



By Varsha Banerjee  
and Juhi Bhambhani,  
*Dhir & Dhir Associates*



D-55, Defence Colony,  
New Delhi – 110 024  
India

#### Contact details

Tel +91 11 4241 0000

Fax: +91 11 4241 0091

Email: [contact@dhirassociates.com](mailto:contact@dhirassociates.com)

Website: [www.dhirassociates.com](http://www.dhirassociates.com)

## Recognition of homebuyers: Sympathy without security

The fate of homebuyers when a real estate developer (RED) undergoes a corporate insolvency resolution process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC), has been intensely deliberated. An amendment of the IBC through an ordinance of 6 June 2018 recognized the rights of homebuyers in a CIRP by deeming the amounts they pay to a RED to have the “commercial effect of a borrowing”, thus clearly making homebuyers financial creditors.

Homebuyers may now initiate a CIRP and will have representation on the committee of creditors (CoC), under section 7 of the IBC, with voting rights in proportion to the amounts they have paid to a RED. This is reflected in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018, dated 3 July, which lay down a detailed procedure for appointing an “authorized representative” in respect of a class of creditors.

Under this amendment, the interim resolution professional has been mandated to appoint three insolvency professionals to represent the interests and concerns of each class of creditors. The homebuyers being a specific class of creditors, they will be assigned one insolvency professional, who will represent their interests and exercise their voting rights in the CoC, in proportion to their financial debt.

However, despite the changes brought about by the recent ordinance, protection and preservation of the rights of homebuyers lies only in the due approval and implementation of a resolution plan for the RED.

Where the resolution plan is not approved or agreed, the RED will face liquidation.

With resolution of the RED, homebuyers may get their homes or a refund of part of their investment as may be decided by the CoC, where they have representation and voting rights. However, if a resolution plan cannot be finalized and approved, and the RED goes into liquidation homebuyers may get nothing as they will be ranked as unsecured creditors and, with the staggered priority for recovery of dues under section 53 of the IBC, will lose out to creditors with security interest, who have a prior claim over the amounts that are realized from liquidating assets of the RED. Thus, banks and other financial institutions will appropriate to themselves the majority of the RED’s assets, leaving little for the unsecured homebuyers.

One may compare this outcome with the example of shareholders occupying the lower rungs of the distribution mechanism under section 53 of the IBC. They justifiably stand a much lower chance of recovery in the event of liquidation because, as investors in the RED, they have knowingly subscribed to the inherent risk of failure of the RED’s business enterprise.

Thus, owing to the lower priority, if unsecured homebuyers do not recover amounts they have advanced, through the approval of a resolution plan, the IBC and the 2018 ordinance do not in any manner come to the rescue of such homebuyers. No protection has been afforded for recovery during liquidation.

Thus, the IBC and the 2018 ordinance could fail to comprehensively protect the

interests of homebuyers, which prevail at the stage of both resolution and liquidation. For this reason, the scope of the 2018 ordinance is incomplete, its application being limited to only the resolution process, and its provisions may need to be reviewed in a liquidation scenario.

However, the present state of affairs serves as a compelling factor to motivate homebuyers to push for a viable resolution plan in order to recover their dues. The stranded homebuyers of the insolvent Jaypee Infratech are a case in point. They have vehemently opposed a proposal by Jaiprakash Associates to reacquire Jaypee Infratech. The homebuyers have validly argued before the Supreme Court that an entity that is itself insolvent and is debarred by the amended section 29A of the IBC cannot take over the management of Jaypee Infratech. This point is strengthened by the fact that the delay and non-delivery of flats is mostly attributable to the mismanagement by Jaiprakash Associates.

The Supreme Court has been taking into account the concerns of the homebuyers at every stage of the insolvency process. This only serves to emphasize that it is indispensable that the voice and concerns of homebuyers be made part of the entire insolvency proceedings under the IBC.

**Varsha Banerjee is an associate partner and Juhi Bhambhani is an associate at Dhir & Dhir Associates. The views expressed are solely those of the authors and do not constitute definitive advice.**