

Treatment of Homebuyers under IBC & Related Case Laws

Megha Mittal
Vinod Kothari and Company

Kolkata:

1006-1009, Krishna
224 AJC Bose Road
Kolkata – 700 017
Phone: 033 2281 3742/7715
Email: resolution@vinodkothari.com

New Delhi:

A-467, First Floor,
Defence Colony,
New Delhi-110024
Phone: 011 6551 5340
Email: delhi@vinodkothari.com

Mumbai:

403-406, Shreyas Chambers
175, D N Road, Fort
Mumbai
Phone: 022 2261 4021/ 3044 7498
Email: mumbai@vinodkothari.com

Website: www.vinodkothari.com

Copyright & Disclaimer

- The contents of this presentation are only for the purpose of academic discussion.
- No circulation, publication, or unauthorised use of the presentation in any form is allowed, except with our prior written permission.
- No part of this presentation is intended to be professional advice, or solicitation of professional assignment.



About us

- *Vinod Kothari and Company, consultants and advisors*
- *Based out of Kolkata, New Delhi & Mumbai*
- *We are a team of consultants, advisors & qualified professionals having over 32 years of practice.*

Our Organization's Credo:

Focus on capabilities; opportunities follow



Agenda



Home-Buyers under IBC

Case Study I – Amrapali Group

Case Study II – Jaypee Infratech

Role of NBCC

Challenges faced & Road Ahead



Home Buyers under IBC

Who is a 'Home-buyer'

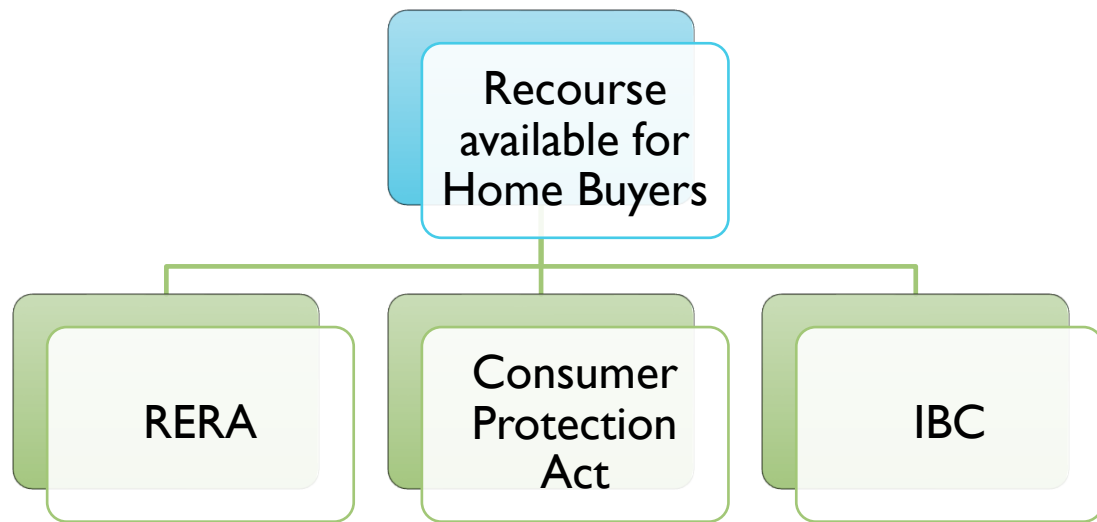
- Referred to as 'Real-Estate Allottees' under IBC
- Explanation (ii) to Section 5 (8) (f) –

“allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016

The 'Real Estate Project' as defined under RERA must be registered with the Regulator – failing which the allottee shall not fall under the scope of RERA and/ or IBC

- **Meaning of Allottee under RERA [Sec. 2(d)]-**
“allottee” in relation to a real estate project, means
 - person to whom a plot, apartment or building, as the case may be, has been
 - allotted,
 - sold (whether as freehold or leasehold) or
 - otherwise transferred by the promoter,
 - and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise
 - but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

Recourse Available for Home-Buyers



- Home-buyers may decide to proceed before any of the three forums;
- Motive is the deciding factor : recovery/ reorganisation
- IBC does not allow application for recovery. Thus,
 - Where objective is recovery – No IBC
 - Home buyers may proceed under RERA/ Consumer Protection Act
 - Application under IBC –
 - Home buyers must prove that they have lost faith in management & reorganisation of the company is desired

Application under IBC

- Home buyers are identified as Financial Creditors [Explanation (i) – Section 5 (8) (f)]
 - Hence, application for initiation – u/s 7
 - W.e.f. 6th June, 2018 – IBC (Second Amendment) Act, 2018
- **Insolvency Committee Report – forward sale contract** (*Nikhil Mehta v. AMR Infrastructure*)
- **Minimum threshold for filing application**
 - Application must be filed jointly, by at least –
 - one hundred of such allottees **under the same real estate project**; or
 - 10% of the total number of such allottees **under the same real estate project**
 - whichever is less
 - Introduced by IBC (Second Amendment) Ordinance, 2019; thereafter, IBC (Amendment Bill), 2020 w.e.f. 13th March, 2021

Classification as financial creditors was challenged in *Pioneer Urban Land and Infrastructure Limited & Anr – Hon’ble SC upheld classification as FCs.*

[see analysis of the SC Order at - [Home-Buyers in the IBC: Square Pegs in Round Holes?](#)]

Minimum threshold criteria was upheld by Hon’ble SC in *Manish Kumar v. Union of India*

[see analysis at - [IBC Passes Another Test of Constitutionality](#)]

Voting under IBC

- The home-buyers will constitute a ‘class of creditors’ – as such, must appoint an Authorized Representative-
 - Any IP who is eligible as per CIRP Regulations
- Voting share of an individual home-buyer shall be proportional to his/ her dues;
- The AR shall first circulate the agenda and seek preliminary views
 - This enables the AR to make representations at the meeting
- After the meeting, the AR will circulate the minutes as received from the RP
- **Voting** – The AR shall cast the vote
 - on behalf of all the financial creditors he represents
 - in accordance with the decision taken by a vote of more than 50% of the voting share of the financial creditors he represents.
 - In case of voting for withdrawal – voting to be done on behalf of individual FC



SILICON CITY

Case I - Amrapali Group

Background



2000-2003

- The Amrapali Group started building projects with low costs & affordable prices



By 2011

- The group was unable to deliver possession of flats
- Also failed to pay the dues of the land (over INR 500 Crores)



2016 - 2017

- Bank of Baroda initiated CIRP against Amrapali Silicon City Private Limited
- Application filed for over INR 70 crores - Admitted on 4th September, 2017



2017-18

- Bikram Chatterjee, a home buyer, raised protest - By 2018, he was joined by over 30,000 home buyers
- Amrapali Group had allotted only 12000 flats out of the 40000 flats across several projects
- **Hon'ble SC took Charge**



2018-2021

- SC passed several orders – passing directions against the directors; group cos; auditors
- **NBCC was brought into picture to take over completion of projects (12.09.2018)**

Terms of Agreements – Key terms

- **Terms of the agreement between CD and Homebuyers**
 - Company can mortgage the flats/ building/ land & allottees will have no objection
- **The land was taken on lease from NOIDA Authority & Greater Noida (Authorities)**
 - Terms of lease – the lease shall be cancelled on non payment of half-yearly rentals
 - Only 10% was paid at the time of obtaining the lease – rest remained underpaid for 10 years
 - Authorities took no steps – the lease of land continued
 - Authorities had first charge on the land/ building/ flats
 - The company could not mortgage it further without NOC from the Authorities
- **Loans from Banks**
 - The Banks were given second charge on land/ building/ flats – NOC was to be taken
 - Authorities gave a conditional NOC – No mortgage until all payments done
 - Hence, no clear mortgage was made.
 - The loans from banks were **NOT** used for construction
 - The forensic audit report noted that the amount of over INR 5,000 crores was siphoned
 - Given to employees
 - Family weddings
 - Tax liabilities of the employees etc.

Observation of the Apex Court

- **Failure of Authorities and financial institutions in ensuring proper conduct**
 - Failure of authorities in taking appropriate action against delayed construction
 - Failure of banks in satisfying proper utilisation of funds
 - The Authority gave a faulty and conditional NOC
 - Banks did nothing to obtain a clear NOC; no mortgage was ever created under law
- **Hence, it was held that**
 - Recoveries from sale of unsold flats – shall be utilised for payment of interest to home buyers
 - Banks & Authorities – since their loan was not used by the Company for construction
 - Banks will be entitled to get their dues from the attached assets of the group company and directors
- **Actions against the CD & Amrapali Group**
 - Bank accounts and assets of the 40 group companies were freezed
 - Personal assets of the directors of all group cos. were also freezed
 - RERA license – cancelled
 - Lease agreements cancelled
 - Enforcement Directorate ordered to conduct investigation

Curative orders

■ Position of NBCC with regard to projects

- NBCC was brought into picture after the Amrapali Group failed to honour its completion affidavits
- Thus, NBCC was made in-charge for completion of projects - commission 8%
- However, NBCC was being made party to several complaints and litigation by home buyers. Court directed that –
 - Progress updates to be given to Receiver (appointed by Court)
 - Not responsible to handle individual buyer's queries
 - No legal actions, summons etc can be issued against it

■ Discharge of loan amounts to home buyers

- Many home buyers had taken loans from banks for purchasing flats
- Banks were not issuing remaining part of the loans
- Court ordered financial institutions to release loans to homebuyers
- Irrespective of RBI's direction with respect to NPA (non-performing asset);
- Stage wise and long term loan restructuring to ensure home buyers are in a position to repay

■ Authorities' action against Home buyers

- It was held that the Authorities **CANNOT** demand dues from Home buyers
- **CANNOT** demand lease rentals or money from the Home Buyers

Current Status

- NBCC has put over 3,000 flats for sale to fund further completion needs
(updates available at - <https://receiveramrapali.in/home-buyers/>)
- Guarsons will pitch in and assist NBCC to complete several projects
- Work is still ongoing –
 - As per the progress updated by the Court Receiver (See above link), projects are anticipated to be complete by 2023



JAYPEE GREENS
WISH TOWN
NOIDA
INTEGRATED CITY

The image shows a large green sign with white text, tilted upwards. The sign is mounted on a grey pillar. In the background, there is a modern building with a glass facade and some trees. The sky is overcast.

Case II - Jaypee Infratech

Sequence of Events

Default in payments to banks and possession to homebuyers

CIRP initiated on 9th August, 2017

18th August- Clarification by IBBI for home buyers to file claim as other creditors

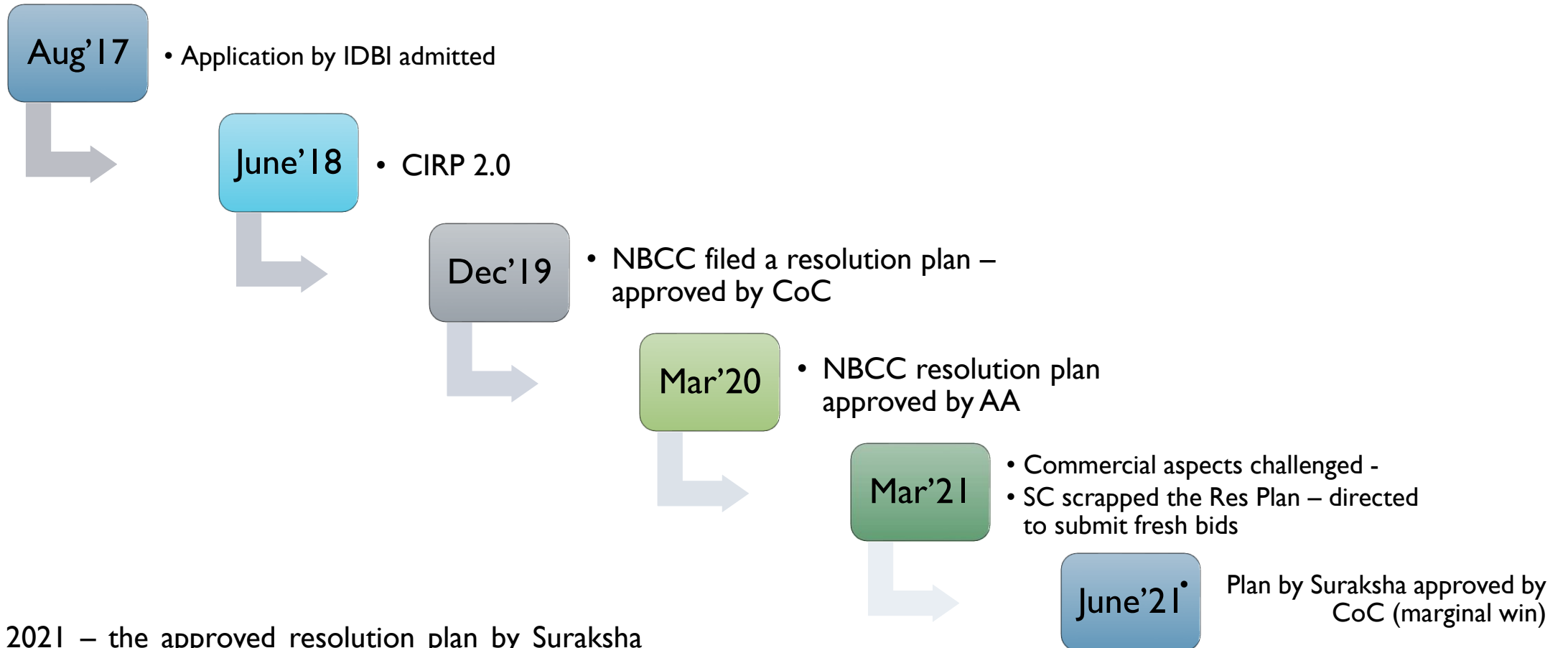
6th June, 2018 – Home buyers- Financial Creditors – CIRP 2.0

IDBI Bank Limited filed application

16th August – form introduced for claims by 'Other Creditors'

11th September, - SC modified its earlier stay order – **directed for appointment of a home buyer representative in the CoC**

CIRP 1.0 to 3.0 – The Long Journey



On 8th July, 2021 – the approved resolution plan by Suraksha has been submitted before NCLT for approval

Key Concerns

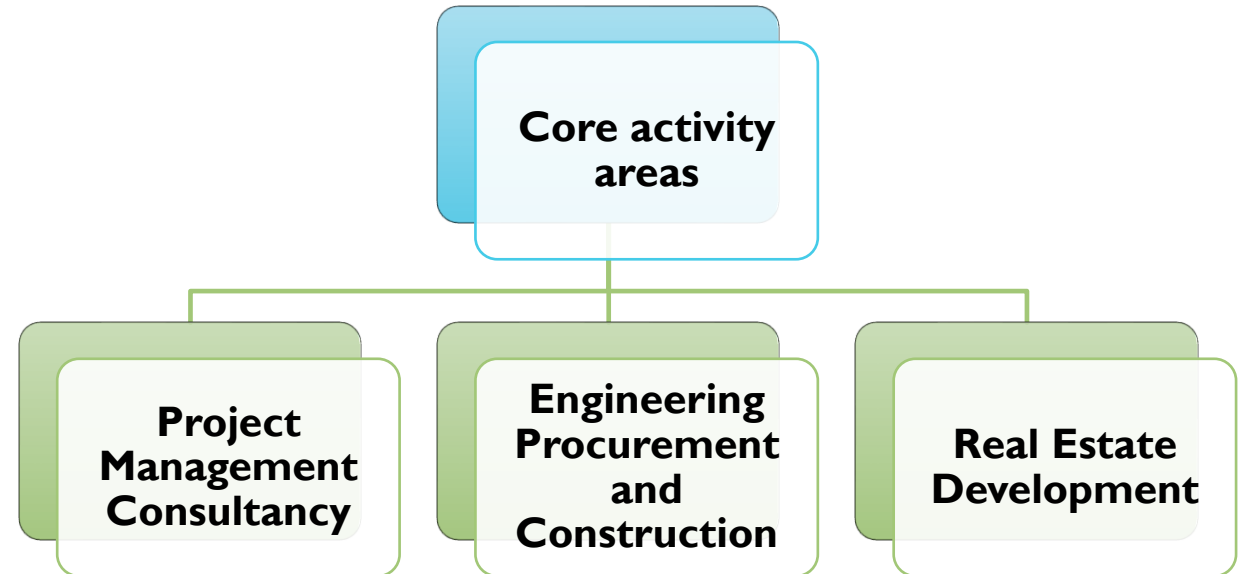
- **AA's power to modify plans**
 - **CoC – the protagonist in approval of Resolution Plan**
 - Resolution Plan to be approved by CoC
 - Adjudicating Authority cannot modify
 - Not even if basic structure remains un-altered
 - May give directions for certain modification (Essar)
 - Maximisation of value and commercial viability
 - Left to assessment and enquiry by CoC
 - Defects in resolution plan
 - Adjudicating Authority to direct re-submission
- **Simultaneous voting on two resolution plans**
 - Not restricted under the prevailing law at that time
 - Further clarification vide amendments w.e.f 7th Aug, 2020
- **Payment to dissenting creditors**
 - To be made in cash only – Hence NBCC's plan was rejected
 - Cannot be made in kind (equity, land etc)
- **Dissenting home buyers as dissenting creditors**
 - Homebuyers to vote as a class of creditors
 - Represented and voting done by authorised representative
 - More than 50 % (57.66% in present case) deemed to be 100 % approval
 - Bound by the terms of resolution plan



Role of NBCC

Introduction to NBCC

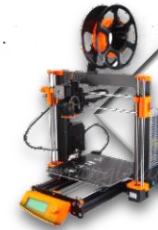
- Incorporated as National Buildings Construction Corporation Limited (NBCC)
- Presently NBCC (India) limited
- Government of India *Navratna* enterprise
- Concerned ministry – Ministry of Housing and Urban Affairs
- Listed on both NSE and BSE
- Have national as well as global presence
- **Playing the role of a facilitator as well as acquirer**



Role of NBCC in CIRP

- Major resolution applicant in CIRP of corporate debtors involving home buyers
- Resolution Plans are generally in favour of home buyers and provides for re-possession rather than refund
- Have entered into value added ventures with various parties to facilitate efficiency and efficacy
 - Adoption of non-tectonic system for faster construction
 - Process innovation in recycling of treated water
 - Composite design technology ensuring
 - High quality
 - Safety
 - Faster delivery
 - Reducing adverse pollution impact

Exploring opportunities in -




Suitability of 3D printers in low cost housing schemes



Highly energy efficient technology for adoption in construction of Green Buildings



Development of electric vehicle charging infrastructure



Challenges & Road Ahead

Challenges Apprehended

- **Banks may charge more for loans** if their recovery rates in the event of insolvency are going to be lower;
 - another layer of distribution, which was not factored in at the time of origination of loan to the developer
 - **Is the framework of the Code prejudiced?**
- **Practical Difficulties**
 - Many practical difficulties like
 - initiation of proceedings;
 - collating the claims and interests of the min. no. of allottees
 - Disparity in date of default
- **The Home-Buyers' threshold – A need for trade-off**
 - 10% or 100 (whichever is lower) real state allottees of one project – can initiate proceedings
 - Proceedings are against the whole company
 - May not be balanced
 - What about the interest of the other home buyers ?
 - 10% of the total allottees of the companies?
 - A very easy feat to achieve
 - Would jeopardize the company
 - The intent of introducing thresholds would be frustrated

Were highlighted in *Manish Kumar v. UOI*. However, SC held that practical *difficulties* would furnish a ground to strike down a law

The 'SWAMIH' Fund

- In 2019 – CG initiated '**Special Window for Affordable and Mid-Income Housing Fund**' (SWAMIH)
- CAT II AIF – with corpus of Rs. 25,000 crores
 - To complete 1,500 stalled housing projects
 - To provide 4.58 lakhs units
 - Manager – SBICAP Venture
- The first example of successful project –
 - Rivali Park, Suburban Mumbai
- A booster for Resolution Applicants who take on to complete the pending projects
- Would indirectly benefit home buyers to get their long pending homes