

Treating Homebuyers Within The Ambit Of 'Financial Creditors' Under Insolvency Bankruptcy Code, 2016 And Critical View On The Recent Amendments

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In the past two decades, we have observed delays from the builders/developers side in giving possession to home buyers. These builders often borrow money from the home buyers and further are incapable of fulfilling their commitment in delivering the aforesaid flat/homes and other real estate projects. Homebuyers had invested their life savings and hard-earned money in the builder's project and also has taken loans from the bank and paying EMI's for the flats, whose allotment and possession is still due. The builders have physically and mentally harassed homebuyers over the years, and we have seen their sufferings from various judicial precedents of Amarpali, Jaypee Infratech and Supertech cases. Considering these factors government has taken the initiative to bring homebuyer under the definition of the financial creditor by amending the Insolvency and Bankruptcy Code, 2016 and is still in the process to come with an effective ordinance to deal with and overcome the existing lacunas under the Code.

Financial and Operational Creditors under IBC, 2016

In order to efficaciously initiate Corporate Insolvency Resolution Process (CIRP) against a debtor, it is *sine qua non* to attest that the creditor falls within the ambit and scope of the definition of either 'Financial Creditor' u/s. 5(7) or 'Operational Creditor' u/s. 5(20) of the IBC, 2016. Financial creditors are those who have legally disbursed funds to the corporate debtor "against consideration for the time value of money". To ascertain a financial creditor, the debt owed must fall within the ambit of a 'Financial Debt' as u/s. 5(8) of the Code. On the other hand, 'Operational Creditors' determine numerous liaisons with the debtor company by providing goods or services, employment or government dues etc.

In *Col. Vinod Awasthy v AMR Infrastructure Limited*¹ A distinction was drawn out where the court dismissed a petition u/s.9 of IBC, 2016 on the issue of whether 'flat purchaser' or homebuyer fell within the definition of s.5(20) of 'Operational Creditor'. It was held that IBC did not intend to include within the expression of an operational debt any debt other than a financial debt and therefore, an operational debt is restricted to classifications specified u/s. 5(21).

Homebuyers primarily protected under Article 32 and 142 of the Indian Constitution.

Before the Insolvency and Bankruptcy (Amendment) Act 2018, homebuyers were not covered under the scope of either 'financial creators' u/s 5(7) or 'operational creditors' u/s. 5(20) of the initial IBC, 2016 Code. Despite insinuating that all companies under Companies Act, 2013 fall u/s. 2(a) of the Code, no clarity was laid on the ambit of Homebuyers and Real Estate Players.

After an application to initiate Insolvency Process u/s. 7 of the Code was shifted to National Company Law Tribunal (NCLT), in the case *Nikhil Mehta & Sons & Ors v AMR Infrastructure Ltd* ², NCLT held that the period of committed return from the execution of an MOU to the possession of the unit(s) does not acquire the status of a 'Financial debt' due to any failure and come within the scope of a 'Financial Creditor'. Later, this judgement was overruled by National Company Law Appellate Tribunal (NCLAT), and it was held the appellants did fall under the ambit of a 'Financial Creditor'.

*Chitra Sharma & Ors v Union of India & Ors*³ brought up the issue of the Homebuyers exclusion from the IBC, 2016 and it is violating their fundamental right to life, as well as homebuyers being disentitled from becoming part of the Committee of Creditors despite being one of the most significant contributors of finance in real estate. It was also inequitable to render them remedy less if a moratorium is granted to certain parties u/s. 13 and 14, of the Code.

Insolvency and Bankruptcy (Amendment) Act, 2018

Through the statutory Amendment to the Code, Homebuyers were duly at par with 'Financial Creditors' and now could subsequently initiate provisions of the IBC in case of any delay in

¹ Col. Vinod Awasthy v. AMR Infrastructure Ltd., 2017 Indlaw NCLT 101

² Nikhil Mehta & Sons v. AMR Infrastructures Ltd., 2017 Indlaw NCLAT 60.

³ Chitra Sharma & Ors. v. Union of India & Ors., (2017) 143 SCL 680 (SC).

possession or repudiation. This Amendment was subject to judicial scrutiny in *Pioneer Urban Land and Infrastructure Limited v Union of India & Ors.*⁴, where it was found that delay in completion of apartments was widespread and the funds raised from the home buyers drastically aided in financing these constructions. Therefore, it was crucial to treat homebuyers as financial creditors. The judgement concluded that the Amendment didn't infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India and that RERA is to be read amicably with The Code, but The Code prevails through any incident of conflict.

The Insolvency and Bankruptcy (Amendment) Act, 2020

The 2020 Amendment passed by the central government unduly altered the modus operandi in initiating the CIRP and placed a cap on the number of Homebuyers/Allottees approaching the NCTL u/s 7 of the IBC, 2016. The 2nd proviso declared that for homebuyers to contact NCTL, there must be either 10% of the allottees of the project or 100 homebuyers, whichever is less. The applicability of this ordinance seemed impractical as the implementation was problematic and a fallacy of presumption.

The 2020 Amendment Act, u/s. 3 establishes brand new obstacles for the homebuyers without exploiting their statutory status as a financial creditor. It discourages entertaining individual claims and endorses only class action suits. The Amendment mandates homebuyers to satisfy the minimum members' requirement, even if the debt that is individually owed to them far exceeds the number of Rs. 1 Lakh, which hitherto allowed all financial creditors to initiate the CIRP, this sinister stipulation deters homebuyers from reaping benefits available to all other financial creditors and puts them at a disadvantage.

It operates on the assumption that all the allottees have been identified and that there is a network of communication among them and there are no pending cases before the NCLT. Moreover, since the Amendment applies to the present petitions, homebuyers without a court order who are already before the NCLT must file an amendment in their application within 30 days and fulfil the new threshold or else the case will be considered withdrawn. Individual homebuyers who do not fulfil the requirement above (s), are at the mercy of the Committee of Creditors (COC) as they don't partake in the decision-making process, and once the moratorium is granted in any other petition before NCLT, it will put homebuyers at abeyance.

⁴ Pioneer Urban Land and Infrastructure v Union of India (2019 SCC OnLine SC 1005)

A bare reading of the new provisions makes it apparent that the Amendment has been designed to protect private developers rather than enabling unintended citizens. Non-adherence to the mandatory provision will undeniably lead to the quashing of the homebuyer's application and may well prevent genuine and bonafide cases from being brought before the court of law. The Amendment was ineffective in addressing the vital issue of determination of the status of the homebuyers as 'secured' or 'unsecured' creditors during the inbound cascade of liquidation and the system of recovery of money for an individual homebuyer in case no other creditor is accessible. It is important to understand that every financial creditor is not a secured creditor. Being a financial creditor and being a secured creditor is not same and is very much evident from the definition of financial debt, secured debt and also the priority of payment enlisted under Section 53 of the Insolvency Bankruptcy Code, 2016. If the builder's company get into liquidation, where the homebuyer is an unsecured creditor as per the real estate agreement, he is in a very less advantage position. The bare reading of Section 53 (1)(d) of IBC, 2016, which states financial debt owed to the unsecured creditor and covers homebuyers in that ambit, which means financial debts owed to unsecured creditors ran after the dues of the secured creditor, workmen and employees. It is very much blatant that Insolvency and Bankruptcy Code 2016 is still missing on providing a practical solution and a holistic approach for homebuyers protection. Therefore, considering the position above, there is an urgent need to define the priority of homebuyers in a way so that they can get their refunds along with the dues of secured creditors and workmen.

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