically be halted until the approval or rejection of resolution plan under S.31 of the Code. The creditor would be at liberty to file its claim before the IRP also". The decision in the case of *Impex Ferro Tech Ltd. v. Aroma Coke Ltd.*[59] was relied upon where it was stated that "*due to the moratorium imposed under S.14 of the Code, High Court would cease to exercise jurisdiction over any pending windingup proceeding and the same would be transferred to the NCLT*".

Likewise, the Bombay High Court in case of *Jotun India Pvt. Ltd. v. PSC Ltd.*[60] held that the pendency of winding up petition before High Court would not bar the NCLT from proceeding with an application filed for initiating CIRP against the same corporate debtor.. Additionally, the division benchmade it clear that:

"*The [IBC] itself contemplates a bar on filing an application for insolvency resolution under specific circumstances by certain entities. Section 11(d) of the [IBC] inter-alia prohibits a corporate debtor against which a liquidation order has been passed from making an application*
for initiating corporate insolvency resolution process… The intention of the legislation is clear
from Section 11(d) of the [IBC], which only bars insolvency proceedings against a corporate debtor, after an order of liquidation against it, in case of an application by the said corporate debtor itself and conspicuously omits anysuch restriction for applications by financial or operational creditors"

Moreover, in *Forech India Ltd. Edelweiss Assets Reconstruction Co. Ltd*[61] the Supreme Court has held that the bars imposed vide Section 11(d) of the Code only appliesto petitions under Section 10 of the Code and not to petitions under Sections 7 or 9. The relevant portion of the judgment is produced below:

"… Section [11(d)] is of limited application and only bars a corporate debtor from initiating a petition under Section 10 of the [IBC] in respect of whom a liquidation order has been made. From a reading of this section, it does not follow that until a liquidation order has been made against the corporate debtor, an insolvency petition may be filed under Section 7 or Section 9 as the case may be, as has been held by the [National Company Law] Appellate Tribunal…"

Thus, a conclusion can be drawn that the creditors of the corporate debtor can file for CIRP even after an order for commencement of winding up has been made against the company. The

[59] APO No. 273 of 2018

[60] [2019] 213 Comp Cases 61 (Bom)

[61] CIVIL APPEAL NO. 818 of 2018

restriction is only on the corporate debtor as he cannot file an application forCIRP after passing of the winding up order.

Apart from the changes in the winding up proceeding, the Code has further affected S.325 of the CA, 2013 which prescribes for the sequencing of payment. It has been omitted and S.326 and S.327 have been amended due to the effect of the Code. These sections dealing with the waterfall mechanism which is used for payment of creditors. Now, in the event of liquidation S.53 of the Code shall prevail which deviates from the CA, 2013. It provides for the cost of CIRP and liquidation as the first priority which was at the bottom of the list under the CA, 2013. Secondly, revenues and taxes payable to the government have gone down in priority and are placed after payment of financial debts owed to unsecured creditors. Thirdly, the dues to workmen for 24 months are computed from the date of commencement of liquidation under the Code, while the CA, 2013 provides the computation from the date of winding up order.

Another change made by the Code is that under S.6 of the Code, a financial or operational creditor or the corporate debtor can initiate CIRP, if a corporate debtor defaults in payment of INR 100,000 or more (which has now been increased up to Rs. 1Crore). Upon CoC's approval, NCLT reviews it and then conclusively decides in favour or against it, as it deems fit. The Code excludes shareholders and operational creditors from approval process. Contrary to this the Act requires special resolution of all categoriesof creditors and shareholders. The Code empowers the CoC to approve the resolution plan and NCLT has a limited role in the approval process. In contrast, the Act requires NCLTto exercise wide range of powers in approving a scheme and if deem fit, modify it too.

In addition, the Code has introduced an entire framework of professionals who will be experts in the field of insolvency. These new professionals introduced by the Code are also made part of the CA, 2013 and the definition is amended. The relevant provisions of S.275 are referred below:

"*275. Company Liquidators and their appointments. - (1) For the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained under sub-section (2) as the Company Liquidator. [(2) The provisional liquidator or the Company Liquidator, as the case*
may, shall be appointed by the Tribunal from amongst the insolvency professionals registered under the Insolvency and Bankruptcy Code, 2016;]"

Furthermore, the IBBI has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 on March 31st, 2017. Before introduction of

the

Regulations, the Companies Act, 1956 controlled voluntary liquidation as provisions under the CA, 2013 were never notified. The government has omitted provisions of voluntary liquidation under both the Companies Act, 1956 and the CA,2013.

The CA, 2013 is amended in such a way that now both words Act and Code are part of it so as to give way to the Code. Thus harmonizing both the statutes. But when weinterpret the Code and the CA, 2013 a conclusion can be drawn that almost all the casesare brought under the Code to the NCLT rather than the Act.

3.2. SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT AND THE CODE

The existing legal framework relating to commercial transaction has never kept pace with the requirements of the commercial sector. SARFAESI Act was made as per the suggestion of Narshimham Committee I and II and Andhyarujina Committee constituted by the Central Government with the purpose of making reforms in banking sector and provides much needed changes in the legal system for recovery of debts. Further, the Act provides for formation of ARCs which are regulated by RBI which will further acquire assets from banks and FIs. Theprocess is as follows:

Borrower Banks or FIs ARCs The Act includes the following within its ambit:

- Regulation and registration of ARCs by RBI

- Securitization of financial assets of banks and Financial Institution with or without the securities underlying.
- Facilitating the reconstruction of financial assets which are acquired while exercising powers of enforcement of securities conferred on banks and Financial Institutions.

Thus the SARFAESI Act provides for determination of assets and rectification of problems of NPAs in a legal manner. There are four pre-conditions for enforcing the rightsof a secured creditor. They are:

- The debt should be a secured debt;

- The debt has been classified as an NPA by the bank;

- Outstanding dues are one lakh and above and more than 20% of the principal loan amount

and interest thereon;

- The security to be enforced is not an agricultural land.

The purpose of SARFAESI Act is to safeguard the financial creditors which are mostly the banks and other FIs by empowering them to enforce their security interest without intervention of the Court. On the contrary, the Code safeguards the rights of all the creditors. It was inevitable that both these laws will cross-paths and there will be conflict between various provisions of these two legislations.

There are however some difference between the Code and SARFAESI Act. Under the Code, the debt is not required to be secured. Claims for unsecured debt can also be made. The Code does not differentiate on basis of credit security. One of the major drawbacks of the SARFAESI Act is that it does not apply to unsecured creditors. Secondly, the debt is not necessarily classified as an NPA under the Code. The Code does not mention anything about underlying security with the debt. As mentioned above, it is clear that after enactment of the Code, it will have an overriding effect over other legislation by virtue of S.238 and S.14.. Thus the Code will have supremacy over the Act.

In the case of *Rakesh Kumar Gupta, Director, M/s Gupta Marriage Halls Pvt. Ltd. v. Mahesh Bansal, IRP, M/s Gupta Marriage Halls Pvt. Ltd* [62] it was held that the pending proceedings under the SARFAESI Act shall not hinder the proceedings triggered by the financial creditor under the Code. Therefore, even when proceedings under SARFAESI Act, have already been initiated, fresh proceedings under the Code can still be accepted becauseof the *non obstante clause*.

As both the Code and SARFAESI Act have overlapping jurisdictions, there are chances that the borrowers under the SARFAESI Act may hide behind the Code. Often there are instances where the multiple proceedings are triggered under different enactments. Many creditors follow the practice of forum shopping with a fraudulent and malicious motive to pressurise the other party by way of opening the floodgates of litigations. Forum shopping means a "practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on a determination of which court is likely to provide the most favourable outcome"[63]. In *Punjab National Bank v. M/s Vindhya Cereals Pvt. Ltd.* the NCLAT set aside the decision of the NCLT on the ground of forum shopping in a matter where the NCLT rejected an application under the Code on the ground that the matter was already pending under the SARFAESI Act. The NCLAT observed that because simultaneous

proceedings under the Code and SARFAESI can exist, this was not a case of forum shopping. It also observed that the objective

[62] Company Appeal (At) (Insolvency) No. 1408 of 2019. Similar view was held in the case of Dream LandRealtor Pvt. Ltd., In re, (2018) 89 taxxman 293 (NCLT – New Delhi)

[63] Forum Shopping, Merriam Webster Online Dictionary, https://www.merriamwebster.com/legal/forum%20shopping.164 Company Appeal (At) (Insolvency) No. 854 of 2019

behind the introduction of Code is to ensure speedy justice. As far as possible, the laws should be construed in such a way that proceedings under either law should not be hampered.

Another issue which has been settled by the Apex Court in the decision of *PR Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.*[64] and *State Bank of India v. Ramakrishnan and Anr.* [65] The judgments further stated that the moratorium under S.14 is not applicable to personal guarantors under S.13 (11) of the SARFAESI Act. The protection given by the Code during moratorium is limited to the corporate debtor and cannot be extended to the personal guarantor. At the same time it is also clarified that this does not preclude them in proceeding against the personal guarantors of the corporate debtor under S.13 (11) of the SARFAESI Act. So the question arises that can the security interest under S.13 of the SARFAESI Act be enforced against the personal guarantor of the corporate debtor after commencement of the moratorium under the S.14 of the Code. To comprehend this, it is necessary to understand S.35 of the SARFAESI Act, which reads as follows:

"*S.35.* ***The provisions of this Act to override other laws*** *– the provisions of this Act shall have affect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

The Insolvency Committee in its report submitted in March 2018 gave its recommendations and suggested in para- 5.11, as under-

"*The committee concluded that section 14 does not intend to bar actions against assets of the guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of moratorium may be restricted to the assets of the corporate debtor only"*

And since Code is the latter law, its provisions will prevail. In the case of *Encore Asset Reconstruction Company Pvt. Ltd. v. M/s Charu Sandeep Desai*[66] it was held that when two proceedings are initiated, one under the Code and other under the SARFAESI Act, then the proceedings under the Code shall prevail..

To obviate the above confusion and to clarify other matters, the Parliament, in observance of the recommendations given by the Insolvency Committee in its March, 2018 'Report of the Insolvency Committee', passed Insolvency and Bankruptcy Code (Second Amendment), 2018. Accordingly,

[64] Supra note 138.

[65] Civil Appeal No. 3595 Of 2018

[66] Supra note 90

the amendment was made to S.14 (3) which states the following:

"*the provisions of sub section (1) shall not apply to –*

(b) a surety in a contract of guarantee to a corporate debtor."

Thus, the Apex Court in *SBI v. Ramakrishnan and Anr.*[67] stated that S.14 cannot apply to personal guarantor stating that clarificatory amendments are retrospective in nature.

Another issue where the conflict between these two legislations emerges is with regard to the priority of payments in the case of winding up of the company. Under the SARFAESI Act the secured creditors had absolute rights in the secured assets and as soon as the default occurred the lender could sell off the assets and recover the money due to them. Alternatively, they also can realise their security interest with the permission of the liquidator appointed by NCLT. Thus, the right which was absolute right of the secured creditor is now subjected to approval of the liquidator. The added disadvantage is that the liquidator will be appointed only after the completion of the mandatory period of CIRP which was initially of 180 days and now 330 days. One commentator has observed that "The provisions of the Code defy the basic logic behind the enactment of the SARFAESI Act, 2002."[68]

Another bone of contention between the Code and the SARFAESI Act is S.18 of the Code. S.18 of the Code provides for the measures the IRP shall undertake to pay the debts of the corporate debtor and S.13 (4) of the SARFAESI Act provides for measures which the secured creditor can take in case of default of payment. In the matter of *SBI v. Calyx Chemicals and Pharmaceuticals Ltd.*[69], the Court held that the SARFAESI Act being an existing law, S.238 of the Code will prevail over any of the provisions of the SARFAESI Act if it is inconsistent with any of the provisions of the Code. S.18 of the Code will prevail over S.13 (4) of SARFAESI Act. The Code provides for the benefit of all the creditors whereas the SARFAESI Act is limited in application only to effective recovery of the debt of secured creditors.

Contrary to this in the case of *Unigreen Global Pvt. Ltd. v. PNB and Ors.*[70], the Applicant Unigreen made an application to initiate CIRP in the NCLT as it was unable to discharge its liabilities to the worth of Rs. 100 crores. Thus the CIRP application should be rejected. The NCLT after verifying all the documents came to a conclusion that when CIRP commences, the mandatory moratorium

[67] Civil Appeal No. 3595 and 4553 of 2018

[68] Manoj Kumar & Karan Gandhi, Annihilation of Security Interest under Insolvency Code, insolvencycode.com/insolvency-articlesdetails/ANNIHILATION_OF_SECURITY_INTEREST_UNDER_INSOLVENCY_CODE.

[69] IA 33 in C.P.(IB)-1554(MB)/2017

[70] Supra note 85.

given under S.14 will restrain all the other proceeding and it would be unjust to restrain banks from exercising security interest under SARFAESI Act. Consequently, the NCLT not only dismissed the Unigreen's application but also imposed penalty of Rs. 10, 00,000 on Unigreen and its directors under the S.65 of the Code..

Even though taking into consideration the hardships caused to the secured creditor, an important fact which cannot be ignored is that as per the data of the year 2018-19, the recovery rate under SARFAESI Act was merely 14.5 percent whereas, the same under the Code was 42.4 percent. The recovery rate under the Code is much higher in comparison to other laws. Thus, the inclination of lenders is also shifting towards the
Code.

3.3. SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 V. THE CODE

"*SICA is been seen as an unsuccessful attempt at combating corporate sickness. Thus, after advent of IBC, the death of SICA was imminent. Interestingly, the law to repeal SICA was enacted way back in the year 2003, when revival and rehabilitation processes for sick companies were incorporated in the Companies Act, 1956 by way of an amendment in 2002. However, the*
concerned provisions in the Companies Act were never enforced, and thus, the SICA repeal law
too, remained dormant. The SICA repeal law was finally enforcedafter coming of IBC, in the year 2016."[71]

It was in the year 1981 that a committee was formed to lookinto the problem of industrial sickness. The Tiwari Committee was formed to find remedial measures which can be undertaken in case of a sick or potentially sick company and also to suggest the course of action when its revival was not possible and it needs to be closed. As per the recommendations of this Committee the parliament enacted SICA. The overall legal framework for restructuring, reorganisation or liquidation of financially distressed or sick units is laid down under SICA. The intention was to getthe locked up capital investment in such industrial units released and use them in a more productive manner.

Under the provision S.3 (1)(o) of SICA, a sick industrial company was defined as "a unit or a company which at the end of any financial year have incurred accumulated losses equal to or

exceeding to its entire net worth". For application of SICA an industrial undertaking must have a

[71] Niddhi Parmar, Sica Bids Adieu, at pg. 19, http://vinodkothari.com/wp-content/uploads/2019/06/SICABids-Adieu.pdf .

minimum gestation period of five years. S.23 of SICA also defined the concept of potentially sick company so that early revival can take place. Thus under SICA, sickness was defined in terms of net-worth whereas the Code triggers on default and there is norole of net worthto bring an action.

Once a company was found to be sick by BIFR, certain time limit was granted to the company to come out of sickness and achieve positive net worth without any external aid. The operating agency shallprepare and apply a plan with respect to the company referred by including the following measures:

- Financial Reconstruction;
- Change in the management of the company, or takeover of, the management of thesick industrial company;
- Amalgamation;
- Sale or lease of its undertaking;
- Rationalization of its staff.
- Any other preventive or remedial measures; and
- Incidental or consequential measures

It was the duty of the operating agency to provide the revival scheme within 90 days to BIFR. On receiving the draft of the revival scheme, the BIFR will forward thedraft to the interested parties. The draft is sent to the interested parties for their suggestions.

BIFR will also publish the revival scheme in the newspaper inviting suggestions and objections from the shareholders, creditors, employees. BIFR will make the modifications if necessary.The company was revived accordingly.

The working of SICA was not as simple as it appears from the above. It faced various hurdles to revive a company. One of the major drawbacks of SICA was that the definition under SICA was limited to industrial undertakings only. S. 3 (f) define industrial undertaking as:

"*industrial undertaking" means any undertaking pertaining to a scheduled industry carried on in one or more factories by any company but does not include—*

(i) an ancillary industrial undertaking as defined in clause (aa)[72] *of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951); and*

[72] 3 [(aa) ""ancillary industrial undertaking" means an industrial undertaking which, in accordance with theproviso to sub-section (1) of section 11B and the requirements specified under that sub-section, is entitled tobe

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regarded as an ancillary industrial under taking for the purposes of this Act;]"

(ii) a small-scale industrial undertaking as defined in clause (j) of the aforesaid section-3;

S.22 of SICA which provided for moratorium, allowed companies to seek a bar on proceedings for execution, arbitration, recovery suits, enforcement of security interest etc. and deferred the action by the creditors. It can be better understood from the conclusion made by the Goswami Committee Report which states that "*There are sick companies, sick banks, ailing financial*
institutions, and unpaid workers. But there are hardly any sick promoters. There lies the heart of the matter".[73] The promoters were protected, and financial creditors were facing inordinate delays in securing financial decree from Courts on Civil Suits.

Also, Small and ancillary industrial undertakings have been specifically excluded from the jurisdiction of SICA and only medium and large-scale industrial undertakings fall within its ambit so that focus remains on rescuing the industries in which large resources in terms of capital; human resources, etc. have been deployed. SICA was first legislation which provided companies to formulate rehabilitation in the form of draft rehabilitation scheme under an operating agency.

As the definition provided under SICA was misconstrued, the entire approach of the Act was mistaken. The symptoms of sickness were avoided for so long that company become completely sick and no cure was left thus leaving a very meagre chances of revival. There was nothing left to salvage after such delays. The Code has adopted the new cash flow approach which is way faster in detecting sickness rather than the balance sheet approach laid down under SICA.

Under SICA, no specialised professional was appointed to take over the industrial undertaking. Contrary to this the Code has created an entire framework which provides for experts like Insolvency Professionals to deal with corporate debtors who are suffering from debt accumulation. Under SICA, the High Court had the power to wind up the company which is now the power of the NCLT under the Code.

Under the SICA, BIFR was formed. It was a quasi-judicial body established to allow companies to make reference in case of sickness and insolvency. BIFR adjudicated the matter after hearing to the Companies and its creditors. The appellate authority to BIFR was AAIFR. It is rightly said by Shri V.P. Singh that "*the BIFR did not achieve much in tackling industrial sickness. Instead of addressing sickness in the industry, BIFR itself became a sickinstitution and a refuge ground for defaulting borrowers who tried to take advantage of the indefinite*

moratorium

[73] Goswami Committee, Report of The Committee on Industrial Sickness and Corporate Restructuring, MINISTRY OF CORPORATE AFFAIRS, pg no. 2

under SICA."[74] SICA was grossly misused by the promoters of the company as a reference to BIFR was deliberately filed to seek an automatic stay on rights of creditor for enforcement of claims against the company. The moratorium thus granted, was an effective cover behind which the promoters could happily continue with their business as usual, bleeding the company further or continues with its assets stripping.[75] The Insolvency Professional will only get fess whether the company survives or dissolves. He does not have any other motive or interest and so he will genuinely work for the betterment of the company.

Another drawback of SICA was that it was primarily dependant on the existing legal framework of courts, where the High Court would be tangled up with multiples legislations and there was no specialised body to deal with those cases, which ended up delaying the entire process and making the exercise futile.

Looking into the failure of SICA, Part VI A (S.424A to 424L) was introduced by Companies (Second Amendment) Act, 2002 to provide for revival and rehabilitation of sick company. Thus, although the 2002 Amendment was passed but these lacunae could not be removed as it was never enforced. Whereas under the Code, NCLT and NCLAT are established as specialised tribunals to deal with matters related to company.

There was no fixed timelines defined in SICA, which enabled the story to continue like test match but with prescribed timelines under the Code, the process is like a twenty- twenty match. Under the Code, a company can no longer be a sick entity. If at any time, it fails to pay its debt than either it has to undergo the CIRP or be liquidated in accordance with the provisions of the Code. Chapter XIX of the CA, 2013 borrowed the concept of sickness from SICA as a starting point to initiate corporate rescue. The BLRC had even regarded Chapter XIX as an improvement to erstwhile SICA. The process of determining a company sick started when a secured creditor made an application for payment of debt representing total number of creditors being 50% or more and the company failed to pay the same.[76] The NCLT would then appoint an interim administrator (IRP) who will appoint a committee of creditor (CoC) with the maximum of 7 members representing each class of creditors, convene their meeting and submit a report of revival or rehabilitation if possible. Now the entire Chapter XIX is omitted by the Code and it provides an opportunity of resolution and liquidation to both financial and operational creditor in speedy

[74] Former Prime Minister and one of the chief architects of SICA, in his speech ,https://economictimes.indiatimes.com/opinion/et-commentary/govt-should-support-bifr-to-rope-in-experts- to-beefup-functioning-of-sick-cos/articleshow/14832263.cms?from=mdr

[75] Sanjay Dongre, Insolvency Code – SICA and the Code, (Jul. 25, 2018), https://taxguru.in/corporatelaw/insolvency-code-sica-code.html.

[76] As contained in omitted S.253 of the CA, 2013

manner. After the advent of the Code, SICA was repealed by notification December 1, 2016. In short, the effect of the Code on SICA was that the Code brought into force the SICA repeal Act and repealed the entire SICA after coming into force. The Orders which had already approved the scheme of rehabilitation were saved. It is to be noted that the Code does not deal with sick companies. It just gets triggers on default and helps the corporate debtor to settle its debts or be ready to be liquidated. Thus the concept of sickness has finally perished after being in ventilator for a stretched era.

S.252 of the Code read with 8th Schedule to the Code provides for amendment of the SICA Repeal Act. 8th schedule provides for substitution in section 4 (b) of the SICA RepealAct. It states that:

"*In section 4, for sub-clause (b), the following sub-clause shall be substituted, namely—*

(b) On such date as may be notified by the Central Government in this behalf, any appeal preferred to the Appellate Authority or any reference made or inquiry pending to or before the Board or any proceeding of whatever nature pending before the Appellate Authority or the Board under the Sick Industrial Companies (Special Provisions) Act,1985 (1 of 1986) shall stand abated:

Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make reference to the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 within one hundred and eighty daysfrom the commencement of the Insolvency and Bankruptcy Code, 2016 in accordance with theprovisions of the Insolvency and Bankruptcy Code, 2016:

Provided further that no fees shall be payable for making such reference under Insolvency and Bankruptcy Code, 2016 by a company whose appeal or reference or inquiry stands abated under this clause."

By S.4 (b) it is clear that all the proceedings pending before the BIFR and AAIFR shall stand abated. The reference or appeal can be made to NCLT with regard to such proceedings which are abated without payment of any additional fees. The reference or appeal were to be made within 180 days of the commencement of the Code.

3.4. RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT,
1993 AND THE CODE

The SARFAESI Act provided stringent powers to the banks and financial institutions whereby,

the secured assets of the borrowers were auctioned without the intervention of the DRT. The T.Tiwari Committee had also examined the recovery to banks and financial sector and after examining legal and other difficulties faced by banks and FIs suggested remedial measures

including changes in law. SICA was the result of the recommendations of this committee. But SICA did not satisfy the requirements. Thus the RDDBFI Act,1993 (51 of 1993) was passed to establish specialized tribunals for recovery of money by banks and FIs. The preamble to the Act states:

"*An Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debt due to banks and financial institutions and matters connected therewith or incidental thereto.*"

Therefore, DRTs were the exclusive forums for banks and FIs for recovery of their debts. Whereas theRDDBFI Act provides the whole judicial proceedings before the DRT and DRAT. As regards impact of the Code on this law, in the case of *Rakesh Kumar Gupta, Director, M/s Gupta Marriage Halls Pvt. Ltd.v. Mahesh Bansal, IRP, M/s Gupta Marriage Halls Pvt. Ltd*[77], it was held that pendency of action under SAFAESI Act or actions under RDDBFI Act, 1993 does not bar the filing of an application under Section 7 of the Code especially in view of S.238 of the Code.

The additional ground raised in the appeal was that bank has already resorted to various proceedings under SARFAESI Act and had also resorted to proceedings under RDDBFI Act, 1993 so the bank could not have filed an application under S.7 of the Code and application should be rejected. The pendency of actions under the SARFAESI Act or action under the RDDBFI Act does not create an obstruction for applying S.7 of the Code, especially given in S.238 of the Code. The application is more to bring about a resolution to corporate debtor than any penal action or any recovery proceedings and hence the Appeal was dismissed.

Thus, even though RDDBFI Act was specifically enacted for banks and financial institutions the Code has overriding effect over it.

Code is a special legislation and any law which contravenes it will be crushed by it unequivocally. Its effect is far and wide. With its time bound process and the creditor in control features, it has a upper hand over other laws. It is a step taken by the government to revolutionize the financial structure of the economy and do away with the NPAs at a much wider pace. The right of the creditor and the company should go hand in hand and at this point of the time it can be achieved only with the aid of the Code.

[77] Supra note 162

CHAPTER - 4

COMPARATIVE ANALYSES OF THE REAL ESTATE REGULATION LAWS AND PRACTICES BETWEEN INDIA AND OTHER COUNTRIES

4.1. Rights of Home Buyer under Indian Law

Section 2(d) of the Real Estate Regulatory Authority Act says that a renter is not the same as an allottee or homebuyer. However, someone who transfers or sells the property is. Every prospective homeowner worries about falling victim to builders who are dishonest, fraudulent, or otherwise deceptive. The buyer of a new home pays the builder a deposit but still has no assurance that the property will be delivered on schedule and in excellent condition. Intelligent purchasers, in the event of a financial crisis, should be aware of their various available choices. The government has recognised the difficulties faced by first-time homebuyers and has taken measures to alleviate those difficulties. A first-time homebuyer, however, may not always be aware of his or her legal rights.

4.1.1. Consumer Protection Act, 1986

Homebuyers can file a complaint under the Consumer Protection Act if the builder provides poor service or does not complete the house on schedule. A complaint can be submitted by an individual customer or a group of consumers who have a common grievance. To file such a complaint, you need not retain the services of an Advocate, as the essential procedures are straightforward. A Complaint and any necessary supporting documents must be submitted by the Applicant to the appropriate administrative agency.

4.1.2. Real Estate Regulatory Authority of India Act(RERA Act), 2016

4.4.1. Real Estate (Regulation and Development) Act 2016

The implementation of RERA was a bold step in the right direction for a major source of national income. Both the developer and the buyer can benefit from RERA because it serves as a platform for mitigating potential problems. [78], It is recommended to keep 70% of the assets collected from buyers in a separate bank for new projects, and 70% of the unused sum for continuing initiatives. The buyer has the right to know everything there is to know about the project and can request any paperwork that pertains to it. [79] Therefore, RERA was necessary to restore faith in the real estate market in our

[78] Tunia Cherian, *New realty Law in force from today*, the India business line (30.04.2017), https://www.thehindubusinessline.com/news/real-estate/new-realty-law-in-force-from-today/article64269506.ece

[79] Arpit Srivastava, Importance of RERA (Real Estate Regulatory Act) and its possible effect on Real Estate sector, (12.05.2017), https://blog.ipleaders.in/importance-rera-real-estate-regulatory-act-possible-effect-real-estate-sector/

country. The government's failure to keep up with the growing demand for housing and infrastructure in the country is documented in the 2013–14 report from the Standing Committee on Urban Development. This gave rise to a variety of issues, not the least of which was the fact that private market participants gained an unfair advantage by exploiting their customers and acting arbitrarily. Second, workers in this unregulated sector were hit with exorbitant interest rates and EMIs despite the availability of easy loans from public and private banks. Finally, without an efficient framework, consumers would have no way of holding builders and developers accountable or getting necessary information from them.

RIGHT OF HOME BUYERS UNDER RERA

RERA became a law when the Indian Parliament passed it. It was passed by the Rajya Sabha on March 10, 2016, and the Lok Sabha on March 15, 2016. It became law on May 1, 2016.The name of this group is Real Estate Regulatory Authority (RERA). The act's goal is to make the main market a more fair and open place to buy and sell apartments. This law says that every state and union region has to set up rules to keep an eye on things inside its borders..[80]. The main goal of RERA is to help buyers and keep the real estate market under control. It has set some rules that developers must follow and some security for buyers. A long time ago, there weren't any good laws that could regulate the real estate business, so the market was plagued by a multitude of problems. These included builders making huge profits by deceiving unsuspecting buyers. Therefore, the legislature enacted the Real Estate Regulatory Authority, 2016 Act to protect the rights of buyers and sellers.

The two fundamental reasons behind enacting this act are: –

1. To provide a fair deal between the customer and the contractor by establishing mutual responsibility.
2. In order to protect harmless buyers from dishonest builders.

FEATURES OF RERA:-

1. Before a buyer or allottee commits to a building project, the builder is required by law to provide them with complete and accurate information on the project from its inception to its completion. RERA needs to have access to this data.
2. The builder must guarantee the building against structural flaws for at least 5 years.
3. Each building site with more than 500 square metres of land or eight units must be registered.

[80] Ashiana, Rights & Duties of Home Buyers under RERA, https://www.ashianahousing.com/real-estate-blog/rights-duties-of-home-buyers-under-rera, March 2, 2020

4. The factory must set aside 70% of the money received from the buyer in a separate account. Funds will be disbursed in accordance with the successful completion of predetermined milestones.[81]. **RIGHTS OF THE BUYER UNDER RERA:**

Rights of allottees is defined under Section 19 of the Act [Section 19(1)-19(5)]

Section 19(1) Right to obtain Information: It tells us about the basic right of the buyer, which is that the buyer should have all the information related to buying the property, such as the authorised plan, the design plan, and information about the rules and guidelines set out in the agreement.

Section 19(2)Right to know completion schedule: It shows us that the buyer is responsible for knowing the estimated completion date of the project, as well as the timing and details of each phase of its completion, down to the provision of utilities such as water and electricity.[82].

Section 19(3) Right to claim possession: If the final paperwork is completed and the required payment is made, the buyer will be entitled to take possession of the flat, plot, or building, including any shared spaces.

Section 19(4) Right to claim Refund: If the seller of a property fails to fulfil his or her obligations under the contract for that property, the buyer can demand a refund of the money he or she paid to the seller as well as compensation, as specified by the Real Estate Settlement Procedures Act (RESPA). However, the seller gets one more chance to make things right before being forced to refund the money.

Section 19(5) Right to have document: The buyer or allottee can take possession of the property and has legal control over any related paperwork.

Other Rights

Under RERA, buyers also have a lot of other rights.

False promises– If there is a discrepancy between the builder's representations and the property's actual condition, the buyer is entitled to withdraw from the contract and get compensation.

Defect after possession– If the buyer discovers a flaw in the building's construction within five years of taking possession of it, the builder must fix the problem within 30 days, and the buyer can sue for damages if the problem persists.

Delay in possession– The buyer is entitled to a full refund plus compensation if the builder fails to complete the project by the agreed upon completion date.

[81] Sejal Makkad, why RERA was introduced? What are the rights of buyers, https://lawtimesjournal.in/why-was-rera-introduced-what-are-the-rights-of-buyers-under-rera/, March 19, 2020

[82] BY SUKHLEEN SALUJA , Understanding the Rights of a Buyer under RERA, https://lawlex.org/lex-pedia/understanding-the-rights-of-a-buyer-under-rera/22381, June 4, 2020

Defect in the title– If the project's title is flawed in any way, the buyer is entitled to reimbursement from the developer. The concept of a title defect is not excluded by the doctrine of limitation[83].

Judicial Pronouncements for Shaping Indian Real Estate Market

The real estate sector in India has experienced an exceptional growth in the recent past wherein the flow of investment in the real estate market has considerably increased due to increasing demand for residential real estate especially from the middle-class population of the nation. Some of the landmark judicial pronouncement from various judicial and regulatory authorities which significantly contributed for the growth of real estate sector in India especially, the residential real estate segment is discussed below:

The Supreme Court of India (hereinafter referred as SC) has played a vital role in shaping the growth of real estate sector in India wherein it deliberates on various aspect of the real estate transactions and attempts to clear the ambiguity for ensuring effective implementation of the legal provisions.

In *Lucknow Development Authority v. M.K. Gupta*,[84] the SC has discussedthe ambit of Consumer Protection Act 1986 in relation to the housing or construction activities wherein it directed that all the builders or developers or constructors comes under the ambit of the Act. The SC stated that "*all builders/contractor(s)/all concerned authorities of any State engaged in Housing Construction activity in any manner are amenable to Consumer Protection Act, 1986 for any act or omission relating to housing activity*". The observation in the case reveals that the consideration of the apex court that the builder or developer constructs the property for the buyers in anticipation of monitory gains. Therefore, it falls under the definition of services and hence is under the ambit of Consumer protection Act 1986.

In *Ghaziabad Development Authority v. Balbir Singh*,[85] the SC deliberated on the liability of the builder to compensate the buyer for delayed possession and the quantum of such compensation. The SC opined that the liability of builder towards payment of compensation cannot be fixed as a particular interest rate and suggested the commissions and forums to analyse the damage, both injury as well as loss, suffered by the buyer to derive the appropriate amount of compensation. Similarly, it directed the commissions and forums to evaluate the deficiency of service on the party of builder and its effect on public at large to determine total damage simultaneously, it suggest considering the mental as well as physical harassment

[83] Shephali Kapoor, Rights and duties of homebuyers under RERA, https://www.99acres.com/articles/rights-and-duties-of-homebuyers-under-rera.html, Dec 05, 2019.

[84] AIR 1994 SC 787.

[85] (2004) 5 SCC 65.

suffered by the buyers due to the behaviour of the builder while determining the total amount of compensation.

In *Nahalchand Laloochand Pvt. Ltd. v. Panchali Co-operative Housing Society Ltd.*,[86] the SC discussed about the legitimacy of selling parking spaces to the individual home buyers. Therefore, the SC explained that the promoters or builders are restricted to sale the parking space as the definition of flat in the Act does not cover garage and hence it is the duty of the promoter or builder to provide the parking space without including its cost in the cost of the flat and it is considered that parking space comes under the definition of common facilities for which all the home buyers need to share the cost jointly.

In *Ferani Hotels Pvt. Ltd. v. State Information Commissioner, Greater Mumbai*, [87] the SC elaborated duties and responsibilities of the builders and developers to ensure information symmetry regarding the sanctioned layout plans. The court emphasised the objective of RERA to ensure transparency in the real estate transaction for which it is necessary for the builder to provide all the information related to sanctioned plan by exhibiting all such documents at the project site or any other office place utilised for the execution of real estate transaction related to the project. The SC also opined that real estate transaction, and its future growth depends upon the maintenance of information symmetry..

In *Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India*,[88] the SC held that the rights and obligations of the promoters and allottees are provided under the provisions of RERA to ensure the level playing field in the real estate market. It stated that RERA offers the liabilities of both the parties in real estate transaction in case of default. Therefore, it ensures the key element enshrined in the objectives of RERA which is to develop an environment for transparency, accountability, and reliability in the real estate market. The court further emphasises on the requirement of interpreting the provisions of RERA using holistic approach and not in isolation to fulfill the legislative intent of establishing standardisation, professionalism, and transparency in the real estate sector.

In *Kolkata West International City Pvt. Ltd. v. Devasis Rudra*, [89] the SC deliberated on the validity of the application of the buyer for refund, on default of builder to deliver possession, after receiving the primary compensation awarded by the consumer forums and commissions. The SC held that the buyers could expect to hang around to get the possession of the property but, the delivery of possession of the property cannot be prolonged for indefinite period. Therefore, it observed that the buyers cannot be restricted to apply for refund even though the

[86] (2010) 9 SCC 536.

[87] (2018) INSC 853.

[88] 2018 SCC OnLine SC 1608.

[89] 2019 SCC OnLine SC 438.

primary compensation is awarded and held the validity of the application of refund.

In *Bikram Chatterji v. Union of India*,[90] the SC deliberated on the diversion of funds by the builder for steering the funds out of the concerned projects for augment the personal assets of the promoters. The SC in its landmark judgment recognised victimisation of the innocent home buyers and cancelled the registration of various projects of the builder. Similarly, the National Building Construction Corporation (hereinafter referred as NBCC) was assigned to develop the project and complete the construction of the project. It also appointed a receiver to execute the sale agreement without any cost for the home buyers. Further, it directed the administrative authorities to recover all the dues against the builder by attaching the personal property. Finally, it directed the administrators to take the similar action against all the defaulters to protect the rights and interests of the buyers in future.

In *Keystone Realtors Pvt. Ltd. v. Anil V. Tharthare*,[91] the SC discussed the need for environment assessment for the impact of the development of the real estate project wherein it upheld the directions of the National Green Tribunal (hereinafter referred as NGT) which mandates the submission of the report on potential impact assessment on the environment by the builders to evaluate the impact on surrounding area. Further, it also emphasised the continuous evaluation to determine appropriate remedial measures including compensatory remedies.

The agreements between the parties of the real estate market have always been the matter for concern in the past due to the lopsided agreements in favour ofthe developers. The buyers had no or in some cases extremely limited opportunity to suggest any alteration, modification, or deliberation on the matters of agreement. Therefore, in the case of *Belaire Owner's Association v. DLF Ltd. and HUDA*,[92] the CCI has comprehensively deliberated on the lopsided agreement in the light of abuse of dominant position. The CCI has made various remarkable comments in the light of protecting the right of the consumers wherein it observed that the conditions of the agreement after the payment of substantial amount becomes a binding on the buyers without presenting any opportunity to oppose the actions of the developer resulting in increasing probability of malpractices by the builders. Further, it exhibits the concerns over unbalance of bargaining power among the parties of real estate transaction resulting in growing instances of infringement of the right of the consumers in the real estate market. Finally, while imposing penalty on DLF, the CCI held that the lopsided agreement in the favour of the builders creates an opportunity for the developer to use the agreement in their interest by keeping their

[90] 2019 SCC OnLine SC 901.

[91] (2020) 2 SCC 66.

[92] 2011 Comp LR 0239 (CCI)

investor and prospective investor in dark and unaware about the details of the project which is unfair on the part of the developer.

Similarly, the change in the structural plan and design layout of the real estate project analysed by CCI in *Pankaj Agrawal v. DLF Gurgaon Home Developers Pvt. Ltd.*, [93] wherein the CCI has opined that the change in construction plan without informing the buyers is abusive towards the rights of the home buyers similarly the change in the number of floors of the apartment affects the interest of the buyer and termed it as unfair practices on the part of developers. Further, it expressed that charging additional cost in the name of external development expenses due to change in number of floors without the consent of the buyers is unfair and abuse of dominance.

In the real estate market of India, the dispute related to delay of handing over the possession by the builder has been a matter of debate from a long time due to the effect of the delivery of possession on the value of asset and the potential of the property to generate profits. Therefore, the National Consumer Dispute Redressal Commission (hereinafter referred as NCDRC) in the case of *Kamal Sood v. M/s. DLF Universal Ltd.*,[94] observed that advertising with the promise of completing the project in prescribed period but failing to execute the promise even though the delay in execution is due to delay in approval from the government department for the required documents does not create a valid ground for excusing the delay in delivery of possession and termed it as unfair practices on the part of builder or developer. Further, it held that the builder or developer is liable for the compensatory liabilities towards satisfying the interests of the buyer if the time for delivery of possession is promised and later not fulfilled by the developer or builder.

In *Satish Kumar Pandey v. Unitech Ltd.*,[95] the NCDRC criticises the practice of the builders regarding imposing a heavy penalty of eighteen percent per annum for the delay on the part of the buyer towards any installment of the payment whereas, the builder always tries to avoid such heavy penalty or compensatory clause in case of deficiency on the part of the builder such as, delay in possession, structural defect in property, quality of construction etc. Further, it has also observed that the agreement specifies a very petty penalty on builders which in majority of the cases is less than three percent of the total cost of the property. Therefore, NCDRC termed such practices of the builders as unfair practices and directed the builders to avert such practices.

Similarly, in the case of *Yogesh Sharma v. M/s. Unitech Ltd.*,[96] the NCDRC has observed

[93] 2015 Comp LR 728 (CCI).

[94] 2007 SCC OnLine NCDRC 28

[95] 2015 SCC OnLine NCDRC 14.

[96] 2015 SCC OnLine NCDRC 3488

that it is the responsibility of the builder to execute the project within the promised time as the builder or developer voluntary promises to execute the project despite the knowledge of various uncompleted activities related to obtaining approvals and permissions. Therefore, it directed the builder to fulfill its liability to compensate the buyers for the delay in delivery of possession. In *Manish Kumar Gupta v. Unitech Ltd.*,[97] NCDRC rejected the plea of the builders to pardon the delay in handing over the possession of the property due to unavailability of construction labour during the period of Commonwealth Games 2010 which accommodated the maximum labour force leaving the construction sector in shortage of labour. The NCDRC while rejecting the plea opined that the builder's intention determines the fulfillment of their obligations specified in the agreement and in the present case, the agreement was of 2006 for which the possession of the property was not delivered till 2010. Further, the NCDRC observed that while accepting plea of the builder on the ground of force majeure circumstances, the emphasis on intention of the builders while promising the delivery time needs to be considered. In *Sanjay Kumar Vij v. Unitech Ltd.*,[98] wherein the complainant deposited entire payment with builder against the proposed property in accordance with agreement entered by the parties. The builder assured the possession of the property around March 2009 but failed to deliver the possession. The complainant prayed for immediate delivery of possession of the property or refund of the entire amount along with legitimate interest but, the filled a response while taking the defense of force majeure circumstances without any supporting factual evidence. Therefore, NCDRC has termed it as absolute deficiency on the part of the builder who enjoys the interest on the deposited amount from the buyer to deliver the possession as per the promised time period.

In the case of *Bhattacharjee v. Delhi Development Authority*,[99] the Delhi High Court discussed the disadvantages to the home buyers due to the delay in possession of the property. The court stated that the delay in delivery of the possession of the property affects the interests of the investor as it swells the opportunity cost related to the potential utilisation of the property, the cost involved for supervising the property as well as the increasing expenses related to administrative charges from the authorities in the form of taxes and fees. Similarly, it also affects the probable return from the property which is possible after transfer of possession due to proper maintenance of the property once occupied.

In *Lavasa Corporation Ltd. v. Manju Narendra Joshi*,[100] the High Court of Bombay dealt with the question regarding applicability of RERA on the real estate transaction such as

[97] 2017 SCC OnLine NCDRC 1741

[98] 2017 SCC OnLine NCDRC 1652.

[99] 1996 SCC OnLine Del 440 : 63 (1996) DLT 467.

[100] 2018 (08) SML BOM 82.

agreement to sale wherein the court explains that although the provisions of RERA does not specifies its applicability on lease agreements but, while analysing the nature of the lease agreement it satisfies to be a real estate transaction to be considered for the protection under RERA. It further, emphasised on decoding the legal provision by understanding the legislative intend which suggest the interpretation needs to attempt for ensuring harmony among legal provision rather than reading in isolation.

4.1.3. Insolvency and Bankruptcy Code, 2016

Under the revised IBC, homebuyers have the same rights as other creditors, including the right to be treated as financial creditors. As a result of the new rules, buyers can file a CIRP claim against the construction company if they choose to do so.

4.1.4. Competition Commission of India, 2002

The purchaser may file a claim for misuse of dominant position against the constructor under the Competition Act of 2002. The CCI will impose severe fines on the contractor if he is found to have engaged in anticompetitive behaviour.

4.1.5. Bharatiya Nyaya Sanhita, 2023

Under the Bharatiya Nyaya Sanhita, 2023, a homebuyer may initiate criminal proceedings against a builder or developer for offences such as cheating, criminal breach of trust, fraud, misrepresentation, and dishonest inducement. Complaints may also be lodged before the Economic Offences Wing (EOW) in cases involving large-scale financial irregularities, diversion of funds, or fraudulent real estate practices. Further, proceedings may be instituted against the developer as well as its directors and officials for offences involving financial fraud, forgery, or money laundering under the applicable criminal laws. If the accused builder fails to appear before the court despite due process, the court
may issue a non-bailable warrant to secure the accused's presence.

A substantial number of investors in real estate projects in India are individual homebuyers who invest their life savings in residential properties. Such homebuyers are presently protected through multiple legal remedies available under the Real Estate (Regulation and Development) Act, 2016, the Consumer Protection Act, 2019, and the Insolvency and Bankruptcy Code, 2016. The remedies available under these statutes are generally concurrent in nature, and a homebuyer may choose the appropriate forum depending upon the facts of the dispute. However, in situations involving inconsistency or conflict, the provisions of the Insolvency and Bankruptcy Code generally prevail due to its overriding effect.

The legal position of homebuyers in India continues to evolve owing to the complex interaction between these legislations and varying judicial interpretations. The existence of multiple remedies under RERA, the Consumer Protection Act, and the Insolvency and Bankruptcy Code creates procedural and legal complexities that may be difficult for an ordinary homebuyer to navigate without professional legal assistance. Furthermore, differing judicial opinions regarding the status and rights of homebuyers have contributed to uncertainty in the enforcement of their rights and remedies.

Where a developer fails to deliver possession within the stipulated period or otherwise violates statutory obligations, homebuyers may seek relief before the Consumer Commissions, the Real Estate Regulatory Authority (RERA), or other competent forums. Depending upon the nature of the grievance, relief may include refund of the amount paid, compensation, interest, possession of the property, or penal action against the builder.

After the enactment of the RERA Act, developers frequently raised the contention that Consumer Forums lacked jurisdiction to entertain complaints filed by homebuyers because RERA constituted a special statute governing real estate disputes. However, courts have repeatedly clarified that the remedy available under the Consumer Protection Act is an additional remedy and does not bar a consumer from approaching the Consumer Commission merely because relief is also available under RERA. Consequently, homebuyers continue to possess the right to pursue remedies under both statutes, subject to the facts and circumstances of each case.

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4.2. Real Estate Law in Other Countries

4.2.1. The United States of America

Each state and the central government have different powers, and the Constitution of the United States makes sure that these powers are balanced. This allows the federal government to enact laws affecting all Americans while granting the individual states the authority to enact laws affecting only their residents. In light of the foregoing, it is also worth noting that the source of each state's authority is its own set of laws. It's also worth noting that each country has its own highest court to ensure that justice is served.

When it comes to intangible assets like intellectual property rights, US property law rules them just as strictly as it does more tangible assets. In US, the property law is essentially an issue of state law and that notion has been started from common law and have been amended from time to time. The laws of the United States are comparable to those of India, both of which were ratified by their respective parliaments and codified into separate "Title" and "Chapter"

sections.

It's worth noting that there are multiple tiers of government involved in regulating the American real estate market. Therefore, it may be said that there is no single, overarching regulatory organisation; rather, authorities have been set up at several tiers to investigate issues like property ownership and use. But the Department of Housing and Urban Development (HUD) has enacted guidelines in the form of the "Real Estate Settlement Procedures Act" to defend users' rights and interests in residential properties. As of the 22nd of December, 1974, Title 12, Chapter 27 of the United States Code (the "said Act"), which was adopted by the 93rd Congress, was in effect.

Under this law, users' complaints are not the federal government's responsibility. Instead, they are dealt with according to the terms and conditions of the contract that both sides agreed to. If the buyer sues the developer for breach of contract after the developer doesn't hand over control of the property as agreed, those terms can be used against the developer. The Act's authors also hoped that by informing customers of their rights and preventing them from incurring excessive expenses. The goals of this Act and the RERA are comparable, so the two pieces of legislation can be compared. Additionally, in the United States, real estate commissions have been established in each state according to jurisdiction, the primary purpose of which is to safeguard citizens from unscrupulous real estate professionals, and these commissions are also authorised to implement the real estate licencing laws in their respective jurisdictions. In California, for instance, the Department of Real Estate (DRE) is the state body in charge of real estate licencing and handling consumer complaints related to real estate brokers and salespeople.

4.2.2. United Kingdom

Although there is a dedicated government agency in India that oversees the real estate industry, there is not a central organisation set up to control or keep tabs on the sector as a whole. Common law serves as the basis for the laws and regulations that apply to real estate, which are updated from time to time. For instance, there is 'The Financial Services Authority (FSA)' and, currently, the 'Bank of England' regulates practically all investments in real estate.

As far back as 1991, the government passed an act called "The Property Misdescriptions Act." This law says that people working in real estate agencies and property development can't make false or confusing statements about property. In 2014, however, the Act was repealed since the current administration believed it was redundant with other legislation, although this repeal had been considered for some time before to the election. The 'Consumer Protection from Unfair Trading Regulations, 2008' were passed by the government in 2008 and served as the basis for the eventual repeal of the 'The Property Misdescriptions Act of 1991. It has to be

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pointed out that the fundamental difference between the Acts was that the execution of doctrine of 'caveat emptor" was abolished and importance had been given to greater transparency in the purchasing or renting of property. Prior to

the implementation of RERA, the situation was similar to that outlined in the Consumer Protection from Unfair Trading Regulations, 2008, in which the aggrieved party had the right to apply to court to secure their interest.

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CHAPTER - 5

THE HOMEBUYER'S CONUNDRUM IN REAL ESTATE INSOLVENCY

5.1. INTRODUCTION

Following widespread calls[101] to completely revamp and take a fresh look at bankruptcy laws in India, the present Insolvency and Bankruptcy Code, 2016 (the "**IBC**") replaced the Sick Industrial Companies (Special Provisions) Act, 1986 (the "**SICA**") and a number of relevant provisions in the Indian Companies Act 2013 along with other related legislations [102] . Inspired by the UK Insolvency Act of 1986[103], the IBC moves away from a "debtor in possession" approach, which was previously the position in the SICA to a more "creditor in control" approach.

In its early years, the Supreme Court, various benches of the National Company Law Tribunal (the "**NCLT**"), and the National Company Law Appellate Tribunal ("**NCLAT**") issued a number of judgments analysing and interpreting various provisions of the IBC, many of which were quickly incorporated into the code.

Modern insolvency law protects the interests of secured creditors well, but not employees, workmen, customers, tort victims, or environmental claimants [104] . However, it is also well understood that public policy is an ever-growing work in progress and will continue to develop and grow . In the context of IBC, one category of stakeholders that continues to draw attention is the allottee (or homebuyer) of a real estate project.

5.2. THE RISE OF THE HOMEBUYER

In 2017, the NCLT and the NCLAT had one of their first opportunities to examine the position of allottees as creditors within the IBC framework in a number of cases. In *Nikhil Mehta v. AMR Infrastructure*, the NCLT held that homebuyers are not financial creditors as there is no consideration for the time value of money and that these are simple sale transactions. However, the NCLAT took an opposite view holding that the amounts invested by the homebuyers were not mere sale transactions, but would indeed come under the ambit of financial debts under section 5(8) of

[101] Neeti Shikha, 'Guest Editorial: Cross Border Insolvency in India: What Lies Ahead? '[2021] 30:2 International Insolvency Review, 163

[102] Bankruptcy Law Reforms Committee, 'Report: Volume I: Rationale and Design', November 2015 url

[103] M/S. Innoventive Industries Ltd vs ICICI Bank [2018] 1 SCC 407;

[104] Jennifer LL Gant 'Optimising Fairness in Insolvency and Restructuring: A Spotlight on Vulnerable Stakeholders '

[2022] 31:1 International Insolvency Review, 3

the IBC[105]. The NCLAT held that allottees are indeed, financial creditors.

In *Anil Mahindro & Anr vs. Earth Iconic Infrastructure (P) Ltd*, reliance was placed on *Nikhil Mehta v. AMR Infrastructure* to the same end and effect[106]. The sum of these decisions was that an allottee was neither an operational creditor nor a financial creditor unless an allottee was assured returns, in which case, it would be a financial creditor. This caused much confusion about the status of home buyers under the Code[107]. Thus, an allottee was held to not have the right to initiate an insolvency process unless an allottee was assured returns in terms of allotment[108]. It could only file claim under the category of 'other creditors'. IBBI amended the regulations in the year 2017 to introduce a special form (Form CA) in which claim could be filed by an allottee. In 2018, the Insolvency Law Committee noted that disbursements of funds by potential homebuyers were typically made against the delivery of a future asset, namely the residence. Upon failure of the project, money is repaid, based on the time value of money[109]. This further cemented the position of the homebuyer as a financial creditor.

This status further gave homebuyers the right to approach the NCLT and NCLAT for the resolution of their disputes and to initiate proceedings against bankrupt debtors. Consequently, this also meant that when recovering dues from insolvent real estate firms, homebuyers would also get a seat at the Committee of Creditors ("**CoC**")[110]. A seat at the CoC meant that the homebuyers do have a voice while deciding the outcome of real estate corporate debtors under insolvency[111]. This new status also gives homebuyers access to financial statements and information of the debtor which are not readily available to the general public or operational creditors.

5.2.1. *The 2018 Amendment to the IBC*

Following the recommendations of the Insolvency Law Committee in 2018[112], the rise of the allottee as a creditor was further codified with the Insolvency and Bankruptcy (Amendment)

[105] [2017] 137 CLA 163 (NCLT)

[106] Company Appeal (AT) (Insolvency) No. 74 of 2017

[107] Pratik Datta, 'Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 2016 '(2018)

NIPFP Working Paper Series, No. 247

[108] Company Appeal (AT) (Insolvency) No. 8 of 2017

[109] Insolvency Law Committee, Report of the Insolvency Law Committee, available at http://www.mca.gov.in/Ministry/pdf/ILRReport2603_03042018.pdf

[110] Section 21(2) of the IBC provides for the committee of creditors to comprise of all financial creditors of the debtor company

[111] Section 30 (4) of the IBC enables the committee of creditors to approve a proposed insolvency resolution plan with a three-fourths majority

[112] Report of the Insolvency Law Committee 2018 available at https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf

Ordinance, 2018 and later, in the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (the "**2018 Amendment**"). Prior to this amendment, allottees had no status of either a financial creditor[113] or of an operational creditor[114] within the IBC – this status was granted through caselaw, but not codified under the IBC. The 2018 Amendment also provides that the finances of real estate allottees directed towards the failed real estate project would have the same commercial effect as that of a debt[115]. The statements made by the Supreme Court in *Jaypee Orchard Resident Welfare Society v. Union of India*[116] that they will endeavour to do all in its power to safeguard the interests of the homebuyers is notably encouraging. In *Chitra Sharma v Union of India*, the Supreme Court protected the interests of home buyers in projects floated by Jaypee Infratech Limited and directed the Committee of Creditors to be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors"[117]. However, in *Ajay Walia v Sunworld Residency Private Limited*, courts took the view that a homebuyer who had subrogated its rights in favour of a bank could not take the additional advantage of a financial creditor[118].

The constitutional validity of the classification of financial and operational creditors was upheld in the now seminal case of *Swiss Ribbons v. Union of India*[119]. The Supreme Court in this case held that the repayment of financial debts infused capital into the economy as banks and financial institutions were able, with money that had been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale created an intelligible differentia between financial debts and operational debts, which were unsecured. The constitutional validity of the inclusion of allottees as financial creditors was discussed and challenged in *Pioneer Land Infra v. Union of India*[120] on the grounds of it being violative of Article 14 and Article 19(1)(g) read with Article 19(6) of the Constitution of India. The Supreme Court rejected the challenges and upheld the 2018 Amendment Act's constitutionality. The Supreme Court observed, based on a reading and interpretation of Section 5(8)(f) of the IBC, that homebuyers/allottees were included in the main provision, Section 5(8)(f), from the beginning of the Code, with the Explanation being added in 2018 merely to clarify doubts about the status of homebuyers. The Supreme Court further held that interests of allottees in the insolvency of a real estate company must be protected.

[113] Section 5(7) of the IBC

[114] Section 5(21) of the IBC

[115] Explanation to Section 3 of the 2018 Amendment

[116] Writ Petition (Civil) No. 854 of 2017

[117] (2018) 18 SCC 575

[118] CP (IB) 11/ALD/2018. Decision date- 30.07.2018

[119] (2019) 4 SCC 17

[120] (2019) 8 SCC 416

This was also upheld in the recent judgment of *Yadubir Singh Sajwan v. Ms. Som Resorts*[121] where the NCLT was of the view that homebuyers are those who are genuinely interested in taking possession of the housing units, and the principal amount paid by them to the real estate developer is a financial debt. Hence, the NCLT concluded that homebuyers are indeed, financial creditors.

In *Bikram Chaterji v. Union of India*[122], the Supreme Court noted that "if the real estate business has to survive in India, it has to be answerable to the public and has necessarily to uphold the trust reposed in builders/promoters"[123]. The court went on to establish the status of homebuyers in housing projects vis-à-vis lenders and government authorities. The apex court was of the view that in a real estate project fraught with financial issues, the status of homebuyers was paramount. The Court decided this case with the rationale that for a homebuyer to purchase a house, a major proportion of their life saving are invested with their real estate firm defaulting in their projects generally leads homebuyers to lose this large amount of their life savings which often gets stuck for years.

Around the same time, in *Flat Buyers Association v. Umang Realtech Pvt. Ltd*[124] the NCLAT introduced a novel concept of a reverse corporate insolvency resolution process which allowed the real estate corporate debtor to continue its construction activities in the face of an application under Section 7 of the IBC. This was done "in the interest of the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganized workmen". The NCLAT in *Umang Realtech* also provided for the segregation of projects being developed by the same corporate debtor while holding that a corporate insolvency resolution process ("**CIRP**") against one project should not affect the others. It was found that individual allottees were filing insolvency petitions based on individual grievances and disputes rather than for the resolution of the corporate debtor. The challenge in using the usual CIRP route is that although allottees have been awarded the status of financial creditors, being unsecured financial creditors, they have limited voting rights and do not possess the expertise to assess the long term sustainability of the Corporate Debtor. This leads to two unfortunate consequences for allottees. Since allottees would usually be in favour of delivery of their property over return of monies invested, this would not be possible if the Corporate Debtor goes in liquidation, nor if the

[121] Yadubir Singh Sajwan & Ors. v Som Resorts Private Limited, Company Petition No. (IB)-67(ND)/2022

[122] 2019 SCC OnLine SC 901

[123] (2018) 17 SCC 691

[124] Company Appeal (AT) (Insolvency) No. 926 of 2019, available at https://nclat.nic.in/Useradmin/upload/18011332575e3d0b157e29a.pdf

CoC reaches a conclusion. Even if the Corporate Debtor goes into liquidation, allottees' rights to distributable funds are still severely impacted as unsecured creditors.

5.2.2. *The 2020 Amendment to the IBC*

The Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("**2020 Amendment Act**") was incorporated to balance the scales. The 2020 Amendment Act provided that a CIRP against the real estate corporate debtor can be initiated only jointly, by not less than one hundred of suchallottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever happens to be less[125]. Further, as per the Amendment, matters already filed by individual Homebuyers but not yet admitted by the adjudicating authority prior to the commencement of the 2020 Amendment Act will be dismissed if they are not modified to meet the above-mentioned minimum threshold requirement within 30 days of the commencement of the 2020 Amendment Act.

In the case of *Manish Kumar v. Union of India*[126], the Supreme Court upheld the constitutional validity of the 2020 Amendment Act. However, in the case of *Puneet Kaur v. K V Developers Private Limited*[127], the NCLAT ruled that even claims of Homebuyers who did not file claims should be included in the information memorandum if they were reflected in the corporate debtor's record. The NCLAT determined that ignoring such claims would result in inequitable and unfair resolution. The Appellate Tribunal also mentioned the complexity Homebuyers had to face in filing their claims. It was discovered that the public announcement inviting claims is usually made in the area where the corporate debtor has its registered office and corporate office, and there is a good chance that all of the Homebuyers, who are usually hundreds in number, are unaware of the CIRP and do not file their claims within the time limit. As a result, the NCLAT observed that failure to submit claims within the prescribed time frame is a common characteristic in the insolvency process of almost all real estate projects. The Appellate Tribunal went on to rule that once the allotment letters have been issued to the Homebuyers and payments have been received, the real estate company is obligated to provide possession of the houses, as well as other associated liabilities. Hence, homebuyers have every right to contest their claim.

As a result, the present position on the status of allotees within the IBC framework is that of an unsecured financial creditor capable of commencing a CIRP against a real estate corporate debtor

[125] Insolvency and Bankruptcy (Amendment) Act, 2020

[126] 2021 SCC OnLine SC 30.

[127] Company Appeal (AT) (Insolvency) No. 390 of 2022.

as long as that action is collective. However, as some authors note, this now places homebuyers, insofar as initiation of insolvency applications is concerned, behind even ordinary operational creditors, who can initiate an insolvency application for any default above INR 10 million[128].

However, even prior to the enactment of the IBC and its amendments as well as various case law protecting them, homebuyers' rights were safeguarded under the Real Estate (Regulation and Development) Act, 2016. If we are to derive a harmonious interpretation of homebuyers' rights as consumers under the RERA as well as stakeholders under the IBC, we must engage with the provisions under RERA, which we do in the next section.

5.3. HOMEBUYERS RIGHTS UNDER THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

5.3.1. Background and need for the RERA

Taking advantage of the rising demand for housing in India, private real estate developers had ostensibly taken over the real estate sector with no concern for the consumers[129]. A need for regulating the burgeoning real estate sector had come into sharp focus in the matter of *Belaire Owner's Association v DLF Limited and Ors*[130]. The Competition Commission of India held that DLF, a major real estate development company, was abusing its dominant position owing to several unfair and onerous conditions in its builder buyer agreement, allowing DLF to make unilateral changes in construction plans and schedules and absolute discretion to change clauses without the consent of allottees[131]. The Commission taking into account all the instances of abuse imposed a penalty on DLF at the rate of seven percent of the average turnover for the last three preceding financial years, amounting to approximately INR 6.3 billion. This decree was upheld by the Competition Commission Appellate Tribunal[132] as well as the Supreme Court of India[133]. One of the direct results of *Belaire* was the promulgation of the Real Estate Regulation and Development

[128] Khare, Uday, Insolvency in Real Estate: A Difficult Balancing Act (September 01, 2021). JGILS Working Paper No. 3 / 2021, Available at https://ssrn.com/abstract=3911840

[129] 30th Report of the Standing Committee on Urban Development, Ministry of Housing and Urban Poverty Alleviation, Government of India, February 2014, p 8.

[130] 2011 CompLR 0239 (CCI), p 52.

[131] Shoaib, 'The Penalty on DLF by CCI will effect the real estate sector '(24 August 2011) Good Returns, available at: http://www.goodreturns.in/news/2011/08/24/cci-order-against-dlf-impact-realty-sector.html (accessed on 8 March 2026).

[132] DLF Limited v Competition Commission of India, Competition Appellate Tribunal, Appeal No. 20 of 2011 2014 CompLR 1 (CompAT), available at http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf (accessed on 8 April 2026).

[133] DLF Limited v Competition Commission of India, Interim Application (for stay) No. 1 of 2014 in Civil Appeal No. 6328 of 2014, order dated 27 August 2014,

Act, 2016. While the RERA was widely met with approval[134], there was considerable resistance from the real estate industry itself and quite understandably so[135].

5.3.2. Salient Features of RERA

The RERA establishes a Real Estate Regulatory Authority in each state[136]. Real Estate Regulatory Authorities are government agencies charged with the responsibility of regulating real estate development activities and to maintain transparency in the sector. It is further responsible for keeping a record of development activities by conducting inquiries and directing the roles of promoters, allottees and real estate agents. The Real Estate Regulatory Authority, along with the Central Advisory Council is also expected to advise the governmenton policy matters governing the real estate sector [137] . Real Estate Regulatory Authorities may issue directions for the implementation or impose penalties and fines for the non-compliance of the provisions of the RERA[138]. An appeal against an order of a Real Estate Regulatory Authority lies to the Real Estate Regulatory Tribunal[139].

Companies engaged in real estate development projects, also known as 'promoters'[140], are required to register themselves before the Real Estate Regulatory Authority having jurisdiction over the location where the project is to be constructed[141]. Details of the project, including delays in the completion of other projects promoted by the applicant[142] and the time period within which the project is to be completed must be provided. Upon registration, details of the project, including the site and layout plan, and schedule for completion of the real estate project must be provided to the Real Estate Regulatory Authority for further dissemination to the public.

Real estate promoters take on the primary responsibility of completion of the real estate project and

[134] ' Real Estate Regulation Bill to draw fair industry practices, accountability '(19 September 2013) Bangalore Business Standard, available at: http://www.business-standard.com/article/economy-policy/real-estateregulation-bill-to-draw-fair-industry-practices-accountability-113091901135_1.html (accessed on 8 April 2026)

[135] Sirish B. Patel, 'Real Estate Bill: Naïve to think that it will solve all problems '(15 November 2013) New Delhi The Economic Times, available at: http://articles.economictimes.indiatimes.com/2013-11-15/news/44113610_1_real-estate-bill-project-manager-regulatory-authority (accessed on 8 November 2014). See

also 'Developers seek changes in Bill', (24 August 2013) New Delhi The Hindu Business Line, available at: http://www.thehindubusinessline.com/industry-and-economy/real-estate/developers-seek-changes-inbill/article5055899.ece (accessed on 8 April 2026).

[136] Section 20, RERA

[137] Section 42, RERA

[138] Sections 33-40, RERA

[139] Section 43, RERA

[140] Promoters take on the primary responsibility for real estate development and include real estate development companies, development authorities, State level co-operative housing finance societies, primary co-operative housing societies under Section 2 (zk).

[141] Section 3, RERA

[142] Section 4(2)(b), RERA

are subject to a number of obligations under the RERA including reducing information asymmetry[143], entering into an agreement for sale with proposed allottees[144], adhering to the sanctioned specifications[145]. The promoter is further charged with the duty to repair and rectify any structural defects in the construction within a period of two years from the date on which the allottee was granted possession[146].

The RERA was created to ensure greater accountability towards consumers, and significantly reduce frauds, arrest delays and high transaction costs associated with real estate development[147]. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast track dispute resolution mechanism[148].

5.3.3. Rights of Allottees under the RERA

The RERA provides for a number of rights of allottees, which may be grouped generally under information rights[149], rights to title[150], insurance[151], right to prevent transfer to a third party[152], pecuniary rights[153], etc. However, any legal proceedings that may be commenced before the NCLT under the IBC, must necessarily involve a debt. That is, an amount that is required to be paid by the promoter as the corporate debtor to the allottee as the financial creditor. We must therefore, examine the conditions under which such a debt may be created.

Dues that are payable by real estate promoters to allottees may fall into two categories, viz. return of sums advanced, along with interest, and compensation. Allottees, having advanced any sums towards the allotment, sale or transfer of a plot, apartment or building[154], may choose to withdraw from the project under two circumstances. Firstly, if the allottee suffers any losses or damage due to false or incorrect statements made in an advertisement or prospectus promoting a real estate

[143] Section 12 of the RERA requires that the promoter compensate allottees in case of loss or damage caused by incorrect information in advertisements and the prospectus of the real estate project.

[144] Section 13, RERA allows promoters to receive upto ten percent of the cost of the apartment, plot or building without having to enter into an agreement for sale

[145] Section 14, RERA

[146] Section 14(3), RERA

[147] Statement of Objects and Reasons, RERA

[148] 30th Report of the Standing Committee on Urban Development, Ministry of Housing and Urban Poverty

Alleviation, Government of India, February 2014, p 9.

[149] Section 12, RERA

[150] Section 17, RERA

[151] Section 16, RERA

[152] Section 15, RERA

[153] Section 18, RERA

[154] Refer Section 2(d), RERA

project[155]. Secondly, if the promoter has not been able to deliver the apartment, plot or building within the timeframe declared at the time of registration[156]. Under Section 18 of RERA, allottees of delayed projects may elect to either withdraw from the project, which leads to the return of the sums advanced, along with interest, or to continue with the project, in which case allottees are entitled to compensation for delayed transfer of possession.

Allottees are also entitled to compensation in case of structural defects and faults in the project[157], any loss caused to him due to defective title of the land on which the project is being developed[158] or the failure on part of the promoter to discharge its obligations under the RERA.

Therefore, we note that there are several instances where a debt may accrue on part of the promoter as the corporate debtor in favour of the allottee. Non-payment of such debt would amount to a default under the IBC and has been noted earlier, this would create a cause of action for homebuyers to approach the NCLT, post the 2020 Amendment, albeit as unsecured creditors.

However, we believe that a cogent argument may be made to show that the status of homebuyers may still be elevated to secured financial creditors. That, while homebuyers have a seat at the CoC table, there remains a gap between other secured financial creditors and homebuyers. The next section seeks to bridge that gap.

5.4. HOMEBUYERS AS SECURED CREDITORS

According to subsection 3(30) of the IBC, a secured creditor is a creditor in whose favour a security interest is created. A definition for "security interest" may be found in Code section 3(31). Mortgage, charge, hypothecation, assignment and encumbrance, as well as any other agreement or arrangement ensuring payment or performance of any obligation of any person, generate a security interest in favour of, or provide for, a secured creditor.

In any CIRP, stakeholders are bound to have conflicting priorities. In *Swiss Ribbons*, the Supreme Court upheld the interests of all stakeholders including workers, creditors and shareholders. In light of this judgment, arguments have been raised suggesting that the IBC takes a more inclusivist approach to insolvency resolution as compared to previous attempts. According to the liquidation cascade outlined in Section 53 of the Code, all secured creditors shall be paid in proportion to their

[155] Section 12, RERA

[156] Section 18, RERA

[157] Section 14(3), RERA

[158] Section 18(2), RERA

approved claims. Each secured creditor is free to pursue the enforcement of their security interest in accordance with the applicable law and opt out of the liquidation process, or to waive their security interest and participate in the liquidation proceedings, in which the corporate debtor's assets are sold collectively[159]. In the case of real estate corporate debtors, homebuyers are likely to prioritize speedy delivery of their constructed apartments while the other financial creditors would prioritize maximization of debt recovery[160].

The 2020 Amendment in the IBC brings an interesting bit of inspiration from the Companies Act, 2013 ("**ICA**"). Under the ICA, a minimum of one hundred members or members holding no less than ten percent of the voting rights in the company may institute an action for minority oppression and/ or mismanagement[161] or for compensation[162]. We note a similar mechanism adopted under the 2020 Amendment which provides that a CIRP against the real estate corporate debtor can be initiated only jointly, by not less than one hundred of such allottees under the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever happens to be less.

In order to derive an argument for homebuyers to be treated as secured creditors, we must first understand the nature of secured debt under the ICA.

Loan finance is a key source of capital for companies[163]. Financial Institutions like banks, while lending money to companies take securities over the assets of the company to ensure minimum exposure to the risk of non-repayment of loan[164]. Liens created against properties of the company for the purposes of securing loans, referred to in the ICA as charges, must be registered with the Registrar or Companies[165].

5.4.1. The Homebuyer – Real Estate Developer Relationship

While the contractual and statutory relationship between the homebuyer and the real estate developer has been described earlier in this paper and elsewhere, it may be prudent to capture the essence of the relationship here. The homebuyer and the real estate developer enter into what is

[159] Technology Development Board vs Mr. Anil Goel & Ors. I.A No. 514 of 2019 in CP(IB) No. 04 of 2017

[160] Khare, Uday, Insolvency in Real Estate: A Difficult Balancing Act (September 01, 2021). JGILS Working Paper No. 3 / 2021, Available at https://ssrn.com/abstract=3911840

[161] Section 242 of the Indian Companies Act allows for directive or injunctive relief to be granted by the NCLT

[162] Section 245 of the Indian Companies Act allows for compensation to be granted by the NCLT.

[163] Eilís Ferran, 'Floating Charges, The Nature of the Security '(1988), Vol. 47, No. 2 (Jul., 1988), The Cambridge Law Journal, , accessed 18 April 2026

[164] Ibid

[165] Section 77, ICA

commonly known as the builder buyer agreement[166] – an agreement to sale a property to be created by the real estate developer against the timely payment of consideration by or on behalf of the homebuyer. This contractual relationship is subject to further statutory considerations as described in the previous chapter. As a result, the homebuyer provides consideration or a promise for consideration against the timely delivery of immoveable property. Thus, while the purpose of the builder buyer agreement is to deliver immoveable property to the homebuyer, we see how that purpose may be turned into a debt on part of the real estate developer by action of the RERA. We believe therefore, that this debt, backed by the delivery of immoveable property, is akin to a mortgage and therefore, takes on the garb of a mortgage.

A mortgage, defined under Indian law includes, amongst other things, a transfer of interest in identified immoveable property for the purpose of securing the payment of money advanced, a debt or the performance of an engagement which may give rise to a pecuniary liability[167].

We have seen how, in previous sections, one of the critical identifying factors of a floating charge is that it becomes enforceable against a specific property only upon the happening of an event. It is true that the nature of the transaction between the homeowner and the real estate developer is that of sale of property. However, provisions in the RERA make it clear that upon events of default on part of the real-estate developer, this transaction of sale gives rise to a debt, which is then enforceable not just under the RERA[168], but also the IBC.

However, the basis of this debt is that the homeowner retains a legitimate expectation to either have their investment returned or having their home built. As a result, much like a secured financial creditor, the homeowner also has the right to claim property as part of the original sale transaction. As Khare suggests, while financial creditors would accord some urgency to the repayment of their debts, homeowners would prefer the delivery of their property[169].

Recognising the motivations and preference of homeowners to receive property over repayment of debt, courts have examined a relatively novel concept of a Reverse CIRP. In *Flat Buyers Association Winter Hills v. Umang Realtech Pvt Ltd*[170], the NCLAT was of the view that instead of following the usual route of inviting a resolution plan for the corporate debtor, the project in

[166] M/s. Imperia Structures Ltd. Vs. Anil Patni, Civil Appeal No. 3581-3590 Of 2020

[167] Section 59, Indian Transfer of Property Act, 1882.

[168] Sections 12 and 18 of the RERA

[169] Khare, Uday, Insolvency in Real Estate: A Difficult Balancing Act (September 01, 2021). JGILS Working Paper No. 3 / 2021 , Available at SSRN: https://ssrn.com/abstract=3911840 or http://dx.doi.org/10.2139/ssrn.3911840

[170] Company Appeal (AT) (Insolvency) No. 926 of 2019

question would be handed over to an alternate real estate developer who would carry on the project instead of the corporate debtor. In effect, the other projects being developed by the corporate debtor would not be affected by the delays in one. The concept of Reverse CIRP, while absent in the IBC itself, shows that the judiciary is not averse to legal experimentation, particularly in the case of a real estate corporate debtor. Reverse CIRPs have been met with mixed reactions, with proponents lauding it as "what is needed to achieve the harmony between stakeholders" and opponents suggesting that the NCLAT exceeded their jurisdiction, amongst other issues under the IBC[171]. Irrespective of whether Reverse CIRPs will be used in the future as well, one may argue that the Reverse CIRP process might be misused by homeowners as an arm twisting tactic against delayed possession of apartments.

5.4.2. The Rise of the Mortgage

At this stage, it may be prudent to revisit our understanding of how security interests are created under property law. A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. As noted by the Law Commission of India, this section creates three essential characteristics of a mortgage. Firstly, that there must be a transfer of interest. Second, that interest must be in specific immoveable property; and lastly, the transfer must secure the payment of a loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability[172].

There can be no doubt that an interest in specific immoveable property is created the moment the builder buyer agreement is entered into. At that point of time, the homebuyer has a contractual right to receive a specific unit in the real estate project. Upon the delay of handing over possession, a statutory debt is created under the RERA. This non-performance of the real estate developer gives rise to a pecuniary liability. Consequently, the allottee can either be delivered possession of the property or have their investment returned at the election of the allottee.

In *Umang Realtech*, the NCLAT established that "*the 'unsecured creditors' have a right over the assets of the Corporate Debtor i.e. flats/ apartment, assets of the Company*"[173]. As a result, an

[171] Sanjeev Kumar and Anshul Sehgal, 'Reverse CIRP: An Alien Concept to the IBC Regime', available at https://www.barandbench.com/columns/reverse-cirp-an-alien-concept-to-the-ibc-regime

[172] Law Commission of India, Seventieth Report on The Transfer of Property Act, 1882, August 1977, page 389, available at https://lawcommissionofindia.nic.in/cat_Transfer_of_property_Act/

[173] Company Appeal (AT) (Insolvency) No. 926 of 2019

interest in property is created in favour of the homeowner as soon as the builder buyer agreement is executed. An interest in property against payment of money later convertible into a debt would automatically create a lien, an encumbrance or a charge against the debtor. Even if the property has not been clearly earmarked as part of the builder buyer agreement, or even if the property has not even been created, the homeowner's primary claim would be to receive the property that it had paid for. This gives rise to a floating charge in favour of the homeowner.

Another approach to this argument would entail the conversion of the homebuyer's agreement, which ostensibly is a document memorialising the sale of property. Upon a default on part of the real estate developer, this sale agreement converts to a claim of debt. This argument is supported by the fact that homeowners have the right to claim their money back as a debt under the RERA and the IBC. The basis of that debt is the existence of the sale agreement. It may be argued that while the intention of the parties was to enter into a contract of sale, by operation of law, this contract of sale converts to a claim of debt with a legitimate interest and expectation to receive property.

Consequently, an argument may be made that the homeowner does have a secured debt, with the underlying property in which the homeowner has an interest, which bring the homeowner at par with other financial creditors.

An unsecured creditor's claim for repayment is immensely dependent on his personal contractual rights [174] . A contract's aggrieved party often has just one option for redress: a demand for damages[175]. Action on the debt will be accessible when the claim is for a liquidated sum currently payable, and specific performance and injunctions may also be sought. Unsecured creditors have no rights to the debtor's property while a lawsuit is still pending, and even after a decision has been obtained, the debtor's assets cannot be seized or sold to satisfy the debt without a court order authorizing such enforcement[176].

Post the Insolvency and Bankruptcy Code (Amendment) Act, 2018, homebuyers, despite being granted similar rights as secured financial creditors and with the amount owed to them being recognized as financial debt, are as of yet not considered secured financial creditors [177]. The

[174] Eilís Ferran, 'Floating Charges, The Nature of the Security '(1988), Vol. 47, No. 2 (Jul., 1988), The Cambridge Law Journal, , accessed 8 April 2026 p. 215

[175] Ibid, Hadley v. Baxendale (1854) 9 Exch. 341

[176] Ibid, p. 216

[177] Report of the Insolvency Law Committee 2018 available at https://ibbi.gov.in/uploads/resources/ILRReport2603_03042018.pdf

Supreme Court in the *Pioneer*[178] case clarified homebuyers to be unsecured creditors:

A floating charge debenture holder is in a distinct situation than the others. Once the charge has solidified into a fixed charge, the parties who hold such a charge have the legal right to make an application to the court for an order of sale of the property that is subject to the charge. The court will then decide whether or not to grant the order. The potential power to enforce security without first acquiring judgment for the sums owed and an order enforcing such judgment differentiates a charge from a claim that is based solely on a contract, and it is indicative of a proprietary claim[179]. This is true even though the floating charge remains dormant until it crystallizes.

"54… True, allottees are unsecured creditors, but they have a vital interest in amounts that are advanced for completion of the project, maybe to the extent of 100% of the project being funded by them alone."[180]

Section 11(4)(h) of RERA[181] says that, initially, a mortgage cannot be put on a property for which the agreement has already been signed by a defaulting developer. Secondly, the proviso states that in case a situation arises where mortgage has been charged, it will not be allowed to tamper with the rights and interests of the respective homebuyers.

The provisions of RERA and Section 3 (31) of the IBC[182] show that homebuyers may be protected as secured financial creditors. However, this interpretation has not yet been judicially identified and hence there remains ambiguity around it. As per the Resolution Process, in order to claim dues and exercise the right to a seat in the committee of creditors, it is necessary to be a financial creditor[183]. As unsecured financial creditors, there could be ambiguity related to the homebuyer's interests in the assets of the company and consequent claims over distributable proceedings. If the resolution applicant is giving a certain value to the assets of the company while taking over the company as a going concern, the first claim over the assets would fall to the secured creditors, not homebuyers as unsecured creditors[184.] Unless the homebuyer manages to fall into the majority of 66% or get a blocking vote of 33% or more, the chances of them getting a priority in distribution of assets over secured financial creditors are next to nothing.

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[178] (2019) 8 SCC 416

[179] 23 Tennant v. Trenchard (1869) L.R. 4 Ch.App. 537 at 542 per Lord Hatherley L.C. in Eilís Ferran, 'Floating

Charges, The Nature of the Security '(1988), Vol. 47, No. 2 (Jul., 1988), The Cambridge Law Journal,

[180] Ibid

[181] Section 11(4)(h) of RERA … "(h)

[182] Section 3 (31) of the Insolvency and Bankruptcy Code, 2016,

[183] Standard Chartered Bank, London v. Khubchandani Hospitals Private Limited, Company Appeal (AT) (Insolvency) No. 911 of 2021

[184] Banikiran Pattanayak , "Are Homebuyers Secured Financial Creditors" 2018, Insolvency and Bankruptcy Board of India – Ibbi accessed 8 April 2026

CHAPTER - 6 CONCLUSION

CONCLUSIONS

1. From the above analysis it can be concluded that the Code is a very profound piece of legislation drafted for tackling the serious problem of insolvency plaguing the Indian financial sector. Although the Code overshadows many previous legislations discussed earlier but the reason for this is if the Code was made sub-servant to any of the previous legislation, then the entire objective of introducing the Code would have failed. None of the previous legislation provided a single forum to solve all the issues related to insolvency. It has justified its enactment within a modest period of 6 years. The Code has provided an actual ease of doing business and welcomed foreign investment which led to greater diversification of funds to corporate entity by providing an easy exit route in case of losses.

2. The time frame provided under the Code is adequate. The delays are caused due to the time taken at the initial stage and in judicial proceedings. This issue can be solved by increasing the capacity of the judicial framework and sensitizing judiciary about the special nature of the law and the mischief if intends to address so that courts, especially the constitutional courts deal with case under the Code as per the provisions and intention behind the Code, rather than on pure equitable principles, to which the judges are used to and are trained. The Code provides for the creation of many institutional frameworks within it like the regulator i.e., the IBBI, Insolvency Professionals and Information Utilities. As demonstrated under Part-D of Chapter-3, the Code has been able to change the business environment within a short period of 6 years and installed a sense of fear in the minds of habitual defaulters, who, under the previous regime, used to play with the system taking advantage of loopholes and also by doing forum shopping. The resolutions done under the Code and recoveries made under it are the testimony of the success of the Code, which has been recognized not only in India but also by the international bodies viz. World Bank.

3. The World Bank conducts an annual examination of about 200 economies in terms of ease of doing business. It declared the result of the last examination on October 24, 2019. India improved its overall ranking by 14 spots to 63 on the list and earned a place among the world's top 10 'improvers 'in ease of doing business, for the third consecutive year. In terms of 'resolving insolvency', which reflects ease of exit from business, India's ranking improved

by 56 places to 52 from 108 the previous year. The World Bank recognized that with the reorganization procedure available, through the Insolvency and Bankruptcy Code, 2016 (IBC), companies have effective tools to restore financial viability, while creditors have better tools to successfully negotiate and have greater chances to realize the money.

4. The availability of money in the system due to the faster disposal of the cases, either by resolving the insolvency or by liquidation of the company, has established India as one among the world leaders where the developed countries have started taking India seriously. The way the India has handled the Covid-19 led crisis, where it has sustained not only its citizens by way of free rations, free vaccines etc., but also was the largest supplier of vaccines to the whole world, shows the resilience of Indian economy.

5. Anything, howsoever good, cannot be said to be perfect; and the same holds good for the Code also. In spite of the best of intentions some gaps in the law are bound to remain, which are generally noticed at the implementation stage. Six amendments were made in the Code in as many as six years of its existence, however, shows the seriousness of the Government towards Code's success. The lacunas or gaps which are still noticed in the Code are more related to implementation than on concepts. Improper implementation of the provisions of the Code results in delays frustrating the whole object of the Code. Further, certain loopholes, infrastructural and logistical problems also contribute to frustrating the objective of the Code. Such impediments are however noticed in all progressive and modern legislations, especially with economic legislations, as the economy is a dynamic field and law dealing with that has to be dynamic to address new emerging challenges.

6. In following paras, on the basis of the study made during the present research, we shall deal with certain areas requiring improvements in the Code to make it more efficient, namely.

(A) THE AMBIGUITY WITH REGARD TO DEFINITION OF 'FINANCIAL CREDITOR'.

The first ambiguity with regard to the Code arose when S.29A was introduced by the 1st amendment to the Code by way of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 dated November 23, 2017. This section was inserted with retrospective effect by Insolvency and Bankruptcy Code (Amendment) Act, 2018 dated January19, 2018. The 1st amendment was introduced with the intention to curb the attempts made by the promoters of insolvent companies to regain control of the company by taking the back door route.

It is however felt that the provisions of S. 29A are very rigid. It not only restricts the promoters but also the people related or connected with the promoters. It is felt that in any case, there are not many qualifying resolution applicants and S.29A further narrows downs the already depressed financial condition of any resolution process.

The disruption due to Covid and resultant losses to the business cannot be termed as the fault of the promoters. Therefore, bar u/s 29A will prevent many promoters who are ready to pay the highest bid amount to the creditors. There is evidence that some promoters have been able to turn around the company in their second attempt. Therefore, in the views of the researcher, instead of barring the promoters completely, strict qualifying parameters should be introduced to prevent fraudulent promoters from regaining control of the corporate debtor.

(B) THE PROBLEM OF HAIRCUTS

The most objective and widely used metric to compare performance of economy is the 'World Bank Group's Doing Business Report' where India moved from 136th to 52nd in terms of resolving insolvency. As per the Report released in October 2019 recovery rates of countries were "India – 71.6%, US – 81%, UK –85.4%, Brazil – 18.2%, Russia– 43%, China - 36.9% and South Asia – 38%." It is to be noted that our law is merely about 6 years old whereas the laws of some of these countries are pretty old and settled. Also reference to Table 3 in Chapter 5 explains the growth and improvement in insolvency resolution in India. But in reality, this does not show the complete and clear picture.

If the difference between the amount of debt owed and repayment made is too wide, then the funds recovered and pumped back into the economy will not be able to fill the gap created by the default and to that extent the economy will suffer the loss. The unsettling fact however is that even after a modest duration of 6 years, the haircut on resolved matters is still very high.

"The IBC process was projected as a panacea for recovery of NPAs or bad loans and the government went to the extent of claiming in April 2018 that more than Rs. 4 lakh crores of NPAs had been recovered through the IBC process. However, the data from RBI later revealed that the actual figures for recovery had been much lower. The NPA accounts of 40 companies referred by RBI for the resolution process came much into the limelight as they together account for 60-65% of bad loans in the banking system".[206] "The legislature may therefore consider to have a maximum cut-off percentage as bench mark to the quantum of haircut. Because, even if the minimum amount or percentage of amount is also not recovered than may be the resolution plan was not the best resolution plan.

However, only the Code cannot be blamed for this and it is equally important for lenders to be vigilant and invoke the insolvency resolution at right time to avoid big haircuts. In the words of Dr. M. S. Sahoo "*IBC is a tool in the hands of the stakeholders to use at the right time, in the right case, in the right manner. They should use it in earlydays of stress, when value of the company is almost intact and close the process quickly before value recedes further to minimise or even avoid haircut*." [208]

(C) THE ERADICATION OF CORPORATE ENTITIES DUE TO COPIOUS LIQUIDATION

There has been a significant increase in filing of cases under Code in the last 6 year. This shows the acceptance of the Code by the Indian financial market and corporate entities. However, from the data reflected in the present research, it can be conclusively pointed that the number of liquidations is way more than resolutions. The Code had merely completed the process by doing its funeral. The other problems like rash lending, lending without security, incompetent management etc. also need to be solved apart from blaming the Code.

The Code has triggered a systemic response to the underlying attitudinal problems in the creditor-debtor relationship and is acting as a prophylactic for an acute condition. Initiation of insolvency proceedings at the early stage of default increases chances of better resolution thereby enabling the creditors to keep an earning asset on their books during the term of a loan[209]. In deciding what should be done for the corporate debtor, the weigh between destruction value and salvage value should be done. If it is better to liquidate the entity, then liquidation should be proceeded with.

(D) THE OBDURATE TIME FRAME

The importance of timely completion of resolution process can be determine from the words of preamble of the Code which states as follows:

An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all stakeholders including alteration in the order of priority of payment of Government dues and toestablish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

The first and foremost reason for which Code was enacted was to provide faster resolution

to

insolvency matters. The time frame is also important to be followed as if the faster resolutions are done, there are greater chances for any enterprise to be saved and salvaged. The delay of time will only cause depletion in the value of assets. A single day of delay can cost to an enormous extent to the creditors.

For instance, in the case of Alok Industries,[210] it was Rs. 1.7 Crores a day, in the case of Bhushan Steel[211] it was Rs. 4.2 Crores a day and lastly, in Essar Steel[212] it was nearly Rs. 10 Crores a day. All these resolutions were beyond the period of 330 days, and some went beyond 400 days. If this cost is high, then a smaller amount will be left to be paid to the creditors. Therefore, superfluous delays need to be curtailed. Only after the curtailment of these delays, easier and hassle-free resolutions can be done, and creditors will recover more capital.

(E) INFRASTRUCTURE PROBLEM

With the notification of the Code, the number of cases which are filed every year is increasing at a very high rate but the development of infrastructure for the same is not at
that high pace. The number of benches of NCLT are also very few in comparison to the requirement. The cause of the tendency of the cases in NCLT is due to the fact that they are overburdened. There is a dearth of required number of NCLTs, and its members results in backlog of cases and delay. This puts too much load on the existing Adjudicating Authorities.

(F) PROBLEM FACED BY THE INSOLVENCY PROFESSIONALS (IPs)

S.233 of the Code provides protection to the IPs from action taken by them in good faith. The law, however, failed to provide them security from hostile behavior of the management of corporate debtor. It does not provide them with financial security as if management fails to co-operate, they are unable to use the finances of a corporate debtor and do not have any money for their day-to-day expenditure.

Though the Code under section 19 mandates the promoters and management to cooperate with IP and on an application filed by IP, Adjudication Authority may also direct them to cooperate, but in reality, the IPs face lots of problems on the ground.

The capability of the IPs is also questioned as sometimes the IP appointed is unable to manage the company effectively. The IPs are generally practicing CAs or CSs. Those who are in full-fledged practice are able to give the results with stringent timelines but those with parallel practice, face certain difficulties hampering the process. IP interviewed by the researchers also

stated that in spite

of clear timelines given in the Code or by the Adjudicating Authority, it is not always possible to follow these timelines due to frivolous litigations.

It is also gathered that the institutional capacity also needs to be increased as the present institutional capacity is not capable to meet the 330 days timelines provided under the Code. A complete set of trained professionals is required who are well versed in the insolvency law, company law, contract law, debt law and modern financial transactions along with other laws to achieve the required goals of completion within the 330 days timelines.

(G) THE QUANTUM OF DEFAULT

After the COVID 19 pandemic, the minimum amount of default for initiating the CIRP was increased from Rs. 1 Lacs to Rs 1 Crore. This has resulted in devoiding the operational creditors with meagre means, to initiate the process. An operational creditor may not have an outstanding operational debt of Rs 1 Crore or more. For example, it is unlikely that there would be an employee or small-time supplier of goods/ daily utilities who is yet to receive an outstanding amount that equals to 1 crore or more. Thus, the impact of this amendment is that the operational creditor does not have any option to claim outstanding amount until it reaches the threshold limit of 1 Crore. Initially the Code had created fear in the minds of corporate debtor, so they used to pay the money. Now that fear has gone. The Code was initially beneficial to operational creditors. I agree that Rs. 1 Lacs was a very small amount but Rs. 1 Cr. is very steep increase and need to be rationalize.

These were some of the observations and conclusions which were made by the researcher during the research work. The following are some of the suggestions which can help to remedy the situation and might help in improving the working of the Code.

SUGGESTIONS SCANNER FOR WILFUL DEFAULTERS

The restrictions imposed under S.29A prohibiting the promoters and related entities from submitting the resolution plan may be relaxed in cases where there is no malicious intent on behalf of the promoter.

(A) ADOPTION OF MIDDLE GROUND

Where gross negligence and mismanagement by the existing management of the corporate debtor is proved, its management can be transferred to a registered Insolvency Professional. In the absence of wilful default, as an alternative to the current restriction, a middle ground could

be adopted, similar to Chapter 11 of the US law where the debtor continues to be in control and possession of

the business.

(B) CREATION OF MARKET FOR DISTRESSED ASSETS

Need for a market of distressed asset is one of the major issues which need to be addressed in next to no time. The government should take steps to provide a market for such assets. A more robust debt market needs to be created for the stressed assets with fewer regulatory barriers, such as S.29A.

(C) DISTINCT DEFAULT AMOUNT FOR FINANCIAL AND OPERATIONAL CREDITORS

Amendment should be made for the quantum of default to initiate proceedings under the Code. Sec.4 which provides for default, can be divided in two different parts. This will help in maintaining the quantum of default for financial creditors to avoid frivolous litigations and less threshold for operational creditor shall give them the right to approach the Tribunal seeking remedy.

(D) PROVISION OF HAIRCUT THRESHOLD

For any resolution plan to be accepted, a fixed amount or percentage should generally be there for haircut. This percentage can be lowered only in very exceptional circumstances. This will protect the creditors from forcefully taking large amount of haircuts just for timely completion of the process.

(E) SALE OF BUSINESS ON GOING CONCERN BASIS

The aim to provide resolution should be strictly adhered to. I The proposal of the Standing Committee on Finance 2020- 21 to amend the Liquidation Regulation should be rejected which has
recommended for the removal of the 'sale on going concern basis clause'.

(F) CURB THE TIME TAKEN AT INITIAL STAGE OF CIRP

The time taken by the NCLT during the initial stage of accepting and deciding the application for CIRP is very crucial and it should be reduced. This flaw can be removed by confining the Adjudicating Authority within a fixed timeline at this initial stage which canbe extended only in rarest of the rare case.

(G) MANAGE JUDICIAL DELAY- INCREASE NUMBER OF NCLTs

To control the judicial delay, the number of benches for the Adjudicating Authority (NCLT) needs to be increased. Till the time permanent Adjudicating Authorities cannot be established, Circuit Benches can be formed. Further, online filing, document only proceedings and online hearing of the cases may be encouraged.

Additionally, not only the members of NCLA & NCLAT but also the higher judicial officials, including the judges of the High and Supreme Courts should be sensitized about the special nature of this Code/ legislation which has been enacted to deal with specialtype of cases. They may also be sensitized to keep their natural urge to interfere with any legislation on the ground of equity, on check, and may interfere only in rare of the rarest cases, where gross injustice and irreparable loss is likely to happen to the system.

(H) CREATION OF INSTITUTION OF ASSET MANAGERS

More efficient asset managers are the need of the hour. Like the Institution of Insolvency Professional is developed, on the same lines an institution of Distressed Asset Managers should be created.

(I) AVOID EVER-GREENING

There are numerous examples in the past where the Banks have continued to give loan to a borrower which was mainly used to repay the earlier loan given by the same bank to the same borrower. This is called 'ever-greening of loan'. This dubious method is adopted by banks to keep their balance sheet clean, as the previous unpaid loan will not be seen and there won't be any NPA. Reckless lending should be avoided to control the amount of debt being given to a particular corporate debtor. Proper due diligence should be undertaken by the banks before extending the loan. Especially the government must put in place the system to strictly avoid political interference in loan disbursement, specially by the public sector banks andfinancial institutions.

(J) LOOK AFTER THE INSOLVENCY PROFESSIONAL (IPs)

The payment mechanism for Insolvency Professional (IPs) should be made clear. The cost of insolvency should be borne bythe creditor or corporate debtor who makes a request for CIRP. Before proceeding with the claims of creditors, a separate fund should be created for the expenses related to CIRP. This will help in maintaining finances during CIRP.

(K) ACCOUNTABILITY OF THE GOVERNMENT DEPARTMENTS

The legislature should frame policies to support CIRP and provide all the information needed by the IP is fast and efficient manner. Strict penalties should be imposed on the officers in-charge of

the government department who fail to timely assist the IP in completing the CIRP. Though Information utility has been created for this purpose, as of now, it is not much effective and IPs are forced to collect the necessary data from different sources.

(L) DEVELOPMENT OF MORE INSOLVENCY PROFESSIONALS

Presently, the Chartered Accountants, Advocates and Company Secretaries and Cost Accountants etc. are working as IPs. There is need to develop an entire force of IPs who are well versed with the laws & procedures and their roles & responsibilities includingthe strict timelines to be adhered to by them.

(M) MAKE SALE AND DISBURSEMENT MORE TRANSPARENT

Having given these suggestions for improvement of the framework, as no system can ever be perfect, the researcher wish to put on record the fact that the IBC has had very positive impact on the financial growth of India. According to a report in 2021, about 4540 cases were admitted for CIRP under the Code until June 30, 2021. 394 companies were resolved till June 30, 2021, wherein financial creditors (FCs) including financial institutions, had total claims amounting to Rs 6.80 lakh crore, out of which Rs 2.45 lakh crore have been realised, which is 36% of their claims.[213]

As against the above figures as on June 30, 2021, as per the latest Newsletter published by the IBBI (for January – March 2023), the gist of which was widely reported by Press Trust of India, Insolvency tribunals i.e. the NCLTs have approved 180 resolution plans in FY23, the highest-ever number so far, resulting in a total realisation of Rs 51,424 crore from stressed assets. It further reported that in terms of realisation of the amount for creditors, this is the second highest after FY19, when the total realisation was Rs 1.11 lakh crore after completing 77 insolvency proceedings including some big-ticket matters such as Essar Steel and Monnet Ispat. The resolution has helped creditors of debt-ridden firms in FY23 to realise 36 per cent of their total admitted claims of Rs 1,42,543 crore for the year ended March 31, 2023.

As per the data released by IBBI, the NCLT has cleared a total of 678 resolution plans till the end of FY23 and the creditors have realised Rs 2.86 lakh crore. According to the newsletter, the creditors have realised 68.47 per cent of the liquidation value and more than 83 per cent of the fair value.

All the above data and analysis emphatically proves that the IBC is a unique piece of legislation in the modern India and is unparallel in its reach and effect. However, it has to go a long way to realise its true potential and with the above suggested and other improvements, including

that of

infrastructure and implementation related improvements, it will truly serve in the India's growth story. At the end, while again praising the object and also by and large, execution of the Code so far, the researcher wishes to borrow the very apt (in the context of IBC), and famous quote of Winston Churchill-

"***Now this is not the end. It is not even the beginning of the end.***

But it is perhaps, the end of the beginning."

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