



MOVING FORWARD WITH REVERSE CIRPS: DISSECTING FLAT BUYERS ASSOCIATION VS UMANG REALTECH

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Introduction

The relationship between the IBC and the Homebuyers has been an astute one, emerging from the 2018 amendment to the Code¹, which implied that “Allottees” of a real estate project are to be considered as financial creditors.² This enabled the Homebuyers to approach the Adjudicating Authority (hereinafter AA)³ when the Real Estate developers defaulted in their delivery. CIRPs are one of the core mechanisms of the IBC and are aimed at maintaining the interests of all stakeholders.

As of March 2020, a total of 757 CIRPs have been initiated in the real estate sector.⁴Based on the observations (refer to Table 1), the Adjudicating Authorities have been able to keep up with the continuous rise⁵ at a closed CIRP rate of approximately 40% until March 2020.

| Year | Number of CIRPs | | |
|---------------|-----------------|---------|--------|
| | Admitted | Ongoing | Closed |
| March 2018 | 120 | 92 | 28 |
| December 2018 | 235 | 148 | 87 |
| December 2019 | 665 | 404 | 261 |
| March 2020 | 757 | 450 | 307 |

Table 1

The AA's acknowledge the unextraordinary rate and the challenges of following a “normal course”⁶ in this sector. Especially when several CIRPs are initiated against the real estate companies, where the projects are dragged into insolvency even when they are close to successful completion. One such case, which we will discuss, is that of Flat Buyers Association v. UmangRealtechPvt. Ltd,⁷ and how the NCLAT delivered a game-changer judgment and the implications it carries with the introduction of “Reverse CIRP” to provide equity for all stakeholders.

¹ Section 5 (8) (f) of the Insolvency and Bankruptcy Code 2016

² Section 5 (7) of the Insolvency and Bankruptcy Code 2016

³ Section 7 of the Insolvency and Bankruptcy Code 2016

⁴ The Quarterly Newsletter of Insolvency and Bankruptcy Board of India. Jan-March 2020, Vol.14.

⁵ CIRPs commenced between December 2018 and December 2019, tripled

⁶ Judgment of Flat Buyers Association v. UmangRealtechPvt. Ltd. MANU/NL/0077/2020. Company Appeal (AT) Insolvency No. 926 of 2019.

⁷ Ibid.



Background of the Case

This case involved an application filed under Section 7 of the Insolvency and Bankruptcy Code by two home allottees (Financial Creditors) to initiate CIRP against the project developer, M/s UmangRealtechPvt. Ltd. (Corporate Debtor). The NCLT accepted the application, and passed an order directing the Financial Creditors (hereinafter FC) to deposit a monetary sum of INR 2 lakhs with the IRP to meet the daily expenses of the Corporate Debtor (hereinafter CD). Soon after the CIRP was initiated, the CD offered possession of flats to the homebuyers, including the two applicants of the case.

The developments led the Flat Buyers Association to appeal before the NCLAT claiming the CD should be allowed to finish the project. Also one of the outside Promoters, *Uppal Housing Pvt. Ltd.* agreed to act as a lender to the CD for the completion of the project and was promised by the CD to be paid from the remaining amount received from the Homebuyers. The Appellants also argued that all the assets of the CD should not be maximised since there may be other projects of the same CD with different plans, allottees, authorities and financial institutions which should remain independent of the locus of the resolution affecting the CD in the particular project.

NCLAT's Judgment

Owing to the arguments and concerns of the Appellants, the NCLAT decided to carry out a “Legal Experiment” within the existing methods of the Insolvency Resolution Process. The Tribunal ordered for the completion of the existing project by the CD and immediate delivery of possession of flats to the Allottees. This was done in pursuit of the interest of all stakeholders to the project including the CD, as stated in the Judgment,⁸

“In the interest of the allottees and survival of the real estate companies and to ensure completion of projects which provides employment to large number of unorganized workmen.”

Challenges to the Regular Process of CIRP in Real Estate Sector

In the regular process of the CIRP, moratorium is obligated, essential goods and services are suspended/ terminated, claims of Creditors are verified and resolution plans are either approved-leading to an amicable suspension of proceedings, or rejected by the Committee of Creditors (hereinafter CoC)- leading to company liquidation.

The problem with this process when it comes to the Homebuyers is that, although they are FCs, they possess limited voting rights and lack commercial expertise to assess

⁸ Ibid.



the sustainability of the CD⁹, unlike the other FCs i.e., the Banks, NBFCs or other financial institutions. So, when the resolution plan is approved by the CoC, it is binding on all the stakeholders including the Allottees who usually do not receive adequate compensation for their monetary investment. Like in the instant case, the CD has offered Allottees possession of the flats, and if the CIRP is to continue as normal, the Allottees would be at a loss either the CD goes into liquidation or reach a resolution.

Concept of Reverse CIRP

The reverse CIRP proposed by the NCLAT is a novel idea to the mechanism offered by the IBC. It goes in an opposite direction from the normal CIRP in this case, by allowing the CD to continue the project work so that the Allottees may bear the fruits of their investment while the Insolvency Resolution Professional maintains the company, allowing for the project to be completed within a specific mode, manner and timeframe, set to June 2020¹⁰ by the intervening Promoter, Uppal Housing Pt. Ltd, and saving the employment of unorganised workmen.

In defending its unprecedented decision, the NCLAT referred to the 2019 Supreme Court judgement in the Swiss Ribbons case¹¹, wherein it held that the IBC is an economic legislation which in a broader sense deals with the Indian economy as a whole and “to stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation.”¹² Thus, NCLAT has experimented and worked out a win-win situation for all the stakeholders.

Implications of the Judgment for:

1. Secured and Unsecured Creditors

The NCLAT acknowledged the essential need of equitable and effective asset distribution to different classes of creditors, i.e. the secured and unsecured creditors. That need was reasoned by referring to the case of Pioneer Urban Land and Infrastructure Co Ltd. v. Union of India¹³, where the Allottees were upheld to be unsecured creditors, but the Supreme Court mentioned that they held a “vital interest in the amounts that are advanced for completion of the project, maybe to the extent of 100% of the project being funded by them alone.”¹⁴ Hence the asset preference of secured creditors such as Banks or NBFCs over the Allottees is unjust.

⁹Reverse Corporate Insolvency Process allowed by the National Company Law Appellate Tribunal in case of real estate infrastructure developers and builders. Lexology. Apr 11, 2020.

¹⁰Flat Buyers Association v. Umang Realtech Pvt. Ltd. MANU/NL/0077/2020. Company Appeal (AT) Insolvency No. 926 of 2019.

¹¹ 2019 SCC OnLine SC 73

¹² Ibid.

¹³ 2019 SCC OnLine SC 1005

¹⁴ Ibid.

2. Resolution Plan Independent of Other Projects

In paying due consideration to the arguments of the Appellants, the NCLAT set a precedent to be followed for subsequent cases dealing with similar issues where all the assets of the CD will not be maximised keeping in consideration that there may be other projects of the same CD with different plans, allottees, authorities and financial institutions which should remain independent of the resolution plan affecting the CD in the particular project.

Comparative Analysis of IBC, RERA and CPA

It is important to note that one of the major implicit reasons behind the NCLAT's new concept of Reverse CIRP is the confusion between the real estate investors on the conclusive authority/legislation for seeking remedy. Insolvency proceedings are initiated under the IBC even when the remedy for the petitioner might lie within the Consumer Protection Act (CPA) or the Real Estate (Regulation and Development) Act (RERA). A comparative analysis of mechanisms under RERA, CPA & IBC (refer to Table 2) suggests that for a Homebuyer who seeks return of monetary investment the best remedy would be IBC, and for any other remedies sought such as performance of statutory obligations or compensation, the more appropriate and fulfilling legislations would be RERA or CPA. The Supreme Court judgment in the case of Pioneer Urban Land and Infrastructure Limited and Ors. Vs. Union of India and Ors.¹⁵ further cleared the trilemma of the Homebuyers by stating that RERA and IBC would run concurrent to each other, and in case of a conflict, the IBC would prevail over RERA.¹⁶

| | RERA | CPA | IBC |
|----------------------------|--|---|---|
| Case Timeline | A few months to years | 5-6 years (Avg.) | 6 months- 1 year |
| Accessibility | 1-2 offices per State | District Forums in each District | 1 NCLT per State. Practically, 16 Benches in the country |
| Relief Provided | Fine imposition, Project deregistration, Direct Project completion | Executes its own orders. Typically, a swift process | IRP is appointed until Resolution or Liquidation is reached |
| Appellate Authority | Real Estate Appellate Tribunal (REAT) | State forum or National Commission | NCLAT |

Table 2¹⁷

¹⁵Ibid.

¹⁶Ibid.

¹⁷IBC for Homebuyers – Opportunities & Challenges Ahead. IBC Laws. Apr 28, 2020. <https://ibclaw.in/ibc-for-homebuyers-opportunities-challenges-ahead-by-santosh-kumar/>



Conclusion

IBC has undergone various changes over the years to provide adequate resources and medium for the real estate sector to seek recourse in matters of insolvency and bankruptcy. Despite the pro-active approach of the Central Government with IBC, the NCLT/NCLAT process has not been majorly successful in terms of percentage of resolution¹⁸ (refer to Table 1) or adequate monetary return for Homebuyers. But the sheer determination of IBC's Adjudicating Authority to provide equity for all stakeholders via reverse CIRP might just tip the scale of more closed resolutions/cases. The legal experiment by NCLAT might just be what is needed to achieve the harmony between stakeholders, but it should also be kept in mind that the IBC does not have any provisions pertaining to the judgment passed in the Flat Buyers Association case. For this reason, the NCLAT restricted the applicability of this experiment to this case.

A few suggestions which would be beneficial going forward pursuant to the remarkable NCLAT judgment would be:

- Adding a mandatory provision in IBC, making IBC the last legal option available for Homebuyers, if not seeking renumeration of monetary investment, after exhausting the remedies under the RERA and CPA, so reverse CIRP would not be necessary since it falls outside the current IBC ambit.
- Clarification to be provided in the IBC where Unsecured Creditors are classified as a separate class of Financial Creditors, to ensure they receive their due weightage (thus due pecuniary returns) of voting rights in the Committee of Creditors during CIRP.

References

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¹⁸ Based on observations of Table 1, at 40%