Real Estate Developers And Homebuyers: Finding A Harmony Under the Ibc

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The real estate sector in any economy is of supreme significance. Not only does it serve the economy by enhancing its infrastructure, but also reflects its well-being. In the recent past, the troubles of this sector have exacerbated due to various reasons such as corporate mismanagement and the dearth of liquidity. The failing sector has adversely affected the economy at large, but the ones to suffer the most are the homebuyers. To ensure that interests of both, the developers and the homebuyers are protected, the government and the judiciary have consistently taken steps. While the recent reforms brought in by them, through the 2020 IBC amendment and the 2020 NCLAT order propounding the novel version of the CIRP, serve to ameliorate the situation, they are debatable in terms of their sustainability in law and practice. There is a dire need to identify the problems which still persist in the framework of law for this sector, particularly under the IBC to ensure a unison between the two contesting parties. The authors, through this paper, will delve into the implications of the recent reforms and propose a framework to reconcile the long-standing conflict between the homebuyers and the real estate developers.

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I. Introduction

In December 2019, the ex-RBI Governor Raghuram Rajan opined that the real estate sector was in deep trouble.[1] He believed that the tribulations of this sector were spreading like fire to other stakeholders in the economy. The NBFCs,[2] which are the primary source of capital for this sector, were suffering from an acute meltdown since 2018.[3] With a severe liquidity crunch,[4] developers faced an exponentially high burden to complete their projects within the decided timeline.[5] The said state of affairs gravely affected millions of homebuyers who had put in their hard-earned money into the purchase of flats/apartments in these projects.

The IBC[6] was introduced in 2016 to streamline the insolvency and bankruptcy process for companies. Today, with a promising track record in resolution of companies,[7] the IBC endeavours to give a time-efficient remedy

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1 Raghuram Rajan, 'Exclusive: Raghuram Rajan Explains How to Fix the Economy' (*India Today*, 9 December 2019) <https://www.indiatoday.in/business/story/raghuram-rajan-plan-fix-indian-economy-10-points-1625829-2019-12-06> accessed 12 June 2020.

2 Non-Banking Financial Companies.

3 Aarati Krishnan, 'NBFC Crisis: A Realty Check', (*The Hindu*, 27 June 2019) <https://www.thehindubusinessline.com/opinion/columns/aarati-krishnan/nbfc-crisis-a-reality-check/article28189944.ece#:~:text=After%20the%20dramatic%20default%20by,-failures%20across%20the%20NBFC%20space.&text=The%20funds%20crunch%20caused%20by,downgrades%20of%20some%20NBFCs%2FHFCs.> accessed 12 June 2020.

4 *Ibid*.

5 Ashwini Priolker, 'How Real Estate Developers are Tiding over Liquidity Crisis' (*Bloomberg*, 3 September 2019) <https://www.bloombergquint.com/business/how-real-estate-developers-are-are-tiding-over-liquidity-crisis> accessed 12 June 2020.

6 The Insolvency and Bankruptcy Code 2016 (IBC 2016).

7 Ishan Bakshi, 'Insolvency and Bankruptcy Code Should be the Preferred Option for Resolution of Bad Loans, Not the Last Resort', (*The Indian Express*, 20 November 2019)

to creditors. The homebuyers perceive IBC as a panacea for their troubles against the real estate developers. In an attempt to harmonize the demands of the developers and homebuyers under the IBC, the legislature and the judiciary have been consistently undertaking measures.

It is against this background that the IBC introduced the Insolvency and Bankruptcy Code (Amendment) Act, 2018[8] and the Insolvency and Bankruptcy Code (Amendment) Act, 2020[9]. The 2018 IBC amendment has now become settled law. However, the 2020 IBC amendment is still being disputed. In addition to these changes, the judiciary has also started experimenting with the IBC to resolve the issues of homebuyers. However, any step that was taken to pacify one side has been disputed by the other. An effective solution to this fallout between the two conflicting interests still remains unattained.

The authors will be delving into the 2020 IBC amendment and a 2020 NCLAT[10] order which proposed a modified CIRP[11] for real estate companies. This article is divided into four parts. In the first part, the authors will briefly trace the recent history of remedies available to the homebuyers so far. In the second part, the authors will critique the recent 2020 IBC amendment. The third part is a critical analysis of the order passed by the NCLAT on February 04, 2020 which proposed a modified CIRP for real estate companies. Lastly, upon identifying and explaining the persisting issues in the present framework of the law, the authors attempt to suggest solutions for the same in part four.

II. PART I: THE EVOLUTION OF THE LAWS RELATING TO HOMEBUYERS

The Consumer Protection Act 1986 has always been and still remains a remedy available to homebuyers.[12] However, a systematic regulation particular

<https://indianexpress.com/article/opinion/columns/essar-steel-case-insolvency-and-bankruptcy-code-rbi-6127721/> accessed 12 June 2020; CRISIL, 'In Three Years of IBC, More Hits than Misses' (14 May 2019) <https://www.crisil.com/en/home/newsroom/press-releases/2019/05/in-three-years-of-ibc-more-hits-than-misses.html> accessed 14 June 2020.

8 The Insolvency and Bankruptcy Code (Amendment) Act 2018.

9 The Insolvency and Bankruptcy Code (Amendment) Act 2020.

10 National Company Law Appellate Tribunal.

11 Corporate Insolvency Resolution Process.

12 *Pioneer Urban Land and Infrastructure Ltd.* v *Union of India*, (2019) 8 SCC 416 [29]; *M3M India (P) Ltd.* v *Dinesh Sharma*, 2019 SCC OnLine Del 9949: AIR 2020 Del 23 [22].

to the real estate market began only with the introduction of RERA[13] in 2016. Although every state had its own law which governed the real estate market, RERA centralised the regulation of the real estate industry. This Act brought in some much-needed transparency in the real estate sector. For this purpose, the Act empowered the Central Government to establish the Real Estate Regulatory Authority[14] and requires the compulsory registration of real estate projects with the mandatory filing[15] of certain data and display of information[16] on the RERA website. This has equipped the homebuyers to make informed choices. It has also provided for remedies in the case of delay and other default.[17]

The IBC also came into force in 2016. In the case of real estate sector, the IBC granted homebuyers an additional remedy under which they could approach the NCLT[18] in the event of a default. Even the courts stepped in to secure the rights of these homebuyers on the flats allotted to them. For instance, in *Bikram Chatterji* v *Union of India*, the Supreme Court did not permit the Noida and Greater Noida authorities and the banks to sell the flats in order to protect the rights of homebuyers.[19] Further, the Supreme Court also recognized that the IBC as an experimental legislation,[20] and has taken steps to do complete justice to the homebuyers. For instance, in *Chitra Sharma* v *Union of India*, the Supreme Court directed a senior counsel to represent the rights of the homebuyers in the Committee of Creditors, and by using its powers under Article 142, ordered a re-commencement of the CIRP process.[21] However, throughout this period, it was disputed whether the homebuyers were financial creditors or operational creditors. The Insolvency and Bankruptcy Board of India notified a new form, Form 'F' for all creditors "other than financial and operational creditors", to file their claims.[22] This further added to the confusion about the position of homebuyers.

The IBC recognises two kinds of creditors who may initiate a CIRP-financial and operational.[23] A financial creditor is a person to whom a finan-

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13 Real Estate (Regulation and Development) Act 2016 (RERA 2016).
14 RERA 2016, s 20(l).
15 RERA 2016, s 11.
16 RERA 2016, ss 11, 34.
17 RERA 2016, s 11.
18 National Company Law Tribunal.
19 *Bikram Chatterji* v *Union of India*, 2019 SCC OnLine SC 901 [154].
20 *Swiss Ribbons (P) Ltd.* v *Union of India*, (2019) 4 SCC 17 [85].
21 *Chitra Sharma* v *Union of India*, (2018) 18 SCC 575.
22 KT Jagannathan, 'Jaypee Homebuyers Get Separate Form to Claim Their Money' (*Hindustan Times*, 18 August 2017) <https://www.hindustantimes.com/noida/jaypee-homebuyers-get-separate-form-to-claim-their-money/story-6ItgiDtHnS8OQlDuB9wxfI.html> accessed 14 April 2020.
23 IBC 2016, s 5.

cial debt is owed, i.e., a debt disbursed against the consideration for time value of money.[24] An operational creditor is a person to whom an operational debt is owed i.e. debt in respect of the provision of goods or services.[25] The financial creditors have certain additional benefits over operational creditors in initiating an application[26], in becoming part of the Committee of Creditors[27] and in liquidation.[28] Since various cases had brought to light the affliction of the homebuyers, the courts granted them certain rights which were available exclusively to the financial creditors.[29] To bring an end to the confusion about the position of homebuyers under the IBC, the government added an Explanation to Section 5, by way of an Ordinance in 2018, which made homebuyers financial creditors.[30] The Ordinance got the legislature's approval in the same year.[31] It was later constitutionally challenged in *Pioneer Urban Land and Infrastructure Ltd.* v *Union of India*[32] wherein its legality was upheld by the Judiciary.

This 2018 IBC amendment added to the long-standing conflict between the homebuyers and the real estate companies as it opened a floodgate of real estate insolvency cases.[33] The possibility of applications being initiated by speculative homebuyers also increased,[34] thereby jeopardising projects which were otherwise sound. Thus, by way of 2020 IBC amendment the legislature sought to restore a balance between the interests of homebuyers and developers.

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[24] IBC 2016, s 5(8).
[25] IBC 2016, s 5(21).
[26] IBC 2016, ss 7,8, 9.
[27] IBC 2016, s 21.
[28] IBC 2016, s53.
[29] *Chitra Sharma* (n 21).
[30] The Insolvency and Bankruptcy Code (Amendment) Ordinance 2018, s 3.
[31] The Insolvency and Bankruptcy Code (Amendment) Act 2018.
[32] *Pioneer* (n 12).
[33] D Dhanuraj, 'RERA and IBC: The Real Solutions for Real Estate' (*Financial Express*, 1 January 2020)<https://www.financialexpress.com/opinion/rera-and-ibc-the-real-solutions-for-real-estate/1808937/> accessed 9 June 2020).
[34] Dipak Mondal, 'IBC Code: Are Speculative Homebuyers Misusing the Insolvency Law' (*Business Today*, 2 October 2019) <https://www.businesstoday.in/current/corporate/ibc-code-are-speculative-homebuyers-misusing-insolvency-law/story/382538.html> accessed 14 April 2020.

III. Part II: The 2020 IBC Amendment-Minimum Threshold for Homebuyers

The 2019 Ordinance[35] imposed a threshold qualification for homebuyers to initiate a CIRP by mandating that, 'an application for initiating corporate insolvency resolution process shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent of the total number of such creditors in the same class, whichever is less.'[36] The legislature gave its assent to this Ordinance in 2020.[37]

Nevertheless, the 2020 amendment created a furore amongst the homebuyers. A number of writ petitions were filed before the Supreme Court questioning its constitutionality.[38] As a response to it, the Supreme Court issued a notice making the amendment inapplicable to applications that were already filed before the NCLT.[39] However, the Supreme Court is yet to hear the arguments of both the sides and adjudicate on this matter conclusively. The authors will now examine the constitutionality of this amendment [A] and identify its shortcomings [B].

A. Constitutionality of the 2020 IBC Amendment

At the outset, it is important to note that the judiciary generally restrains itself from questioning amendments which have an economic implication. This has been discussed in great detail in various Supreme Court cases[40] and has been reiterated by the Supreme Court in the famous *Pioneer* case where it emphasised that, 'apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts'.[41] The primary challenge in the petition was to the creation of a class within a class which was stated to be in violation of the right to equality as provided under Article 14 of the Constitution. To support their claims the petitioners referred to a number of cases.[42]

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35 The Insolvency and Bankruptcy Code (Second Amendment) Ordinance 2019.

36 The Insolvency and Bankruptcy Code (Second Amendment) Ordinance 2019, s 3.

37 The Insolvency and Bankruptcy Code Amendment Act 2020.

40 *State of Gujarat* v *Shri Ambica Mills Ltd*., (1974) 4 SCC 656: AIR 1974 SC 1300 [66]-[67]; *VC Shukla* v *State (Delhi Admn.)*, 1980 Supp SCC 249 [11]; *Bhavesh D Parish* v *Union of India*, (2000) 5 SCC 471 [26]; *Swiss Ribbons* (n 20).

41 *Pioneer* (n 12) 15.

42 *EV Chinnaiah* v *State of A.P.*, (2005) 1 SCC 394; *Sansar Chand Atri* v *State of Punjab*,(2002) 4 SCC 154; *Union of India* v *SPS Vains*, (2008) 9 SCC 125; *State of U.P.* v *Mata Tapeshwari Saraswati Vidya Mandir*, (2010) 1 SCC 639.

On an inspection of these cases, it can be noticed that they have not prohibited the creation of a class within a class as long as it passed the test of reasonableness.[43] Various cases have allowed the creation of a class within a class[44] if it passes the test of reasonableness[45] under Article 14. The test requires the satisfaction of the intertwined dual requirement of the classification having an intelligible differentia (*i*) and a rational nexus to the object sought to be achieved (*ii*).[46] Therefore, the authors will test the amendment on these two criteria.

1. Intelligible Differentia

The first aspect of the test requires that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group.[47] In the *Pioneer* case, the Supreme Court concluded that homebuyers are to be considered as financial creditors because they fund real estate projects[48] and because they get a consideration for the time value of money (as the project in itself would increase in worth, like in transactions with other financial creditors).[49] However, the authors fail to agree with this reasoning. What sets the homebuyers apart from other financial creditors is that the relation of the company with the latter remains purely financial at all times whereas the homebuyers get their return in the form of possession of their flats. Therefore, unlike in contracts with other financial creditors, the satisfaction of homebuyers' claim lies on the presumption that they would want the possession of the property at the end of the project. However, there may be homebuyers who no longer wish to have possession over the flat or apartment and would rather have the money returned instead. Therefore, this would create the possibility that they would want the project to be stalled, unlike other creditors who would like the projects being completed, so as to ensure that there are better chances of recovering their dues.

Another difference between the homebuyers and other financial creditors is the source from which the tribunals ascertain default. A financial creditor under the IBC[50] is obligated to provide and regularly update financial infor-

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[43] *Ibid*.
[44] *Ravi Paul* v. *Union of India*, (1995) 3 SCC 300; *Havaldar Bhagat Singh* v *State of Haryana*, (1996) 8 SCC 649; *Govt. of A.P.* v *G Jaya Prasad Rao*, (2007) 11 SCC 528.
[45] *State of W.B.* v *Anwar Ali Sarkar*, AIR 1952 SC 75.
[46] *Ibid*.
[47] *DS Nakara* v *Union of India*, (1983) 1 SCC 305: AIR 1983 SC 130.
[48] *Pioneer* (n 12) 40.
[49] *Pioneer* (n 12) 40.
[50] IBC 2016, s 215(2).

mation with the IU[51]. However, in case of homebuyers, the nature of the debt makes it difficult for them to enter, provide and maintain details with the IU, due to the lack of proof to answer the questions given in the form which they have to submit.[52] For the homebuyers, information is obtained primarily from the RERA website[53] while for all other financial creditors, the IU is the primary source.[54] The information that is to be displayed on the RERA website depends on the rules made by the respective State governments.[55] Some of the States have not operationalised their websites,[56] while others do not have enough information.[57] This is a relevant factor in justifying the threshold because the RERA website is not as extensive as the IU and many of them do not have adequate information.[58] This makes it more troublesome for the tribunals to adduce the probity of the applications of homebuyers. Therefore, taking into consideration the distinct nature of the debt and the dearth of information available, homebuyers fall in a class separate from other financial creditors.

2. Rational Nexus

The second aspect of the test requires that the differentia must have a rational relation to the object sought to be achieved by the Act.[59] The objective of the IBC is to promote entrepreneurship and to balance the interests of the various stakeholders.[60] The 2020 IBC amendment, by rectifying certain complications raised by the 2018 IBC amendment, serves both these objectives.

The 2018 IBC amendment declaring homebuyers as financial creditors was a genuine attempt to rescue homebuyers. However, the amendment led to a

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[51] Information Utilities.

[52] Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017, Schedule, Form C.

[53] *Pioneer* (n 12) 5.

[54] IBC 2016, s 7(4).

[55] RERA 2016, s 84.

[56] Ministry of Housing and Urban Affairs, *Real Estate (Regulation & Development) Act, 2016, Implementation Progress Report*, 20 December 2019 <http://www.mohua.gov.in/upload/uploadfiles/files/RERA_Status_Tracker%20(20-12-2019).pdf> accessed 14 June 2020 (Implementation Progress Report).

[57] Ashwini Kumar Sharma, 'Rera's Three-year Report Card Shows Gaps in Implementation' (*Livemint*, 7 May 2019) <https://www.livemint.com/money/personal-finance/rera-s-three-year-report-card-shows-gaps-in-implementation-1557237162103.html> accessed 14 June 2020.

[58] Ashwini Kumar Sharma (n 57).

[59] *Anwar Ali Sarkar* (n 45).

[60] IBC 2016, Preamble; *Swiss Ribbons* (n 20) 9.

deluge in the number of applications which were filed before the tribunals.[61] According to a Government estimate, more than 1800 insolvency cases were pending against real estate companies as in November, 2018.[62] It is true that the 2018 IBC amendment was brought in since the homebuyers were facing utmost difficulties due to the rising number of incomplete projects. However, it also led to projects being stalled for sundry reasons and thus, appeared to be anti-developer.[63] Both the Supreme Court and the NCLAT have recognised that certain homebuyers may approach the court fraudulently or maliciously, not for the possession of the flat/apartment, but instead with the aim of getting a refund.[64] In light of this, if homebuyers approach the tribunals with some malicious intention or on account of only a few months of delay by the developer for a genuine reason, the otherwise sound projects will be hampered, adversely affecting the entrepreneurial spirit of this sector.

The 2020 IBC amendment, by requiring that a minimum number of homebuyers claim that there has been a default by the developer, ensures to an extent, that cases are not based on *mala fide* considerations of certain individuals. The amendment thereby, encourages entrepreneurship in the real estate sector and balances the rights of the developers and the homebuyers. Therefore, the 2020 IBC amendment satisfies the rational nexus test by serving the objects of the Act.

Presently, the petition challenging the 2020 IBC amendment is pending before the Supreme Court. Even if the Supreme Court invalidates the 2020 IBC amendment for being violative of Article 14 of the Constitution, the aforesaid differences between homebuyers and other financial creditors, and its repercussions, still stand relevant. The peculiar needs of homebuyers are bound to give rise to certain complications in adjudication of real estate insolvency cases. For instance, the possibility of speculative applications by homebuyers looms large as discussed earlier, thereby requiring particular attention. Moreover, the dissimilarity in the information available to homebuyers and other financial creditors for ascertaining default again calls for a closer inspection to ensure that genuine applications of homebuyers are not dismissed. Therefore, the tribunals need to be cautious and bear in mind these differences while adjudicating upon claims by homebuyers. The authors will elaborate upon certain changes which can be brought about in the existing framework, in order to deal with the special needs of homebuyers, in Part IV of the paper.

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[61] Dhanuraj (n 33).
[62] Ashwini Kumar Sharma (n 57).
[63] Mondal (n 34).
[64] *Pioneer* (n 12) 50; *Navin Raheja* v *Shilpa Jain*, 2020 SCC OnLine NCLAT 46: Company Appeal (AT) (Insolvency) No. 864 of 2019 [50].

B. Critical Analysis of the 2020 IBC Amendment

The 2020 IBC amendment has raised concerns amongst homebuyers that their right as financial creditors is being diluted.[65] However, a closer perusal reveals that the addition of a minimum threshold could be obliquely beneficial to even the homebuyers. Litigation under the IBC can be expensive and sometimes time-taking as well, as evidenced by the *Bikram Chatterji* judgment and the *Chitra Sharma* judgment.[66] Homebuyers who have previously approached the NCLT faced problems in producing evidence to prove their claims.[67] Even when their case was admitted, due to multiple claims and lack of consensus, a successful resolution plan was often not attained leading to liquidation, which again is time consuming.[68] Therefore, it would be more beneficial for homebuyers to approach the IBC after having exhausted remedies offered to them by RERA. The added threshold requirement under IBC ensures that in circumstances where the default is not genuine or is capable of rectification by means lesser than taking over control of the management of the company, remedy under RERA would be sought. Further, as discussed earlier, unlike other creditors, speculative homebuyers may be prone to derailing a project because of their desire to obtain a refund as opposed to taking possession of the apartments. For instance, in *Navin Raheja* v *Shilpa Jain*, the applicants refused to take possession of the flat and instead wanted to get back their money.[69]

The failure to attain the threshold may also indicate that in such cases another remedy may be more suitable.[70] Therefore, the bar created for initiating cases under the IBC has served the purpose of protecting real estate companies and other homebuyers from speculative cases and also ensures that the remedies offered by RERA and IBC are both availed constructively, as per the needs of the case.

Furthermore, the amendment would prevent multiple litigations with respect to the same issue and ensure that individual applicants would not separately approach the tribunal and instead would file an application together.

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[65] Renu Yadav (n 39).

[66] Sunita Mishra, 'Five Government Measures that Could Revive Realty in 2020' (*Proptiger*, 7 January 2020) <https://www.proptiger.com/guide/post/challenges-and-solutions-for-indian-real-estate> accessed 13 April 2020.

[67] Vijay K Singh, 'Homebuyers Must be Cautious When Approaching NCLT' (*Livemint*, 2 July 2019) <https://www.livemint.com/money/personal-finance/opinion-homebuyers-must-be-cautious-when-approaching-nclt-1562083251326.html> accessed 9 June 2020.

[68] *Ibid*.

[69] *Navin Raheja* (n 64).

[70] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee*, 20 February 2020 [24] (Report of the Insolvency Law Committee).

This can also be inferred from the fact that the minimum threshold has been brought about for another category of creditors given under Sections 21(6A) (a) and (b).[71] This category includes the security or deposit holders who are represented by a trustee or agent or an authorised representative, as well as certain classes of creditors which exceed a specified number, and are represented by a Resolution Professional. Therefore, the minimum threshold requirement has been imposed on such creditors who have the same debt interest and are capable of initiating a single application in the case of a default. Apart from curbing multiple litigations, the threshold also helps the creditors to have a stronger case and reduce the financial burden on them for the litigation.

While the authors recognize all these advantages, the amendment still fails to conclusively ensure that both the parties are adequately safeguarded. Two persisting problems that the authors observe in this amendment are the lack of information available to the homebuyers resulting in their inability to reach out to other homebuyers for satisfaction of the threshold and the non-consideration of genuine applications which fail to meet the required percentage or number. These problems have been further dealt with in Part IVA and Part IVB of the paper.

IV. PART III: THE REVERSE CIRP

In the 2020 order in *Flat Buyers Association Winter Hills-77, Gurgaon* v *Umang Realtech (P) Ltd. through IRP and Ors*,[72] the NCLAT propounded a modified resolution process for real estate companies.[73] While the initial application in the case was made by two homebuyers, several other homebuyers made separate applications later, who subsequently formed the Flat Buyers Association.[74] The case of the applicants was that the company had inordinately delayed handing over the possession of the flats/apartments in their project named, 'Winter Hills 77', and had also not complied with their promise of compensation in case of such delay.[75] After delving into the

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[71] IBC 2016, s 21(6A); The Insolvency and Bankruptcy Code (Second Amendment) Ordinance, 2019, s 3.

[72] *Flat Buyers Association Winter Hills-77, Gurgaon* v *Umang Realtech (P) Ltd.*, Company Appeal (AT) (Insolvency) No. 926 of 2019, [12]-[20] (National Company Law Appellate Tribunal).

[73] *Umang Realtech* (n 72) 12-20.

[74] *Umang Realtech* (n 72) 1, 2.

[75] *Rachna Singh* v *Umang Realtech (P) Ltd.*, CP No. IB-1564(PB)/2018, decided on 20-8-2019 (NCLT)[6], [7], [8].

Apartment Purchase agreement, the NCLT admitted the application under Section 7 of the IBC.[76]

Before diving into the new resolution process propounded here, it is pertinent to understand two primary principles that the NCLAT has laid down-

a. At the CIRP stage, the claim of secured financial creditors on the flats/ apartments of the corporate debtor does not have a preference over the claims of the homebuyers, who are unsecured financial creditors, for whom the project has been approved.[77] This principle arises from the equality for all approach underlying the IBC by virtue of which the CIRP of companies must be done while balancing the interests of all the stakeholders.[78]

b. In the resolution process of a real estate company, the resolution is made project specific[79] thereby solely maximising the assets of that specific project. Claims of homebuyers of one project of the real estate company cannot be made before the Resolution Professional appointed for another project.[80] This principle recognizes that defaults made in one project cannot be attributed to other works undertaken by the real estate company. Since the success of every real-estate project depends on a variety of factors like the location of the project, the land, the permissions, labour, etc., non-completion of one project in due time should not hinder the entrepreneurial spirit of real estate companies.

In Reverse CIRP, the promoter of the company himself is given an option to act as a lender, i.e., a financial creditor. The promoter pools in money to ensure the completion of the project. The secured financial creditors are paid from the amount that is paid to the corporate debtor by homebuyers as part of their instalments or for new bookings.[81] This process calls for a deeper analysis in order to understand its implications and its compatibility with the principles of the IBC.

A. UNDERSTANDING THE MERITS OF THE REVERSE CIRP

The modified resolution process for real estate companies can be a valuable move as it solves the problem of conflicting claims of secured and unsecured

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[76] *Rachna Singh* (n 75) 10, 11, 12.
[77] *Umang Realtech* (n 72) 4.
[78] *Umang Realtech* (n 72) 4.
[79] *Umang Realtech* (n 72) 21.
[80] *Umang Realtech* (n 72) 21.
[81] *Umang Realtech* (n 72) 20, 27.

creditors. The NCLAT, while laying down the purpose of equitable relief to all stakeholders, demonstrated this conflict.[82] Banks, financial institutions and other NBFCs are secured creditors who can enforce the security held by them in case their loans remain unpaid to them.[83] This security is often the flats/apartments of the projects under the real estate companies. At the same time, homebuyers, also want possession of the flats/apartments allotted to them.[84] In such a situation, the NCLAT realised that the secured financial creditors would push for liquidation of the company by voting against resolution plans, to ensure preference in distribution of assets under Section 53 of the IBC, instead of trying to save the project.[85] This is against the objective of using liquidation, only as a last resort.[86] The Reverse CIRP balances the interests of both these classes of creditors.

The *Umang Realtech* order rightly acknowledged that the homebuyers, unlike other financial creditors, do not have the commercial wisdom to decide which resolution plan is most beneficial to them.[87] The Reverse CIRP remedies this as well since it maintains status quo in the management of the company but ensures that the promoter pools in funds to complete the project. Moreover, it has been observed that resolution applicants are not interested in an abandoned project due to multi-level complexities.[88] This makes the CIRP of real estate companies increasingly difficult. It can be observed that very few resolution plans have been approved where the real estate sector is concerned.[89] The Reverse CIRP gives a chance to the promoters of the real estate companies to revive the project, without automatically displacing them from the working of the company. The project specificity also ensures that only the assets under that specific project are brought in for resolution, thus, eliminating any unnecessary hardship for the company.

B. Critically Analysing the possible contentions against the Reverse CIRP

At the outset, it is observed that the Reverse CIRP process propounded in the Order is one which is shaped by the facts of the case. It cannot therefore be a perfect prototype for other real estate insolvency cases. To use or not to use the Reverse CIRP will be a fact-dependent decision. The Reverse CIRP is

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82 *Umang Realtech* (n 72) 10, 11.
83 *Umang Realtech* (n 72) 10, 11.
84 *Umang Realtech* (n 72) 10, 11.
85 *Umang Realtech* (n 72) 4.
86 *Swiss Ribbons* (n 20) 11; *Pioneer* (n 12)29.
87 *Umang Realtech* (n 72) 8.
88 Mondal (n 34).
89 Mondal (n 34).

like a trial resolution process. On failure of resolution by the Reverse CIRP, the NCLAT proceeds with the normal CIRP process.

The authors will investigate whether the Reverse CIRP is compatible with the principles of the IBC. The authors have laid down three possible contentions against it and critically studied them.

1. In allowing the promoter to act as a financial creditor, the NCLAT has contravened the purpose of Section 29A.

Section 29A was inserted through the 2017 amendment to the IBC, to curb defaulting promoters from getting a back-door entry to their companies by submitting a resolution plan.[90] It disqualifies some persons from being resolution applicants.

To begin with, it is important to note that the Reverse CIRP in fact does not arrive at the stage of inviting resolution plans. As per Section 5(25) and 5(24), a resolution plan is one which is made pursuant to an invitation by the Resolution Professional calling for them under Section 25(2)(h).[91] Under the Reverse CIRP, the Interim Resolution Professional does not make such an invitation, instead it gives an opportunity to the promoters of the company to step in and finance the resolution without entertaining any third-party plans. The Reverse CIRP is an attempt by the NCLAT and the stakeholders to internally resolve the default. It is when such a resolution fails that the normal CIRP process takes way and resolution plans are called. As a result, since the Reverse CIRP is a trial stage before the normal CIRP, the question of Section 29A does not arise.

However, since the Reverse CIRP is not currently found in the scheme of the IBC, it is necessary to see if it leads to the circumvention of the principles mentioned in it. The authors will investigate whether the Reverse CIRP contradicts the essence and purpose of Section 29A.

In *ArcelorMittal India (P) Ltd.* v. *Satish Kumar Gupta*[92], the Supreme Court emphasized on the need to give a purposive interpretation to Section 29A.[93] The objective of Section 29A is to prevent the initial defaulters of the corporate debtor from re-gaining control of the company, to protect the

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[90] Shivangi Pathak and Aherar Patel, 'Critical Analysis of Section 29A' (*IBC Laws*) <https://ibclaw.in/critical-analysis-of-section-29a-of-the-code/> accessed 14 April 2020.

[91] IBC 2016, s5(25), s 5(24).

[92] *Arcelor Mittal India (P) Ltd.* v *Satish Kumar Gupta*, (2019) 2 SCC 1 [27].

[93] *Ibid.*

creditors.[94] Uppal Housing Pvt. Ltd. is admittedly the promoter of Umang Realtech.[95] Therefore, it falls within the ambit of Section 29A, as evidenced by Clause (c) and Clause (g).[96]

In the Umang Realtech order, the home buyers themselves wanted the promoter to pool in money to save the project.[97] The secured financial creditors also agreed to this framework.[98] It can be implied here that if the Committee of Creditors would have been formed, the promoter's plan would have been accepted. However, although the Committee of Creditors is given wide powers to assess the viability and feasibility of resolution plans, the proviso to Section 30(4) holds that the Committee of Creditors cannot approve a resolution plan made by an ineligible resolution applicant.[99]

The NCLAT order states that the promoter is to, 'stay out of the CIRP other than to act as a lender'.[100] While there is no further explanation for what is meant by to 'stay out of the CIRP', it can be inferred that the Interim Resolution Professional will continue to have control of the corporate debtor, even though the promoter is pooling in funds. Moreover, to ensure the rightful use of the funds being brought in by the promoter and the homebuyers, every payment must be made by a cheque, signed by the authorised person of the company as well as the Interim Resolution Professional.[101] The promoter has to cooperate with the Interim Resolution Professional during the resolution process.[102]

However, despite the NCLAT's attempt to keep the promoter out of the resolution process, it has called on him to use his expertise to assist the Interim Resolution Professional in the resolution process and to lay down how and when the project will be completed.[103] This implies that the promoter

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94 *Ibid* [56].

95 *Umang Realtech* (n 72) 13.

96 IBC 2016, s 29A(c), s 29A(g).

Section 29A(c) makes ineligible promoters of corporate debtors which have a non-performing account at the time of submission of the resolution plan, and at least a period of one year has lapsed from the date of classification of the account as a non-performing account till the date of commencement of the CIRP of the corporate debtor.

Section 29A(g) makes ineligible promoters of corporate debtors in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the NCLT under the IBC.

97 *Umang Realtech* (n 72) 1.

98 *Umang Realtech* (n 72) 13.

99 IBC 2016, s 30(4).

100 *Umang Realtech* (n 72) 26.

101 *Umang Realtech* (n 72) 26.

102 *Umang Realtech* (n 72) 26.

103 *Umang Realtech* (n 72) 15.

will not only perform the tasks of a financier but also take decisions about the resolution process. While in all other IBC proceedings, the power of the management is completely suspended, the NCLAT in this Order permitted the promoters to access the company accounts with certain conditions.[104] Therefore, although the NCLAT order provides for certain safeguards, it gives a way for the promoter to be involved in the corporate debtor's management during the resolution process. In *Chitra Sharma*, the Supreme Court refused to make an exception to allow the promoters to take control of the resolution. The Court opined that Section 29A has been enacted in the larger public interest and to facilitate effective corporate governance.[105] To permit promoters to participate in the resolution process would undermine the salutary object and purpose of the IBC.[106]

As beneficial as it may be, the Reverse CIRP would be violative of Section 29A, a strictly adhered to principle of the IBC.

2. The Order remains ambiguous about the creation of the Committee of Creditors in a Reverse CIRP.

The establishment of the Committee of Creditors gives the creditors a body through which they can represent their demands to the Resolution Professional. Since the formation of the Committee of Creditors and the voting rights given to it are important facets of the IBC, taking it away completely seems like a massive deviation.

In the *Umang Realtech* order, the homebuyers as well as the other secured financial creditors themselves wanted the promoter to pool in funds to revive the project, and therefore, no injustice was done even if no Committee of Creditors was created.[107] However, such a deviation from the scheme of the IBC should not be a precedent. A conflict in the demands made by different group of creditors can only be addressed if a Committee of Creditors is formed.

In *Committee of Creditors of Essar Steel India Ltd.* v *Satish Kumar Gupta*, the Supreme Court emphasized that the Committee of Creditors has the supreme power in making decisions about whether or not to put the corporate debtor back on its feet.[108] Moreover, the legislative history of

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[104] *Umang Realtech* (n 72) 26.
[105] *Chitra Sharma* (n 21) 13.
[106] *Chitra Sharma* (n 21) 30.
[107] *Umang Realtech* (n 72) 1, 2.
[108] *Committee of Creditors of Essar Steel India Ltd.* v *Satish Kumar Gupta*, 2019 SCC OnLine SC 1478 [79].

the IBC demonstrates the legislature's intention of giving the Committee of Creditors paramount status without judicial intervention.[109] The Committee of Creditors is important not only for voting to decide what happens to the corporate debtor, but also for holding the Resolution Professional accountable.[110] The Insolvency Law Committee highlighted that the Committee of Creditors approves all the actions that a Resolution Professional takes and ensures that he does not carry out his duties unfairly to any creditor.[111] As a result, these functions remain unperformed when a Committee of Creditors is not formed. Therefore, the Reverse CIRP must not contravene this cardinal requirement of forming a Committee of Creditors under the IBC.

3. The resolution process is made project specific which is not compliant with the IBC.

A practical study of the working of real estate companies shows that a separation of projects by the creation of SPV[112] is widely found in the real estate market.[113] A SPV is like an independent arm of the parent company, through which the company carries on high risk projects, so as to isolate its liabilities under that project from other projects of the company.[114]

As per Section 18 of the IBC, all the assets over which the company has ownership rights are to be brought under the control of the Resolution Professional.[115] In the *Umang Realtech* case, Umang Realtech Pvt Ltd. is the subsidiary of the Uppal Housing Pvt Ltd,[116] which follows a SPV framework. Therefore, the project undertaken by Umang Realtech Pvt Ltd, against which the CIRP was started ('Winter Hills 77'), was rightly separated from the other projects of the parent company. Moreover, all other projects undertaken by Umang Realtech Pvt Ltd were completed at the time of the case[117] and therefore, 'Winter Hills 77' was the only project under the subsidiary company. As a result, the project specificity followed in this Order was in

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[109] *Essar Steel* (n 108) 79.
[110] Report of the Insolvency Law Committee (n 70) 49-50.
[111] *Ibid*.
[112] Special Purpose Vehicle.
[113] Krzysztof Sadecki, 'Investing in Real Estate through an SPV–A Case Study' *Businessman Today* (20 February 2017) <http://www.businessmantoday.us/investing-in-real-estate-through-an-spv-a-case-study/> accessed 14 April 2020.
[114] Corporate Finance Institute, 'Special Purpose Vehicle', <https://corporatefinanceinstitute.com/resources/knowledge/strategy/special-purpose-vehicle-spv/> accessed 14 April 2020.
[115] IBC 2016, s18.
[116] *Umang Realtech* (n 72) 13.
[117] 'Umang Realtech Private Ltd', (PropTiger) <https://www.proptiger.com/umang-realtech-102867> accessed 14 April 2020.

compliance with the IBC. Where the companies have established such SPVs, as aforesaid, the insolvency process evidently becomes project-specific.

With the recent crisis in the real estate market, the authors expect that project-level investment will be increasingly preferred, resulting in a SPV framework in the coming times.[118] However, in the event where a SPV structure is not followed, while the decision to carry on insolvency proceedings in a project-specific manner is one which may go beyond the boundaries of the IBC at present, the legislature or the judiciary can legalise the same, by considering its advantages. This will be further discussed in Part IV D of the paper.

C. Conclusive Findings on the Reverse CIRP:

The Reverse CIRP is a tool used by the NCLAT to circumvent the drawbacks that arise in the scheme of the IBC, while deciding some real estate insolvency cases. While the authors recognize that the Reverse CIRP has its merits, at present it does not have a genesis in the IBC. The Supreme Court in the *Pioneer* judgment, while discussing the sphere of the IBC, held that the focus of the IBC is to rehabilitate a corporate debtor by replacing its management by means of a resolution plan.[119] The NCLAT by propounding the Reverse CIRP overstepped this sphere of the IBC. The Reverse CIRP is therefore, a modified process propounded out of judicial innovation and overpowers the legislative mandate of the IBC.

The Supreme Court in *Essar Steel* has held that the NCLAT is not a court of equity and must therefore, strictly work within the scheme of the IBC.[120] At the same time, the Supreme Court has also recognized that the IBC is an experimental legislation and ingenuity in its enforcement to satisfy its underlying objectives are necessary.[121] The *Umang Realtech* case has not been appealed in the Supreme Court as of today. If the case is put to test before the Supreme Court and the Supreme Court upholds it, the Reverse CIRP will remain a tool of judicial innovation introduced outside the legislative mandate of the IBC. The authors will discuss possible ways by which the Reverse CIRP can be brought within the ambit of the IBC, without violating its underlying principles in Part IV of the paper.

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[118] Shrija Agrawal, 'Why SPV is a Preferred Route for Real Estate Investors' (*VC Circle*, 12 August 2008) <https://www.vccircle.com/why-spv-preferred-route-real-estate-investors/> accessed 17 April 2020.

[119] *Pioneer* (n 12)29.

[120] *Essar Steel* (n 108) 45.

[121] *Swiss Ribbons* (n 20) 120.

V. PART IV: PROPOSED FRAMEWORK

The 2020 IBC amendment and the 2020 NCLAT order are both steps in the right direction to harmonise the homebuyers and developers under the IBC. However, both these developments suffer from certain glaring predicaments which raise concerns about their sustainability in law and in practice.

The 2020 IBC amendment has created a minimum threshold for homebuyers to file a suit under the IBC, in order to bar insincere suits. However, considering the practical impediments it raises, it seems that even genuine cases would not be able to cross this bar. Similarly, the 2020 NCLAT order is laudable as it solves the conflicting interests of homebuyers and secured creditors. However, it raises serious concerns as it could lead to the circumvention of vital principles of the IBC. The authors believe that these shortcomings call for certain modifications in the law as it stands now. In pursuance of this, the authors, in this Part, shall make some propositions in order to redress the persisting issues in the existing law.

A. Assisting the Homebuyers to Attain the Minimum Threshold

As highlighted in Part II of this paper, the homebuyers face some limitations due to the lack of information which is available to them, hindering them from initiating an application successfully after the coming of the 2020 IBC amendment. A necessary requirement for satisfying the threshold is for homebuyers to have access to the contact details of other homebuyers. However, currently, this information is unavailable to them.

To assist the homebuyers in bringing other homebuyers together in satisfying the threshold, the authors propose the following:

1. To follow the procedure laid out under the Code of Civil Procedure, 1908 for class-action suits

Since an individual homebuyer would find it difficult to reach out to the other homebuyers without the prerequisite information, the tribunals must assist them. Under Order I, Rule 8 of the Code of Civil Procedure 1908,[122] where a class action suit is made by a person, the court makes a personal service or a public advertisement to invite all other aggrieved persons who

[122] The Code of Civil Procedure 1908, Order I, r 8.

have an interest in the suit. This procedure is also used in the Consumer Protection Act, 1986[123] and the Consumer Protection Act 2019.[124]

Similarly, while respecting the threshold propounded by the 2020 IBC amendment, the authors suggest that, the NCLT can allow the initiation of the application of insolvency by even a single homebuyer. The NCLT can then make a public announcement of this application and invite aggrieved persons to join in to satisfy the threshold. Till the threshold is met, the application shall only remain at a pre-admission stage. Once more applications are received and the threshold is met, the admission stage under Section 7 shall take its natural course. The legislature should permit such a procedure by bringing an amendment to include a pre admission stage for real estate insolvency cases where the threshold is not met. Such a stage will assist the homebuyer in bringing together all persons aggrieved by the real estate developer.

2. Increasing the amount of information available from the RERA Website

The RERA Website is the most easily accessible and comprehensive source of information for a homebuyer regarding any project. However, some states have not operationalised their websites yet.[125] Even in states where the websites are operational, as of now, they do not show the name and the contact details of the homebuyers.

The RERA website helps homebuyers to garner information to initiate an application under the IBC. Therefore, the concerned state governments need to expedite the setting up of these websites. Further, the government should bring about measures to ensure that the homebuyers are able to know the number of homebuyers in a given project and their contact details to reach out to them. This could ideally be done by bringing about an amendment to RERA. This amendment should require that the developers make the contact details of the homebuyers available on the RERA website. In order to take care of the privacy concerns of these homebuyers, the government could ensure that the information reaches only a limited number of people (i.e. the other homebuyers and the developer) like in the case of IU.[126] The access to this information could be restricted by way of a password and the requirement

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[123] The Consumer Protection Act 1986, s 13.
[124] The Consumer Protection Act 2019, s 38(11).
[125] Implementation Progress Report (n 56).
[126] Insolvency and Bankruptcy Board of India (Information Utilities) Regulations 2017, reg 23.

to give the RERA project registration number. This is also in line with the order of the NCLT, Allahabad Bench which held that publication of the details of the creditors is not in contravention to their right of privacy, as it serves the vital interests of the parties and the discipline of the IBC.[127]

B. Discretionary admission of some applications which fail to satisfy the threshold

Another issue with the minimum threshold clause is that it does not cater to the circumstances in which the application is genuine but is falling short of the requisite numbers. There have been various cases where the bona fide claims of homebuyers have been rejected due to a lack of evidence.[128] In light of this, the authors would like to suggest that the government may grant the tribunals a discretionary right to accept some applications which do not fulfil the required numbers. A similar provision is given to the courts in case of class action suits under the Indian Companies Act, 2013, which allows the court to accept applications even if they do not meet the prescribed number.[129] In the *Cyrus Mistry* case[130] the NCLAT had clarified that such a discretion must only be exercised in exceptional circumstances. The same principle could be used for insolvency applications, thereby ensuring that it would not defeat the purpose of the amendment.

C. Fact-based enquiry at the stage of admission for real estate insolvency applications:

As per Section 3(12) of the IBC, a default comes into existence when debt becomes 'due and payable', i.e. the time decided in the contract for payment, has arrived.[131] The NCLT admits a case once the IU, contentions of the creditors and the corporate debtor show the existence of an outstanding debt.[132] In the admission order for *Innoventive Industries Ltd.* v *ICICI Bank*, it was held that the NCLT only has to ascertain the existence of a debt due and payable, and not deliberate on its extent and composition.[133] This position has been consistently followed across all insolvency cases.

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[127] *IDBI Bank Ltd.* v *Jaypee Infratech Ltd.*, Company Application No. 225/2018 [21]-[23] (National Company Law Appellate Tribunal).
[128] Vijay K Singh (n 66).
[129] The Indian Companies Act 2013, s 244.
[130] *Cyrus Investments(P) Ltd.* v *Tata Sons Ltd.*, 2019 SCC OnLine NCLAT 858: Company Appeal (AT) No. 268 of 2018 [6].
[131] IBC 2016, s 3(12).
[132] *SBI* v *Western Refrigeration (P) Ltd.*, 2017 SCC OnLine NCLT 1766: CP (IB) NO 17/7/NCLT/AHM/2017 [17].
[133] *Innoventive Industries Ltd.* v *ICICI Bank*, (2018) 1 SCC 407 [30].

The authors however, propose that admission applications for real estate insolvency cases should be treated differently. These applications should not only ascertain an outstanding payment, but also make out the need for corporate financial restructuring under the CIRP process. Such an enquiry must be made within the timeline given under the IBC for admission applications i.e. it should not exceed 14 days.[134] The NCLT should not engage in a long-drawn pre-admission exercise which will defeat the object of the IBC.[135] Such a fact-based enquiry will help in separating the jurisdictions of the NCLT and the RERA tribunal and further reduces the burden of the NCLT.

D. Use of the Reverse CIRP in Specific Circumstances

The Reverse CIRP, as discussed in Part III, has been able to unite the interests of the homebuyers with the other financial creditors. It also ensures that the project does not come to a grinding halt due to the insolvency application. Although the Reverse CIRP conflicts with certain principles of the IBC, it balances the interests of all the stakeholders and preserves the corporate debtor as a going-concern, both of which are indeed objectives of the IBC.[136]

However, presently, the Reverse CIRP does not find a place in the IBC. The *Umang Realtech* order has not been appealed, and Reverse CIRP remains a judicial innovation, unsupported by the IBC. Despite this lack of legislative backing, other cases have started making use of the Reverse CIRP.[137]

The authors believe that there are considerable benefits in validating the Reverse CIRP and therefore, suggest that an amendment be made to the IBC to that effect. This would serve the dual purpose of making the Reverse CIRP well-grounded in the IBC and ensuring that the ambit of the process is clearly demarcated. Currently, as there is no expressly defined protocol for its application, the Reverse CIRP may be used for cases which do not satisfy the factual criteria of *Umang Realtech*. Such an application of the Reverse CIRP may significantly undermine the legislative mandate of the IBC.

The authors propose that the amendment should clearly lay down the essential requirements for the application of the Reverse CIRP- such that all the creditors must agree to the promoter pooling in funds to save the project, and such that the promoter's involvement in the CIRP should not be

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[134] IBC 2016, s 7(4).

[135] *Allahabad Bank* v *Poonam Resorts Ltd*.,Company Appeal (AT) No. 13043 of 2019 [8] (National Company Law Appellate Tribunal).

[136] IBC 2016, Preamble; *Swiss Ribbons* (n 20) 84.

[137] *Rajesh Goyal* v *Babita Gupta*,Company Appeal (AT) No. 1056 of 2019 (National Company Law Appellate Tribunal).

in violation of Section 29A. The amendment should further provide that the Committee of Creditors should be constituted irrespective of complete consensus among the creditors, as it has the important function of overseeing the work of the Resolution Professional and the process as a whole.[138]

Such an amendment would be able to reconcile judicial innovation with the legislative mandate of the IBC.

E. Project Specificity in a Non-SPV framework:

In the rare case where a real estate company does not operate in a SPV framework, or where the SPV also has many real estate projects under it, a question arises about whether the insolvency process can be restricted to that particular project. The authors suggest that such a project-specific framework should be brought in for all real estate insolvency cases and shall attempt to explain its positive implications.

Prior to RERA, 2016, real estate companies were permitted to divert funds of one real estate project to the other.[139] This implies that the funds of homebuyers of Project A could be instead used for Project B. Such a system was not in the best interest of homebuyers as real estate companies could prioritise their projects and exchange funds. This was substantially stopped after the coming of RERA, 2016. As per Section 4(2)(l)(D) of the RERA, 2016, 70% of the funds given by a homebuyer for one project must compulsorily be used for securing the cost of land and construction of that project.[140] This ensures that the money is used for the project that the homebuyer wishes to finance. Therefore, since a substantial amount of the funding has been separated, to permit the use of assets of one project in the resolution of another, will affect the home buyers of the viable project adversely.

The authors therefore, suggest that where a real estate company does not operate within a SPV framework, the funds which are separated for the use in one project should not be used for the resolution of another. Therefore, in a non-SPV framework also, project specificity should be maintained to the extent of funds which are separated by law (like the RERA under Section 4(2)(l)(D)) or as inferred from the company's balance sheet, and the terms

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[138] Report of the Insolvency Law Committee (n 70) 49-50.

[139] Sunil Dhawan, 'Builders Can Keep Funds in Separate Account instead of Escrow Account: Will RERA Prevent Misuse?', *The Economic Times* (19 April 2017) <https://economictimes.indiatimes.com/wealth/real-estate/builders-can-keep-funds-in-separate-account-instead-of-escrow-account-will-rera-prevent-misuse/articleshow/58242934.cms?from=mdr> accessed 14 April 2020.

[140] RERA 2016, s 4(2)(l)(D).

and conditions of the loan agreements with banks and financial institutions. This entails that common funds of the real estate company, which are not specifically allotted for a project, can be used in the resolution process of any project under the company, in compliance with Section 18 of the IBC. The NCLAT order in *Umang Realtech* also hints at such a framework when it opined that project-specificity can be done where the creditors, land, and other such factors are different.[141] To incorporate this proposal, the legislature can add a proviso to Section 18 of the IBC stating that assets specific to a real estate project should not be used for the resolution of another project of the same company.

F. Unsecured Homebuyers during Liquidation

The 2018 IBC amendment concretized the status of homebuyers as financial creditors. However, what is still unclear is whether they are secured or unsecured financial creditors.[142] This question is of ample importance when it comes to liquidation. Section 53 of the IBC provides for a waterfall mechanism i.e. an order of priority for distributing the liquidation assets between the creditors.[143] According to Section 53, the order of priority, places workmen, secured financial creditors and employees above unsecured financial creditors.[144] As highlighted earlier, very few real estate cases have achieved resolution and most of them end up going into liquidation.[145] Therefore, the order of priority under Section 53 is critical for home buyers.

There exists a view that the Flat/Apartment Purchase agreements reflect whether home buyers are secured or unsecured creditors.[146] Certain Flat/Apartment-Purchase agreements may place the home buyers in a position of secured financial creditors. Under such circumstances, the home buyers are in a higher priority to realise their assets in liquidation, in accordance

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[141] *Umang Realtech* (n 72) 21.

[142] Aditya Khadria and Sivaprakasam Babu, 'Are Homebuyers Secured Financial Creditors or Unsecured Creditors under IBC', (*The Economic Times*, 10 August 2019) <https://economictimes.indiatimes.com/wealth/real-estate/are-home-buyers-secured-financial-creditors-or-unsecured-creditors-under-ibc/articleshow/65332287.cms?from=mdr> accessed 4 June 2020; Abhinav Dixit, 'Are Homebuyers Secured Financial Creditors or Unsecured Financial Creditors under IBC?', (*Centrik*, 17 July 2020) <https://www.centrik.in/blogs/are-homebuyers-secured-financial-creditors-or-unsecured-financial-creditors-under-ibc> accessed 4 June 2020.

[143] IBC 2016, s 53.

[144] *Ibid*.

[145] Vijay K Singh (n 66).

[146] Banikinkar Pattanayak, 'Bankruptcy Code: Are Homebuyers Secured Financial Creditors? Read Builder Agreement Carefully' (*The Financial Express*, 12 July 2018) <https://www.financialexpress.com/market/exclusive-bankruptcy-code-are-homebuyers-secured-financial-creditors-read-builder-agreement-carefully/1241276/> accessed 13 June 2020.

with Section 53. However, since all such agreements are standard forms of contract with little to no negotiation power on the side of the buyer, it is extremely rare for the homebuyers to be secured creditors.[147] For home buyers who are unsecured financial creditors, Section 53 raises concerns as it places them much lower on the priority list. The authors will first attempt to understand the rationale behind the priority given under Section 53.

The celebrated *Swiss Ribbons* judgment has highlighted the reason for the order of priority under Section 53, stating that secured financial creditors like banks and financial institutions have the ability to further lend the money received to the economy.[148] This is in compliance with the objective of the IBC to promote entrepreneurship by ensuring the availability of credit in the market.[149] If all homebuyers are given preference over other secured creditors or are placed at par with them under Section 53, it may adversely affect the willingness of institutional lenders to provide credit.[150] This is because a huge chunk of the liquidation assets will be taken by the homebuyers, due to their number and cumulative amount owed to each of them. The secured creditors would find themselves receiving much lesser, leaving them at a severe loss. This would further add to the liquidity crunch in the real estate sector.[151]

Having dwelled upon the merits of the mechanism provided for in Section 53, the authors are of the opinion that under some circumstances, the banks and other secured financial creditors must not be given priority over unsecured homebuyers. The *Bikram Chatterji* judgment is significant here. In this case, the promoters of the real estate company had siphoned off the funds of the homebuyers for personal expenditures resulting in several defaults.[152] The Noida and Greater Noida authorities as well as the banks and financial institutions had a security interest on the flats booked by the homebuyers.[153] Under Section 53 of the IBC, these secured financial creditors would have the first priority on the assets of the corporate debtor. This would have left the homebuyers with a meagre or no amount. The homebuyers therefore, petitioned the Supreme Court fearing the loss of their investments under Section 53 in the NCLT proceeding against the real estate company.

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147 *Rachna Singh* (n 75) 12.
148 *Swiss Ribbons* (n 20) 84.
149 *Swiss Ribbons* (n 20) 84.
150 Rohan Abraham, 'Tepid Demand, Risk-Averse Bank Lending Hampers Real Estate Recovery' (*Money Control*, 30 July 2018) <https://www.moneycontrol.com/news/business/real-estate/tepid-demand-risk-averse-bank-lending-hampers-real-estate-recovery-2781611.html> accessed 13 June 2020.
151 Ashwini Kumar Sharma (n 57).
152 *Bikram Chatterji* (n 19) 147.
153 *Bikram Chatterji* (n 19) 5, 6.

It was found that some security interests of the banks and Noida and Greater Noida authorities were found to be not in compliance with Section 11(4)(h) of the RERA, 2016.[154] As per Section 11(4)(h) of the RERA, 2016, no mortgage or charge on a flat shall be created after an agreement for sale is executed. Where any such charge is created, the homebuyer's rights and interest in the property will not be affected. Therefore, the Supreme Court upheld this provision and ensured that the homebuyers are not adversely affected by a charge created on their flats after the agreement to sale was executed.[155]

Moreover, the Supreme Court observed that the banks had failed to conduct due diligence and ensure that the loan amount was used for the purposes of the project.[156] According to the Court, the Noida and Greater Noida authorities also were in collusion with the promoters.[157] The Supreme Court held:

> Bankers have failed to ensure and oversee that the money was invested in the projects. It was diverted elsewhere as rightly found by the Forensic Auditors. Thus, no charge can be said to have been created by bank loans on the projects....Though they (homebuyers) may not be secured creditors, they have a right to be treated in accordance with the law, fairly and they cannot be subjected to a fraudulent action by the promoters, that too in connivance with the bankers and officials of the Noida and Greater Noida authorities.[158]

Due to all these factors, the Supreme Court decided that the mortgage created by the bankers or the dues of the Noida and Greater Noida authorities shall not affect the rights or interests of the home buyers.[159] The Supreme Court attached the personal properties of the promoters to compensate the banks and the Noida and Greater Noida authorities, while securing the rights of the home buyers on the flats by appointing a management consulting company to ensure completion of the project.[160]

Although this decision did not directly delve into the validity of the order of priority under Section 53, it can be inferred that the Supreme Court took

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[154] RERA 2016, s 11(4)(h).
[155] *Bikram Chatterji* (n 19) 134.
[156] *Bikram Chatterji* (n 19) 84.
[157] *Bikram Chatterji* (n 19) 77.
[158] *Bikram Chatterji* (n 19) 127.
[159] *Bikram Chatterji* (n 19) 134.
[160] *Bikram Chatterji* (n 19) 150-54.

notice of the fact that the home buyers would have lost their investments if the company would have reached liquidation in the NCLT proceeding.[161]

The authors therefore propose that firstly, the NCLT must ensure that the security interest of secured creditors is in compliance with Section 11(4)(h) of the RERA. In other words where the secured creditors had secured their charge on the flats of the homebuyers after the agreement to sale was executed, the homebuyers should be given preference over them under Section 53. This can be brought about by the judiciary by harmoniously construing the RERA and the IBC.[162]

Secondly, where banks or other secured creditors have failed in diligently overseeing how the loan amount was used and colluded with the promoter, the rights of the homebuyers should be given preference in realising from the liquidation assets under Section 53. The Supreme Court in the *Bikram Chatterji* case opined that since the homebuyers are not a party to the agreement between the banks and the Noida and Greater Noida authorities with the developers, if they want to impose a charge on the flats of the homebuyers, it is their duty to ensure that the money is invested in the project itself.[163] The same principle should be upheld by the judiciary while deciding the order of priority under Section 53.

Therefore, the judiciary under the aforesaid circumstances should not permit the banks and financial institutions to hold preference over unsecured homebuyers during liquidation under the IBC.

VI. CONCLUSION

The real estate sector is of supreme significance for any economy. Due to conflicting interests, the two primary stakeholders of the real estate sector, the developers and the homebuyers, have remained irreconcilable under the IBC. The authors through this paper have attempted to identify their differences and have proposed a framework to help reconcile them.

It is a well settled principle in jurisprudence that every right must be accompanied with an appropriate remedy. The 2020 IBC amendment poses a serious concern for homebuyers regarding access to their legal remedy. As discussed in Part II of the paper, the threshold introduced by the 2020

[161] *Bikram Chatterji* (n 19) 7.
[162] *Pioneer* (n 12) 86.
[163] *Bikram Chatterji* (n 19) 127.

IBC amendment causes significant inconveniences to homebuyers. It hampers their ability to exercise their rights as financial creditors. To achieve the threshold's true purpose, the loopholes need to be plugged.

It is often said that while law should be well-defined, it should not be rigid and should have enough room for discretion. This permits liberal steps to be taken within the confines of the legal system after taking into account the circumstances of the case. However, it is also important to respect the legislative mandate. While the Reverse CIRP proves to be beneficial to balance the interests of all stakeholders, it currently contravenes vital principles of the IBC. What is required to remedy this is a clearly defined protocol within which the Reverse CIRP can be used.

The real estate sector has been plagued with delays, defaults and fraud. More so, with the outbreak of the pandemic, it is expected that the economy will face a bitter contraction of economic activity, resulting in a recession.[164] Lately, the Government announced the Covid-19 economic package which included an extension given to real estate companies to complete their projects.[165] This has added to the long-standing conflict between the two. Thus, at this stage, it becomes crucial to balance the interests of the stakeholders. By strengthening the compatibility between the developers and the homebuyers under the IBC, entrepreneurial spirit of the developers as well as the investment motivation of the home buyers will be encouraged. Taking a cue from Raghuram Rajan,[166] the legislature and the judiciary should take measures before the fire engulfs the entire Indian economy.

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[164] Sugata Ghosh, 'How Coronavirus May Cause Legal Wrangles' *The Economic Times* (26 March 2020) <https://m.economictimes.com/news/politics-and-nation/how-coronavirus-may-cause-legal-wrangles/articleshow/74815141.cms> accessed 14 April 2020.

[165] Priolker (n 5).

[166] Rajan (n 1).