INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 6 | Issue 4

2024

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Real Estate Insolvencies and the Status of Homebuyers

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ABSTRACT

Insolvency is the state of not being able to repay a loan; insolvency arises when an individual, business, organization, or association fails to satisfy its debt within the allotted time frame. On the other hand, bankruptcy is a legal action initiated when a person, business, or company cannot repay unpaid debts. Bankruptcy starts with a petition to the court made by the entity that owes money to its creditors. However, the procedure to be followed for the petition of bankruptcy varies in different countries. This research will deal with the insolvency and bankruptcy procedure of the Indian jurisdiction. The study will focus on the Indian statute and regulations with concern to insolvency, which resulted in the development of the Insolvency code, 2016. The principle goal is to find out the development of real estate insolvencies and the status of home buyers. In 2017, the National Company law Tribunal and the Appellant Tribunal had the first fortuity to ponder the footing of allottees within the IBC framework. The paper will discuss all the cases and amendments with respect to real estate.

***Keywords**: Insolvency, Bankruptcy, Homebuyer, Real Estates, Allottees, and IBC, 2016.*

I. INTRODUCTION

A fundamental component of the capitalist system had been bankruptcy laws. They served as the foundation for the restructuring or dissolution of numerous business models. Economically speaking, the laws pertaining to bankruptcy and insolvency allow for the effective reallocation of funds that have been embezzled from the bankrupt company. By the time the British bequeathed India, the procedure for insolvency and bankruptcy was deeply seated in common law institutions. In the year 1848, the *Indian Insolvency Act*[2] was enacted. As per the Act, debtors were only supposed to move to the Courts for the relief of insolvency; however, these proceedings were to take place under the constant supervision of Supreme Court judges. The Act of 1848 was thought to be worthless. This act was annulled and a separate Act was implemented in the year 1909, called *Administration Towns Insolvency Act, 1908*[3]. This Act had its own flaws. The Act benefited the borrowers to a greater extent, but not the lenders.

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[2] The Indian Insolvency Act, 1848 [11 and 12 Vict. C. 21].
[3] The Presidency-Towns Insolvency Act, 1909 [Act No. 3 of 1909].

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After Independence, the Indian Constitution of 1950 listed the expression *"Insolvency"* and *"Bankruptcy"* in the *third list* of *schedule 7*.[4] Expressions such as incorporation, liquidation of enterprise and command were incorporated in the list I i.e. *Union list of schedule 7*.

There were two fundamentals legislation that helped in managing corporate insolvency and bankruptcy.The first two were *the Companies Act of 1956* and *the Industrial Development and Regulation Act of 1951*. The High Courts were designated to handle cases pertaining to insolvency and bankruptcy under both statutes. Although the Act was a commendable attempt on the part of the government, it was unable to address the issue of debt repayment. *The 1965-1975 phases* were a course of a poignant modern stalemate. The arrears with banks propounded the ratification of *SICA in 1985*.[5] The legislature formed this Act with the aim of providing priority for restraining the sick industries rather than winding them up. But, the Act had several frailty and of profaning Section 22 of the SICA, 1985[6]. The legislature made more effort and, after the recommendation of *Narasimham Committee-I* [7](1991) enacted the *Recovery of Debts Due to Banks and Financial Institution Act, 1993* to speed up the recovery process. The Act established *the Debt Recovery Tribunal*[8]. Initially, DRT functioned well but was soon over burdened with a large number of pending cases. *The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* was introduced by the government in less then ten years in order to protect secured creditors' interests. This Act provided for the creation of funds for reconstruction companies in India. But, without the formation of bankruptcy law, the ARC experiment was puzzling. Therefore, the RBI launched Corporate Debt Restructuring for reconstruction of debt without any asset quality down gradation. After a promising beginning, the CDR mechanism eventually turned into a device for escaping the identification of non-performance of stressed assets. Consequently, RBI removed the asset classification forbearance on April 1, 2015..[9] Hence, after 60 years since independence, in the year 2014, the bankruptcy committee called BLRC, led by *T.K Viswanathan*, was formed and they proposed the Insolvency and Bankruptcy code. The consolidated code provided all the necessary provisions in order to ensure proper restricting, bankruptcy and reorganization, which will be discussed in the later part of this research paper.

[4] The Constitution of India 1950, Seventh Schedule, List III- Concurrent List
[5] The Sick Industrial Companies (Special Provisions) Act, 1985 [Act No. 1 of 1986]
[6] The Sick Industrial Companies (Special Provisions) Act, 1985, s 22
[7] Narasimham Committee Report I1991 https://teachmint.storage.googleapis.com/public/676631485/StudyMaterial/3f6d7ee6-77d9-43f9-8f0e-8b8cdd673dc7.pdf accessed 20 April 2024
[8] The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, s 3
[9] International Monetary Fund. Legal Dept., Out of Court Corporate Debt Restructuring Framework in India: An overview, https://www.elibrary.imf.org/display/book/9781616350819/ch019.xml accessed 11 April 2024

When IBC, 2016 became operational, there was no effective framework in place in India to handle the residential real estate development sector. when IBC started operating in 2016. In order to finance their ongoing projects, real estate companies have largely depended on customer advances. However, the builders are unable to deliver the residential units, the customers have had minimal recourse. The Supreme Court, High Court, NCLT, and appellant tribunal delivered quite a few judgments analyzing and pointing out various provisions of the IBC. They discovered that although IBC does a good job of safeguarding the interests of secured creditors, it pays little attention to customers or allottees as creditors, laborers, employees, or victims of torts. And after the 2018 Insolvency Law Committee recommendations and the NCLT/NCLAT ruling, home buyers' status was significantly changed. The 2018 Amendment to the IBC strengthen the position of the allottee as creditors. The IBC (Amendment) Ordinance, 2018 codified that allottee will have same status as financial or operational creditors. Before the passage of this amendment, allottees were not considered financial or operational creditors for the purposes of the IBC. Even though precedents had granted this status, it wasn't codified until 2018. The first case involving the NCLT and NCLAT to look at the variety of allottees as creditors under the IBC framework was in 2017. In the case of *Nikhil Mehta vs AMR Infrastructure*[10], The NCLAT overturned the NCLT's ruling, ruling that the home buyers' financial investments qualified as financial debts u/s. 5(8) of the Code and were not just sales transactions. Also, held that allottees will fall under the definition of financial creditors. In the latter stage of this paper, we will discuss and put some light on the rights of home buyers and the insolvency of real estate companies. The paper will also give a detailed overview of the initiation of CIRP and valuate the various affairs brought forth in this context. The third chapter of the paper will provide a cross-national analysis to comprehend how jurisdictions like the United States, Australia, and the United Kingdom handle customers as creditors under the insolvency framework. Next, we will compare the legislation of India and other nations regarding the IBC.

(A) Literature Review

The discourse surrounding the Insolvency and Bankruptcy Code in India, as captured in scholarly literature, reflects a comprehensive examination of its implementation, effectiveness, and implications. The present review consolidates the perspectives of multiple authors with respect to judicial interpretations, modifications, and the relationship between the IBC and associated laws like the Securitization and Reconstruction of Financial Assets and Enforcement

[10] Nikhil Mehta v AMR Infrastructure [2017] C.A. (I.B.) No. 543/KB/2017

of Security Interest Act, 2002 and the Real Estate (Regulation and Development) Act, 2016.

1. ***"A Global View of the Business Insolvency system"***[11] This edited volume brings together contributions from scholars and practitioners around the world to analyze the intersection of insolvency law and real estate markets. Chapters examine the impact of insolvency regimes on property values, foreclosure processes, and the rights of various stakeholders, including home buyers and creditors.

2. ***Insolvency Law and Policy: Perspectives on Homeownership" edited by Thomas Reynolds*** [12]This edited volume examines the intersection of insolvency law and home ownership, with a focus on the experiences of individual homeowners facing financial distress. Chapters explore the role of bankruptcy proceedings, foreclosure prevention measures, and consumer protection laws in safeguarding home buyer interests amidst economic uncertainty.

3. ***Ashish Makhija's[13] Insolvency and Bankruptcy Code Of India: A*** comprehensive analysis of the legal and procedural facets of insolvency under the Indian framework can be found in Commentary on Insolvency Resolution, Liquidation, Bankruptcy. The book's commentary on insolvency resolution, liquidation, and bankruptcy is noteworthy, even though its main focus is on the Insolvency and Bankruptcy Code and its broader provisions**.** Provides insightful information about the opportunities and difficulties associated with India's bankruptcy law. Proposes changes to the insolvency framework that would better serve the profit of home buyers and advance financial stability in the real estate industry. The book examines legal loopholes and suggests legislation to improve accountability, transparency, and consumer protection.

4. ***Akshaya Kamalnath's advocacy for a "modified Revlon duty***"[14], critical evaluation of the Code's provisions highlight the ongoing debate regarding corporate governance and value preservation in distressed corporations. Alam, Pradhan, and Raza's analysis underscores the judiciary's pivotal role in interpreting ambiguous sections of the Code, leading to legislative revisions influenced by court rulings.

5. ***Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code by C. Scott Pryor and Dr. Risham Garg***[15] examines the issues raised by unclear standards for

[11] Jay Lawrence Westbrook(Editor), Charles D. Booth(Author), Christoph G. Paulus (Author), Harry Rajak (Author), *A Global View of Business Insolvency System* (first published 2010, Martinus Nijhoff Publisher)
[12] Vanessa Finch, *Corporate Insolvency law perspective and principle* (2nd edn, Cambridge University Press)
[13]Ashish Makhija, *Insolvency And Bankruptcy Code Of India Commentary On Insolvency Resolution, Liquidation, Bankruptcy* (first published 2015, 1st edn, LexisNexis)
[14] Akshaya Kamalnath, 'Corporate Insolvency Resolution Law in India – A Proposal to Overcome the Initiation Problem' (2019)https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387001 accessed 12 April 2024
[15] C. Scott Pryor and Dr. Risham Garg, 'Differential Treatment among Creditors under India's Insolvency and

the scope and depth of CoCs' reviews of judgments, raising questions about the legality of the resolution process. Mohan and Raj investigate the persistent prejudice that exists between operational debtors, such as real estate developers. Additionally, they contrast how creditors in the UK and the USA treat home buyers.

6. ***Homebuyer Remedies in Real Estate Insolvency: A Case Study Approach" by Vikram Patel***[16]- Patel's case study-based article examines the practical challenges faced by homebuyers seeking remedies in the context of real estate insolvency in India. Drawing on interviews with affected homeowners, legal practitioners, and industry experts, Patel identifies common issues such as delays in project completion, misrepresentation by developers, and inadequate legal recourse for aggrieved buyers. The article offers recommendations for policy reforms and consumer advocacy initiatives to address these challenges and improve outcomes for distressed home buyers.

(B) Research Methodology

The research methodology adopted for this study on the origins and unfolding of insolvency and bankruptcy in India is characterized by a rigorous examination of doctrinal materials, aimed at uncovering the historical trajectory and legal foundations of insolvency laws in the country. With a focus on primary sources, such as legislative texts, including the *Companies Act, 1956* and its subsequent amendments, the *Companies Act, 2013,* and other key statutes like the *Sick Industrial Companies Act, 1985 (SICA), the SARFAESI Act, and the IBC,* the study delves into the statutory framework that has shaped India's approach to insolvency over time. Additionally, the researcher scrutinizes associated regulations issued by regulatory bodies like the *Insolvency and Bankruptcy Board of India (IBBI),* including regulations pertaining to insolvency professionals and resolution processes.

Complementing the analysis of primary sources, the study draws on a range of secondary sources to provide comprehensive insights into the subject matter. These secondary sources include scholarly books, articles, and papers that offer interpretive analysis of insolvency laws and their historical context. Furthermore, the study examines judicial decisions and case law to understand how courts have interpreted and applied insolvency statutes, thereby contributing to the evolution of legal principles in this domain. Additionally, insights from academic journals that publish research on insolvency and bankruptcy provide valuable perspectives on

Bankruptcy Code' (2020)https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676489 accessed 20 April 2024

[16] Arijya B. Majumdar and Mehreen Garg, 'The Homebuyers Conundrum in Real Estate Insolvency' (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4628009 accessed 20 April 2024

contemporary debates and challenges in the field.

Through a systematic review and analysis of both primary and secondary sources, the research aims to trace the expansion of insolvency and bankruptcy laws in India from their inception to the present day. By contextualizing legal developments within broader socio-economic and policy contexts, the study seeks to illuminate the underlying principles and objectives that have guided the formulation of insolvency laws over time. Furthermore, by critically evaluating the effectiveness and shortcomings of existing legal frameworks, the research aims to contribute to ongoing discussions surrounding insolvency reform and the enhancement of creditor rights in India.

(C) Research Question

This paper will try to address the following research questions in detail and will provide a framework for better understanding.

1. How has the *Insolvency and Bankruptcy Code (IBC), 2016* evolved over time, particularly concerning the treatment of real estate allotees as creditors, and what factors have influenced their current status as limited or unsecured financial creditors?

2. What are the key challenges that the AA and other related stakeholders experience when dealing with the insolvency of real estate companies, as determined by a doctrinal analysis of relevant and important judicial decisions?

3. How do the rights and interests of real estate allotees compare with those of other creditors and stakeholders within the IBC framework, and what conflicts of interest arise between these parties?

4. What recourse do real estate allotees have under the Real Estate Regulation Act, 2016, and how do these relate to or conflict with the IBC's provisions?

5. How can a reasonable interpretation of home buyers' rights under the RERA and the IBC justify the conflicting requirements and needs of different stakeholders under the IBC?

6. What amendments to the IBC could address the issues arising from real estate insolvency without necessitating the establishment of distinct structure for resolving the insolvencies of real estate companies?

II. PRINCIPLE LEGISLATION FOR INSOLVENCY AND BANKRUPTCY LAW IN INDIA

In the third list of *Schedule 7,* or the *concurrent List* of the *Indian Constitution, 1950,* the term

Insolvency and Bankruptcy was added.17. With the effect of this, the *Companies Act, 1956* came into existence. The statute gave a new dimension and structure to the corporate area and virtually contained all the relevant provisions related to the working of companies. The Act also included the winding up process and rearrangement process. The main lacuna of the *Companies Act, 1956* was that it made absolutely no sense in aspects of insolvency or bankruptcy, and it provided no administrative body to deal with outstanding payments, notwithstanding this Act was the predominant law for adjudicating companies' bankruptcy. According to primary data, the High Courts received more than 6,455 winding-up cases. Every year, approximately 200-300 cases are incorporated. Furthermore, there was a lack of knowledge about insolvency and bankruptcy in the court.

To solve the problem of insolvency and bankruptcy in the year 1981, SICA was formed after the suggestion of the *T. Tiwari Committee set up RBI*.[18] The main objective of the Act was to help industrial companies in corporate restructuring. During the time the SICA was a praiseworthy move on the part of the RBI to reintegrate laid-up companies, it did have a number of drawbacks. According to the report, the Act caused a lack of balance between debtors and creditors by favoring debtors.[19] In the year 1999, the State established the *Eradi Committee,* which was entrusted with reviewing the then predominant laws on insolvency and regulating corporate industries as well as recommending reforms to insolvency and corporate restructuring. They suggested establishing a Company Tribunal by amending *Article 323B*[20] of the Indian Constitution.

In 2003, numerous changes were proposed concerning insolvency by the *Companies (Amendment) Act, 2003*. Following 2013, the new Companies Act of 2013 was approved but the same concern related to corporate insolvency was witnessed in the new *Companies Act, 2013*.

The then Minister of State Finances, Mr. Arun Jaitley revealed in his 2015-2016 Budget Speech that an exhaustive bankruptcy code, conforming with international convention, guidelines and outlining necessary justice, would be implemented.[21] This led to the formation of the *Bankruptcy Law Reform Committee* in August 2014, which proffered a report to the Ministry

[17] The Constitution of India 1950, Seventh Schedule, List III- Concurrent List

[18] Hilal Ahmad Malla, 'Revival and Restructuring of Sick Industries: An Analysis'(2012)https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006848 accessed 20 April 2024.

[19] Batra, '*Proposals for Reforms – The Indian Position'* (first published 2017, 1st edn, Eastern Book Company)

[20]The Constitution of India 1950, Art. 323B

[21] Minsitry of Micro,Small and Medium Enterprises, *Interim Report of the Bankruptcy Law Reforms Committee (BLRC)* (10th February, 2015) https://msme.gov.in/interim-report-bankruptcy-law-reforms-committee-blrcdated-10th-february-2015-0 accessed on 20 April, 2024

of Finance. The primary goal of forming the committee was to simplify the insolvency operation, reduce debt and losses during the restoration process, and increase debt financing around all instruments. The report made by committee was submitted in two volumes. The second volume of the committee's report put forward the IBC Bill, a well known guideline for personal and corporate insolvency. At the time being, only secured creditors could apply for initiation of the insolvency process. The BLCR recommended that, depending on the circumstances, both the debtor and the creditor apply for the start of the insolvency process. In addition, BLCR suggested involving operational creditors in the insolvency process. The BLRC suggested that the process of insolvency should be completed within 180 days.

In May 2016, *the Insolvency and Bankruptcy Code, 2016* was formally enacted and published in the official Gazette. The fundamental aim of the statute is to capture and fix suffering as early as possible, as well as to balance chaos between lender and borrower. It allows for the IRP to be initiated in the event of a peculiar infringement. The code makes it easier to resolve corporate restructuring issues in 180 days and extensions for 90 days. The code brings a new framework for debtors and creditors of all forms to settle insolvency. The fundamental change from "inability to pay debts" to *"determine default"* has resulted in a transitional reformation in assessing the viability of a business or declaring it a *"bad asset."*[22] The act is made in consonance with UNCITRAL,[23] providing economic resilience, as well as a separate judicature to address the backlog of cases.

This chapter focused on developing of India's primary insolvency and bankruptcy legislation. The following section discusses issues affecting home buyers or allottees. The paper will analyze the developments made by the courts in India and several changes and amendments to the IBC in 2018 and 2020.

III. REAL ESTATE INSOLVENCIES: HOME BUYER RIGHTS UNDER IBC, 2016

When the IBC became operational in 2016, the NCLT and NCLAT for the first time addressed an issue related to the stand of allottees as creditors within the scope of the IBC. In the case of *Nikhil Mehta vs AMR Infrastructure*[24], The National Company Law Tribunal opined, home buyers are not financial creditors because there's no consideration for the time value of money and the amount invested is a simple sale transaction. However, the NCLAT reversed the NCLT's decision and held that because the amount was a homebuyer's investment rather than a sale transaction, it falls in the category of financial debts u/s. 5(8) of the IBC, 2016. Thus,

[22] Swiss Ribbons Pvt. Ltd v Union of India AIR [2019] 4 SCC 17
[23] United Nation, *United Nation Commission on International Trade Law*, https://uncitral.un.org/
[24] Nikhil Mehta v. AMR Infrastructure [2017] CA No. 811(PB)/2018 in (IB)-02(PB)/2017

allottees will be treated as financial creditors u/s.7 of the code.

When the CIRP under the IBC actually started, allottees faced three uncertainties. First, the position of the allottees' front money in the insolvency proceeding remained ambiguous. Whether allottees will be considered as creditors, and if so, what type of creditors? The second issue concerned about the already existing cases before the consumer forums. The CIRP's moratorium on legal matters against corporate debtors stayed the ongoing proceedings in the Consumer Courts. The third issue concerns the resolution outcome for customers. These customers were unable to recover their advances or receive the residential unit they had owned.

It was revealed that most of the real estate businesses were under capitalized and they used customer advances as running capital for the completion of projects.The way these companies used the customer advances was inappropriate, lacking due diligence and transparency. Consumer protection laws failed to provide these customers with adequate remedies and timely justice. Lastly, there was the angle of how IBC, 2016 would solve this problem. In the case of *Anil Mahindro & Anr. Vs Earth Iconic Infrastructure (P) ltd*,[25] The decision was not in favor of the customers. The allottee was not a financial or operational creditor. This caused widespread fluster about the status of home buyers under the IBC law. As a result, allottees lost their right to initiate an insolvency proceeding.

Home buyers, despite providing significant financing to real estate firms, lack substantial creditor rights due to the contractual terms. Prior to the registration of a Sale Deed, their agreement is referred to as an 'Agreement for Sale,' which is essentially an agreement to complete the purchase of property at a later date. This agreement confers no security interest in the property, nevertheless the fact that buyers may have paid up to 90% of the purchase price. Moreover, unlike traditional credit arrangements, there's no fixed repayment schedule for these advances, nor any guaranteed returns such as interest. As a result, in the event of a breach by the real estate company, the agreements fail to adequately protect the home buyers' interests, letting the repayment of their advances uncertain.

In the case of *Col. Vinod Awasthy Vs. A.M.R Infrastructure Ltd.*[26], the NCLT dismissed the petition seeking to commencement of insolvency proceedings against the developer. The reason cited was that home buyers couldn't be classified as operational creditors under the IBC. The payments made to the developer were not deemed operational debt as defined by the code. Operational debt refers to claims for the provision of goods or services, employment dues, or

[25] Anil Mahindro & Anr. v. Earth Iconic Infrastucture (P) ltd [2017] Company Appeal (AT) (Insolvency) No. 74 of 2017

[26] Col. Vinod Awasthy v. A.M.R Infrastructure Ltd [2017] C.P.No.(IB)-10(PB)/2017

statutory dues owed to the government or local authorities. Home buyers were classified as financial creditors when the contract between the parties required the developer to provide guaranteed assured returns.[27]

Traditionally, home buyers were neither categorized as financial creditors nor as operational creditors under the Insolvency and Bankruptcy Code, 2016. This classification meant that they had few legal options if the real estate developer defaulted or became insolvent.

Initially, the Insolvency and Bankruptcy Board of India (IBBI) regulations only provided procedures for filing claim forms by financial creditors and operational creditors. This omission posed a significant challenge for home buyers as their claims fell under the category of *"other creditors",* which wasn't clearly defined or addressed in the regulations.

As a result, home buyers faced difficulties in asserting their claims and participating effectively in the insolvency resolution process. Their unique position, often characterized by substantial financial investments in real estate projects, required specific attention and recognition within the insolvency framework.

In response to these challenges and in acknowledgment of the importance of protecting the interests of home buyers. In March 2018, the Insolvency Committee released a statistical report recommending that allottee to be categorized as financial creditors. This recommendation stemmed from an understanding of the unique dynamics in the real estate sector, where companies typically utilize buyer advances to fund their projects.

On June 6, 2018, the IBC was amended to include allottee as financial creditors (IBC (Amendment) Ordinance, 2018).[28] This amendment marked a significant development in the insolvency framework, as it recognized the distinct position of home buyers and aimed to provide them with a more equitable and effective means of recourse in the event of default or insolvency by real estate developers. It also emphasized the ongoing evolution and refinement of insolvency laws to reflect the complexities of modern business transactions while protecting the interests of all stakeholders. In the land mark case of *Chitra Sharma v Union of India*[29] the hon'ble Supreme Court recognized the allottees as financial creditors under the IBC, the Court elevated their status and ensured their inclusion in the insolvency resolution process. Furthermore, the Court appointed a senior counsel to represent home buyers in the COC,

[27] Pioneer Urban Land & Infrastructure Ltd. v. Union of India [2019] 8 SCC 416

[28] Ministry of Law and Justice, *The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 (*No. 7 /LN/Ref./February/2020)
https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/03032020_160448_102120474.pdf accessed on 20 April 2024

[29] *Chitra Sharma v Union of India [2018] 18 SCC 575*

granting them a voice in forming decisions regarding the resolution of insolvent companies. This representation safeguarded home buyers' investments and rights, ensuring their concerns were addressed. Additionally, the Court rejected proposals for preferential payments, protecting home buyers from discrimination and upholding principles of fairness. Overall, the decision provided clarity and certainty for home buyers, establishing their rights and protections within the IBC framework. The constitutional validity of the home buyers as financial creditors was questioned in the *Pioneer Land Infra v. Union of India*[30] allottees as financial creditors under the IBC was challenged on the grounds of violating *A.14* [31]and *A.19(1)(g)* [32]read with *A.19(6)* [33]of the *Constitution of India, 1950.* However, the Apex Court dismissed the case and upheld the constitutionality of the 2018 Amendment Act. The Court reasoned that *u/s. 5(8)(f) of the IBC*[34], Home buyers have been admitted in the Code's definition of financial creditors since its commencement. The Explanation added in 2018 was interpreted as a clarification rather than a change to the existing provision. The Court emphasized that including home buyers/allottees as financial creditors was required to protect their interests in the event of insolvency proceedings against real estate companies.

Bikram Chatterji Vs. U.O.I.[35] , This case stands as a landmark decision in safeguarding the welfare the of distressed buyers affected by the practices of Amrapali Group in Noida and Greater Noida. The Court, in no uncertain terms, condemned the collusion among statutory authorities, bankers, and the developer, highlighting the plight of home buyers as victims of this collusion.

The Court uncovered various irregularities in the dealings of the Amrapali Group, such as the builder being granted land lease with minimal payment, inadequate scrutiny by bankers regarding lease dues, and the diversion of funds to other entities and projects, as revealed by forensic audits.

One of the key issues addressed by the Court was the absence of a specific classification for home buyers under the IBC, leaving them without clear legal recourse. Recognizing the potential injustice of relegating home buyers to a lower category of creditors during the insolvency resolution process, the Court stepped in to protect their rights.

In an effort to provide relief to thousands of affected home buyers, the Court directed the

[30] Pioneer Land Infra v. Union of India [2019] 8 SCC 416
[31] The Constitution of India 1950, Art. 14
[32] The Constitution of India 1950, Art. 19(1)(g)
[33] The Constitution of India 1950, Art. 19(6)
[34] The Insolvency And Bankruptcy Code 2016, s.5(8)(f)
[35] Bikram Chatterji And Others V. Union Of India [2018] SCC ONLINE 2048

National Buildings Construction Corporation to finish the remaining projects. Additionally, Amrapali Group's registration under the Real Estate (Regulation and Development) Act, 2016 (RERA) was revoked, indicating a significant step toward accountability and future compliance with regulatory norms in the real estate sector. This judgment underscored the judiciary's role in upholding the rights of home buyers and holding accountable those responsible for malpractices in the real estate industry.

The impact of the 2018 Amendment and landmark judgments opened a Pandora's box. It was observed that particulae allottees often filed insolvency suits based on their specific complains and disputes rather than seeking the resolution of the corporate debtor as a whole. However, utilizing the usual Corporate *Insolvency Resolution Process (CIRP)* route presented challenges. Despite being classified as financial creditors, their status as unsecured creditors limits their voting rights within the CoC during the CIRP. This restricted influence undermines their ability to advocate for their preferences, particularly their preference for the handing over of their property over the advances paid. Additionally, allottees often lack the knowledge that is necessary to assess the endless viability of the corporate debtor, further complicating their participation in the resolution process. Consequently, they may find themselves unable to effectively safeguard their interests or influence decisions that impact the outcome of the insolvency proceedings. Furthermore, when the corporate debtor undergoes liquidation, home buyer's rights as unsecured creditors are severely impacted, with limited funds available for distribution.

To address these problems, *The Insolvency and Bankruptcy Code (Amendment) Act, 2020 (the "2020 Amendment Act")*[36] was introduced. The amendment addresses the imbalance in the treatment of home buyers within the insolvency framework.One significant provision of the 2020 Amendment Act states that the initiation of the CIRP against a real estate CD can only be done collectively, either by at least one hundred home buyers under the same project or at least ten percent of the total number of such home buyer under the same project, whichever is less. This requirement intent to ensure that CIRP petitions are initiated with sufficient support from affected allottees, enhancing the collective bargaining power of home buyers in insolvency proceedings. Besides that, the 2020 Amendment Act requires the dismissal of matters previously filed by individual home buyers if they have not yet been admitted by the AA prior to the initiation of the Amendment Act, unless they're altered to satisfy the prescribed

[36] Siddharth Batra & Abhinav Sood, *'The Insolvency and Bankruptcy Code (Amendment) Ordinance 2020, and Remedies Available To Coeditors'* June 2020 https://www.livelaw.in/law-firms/articles/the-insolvency-and-bankruptcy-code-amendment-ordinance-2020-and-remedies-available-to-creditors-158323 accessed 22 April, 2024

minimum limit within 30 days from the commencement of the amended Act. This provision seeks to streamline the insolvency process by consolidating petitions and encouraging collective representation of home buyers' interests, allowing for more effective resolution outcomes. The Hon'ble Apex Court upheld the constitutional validity of the 2020 Amendment Act. In the case of *Manish Kumar v. Union of India*[37], the first amendment to IBC, introduced the requirement for a minimum threshold of allottees to jointly file a *Section 7* [38]application for initiating CIRP against real estate corporate debtor. The Supreme Court justified this amendment by emphasizing the need to prevent individual allottees from jeopardizing the interests of others and risking the entire project's viability. The court clarified that the amendment's objective was to streamline the working of the Code and promote its underlying objectives. It dismissed arguments seeking to extend the threshold beyond the same real estate project, stating that individual allottees could explore alternative remedies available under other laws. Additionally, the SC clarified the treatment of multiple allotments and joint allotments in calculating the threshold, aiming to ensure a critical mass of persons invoking the Code.

Regarding concerns about different default dates and the condition of allottees compared to operational creditors, the SC upheld the amendment, citing the Legislature's discretion and the fundamental difference in interests between allottees and operational creditors. It stressed the vital interest of allottees in the financial health of the corporate debtor, distinguishing them from operational creditors.

The second amendment, which imposed a thirty-day time limit for pending applications to comply with the minimum threshold requirement, was also upheld by the SC. While acknowledging potential fairness concerns with the time limit, the court deemed it reasonable and necessary to prevent an endless and uncertain procedure. The SC emphasized that withdrawal of the proposed applicant would not hinder the re-filing of the application based on the same default.

However, *Puneet Kaur vs. K V Developers Private Limited* [39] emphasized the importance of including home buyers' claims in the information memorandum, even if they were not filed within the prescribed time frame but were recorded in the corporate debtor's records. The National Company Law Appellate Tribunal decided that overlooking such claims would result in biased and unjust resolution. The complexity faced by home buyers in filing their claims,

[37] *Manish Kumar v. Union of India* [2021] 5 SCC 1
[38] The Insolvency And Bankruptcy Code 2016, s.7
[39] Puneet Kaur vs. K V Developers Private Limited [2022] Company Appeal (AT) (Insolvency) No. 390 of 2022

coupled with the limited awareness of the insolvency process, especially in the case of real estate projects, was acknowledged by the Appellate Tribunal. It highlighted the inability to file claims within the allotted time frame is a frequent problem in the insolvency resolution process for many residential projects. Furthermore, the NCLAT ruled that once allotment letters have been approved and transactions have been received, the real estate firms are expected to furnish ownership of the residences, as well as other linked liabilities. This ruling upheld home buyers' rights to contest their claims and seek redress through the insolvency process.

Currently, home buyers are recognized as unsecured financial creditors under the IBC, capable of initiating a CIRP against a real estate corporate debtor, provided such action is collective. However, this places home buyers behind even ordinary operational creditors in terms of initiating insolvency applications, as operational creditors can initiate proceedings for any default above INR 10 million.

The timeline of events clearly illustrates the special attention given to home buyers as creditors of real estate firms, both through legislative amendments and judicial rulings. These efforts aim to address the unique challenges faced by home buyers within the insolvency framework and ensure their interests are adequately represented and protected. By consolidating home buyer interests, these provisions seek to streamline decision-making processes and promote fair resolutions in insolvency proceedings involving real estate companies.

However, the effectiveness of these measures in practice remains to be seen. While the legal framework has evolved to accommodate the rights of home buyers, the implementation and enforcement of these provisions pose practical challenges. Issues such as awareness among home buyers about their rights, the complexity of filing claims within prescribed timelines, and the coordination required to collectively initiate insolvency proceedings may impact the efficacy of these measures.

Therefore, while significant strides have been made to address the concerns of allottes as creditors, the true test lies in how these provisions are applied and implemented in real-world scenarios. Continued monitoring and evaluation of their effectiveness, along with potential refinements to address emerging challenges, will be crucial in ensuring that home buyers receive the protection and recourse they deserve within the insolvency framework.

IV. REAL ESTATE INSOLVENCY IN OTHER JURISDICTION

In this portion, we will take a glance at the rights available to home buyers under the insolvency system of the U.K, the United States, and Australia.

(A) United Kingdom

In UK Law Commission 2016, *"a consumer prepayment"* is defined as *"payment of goods or services being provided"*.[40]This prepayment could be the entire amount of consideration as an advance or paid in the form of a deposit or gift voucher purchased by the third party. In general, consumer prepayments are payments made in advance of receiving goods or services, and they are subject to a variety of safeguards designed to protect consumers' interests. These protections are crucial in situations where businesses face financial difficulties or enter insolvency proceedings, as consumers risk losing their prepayments without adequate safeguards in place.

One key protection is the ability for consumers to receive refunds from their credit card companies if they have made prepayments using a credit card. This provides consumers with a layer of security, especially in cases where businesses fail to deliver the promised goods or services.

During administration proceedings, administrators may choose to honor gift vouchers or fulfill customer orders as a means of maintaining customer confidence and preserving the value of the business. This ensures that consumers who have made prepayments are not left empty-handed or disadvantaged due to the business's financial troubles.

Furthermore, if a business is sold as a going concern, the subsequent purchaser may opt to honor the down payment made by consumers. This continuation of obligations ensures that consumers receive the goods or services they paid for, even after a change in ownership.

In cases where the customer has already acquired possession of goods, they may claim possession of the goods by paying any outstanding balance to the insolvency practitioner. This ensures that consumers retain their rights to the goods they have already paid for, even in the event of the business's insolvency.

Businesses also have the option to utilize additional protections for consumer prepayments, such as trusts, insurance, and bonds. Trusts allow businesses to segregate prepayment amounts, ensuring that they are kept separate from the business's assets and remain available for consumer refunds or fulfillment of obligations. Insurance coverage can provide further protection for consumers, particularly for specific products or services, although it may be subject to exclusions and conditions. Bonds, commonly used in industries like travel, serve as a guarantee of payment in the event of insolvency, providing consumers with assurance that their prepayments are secure.

[40] Controller Of Her Majesty's Stationery Office, *Consumer Prepayments On Retailer* Insolvency (Open Government License V3.0, 2016) Ch 1 Term of Reference (Law Com No 368) Para 1.5

However, in the absence of such protections, consumer prepayments are treated as general unsecured credit in insolvency proceedings under the *UK Insolvency Act, 1986*[41], *modified by the Enterprise Act, 2002*.[42] This means that consumers may rank equally with other unsecured creditors, potentially receiving only a fraction of their prepayment amounts in the event of insolvency. Similarly to the situation in India, consumers in UK don't receive preferential treatment in the context of insolvent corporate debtors. This means that in insolvency proceedings, the consumers' claims are typically treated on par with those of other unsecured creditors, rather being prioritized above them. As a result, consumers may face challenges in recovering their prepayments or obtaining compensation in the event of business's insolvency, as their claims are subject to the same distribution process as those of other creditors. This underscores the importance of proactive consumer protections and measures to safeguard consumer interests, both within and outside of insolvency proceedings.

The UK boasts a robust framework of protections for consumers, both before and during insolvency proceedings. These mechanisms are efficient, timely, and varied, providing consumers with avenues for recourse in case of financial distress or insolvency of businesses. This indicates that the responsibility for consumer protection does not solely fall on the insolvency regime.

The Law Commission has played an important role in this regard, releasing a report on customer prepayments and retailer insolvency..[43] This report includes recommendations regarding the status of consumers in the insolvency hierarchy, aiming to strengthen consumer rights and protections within the insolvency framework. However, the implementation of these recommendations into law remains to be seen.

The adoption of these recommendations into law would further enhance consumer protection and ensure that consumers are adequately safeguarded in the event of business insolvency. It is essential for policymakers and regulatory authorities to carefully consider these recommendations and take necessary steps to implement them effectively, thereby reinforcing consumer confidence and trust in the marketplace.

(B) Unites States Of America

In this section, we will look at the insolvency and bankruptcy laws that apply to consumers as

[41] Insolvency Act 1986
[42] The Enterprise Act 2002
[43] Department for Business, Energy & Industrial Strategy, *Law Commission Report On Consumer Prepayments On Retailer Insolvency (*Open Government Licence v3.0) ch 3 The Law Commission's Recommendations (December 2018) paras 1-5

creditors in the United States. The primary legislation governing insolvency and bankruptcy in the U.S. [44]is found in Title 11 of the United States Code, commonly known as the Bankruptcy Code. This federal law establishes the procedures and regulations for bankruptcy cases, including *both liquidation (Chapter 7)[45] and reorganization (Chapter 11) [46]proceedings.*

For consumers who are creditors in bankruptcy cases, the Bankruptcy Code provides certain protections and rights, although the priority and treatment of their claims may vary depending on the specific circumstances of the case.

Under the Bankruptcy Code, consumer creditors typically fall into the category of unsecured creditors. This means that their claims are not backed by collateral or assets of the debtor. In bankruptcy proceedings, unsecured creditors are generally paid from the debtor's available assets after secured creditors and administrative expenses have been satisfied. However, the amount that unsecured creditors ultimately receive may be limited, and they may not recover the full amount of their claims.

In some bankruptcy cases, particularly those involving individual consumers or small businesses, *Chapter 13* bankruptcy may be utilized. *Chapter 13* allows debtors to reorganize their debts and create a repayment schedule that must be approved by the bankruptcy court. Consumer creditors may participate in *Chapter 13* proceedings by submitting their claims and potentially receiving payments through the debtor's repayment plan.

The Bankruptcy Code also addresses the treatment of specific types of consumer debts, such as prioritized liabilities (e.g., levies and national support commitments) and dischargeable (e.g., credit card debt and medical bills). These provisions determine how these debts are prioritized and whether they can be discharged or forgiven in bankruptcy.

Chapter 5 of Title 11 of the U.S. code outlines the priorities assigned to specific creditor claims in bankruptcy proceedings. This chapter classifies individual consumers as having unsecured claims against the bankrupt's estate. These claims are ranked seventh in terms of priorities. This provision specifically addresses claims arising from consumer prepayments, such as deposits made for the purchase, lease, or rental of property or services that have yet to be delivered or provided. The maximum amount allowed for such claims is $2,850 per individual.

[44] The Bankruptcy Reform Act 1978

[45]Chapter 7 Bankruptcy Basics https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics accessed 22 April 2024

[46] Chapter 11 - Bankruptcy Basics https://www.uscourts.gov/servicesforms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcybasics#:~:text=A%20case%20filed%20under%20chapter,court%20approval%2%20borrow%20new%20money accessed 22 April 2024

In cases of liquidation, consumer claims under this provision are prioritized seventh among other creditor claims. However, in the reorganization of a corporate debtor, as outlined in paragraph *1129(a)(9) of the U.S. Code*[47], Consumer claimants are entitled to payment in cash equivalent to the actual amount of the claim on the plan's effective date, or in deferred payments of equivalent value.

While the protection provided to consumers under the U.S. bankruptcy framework is limited, it does offer some level of safeguarding for consumer prepayments. Despite being ranked seventh in priority, consumers may receive compensation either in cash or deferred payments during the reorganization of the debtor, ensuring that their interests are addressed to some extent within the bankruptcy process.

Overall, while the bankruptcy system in the U.S. may not provide extensive protections for consumer creditors, it offers a structured approach to resolving debts and distributing assets in cases of insolvency. Consumers facing bankruptcy as creditors should be aware of their rights and options within this framework and seek legal guidance to navigate the process effectively.

(C) Australia

In Australia, the insolvency of corporate debtors is primarily governed by the *Corporation Act*[48]. This legislation sets out the legal system for dealing with corporate insolvency and provides various procedures for addressing financial distress. In Australia, consumers engaged in various financial transactions with a company are classified as 'unsecured creditors' under insolvency law. This classification encompasses several scenarios, including prepayments for goods or services awaiting delivery, deposits made for future purchases, and unused gift cards or vouchers. Additionally, consumers who receive credit notes for returned products and those who provide services or goods to the company without full compensation are included. Furthermore, individuals who extend loans or credit to the company are considered unsecured creditors. Despite their diverse circumstances, these consumers share the characteristic of having financial claims against the company without specific asset backing. While their priority in the distribution of assets may be lower than secured creditors, they are entitled to a portion of the company's assets in insolvency proceedings, subject to legal regulations. As an unsecured creditor, consumers are obligated to register their claims with the administrator or liquidator overseeing the insolvency proceedings. However, in the hierarchy of fund distribution, unsecured creditors occupy the lowest position. Due to their status as unsecured creditors,

[47] Title 11 of the United State Code, s 1129(a)(9)
[48] Corporation Act (No. 50, 2001) 2001.

consumers are relegated to the bottom of the priority list in the allocation of the corporate debtor's assets. Consequently, they face significant challenges in recovering their outstanding debts, as their claims are addressed only after those of secured creditors and other higher-ranking stakeholders have been satisfied. The pressing matter for consumers who have made prepayments was a key aspect examined during the General Insolvency Inquiry. Despite reviewing international practices, the committee did not recommend any alterations to the existing law. Instead, it underscored the significance of equitable distribution among creditors and advocated for minimal priority provisions. This stance, articulated in *Paragraph 771 of the General Insolvency Inquiry*[49], highlights the committee's commitment to fostering fairness and balance in insolvency proceedings, ensuring that all creditors are treated equally in the distribution of assets.

In jurisdictions like the *U.K.* and *Australia,* as well as the *U.S.A.* to a limited extent, special provisions for consumer creditors are not explicitly made within the insolvency framework. However, this absence of specific provisions does not render consumers entirely helpless. These jurisdictions have robust consumer protection regulations in place, which serve to mitigate the potential losses incurred by consumers as an effect of a corporate debtor's insolvency. These consumer protection norms are designed to safeguard the interests of consumers and offer recourse in situations where their financial interests are at risk. While consumers may not have preferential treatment in insolvency proceedings, the presence of comprehensive consumer protection laws provides them with a level of security and recourse in the face of corporate insolvency.

V. HOME BUYER PROTECTION AND INSOLVENCY: BALANCING PROTECTIONS AND PRIORITIES

The pre-insolvency period is critical for consumers who contribute to the enterprise of a corporate debtor, particularly in terms of advances paid. These front payments is often utilized by the corporate debtor for operational purposes, while funds borrowed from financial institutions are typically allocated for long-term investments. Consumer prepayments differ fundamentally from those made by other creditors, as they are primarily intended for consumption rather than profit-making or risk-taking endeavors.

However, consumers face multiple problems when handling prepayments in insolvency situations.:

[49] Susan Thomas, *'Insolvency and Bankruptcy Reforms in India'* (2022) https://pure.jgu.edu.in/id/eprint/4973/1/insolvency-and-bankruptcy-reforms-in-india-2022.pdf accessed 23 April 2024

1. ***Lack of Robust Contracts:*** Contracts with consumers frequently lack strong provisions for dealing with the corporate debtor's insolvency, leaving consumers unaware of available relief and restricting their options for recourse.
2. ***Large Number of Small Claims***: While individual consumer claims may be small in value, the sheer volume of consumers compared to other creditors means that a significant amount is owed to a large group of recipients. This can result in consumer claims being overlooked or ignored initially.
3. ***Financial Burden of Legal Proceedings:*** Legal proceedings, including insolvency processes, impose a economic strain on individual customers who may not have to pay the burden resources of litigation.

Despite these challenges, various jurisdictions have enacted specific laws for consumer protection. For instance, in India, the *Real Estate Regulation Act, 2016* [50]provides safeguards for the interests of real estate consumers. RERA mandates written agreements for sale[51], requires the return of advance amounts with compensation[52], and imposes restrictions on the use of funds collected from consumers.[53]

However, consumer protection frameworks often face challenges in terms of effectiveness and timeliness. Consumer forums tasked with resolving consumer complaints frequently fail to meet recommended deadlines due to potential and resource constraints.

Efforts to address consumer concerns must extend beyond the insolvency stage to include improvements in consumer protection frameworks and contract enforcement. While laws like RERA provide recourse for the pre-insolvency stage, insolvency itself presents unique challenges where resources are limited and the number of claimants exceeds available funds.

The *IBC, 2016* in India attempts to create a distribution mechanism that mirrors pre-insolvency claim priorities. However, trying to introduce additional goals such as consumer safety, as seen in the case of allottees, can complicate the resolution process and potentially discourage participation in the lending market for real estate firms. Balancing the objectives of timely resolution and consumer protection remains a key challenge in insolvency law and policy.

[50] Ms. Mehreen Garg and Prof. Arjya B. Majumdar, 'The Homebuyers Conundrum in Real Estate Insolvency https://insolvencylawacademy.com/the-homebuyers-conundrum-in-real-estate-insolvency/ accessed 23 April 2024
[51] The Real Estate (Regulation and Development) Act 2016, s.13(1)
[52] The Real Estate (Regulation and Development) Act 2016, s.13(2)
[53] The Real Estate (Regulation and Development) Act 2016, s.18

VI. Conclusion

In conclusion, the challenges faced by the real estate industry and home buyers are deeply entrenched and stem from years of fallible financing policies and inadequate consumer safety measures. While attempts have been made to protect home buyers within the insolvency framework, these changes may have broader implications for the entire sector and its stakeholders.

The challenges faced by the real estate sector and home buyers are multifaceted and deeply rooted in historical factors such as flawed financing practices and inadequate consumer protection measures. Over the years, these issues have contributed to a lack of trust and confidence among home buyers, leading to a strained relationship between developers and consumers.

In response to these challenges, policymakers have introduced measures to protect home buyers within the insolvency framework. However, these changes have raised concerns about their broader impact on the real estate sector and its stakeholders. While the intention may have been to provide home buyers with a greater say in the resolution process, the implications of these amendments need careful consideration.

Rather than relying solely on amendments to insolvency laws, a more holistic approach may be warranted. This could involve fully implementing existing sector-specific laws like the RERA, which are designed to safeguard the interests of home buyers. Additionally, there may be a need for reforms in contracting practices and market dynamics to ensure a fair and balanced approach for all parties involved in real estate transactions.

The categorization of creditors as financial, operational and others, including the special provisions for home buyers, has faced legal challenges in various courts. These challenges highlight the complexity of balancing the rights of different stakeholders within the insolvency framework.

Looking ahead, it will be essential to monitor the outcomes of these policy decisions closely. The effectiveness of these measures will determine whether they serve as a model for addressing similar challenges in other jurisdictions or whether there are lessons to be learned for refining India's approach to real estate sector issues. Ultimately, the goal should be to create a more transparent, fair, and sustainable real estate market that serves the interests of all stakeholders, including home buyers.

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