Preserving value, or destroying it?

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The Insolvency and Bankruptcy Code of 2016 (IBC) was established with the goal of conducting the corporate insolvency resolution process (CIRP) of a debt-ridden company. However, the peculiar positionality of certain sectors leads to inherent complexities while subjecting them to the CIRP process. The most glaring example of this is the real-estate sector. Within this sector, the homebuyers act as financial creditors to a real-estate project owner. To this effect, the landmark 2018 amendment to the IBC included real-estate allottees within the definition of "financial creditors", empowering them with a seat on the committee of creditors (CoC) and participation rights in the CIRP.

Nevertheless, this novelty unintendingly spiralled into mounting Section 7 petitions under the IBC, as "speculative investors" who sought debt-recovery rather than resolution of the real-estate company. To curb this menace, the Supreme Court, on 12

September 2025, passed its ground-breaking verdict in Mansi Brar Fernandez v. Shuba Sharma (2025) wherein it stitched a distinction between genuine homebuyers seeking resolution of the company and "speculative investors", thereby shielding projects from being derailed by investors who never intended to take possession. Nevertheless, the most pioneering portion of the verdict was the Court's direction to conduct resolution of the real-estate insolvency on a project-specific basis, as a matter of rule, rather than that of the entire corporate debtor.

This article critically analyses the background of project-wise resolutions in the real-estate sector and states the implications of this judicial innovation. It then suggests potential areas where this innovation can be strengthened. Background: Traditionally, CIRP of one project engulfed the entire company. This would lead to freezing of all other solvent projects in process as well as the cash flow attached to them. Consequently, all homebuyers and lenders from unrelated projects, which were not part of the original financing package, would also be affected by the CIRP process.

In fact, this led Tribunals to encounter numerous developers who had their several Projects halted because of these being forced into one singular Corporate-wide Insolvency process for that developer. All homebuyers of the nearly completed residences would be in a state of limbo with regard to their investment. Similarly, lenders, who held security interest against individual projects, lost their perspective as to the extent of the recoveries corresponding to the projects. In a significant innovation, the NCLAT in Flat Buyers Association Winter Hills – 77 Gurgaon v. Umang Realtech Pvt. Ltd through IRP & Ors., (2020) conceived the concept of reverse-CIRP and provided opportunity of project-wise CIRP, instructing that CIRP would be restricted to the defaulting project only.

Project-wise insolvencies have been implemented in several projects since. Although not formalized yet in the IBC, recent amendments to CIRP regulations allow the Resolution Professional, with prior CoC approval, to invite distinct resolution

plans for individual or grouped projects. Implications: According to IBBI, real-estate constitutes approximately 21 per cent of total insolvencies in India. A deeper issue that remains largely unrecognised in such insolvencies is the allocation of risk. It is assumed by the IBC that creditors take on corporate-level risk and will do so on a conscious basis. This assumption does not hold true in the real estate industry.

Homebuyers only invest in a specific flat located within a specific development project; therefore, they do not have a vested interest in the financial condition (the entire balance sheet) of the developer. Lenders provide a loan for a specific project and more often than not use escrow accounts, security structures, and cash flow from the project as collateral for that loan. Viewing these stakeholders as creditors of the entire corporate debtor alters their risk exposure by retroactively modifying that exposure based on events beyond their control.

Indeed, as observed in Winter Hill (supra), by denying 'secured creditors' an overriding right to the asset (flat/apartment) over the allottees ('unsecured creditors'), the Tribunal neatly highlighted the principle of primacy of a home buyer's rights over his purchase. The fact that there cannot be a haircut of assets/flats/apartment of an allottee becomes foundational to this judicial exercise. The Apex Court decision in Mansi Brar (supra) is just an instance of this principle. The directions serve as guidance notes to introduce accountability and credibility in real-estate projects where interests of genuine homebuyers are safeguarded. These normative pathways can help tackle the problems of multiple regulatory non-compliance issues, legacy litigation and homebuyer disputes that cover several different states that traditionally disincentives resolution.

The fact that bundling together both viable and failing assets dilutes the asset value rather than preserving it is also a significant area of innovation where project-wise insolvencies provide a viable alternative. Suggestions: Project-wise insolvency cannot continue being an unregulated creation of the jurisdiction of

courts. The absence of a statuary basis raises serious problems. When funds have been transferred across different projects, it becomes extremely complex to classify assets and their corresponding liabilities. Furthermore, determining the legitimate claims against a project can become very contentious.

Developers could abuse the claim of project independence as a means to protect the corporate level mismanagement of funds diverted by them. If there is no mechanism in place to limit or regulate the separation of individual projects, there could be a moral hazard where the promoters know that they can isolate (separate) the failures of their projects and still maintain control over the ongoing (profitable) businesses. Thus, it cannot be about choosing between project wise insolvency or corporate wise insolvency; they are not mutually exclusive. A properly calibrated (balanced) approach that recognises the difference in the development of real estate and creditors and develops a protocol that enables creditors to remain disciplined to the standards established under the Insolvency Bankruptcy Code (IBC) is required.

The treatment of real estate should be explicitly stated (recognised) as a separate category under the IBC and should be treated according to its unique circumstances. A `hybrid' approach to resolving insolvency on a project basis should provide an opportunity to resolve issues pertaining to default and cash flow as they relate to specific projects versus on a corporate wide basis, but on the condition that appropriate forensic checks (examination for improper diversion of funds) are established and maintained. The goal of insolvency law is to be an effective tool in resolving financially distressed businesses, as well as protecting the commercial interests of the businesses that are being represented in bankruptcy proceedings.

As the real estate industry continues to develop and expand, it becomes clear that by forcing corporate-wide insolvencies on every case, it becomes very difficult to properly assess how the industry operates. On the other hand, unchecked project-level

insolvency opens the door to significant fraud and degradation of accountability. Therefore, the discussions should revolve around whether the current framework respects value preservation or destruction of value.

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