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Financial Creditors.

HOME BUYERS IN THE CLUB OF FINANCIAL CREDITORS

Under

IBC (AMENDMENT) ORDINANCE 2018

Legal intelligence Series

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Home Buyers - An Unsolved Tragedy

It is a known fact that **home buyers** have had been facing the prevailing malpractices of builders.

The Government after having realized this aspect came up finally with Real Estate Regulation Act, 2016 ('RERA') to contain such issues including delay in possession and bringing the transparency in entire transaction between a buyer and the builder.



The Insolvency & Bankruptcy Code, 2016(IBC) which came into effect from 28th May, 2016 whereas, the provisions on Corporate Insolvency Resolution Process under IBC came into effect only from 1st December, 2016. But, unfortunately it lacked any specific provision for home buyers.

Shelter to Builders under IBC

The IBC unfortunately provided shelter to the builders who could have initiated insolvency application at their own whereas the buyers had no *locus standi* under IBC.

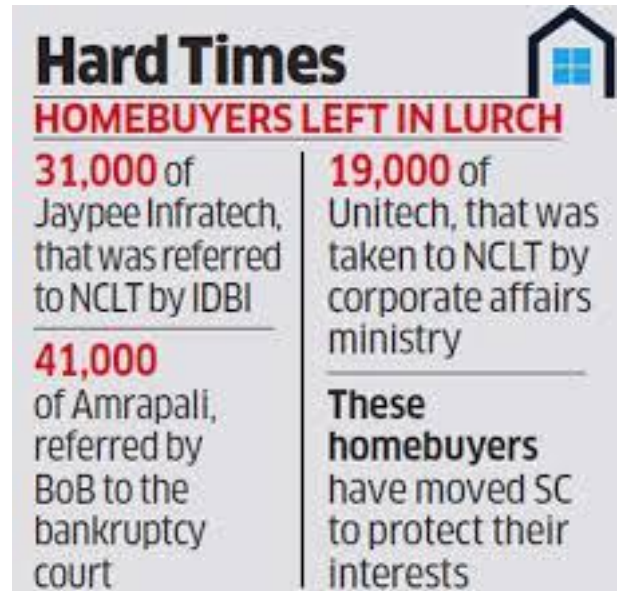


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Of late, the tragic incidences came into public domain when buyers of “Jaypee Infrastructure” and “Amrapali Group” even after battling for many years could not defend in NCLT since there was no remedy available for home buyers under IBC.

The misery continued till the recent orders of NCLAT came as a ray of hope where the transaction involved some committed returns till the time of possession.



Before Amendment

In **Nikhil Mehta & Sons (HUF) & Ors v. AMR Infrastructures Ltd.** for the first time NCLAT considered the *locus standi* of the flat buyers under Section 7 of IBC as financial creditors.

The flat buyer had an agreement with the builder whereby he was to get ‘assured return’ from builder on monthly basis till the delivery of actual possession of flat. The builder after paying it for some time stopped paying thereafter.

NCLAT after perusal of MOU, annual return and balance sheet of the Respondent, held that the debtor treated Appellant as investors and borrowed amount for commercial purpose, treating it as a loan. Thus the amount invested by Appellants comes under the purview of financial debt as per section 5(8) (j) of the IBC.

Regarding the fulfillment of the condition of the consideration for time value of money the bench held that the perusal of the annual return of respondent, it shows the ‘commitments amount’ under the head ‘financial cost’.



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The financial cost includes "Interest of loans" and other charges. Therefore, the 'commitment charge', which includes interest on loan, shown against the head "Financial cost" is accepted by the Corporate Debtor in their annual return and this proves that the Appellant can be a financial creditor.

In Anil Mahindroo & Anr. v. Earth Iconic Infrastructure (P) Ltd, a MOU & allotment letter was executed between the applicants and Respondent Company. The MOU had an expressed promise for return on the investment as 'commitment amount' till the actual possession is delivered.

NCLAT relying upon *Nikhil Mehta & Sons (HUF) & Ors. v. M/s AMR Infrastructures Ltd.* C.P.No. (IS.B)-03(PB)/2017] decided on 23.1.2017 by this bench held that there was a default in "commitment amount"

It further held that the amount paid to the builder falls under the ambit of "debt" as defined in Section 3(11) of the IBC.

The Appellants in this case have also successfully proved that the money disbursed by them is against the consideration for the time value of money and for all purpose, they come within the meaning of 'Financial Creditor' as defined in Section 5(7) of the IBC.

Empathy & Sympathy of IBC via Regulation 9A

The fight of home buyers in *Jaypee Infra house* ultimately led IBBI to insert "Form F" by amending Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2017.

Regulation 9A accordingly provided a person to claim as a creditor, other than a Financial or Operational Creditor before the resolution professional.



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Though the aforesaid amendment was a welcome step but unfortunately could not eradicate the long existing problems of the home buyers.

Amendment w.e.f. 6th June, 2018

With the given background and evolution of various developments for home buyers, an 'Explanation' has been added to Section 5(8)(f) as under;

"An amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing."

Conclusion

The explanation under Section 5(8)(f) will give rocket arm to the home buyers subject to the following acid test:

- a. amount paid by the buyer to the builder
- b. buyer is an allottee under an allotment letter &
- c. linkage test with a real estate project

The onus will lie upon the home buyers and hence once, the above is proved by the home buyer, they will be treated as Financial Creditor under IBC.

WHAT IT MEANS FOR HOMEBUYERS

- They will be part of CoC that approves the resolution plan
- Their voting rights to be in sync with advance payments
- They will be third in preference order to get liquidation proceeds
- But they will also have to take haircuts



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They can initiate the CIR Process against the Corporate Debtor under Section 7 of the IBC just like the other financial creditors.

They will also get due representation in the COC meetings as they will be an integral part of the decision-making process with a voting right.

This amendment comes as a relief to thousands of homebuyers all over the country as they would now have a clear right to move to the NCLT to safeguard their rights and initiate insolvency against the defaulting builders.

Above all, it will be an expeditious remedy available to the home buyers finally under IBC.

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- ii. Non-litigation &
- iii. Litigation

We advise & practice in every law of India.



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