



I N D I A N E T W O R K



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Development Rights Recognized as Proprietary Right in case of Real Estate Company

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The Insolvency and Bankruptcy Code, 2016 (Code) was enacted with an objective to end the old regime of insolvency proceedings which was time consuming and lead to multiplicity of cases before different forums. However, the Code despite being an economic legislative reform has been subjected to multiple impediments on accounts of various loopholes and lacunas, especially while dealing with the interest of the Homebuyers. Homebuyers as stakeholders gain a lot of significance in case of Company having real estate project since the homebuyers of a real estate project are the people who have invested their money for development of a real estate project.



Resultantly the Code was amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 which inserted an Explanation under Section 5(8) (f) and clarified that payments made by an allottee under a real estate project would be deemed to be a financial debt i.e. a homebuyer will be considered as a financial creditor. With the induction of Homebuyers/Allottees as Financial Creditors, the Code granted much awaited relief to the Homebuyers who now had a right to participate in the Corporate Insolvency Resolution Process (CIRP).

The aforementioned amendment was the need of the hour in view of the unnecessary delays and defaults committed by the Builders, wherein the Homebuyers used to be left in lurch and a dilemma in as much as they were left with limited legal remedies. The legal remedies available to the Homebuyers were time consuming and not stringent which resulted in piling up of the real estate disputes with minimal outcome in favour of the Homebuyers.

However, upon the recognition of Homebuyers as “Financial Creditor” under the Code, the Homebuyers became entitled to initiate the Insolvency Proceedings against the Company (Corporate Debtor) upon meeting the threshold against such Companies which defaulted in performing their obligations. The provisions of the Code enable the Homebuyers or any other Financial or Operational Creditors to put the real Estate Company under the rigors of the Code, wherein the management and assets of the Company will be taken over by a court appointed Insolvency Professional who will ensure the resolution of the Real Estate Company in distress and also ensure the repayment of the debts of the Creditors in a manner as prescribed under the Code.

The process of resolution of a real estate Company under the Code finally facilitating the possession of the dream homes by the Homebuyers is not a simple process and more so, in cases wherein the land upon which the real estate project is being developed does not belong to the Company under the Code. The peculiar issue in resolution process of a real estate Company is with regards to the land that has been allotted to the Real Estate Company by the Local Development Authority (Authority) on lease and there is a default or non-compliance with the terms of the lease deed. The main issue arises as and when the Insolvency Professional who acts as Resolution Professional takes over such leasehold land, pertains to ownership of such lands. As the land has been given on lease to the Real Estate Company in lieu of lease premium, the Authority contends that the land cannot be treated as the asset of the Real Estate Company for the purpose of the Corporate Insolvency Resolution Process (CIRP) as the ownership of the land still vests with the Authority. In the given scenario, it becomes difficult for the Resolution Professional to

⁷ 2019 SCC OnLine NCLT 745

⁸ MA 2385/2019 in C.P.(IB)-02/MB/2018

continue with the CIRP of the Real Estate Company wherein the ownership over the land, which is the most important asset of Real Estate Company is disputed by the Local Authority and in the absence of the land, the fate of CIRP and its successful culmination enabling the Homebuyers to get possession of their homes becomes bleak.

The major roadblock which puts the CIRP in case of a Real Estate Company in prejudice arises in cases where the Local Authority being an Operational Creditor seeks to terminate the lease deed and seek complete ouster of the Real Estate Company from the project land on account of default or violation of the terms of the lease deed. Such an action of Local Authority whereby entire locus of the Real Estate Company to exercise developmental rights over the project land leaves thousands of homebuyers stranded and in a dilemma as on the one hand the Real Estate Company has duped them of their hard earned money by seeking investments for their dream home and on the other hand the Local Authority being the owner of the land parcel refuses to recognise Company's rights by cancelling the lease deed thereby creating hurdle in successful culmination of CIRP which is the only ray of hope for these Homebuyers.

In all such cases, the Local Authority denies the existence of any proprietary rights in terms of the development agreement conferred upon the Real Estate Company on the ground that there is a violation of the Lease Deed or the Company is not the owner of the land (asset). It is noteworthy that the Authority allows the construction of projects for years under their nose while providing all the necessary building approvals and later on raises an objection as to the violation of the terms of the lease deed or to the ownership over the land after a substantial time period has elapsed.

It is not incorrect to say that the Authority is always aware about the projects launched and developed by the Real Estate Companies especially on such land which has been leased out by such Authority. The Authority being fully aware about the progress of the project and violation of any norms or clauses of lease deed remains silent and does not raise any objection till the time lease premiums are paid. However, the real issue arises when the Real Estate Company who is developing the project goes into CIRP and the land which is on lease became a subject matter of CIRP. In such peculiar situations, the Authority started raising objections and claiming ownership over the land without even considering the fate of the homebuyers. The intent of the Authority is to take out the land from the purview of the CIRP on the ground that the same is not the asset of the Real Estate Company and hence, Resolution Professional has no right to deal with such asset during the CIRP and such land/rights cannot be handed over to Successful Resolution Applicant.

The issue of assets being under the ownership of the Companies undergoing CIRP under the Code gained prominence from the judgment passed by the Hon'ble Supreme Court in the matter of *M/s. Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors.* 2019 SCC OnLine SC 1542, '*Rajendra K. Bhutta*' Vs. '*Maharashtra Housing and Area Development Authority & Anr.*' (2020) 13 SCC 208 etc. However, it is noteworthy that the said judgments did not deal with the peculiar case of a Real Estate Company, wherein the homebuyers have interest in form of right to property.

The Hon'ble National Company Law Appellate Tribunal, New Delhi in its recent judgment of *New Okhla Industrial Development Authority v Nilesh Sharma & Anr.*⁹ has settled the issue and granted a much-awaited relief to the Homebuyers while recognizing such development rights of a Real Estate Company. The Hon'ble NCLAT has categorically recognized that the development rights as vested in the Real Estate Company is a proprietary right which can be duly treated under the provisions of the Code. The Hon'ble NCLAT has relied upon Section 3(27) of IBC to recognise such rights, the contents whereof are reproduced hereinbelow:

3(27) "property includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present future or vested or contingent interest arising out of, or incidental to property."

The Hon'ble NCLAT while analysing the said provision in the light of the settled position of law has concluded that where Development Agreements create an interest in property, they may specifically perform, but not otherwise. In view of the same the development rights vested in the Corporate Debtor is a proprietary right and the rights under the Joint Development Agreement (JDA) fall within the definition of the term 'Propriety'. Further, the Hon'ble NCLAT also relied upon the finding of the Hon'ble Supreme Court in 'Rajendra K. Bhutta' Vs. 'Maharashtra Housing and Area Development Authority & Anr.' (2020) 13 SCC 208 wherein it was categorically held that as the development rights constitute the property of the Corporate Debtor, no attempt to dispossess the developer can be made by the landowner/authority during the CIRP in terms of Section 14(1)(d) of the Code.

Further, the Hon'ble NCLAT also relied upon Section 4(2) of the RERA Act, 2016 in terms whereof it is mandatory for a real estate project to get approval of the Competent Authority before getting a certificate of registration in terms of the provision of RERA Act, 2016 to give legal recognition to the project and consequential development right. In the given case the project of the Corporate Debtor was registered with the UPRERA and NOIDA had been categorically shown as the Competent Authority who had approved the building plans and commencement certificate which makes it clear that NOIDA has always been aware about the project of Corporate Debtor and at this stage, they cannot allege that the Corporate Debtor is a total stranger as the said land was leased out to another entity by the name of Logix.

The Hon'ble NCLAT after detailed deliberation recognised the development rights which accrued in favour of the real Estate Company. The judgment of the Hon'ble NCLAT is much appreciated and is a positive step towards giving legal recognition to the rights of the homebuyers who have to continue to face harassments first by the Company and then by Local Authority.

The judgment of the Hon'ble NCLAT is indeed subject to challenge before the Hon'ble Supreme Court, however, for the time being the homebuyers can have a limited sense of relief towards fulfilment of their dreams of owning their own house. The object and purpose of the Code ought to be read in a harmonious and purposive manner to fulfil this dream of the homebuyers.

⁹ CA (AT) (Ins) No.288 of 2021, judgement dated 08.03.2022