

Real estate insolvency is a unique ballgame

CHARTING A PATH FORWARD. A specialised resolution framework to address the complexities of the sector can ease up the process

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Due to rising costs and pandemic-induced lack of demand, many real estate companies have gone bankrupt. As of June 2022, of the 2,000-odd cases under corporate insolvency resolution process (CIRP), a staggering 436 cases were from the real estate sector.

The resolution of insolvency in the real estate sector presents unique difficulties due to the sector's peculiarities. Homebuyers were initially categorised as “other creditors”, but there was a sea-of-change in the legal position after the Supreme Court’s decision in *Chitra Sharma v Union of India* and *Bikram Chatterji v Union of India*. After this, homebuyers were recognised as essential stakeholders in the insolvency resolution process of real estate enterprises. Following the amendments to the IBC in 2018, the real estate allottees were recognised as financial creditors. Later, an ‘ex-

planation’ classified the amounts spent by home buyers as ‘financial debt’. This was challenged in *Pioneer Urban Land and Infrastructure Limited v Union of India*, but was upheld by the Supreme Court.

LENDERS V HOME BUYERS

An inherent tension always lies between home buyers and the lenders. This was somewhat addressed by the 2020 IBC amendments, whereby a minimum threshold of 100 allottees or 10 per cent of the total allottees, whichever is lesser, was set as the essential prerequisite for the initiation of CIRP against a real estate enterprise.

Among the many judicial experiments from ‘real estate’ are “reverse” and “project-wise approach”, first introduced in *Flat Buyers Association Winter Hills v Umang Realtech* at NCLAT. In this case, the homebuyers had initiated CIRP against a real estate company for failing to complete construction within time. The NCLAT allowed one of the company’s promoters to act as an external lender and infuse funds



IN FOCUS. The SC recently allowed a project-wise approach to resolving insolvency

into the corporate debtor to ensure that the project is completed and the units are handed over to the homebuyers. The concept of reverse CIRP has been subsequently upheld by the SC in *Anand Murti v Soni Infratech* and *Amit Katyal v Meera Ahuja*.

In a project-wise approach, the

focus is only on the insolvent projects and not the whole entity. In a recent decision in *Indiabulls Asset Reconstruction Co v Ram Kishore Arora*, the SC opined that if the corporate debtor were to be subjected to insolvency proceedings, all of the ongoing projects would be thrown into uncertainty. Hence, a project-

wise approach to resolving insolvency was allowed.

In January 2023, the Ministry of Corporate Affairs invited comments from the public on proposed amendments that were being considered under the IBC regime. One of these changes includes codification of the reverse CIRP and project-wise resolution. The Ministry proposed amending Section 28 of the IBC to enable the resolution professional to transfer the ownership and possession of units to the allottees with the consent of the committee of creditors.

Considering the unique challenges of the sector, there is a need for a specialised resolution framework tailored to address the complexities of the real estate sector. This should consider all stakeholders’ interests and involve qualified professionals — such as insolvency practitioners, real estate experts, and legal advisors — who can contribute to the effectiveness of the resolution process.