

# Trends and Developments

## **Recent Developments Strengthening the Rights of Allottees of Real Estate Projects**

### ***Introduction***

Real estate projects in India have grown at a steady pace indicating strong growth in the sector, which has necessitated legislations and mechanisms for protecting the rights of the allottees/homebuyers of such projects.

The enactment of the Real Estate (Regulation and Development) Act, 2016 (RERA) was one of the important pieces of legislation in this regard. Briefly, RERA mandates the registration of real estate projects and agents, inter alia, ensuring that developers adhere to project timelines and specifications, and provides for a dedicated platform for aggrieved buyers to address grievances, promoting fair practices and protecting consumer interests. It also provides for deposit of funds (including the monies collected from the allottees) in a dedicated account, so as to ensure that such funds are deployed specifically for the relevant project and are not diverted elsewhere.

In cases of delay or default by a real estate developer in handing over possession to the allottees/homebuyers, the said allottees/homebuyers have recourse to file complaints before the Real Estate Regulatory Authority (the "RERA Authority"). This recourse is available in cases where the project is registered with the RERA Authority. RERA, inter alia, provides the following remedies for allottees/homebuyers:

- the allottees/homebuyers may withdraw from the real estate project; and consequently get a refund from the real estate developer (which may also include compensation as per the provisions of RERA); or
- when the allottees/homebuyers decide to not withdraw from the project, such allottees/homebuyers shall be entitled to receive (monthly) interest for delay until the date of possession, as per provisions of RERA.

Similarly, the Consumer Protection Act, 2019 (the "Consumer Act"), which protects consumers against unfair trade practices, deficiency in services and defective products also serves to protect the interests of

allottees/homebuyers. The Consumer Act also covers a deficiency in service by a real estate developer. In such a scenario, the commissions dealing with matters under the Consumer Act are empowered to order compensation for delays, including payment of interest in relation to the amounts paid by the homebuyers/allottees, and/or refund of amounts paid (with interest) to the aggrieved allottee/homebuyer.

The Insolvency and Bankruptcy Code, 2016 (IBC) is another important legislation and, of late, the most prominent in case of residential projects, since a substantial amount of the funds for residential real estate projects are raised from the allottees. However, at the time of its promulgation, IBC was intended for corporate insolvency resolution and did not specifically deal with the interests and rights of allottees/homebuyers vis-à-vis the real estate projects.

The dilemma of the allottees/homebuyers in stranded real estate projects came to fore in the case of the corporate insolvency resolution process (CIRP) of one of the real estate giants, namely, Jaypee Infratech Limited, wherein the need to protect the rights of allottees/homebuyers gained prominence. The Supreme Court of India (*Chitra Sharma v Union of India*, 2018 SCC OnLine SC 874) expressed its concern that where allottees/homebuyers were placed in the last category of the creditors list as per the waterfall mechanism in CIRP, it would amount to gross injustice to such allottees/homebuyers who have invested their life's savings in these real estate projects.

It was pursuant to the said decision of the Supreme Court of India that the Insolvency Law Committee was formed. The Insolvency Law Committee acknowledged that the non-inclusion of allottees/homebuyers within the ambit of "financial creditors" as per the provisions of IBC deprived them of significant rights, inter alia, including the right to initiate CIRP against the defaulting real estate developer. Moreover, the non-inclusion also deprived the allottees/homebuyers of the right of representation on the committee of creditors of the real estate company undergoing CIRP.

In light of the Supreme Court's decision, IBC underwent its first major amendment in 2018 whereby homebuyers were for the first time effectively recognised as a class of "financial creditors" by including their investments as "financial debt" under Section 5(8)(f) of IBC. The said amendment also allowed the allottees/financial creditors to participate in the committee of creditors and

consequently participate in the decision-making process in relation to the real estate company.

Thereafter, a further amendment to IBC was brought into effect on 28 December 2019, when the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promulgated, which was replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2020, inter alia making specific amendments to IBC recognising the allottees/homebuyers as financial creditors and allowing them the opportunity to initiate CIRP of a real estate company. However, there were instances where multiple proceedings were filed by allottees, and such proceedings were being used as tools for recovery and demanding exorbitant interest.

The IBC was further amended and the right to the allottees/homebuyers to file applications for initiating CIRP under the provisions of IBC (to be filed jointly by at least 100 allottees/homebuyers or 10% of the total allottees/homebuyers under the said project, whichever is lesser).

There have been other significant developments in relation to the insolvency of real estate companies by way of judicial experimentation given the peculiar nature of real estate projects. Despite the allottees/homebuyers being categorised as a class of “financial creditors” under IBC, there were still delays in the process, especially where a company with multiple real estate projects was only struggling with one project or where the project was viable but only needed a small amount of funding for completion. In such situations, CIRP (thereby forcing all projects – irrespective of their stages – to be put into moratorium) seemed to be an extreme step and the delay in commencement of CIRP due to challenges created a state of uncertainty, especially for allottees/homebuyers whose projects were near completion/delivery of possession.

Even though there is no specific provision for insolvency of an individual project, the concept of “Reverse CIRP” was introduced for the first time by the National Company Law Appellate Tribunal (*Flat Buyers Association Winter Hills – 77, Gurgaon v Umang Realtech Private Limited*, 2020 SCC OnLine NCLAT 1199). By way of reverse CIRP, it was recognised that if allottees/homebuyers or financial/operational creditors of a particular project initiate CIRP against a real estate company, where there are multiple real estate projects, CIRP may be limited to only the specific project and should not impact other projects of the same real estate company which are viable.

In addition to the above, allottees/homebuyers have recourse under other statutes/legislations, inter alia, the criminal laws in India. However, this guide will deal with recent amendments in IBC, which, inter alia, seek to allow allottees/homebuyers to take possession during CIRP of a real estate developer.

### ***Recent amendments to IBC – way forward to further the interests of allottees/homebuyers***

The Insolvency and Bankruptcy Board of India (IBBI) by way of notification IBBI/2024-25/GN/REG122, dated 3 February 2025, has introduced certain amendments to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the “CIRP Regulations”). The amendments aim to facilitate efficient CIRP of a real estate company, while ensuring that proper transparency is maintained, and the rights of allottees/homebuyers are further protected.

One of the key amendments/insertions to the CIRP Regulations is inclusion of a provision to allow the resolution professional (managing CIRP of the real estate company) to hand over possession of the plot, apartment, unit or building or any instruments agreed to be transferred under the real estate project and to facilitate registration, during CIRP of the real estate company. This would safeguard the allottees/homebuyers, since such assets, where possession has been transferred to allottees/homebuyers, are excluded from the corporate debtor’s assets.

Under the provisions of IBC, during the CIRP period, the resolution professional is duty bound to take control of the assets, affairs and management of the company undergoing CIRP. Concurrently, IBC empowers the resolution professional to work for the interests of the company on a going concern basis and take decisions in the ordinary course of business. Furthermore, all proceedings and claims against the corporate debtor, including any enforcement of litigation proceedings, are suspended due to the statutory moratorium which is imposed upon commencement of CIRP. However, the amendment for the first time introduces a provision that allows handing over of possession by the resolution professional to the allottees/homebuyers during the period of CIRP.

The resolution professional can take steps to hand over possession to allottees/homebuyers after obtaining approval of the committee of creditors of the company, with not less than 66% voting share, and when an allottee/homebuyer has made a specific request for the same. Another aspect worth noting is that the amendment also sets out that the allottee/homebuyer will make a request when such allottee/homebuyer “has performed his part under the agreement”. There may be a situation where allottees/homebuyers have not made payment as per the payment schedule under the terms of the builder–buyer agreement. The amendment aims to recognise such defaulting allottees/homebuyers so that the benefit being extended only protects the interests of allottees/homebuyers who have performed their part of the obligation.

Another relevant amendment in relation to the CIRP Regulations is the appointment of facilitators. The amendment provides that where the number of creditors in a class exceeds 1,000, the committee of creditors may direct the interim resolution professional or resolution professional, as the case may be, to appoint another insolvency professional as a facilitator for a subclass within the creditors of that class. This amendment aims to facilitate ease for the allottees/homebuyers, who would have better access to information qua CIRP of the real estate company. Allottees/homebuyers often lack the resources and organisation to effectively represent themselves in complex IBC processes and where the communications by the authorised representatives of the allottees/homebuyers are limited.

Another important amendment in the CIRP Regulations is the provision that enables the participation of a competent real estate regulatory authority in meetings of the committee of creditors. The “competent authority” in this case is an authority defined under RERA. The role of the competent authority is to provide inputs on matters associated with the development of the real estate project in question. This amendment enables better and more efficient resolution because the statutory authorities/regulators are entitled to exercise their decision-making in relation to matters such as renewal of licences/maps/sanction plans/approvals, etc, which cannot be taken by the Adjudicating Authority under IBC. The participation of such authorities in the CIRP process would save valuable time in the resolution process and reduce the challenges that occur due to the delay in procuring such consents/approvals/revalidation from authorities, while also addressing their claims as per the provisions of IBC.

One more amendment provided in the CIRP Regulations is in relation to filing reports on the status of development rights and permissions of real estate projects. Under this regulation, the resolution professional is obligated to prepare a report regarding the status of development rights and permissions required for development of the project and to submit this report to the committee of creditors for their comments. The report is then submitted to the Adjudicating Authority (along with the comments from the committee of creditors). This amendment aims to ensure that the progress of projects is recorded and reviewed by the key stakeholders as well as the Adjudicating Authority, and there is a record of all permissions required to be taken. This would be a step towards ensuring that real estate projects which are subject matter of CIRP are dealt with effectively and efficiently and the time spent in CIRP is substantially reduced.

## **Conclusion**

Since CIRP is a complex process involving multiple creditors, challenges and protracted litigation proceedings, it can be challenging for allottees/homebuyers, especially, where such allottees/homebuyers have invested their life savings in such projects or have taken heavy loans to purchase such units. The recent amendments in the CIRP Regulations are well thought out and aim to improve the process with area/domain experts as well as the participation of regulators during CIRP; while also facilitating the delivery of possession to bona fide allottees/homebuyers to protect their investments and rights.

It may also be noted that IBC has been amended from time to time, to incorporate more practicable and viable provisions (especially in complex real estate scenarios) and to ensure that the interests and rights of allottees/homebuyers are protected. Even by way of judicial experimentation/intervention, various unique aspects have been brought into force to deal with the concerns of real estate projects.

The co-operative efforts of various stakeholders, including the judiciary and legislature, lead to the conclusion that concerns in the real estate field are being taken care of, one step at a time. This is not only nurturing confidence amongst allottees/homebuyers, but is also facilitating stable and consistent growth in the real estate sector.

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**AZB & Partners** has a real estate practice known for assisting its clients in their merger, acquisition, JV, financing, private credit, capital market, REITs, asset monetisation and joint development agreements across all asset classes including commercial, industrial, retail, data centres and residential real estate. Leading various real estate insolvencies and foreclosure matters, the firm (i) advises resolution applicants on their resolution plans to acquire real estate companies/projects going through the corporate insolvency resolution process under the Insolvency and Bankruptcy Code; and (ii) advises banks/financial institutions on the foreclosure of mortgaged land parcels and real estate projects. AZB & Partners also regularly advises central and state governments on the drafting of laws and regulations around real estate development and on several other policy matters. The driving principle for the real estate practice at the firm is to present the client with an integrated outlook on a particular transaction and equip them to make an informed decision.

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