

OUTLOOK BUSINESS

THINK BEYOND. STAY AHEAD

INSOLVENT BUILDER DEJECTED BUYER



THE INDIAN HOMEBUYER, ESPECIALLY IN THE NATIONAL CAPITAL REGION, DOES NOT HAVE A HOME. THEY SPEND TIME EITHER IN COURTS OR GOVERNMENT FORUMS IN AN ATTEMPT TO CLAIM THE HOME THEY WISHED AND PAID FOR. HOWEVER, THE BUILDER IS BANKRUPT, AND NEITHER THE COURTS NOR THE GOVERNMENT KNOWS HOW TO PROCEED

»» Jeevan Prakash Sharma

The Indian real estate sector is in a mess. Homebuyers are forever waiting for builders to deliver their homes, but builders seem to express their helplessness in completing long pending projects and take the insolvency route. Ever since the Parliament made the insolvency law, beleaguered real estate companies have been dragged into the bankruptcy litigation, and some of them have even used it to fend off suit from projects they cannot or do not want to handle anymore.

Resolving the insolvency of a real estate company, while ostensibly safeguarding the interest of homebuyers, has emerged as one of the biggest challenges for courts, governments and policymakers.

This situation has not emerged overnight. It is the culmination of years of corruption, disregard for housing needs by development authorities in collusion with builders and long winding judicial processes.

Shattering a Dream

A housing real estate sector in 2008-09, particularly in the National Capital Region (NCR) of Delhi, attracted millions of people to invest their hard-earned money into various housing projects. However, the non-existence of a regulator and corruption in development authorities prompted many builders to divert homebuyers' money for activities other than construction.

So, when the real estate sector witnessed a sharp around 2023-24, and many projects remained incomplete even after several years of their launch, impacted buyers started filing cases in courts for compensation, refund and delivery of their promised apartments.

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The NCR Mess: Homebuyers Can't Live In Despite years of wait and involvement of the Supreme Court, there are no checks for homebuyers in the National Capital Region

| UNITECH | RESOLUTION VEHICLE | STATUS |
|--------------------------------|--------------------|------------------------------------|
| SC-appointed directors | | Construction stalled for 2.5 years |
| BUYERS IMPACTED | 19,000 | |
| AMRAPALI | RESOLUTION VEHICLE | STATUS |
| SC-appointed court receiver | | Slow progress |
| BUYERS IMPACTED | 40,000 | |
| JAYPEE INFRA TECH | RESOLUTION VEHICLE | STATUS |
| IBC proceedings | | Deadline for 5 years |
| BUYERS IMPACTED | 22,000 | |
| SUPERTECH | RESOLUTION VEHICLE | STATUS |
| Reverse insolvency proceedings | | Buyers unhappy with moratorium |
| BUYERS IMPACTED | 11,000 | |
| KALYPSO COURT (JAL) | RESOLUTION VEHICLE | STATUS |
| Section B of RERA | | Project completed in two years |
| BUYERS IMPACTED | 274 | |

A turning point of sorts for the sector came in 2017, when, on the one hand, the Congress passed the Real Estate (Regulation and Development) Act (RERA) that made it mandatory for states to appoint a regulatory body for the real estate and, on the other, the Insolvency and Bankruptcy Code was enacted, which envisaged efforts to maximize the value of a bankrupt company's assets and resolve its insolvency.

The introduction of a real estate regulator salvaged the situation to an extent. However, in the time regulatory frameworks were set up in states, the sector was in a deep state of crisis, and courts were flooded with cases of real estate fraud and misappropriation of funds.

One can imagine the extent of fragmentation in the sector from an analysis that started earlier out in 2017 of all the cases filed in the Economic Offence Wing of the Delhi Police. More than 90% of IIRs registered in that year were found to be related to fraud in the real estate sector.

The Jammed Wheel of Justice

A large number of real estate firms have invoked the insolvency law over the years. However, it success rate is not encouraging, especially when it involves big real estate companies.

Take the case of government real estate company Jaypee InfraTech Limited in Noida. Like many other companies in the sector, it is facing corporate insolvency resolution process (CIRP) in the National Company Law Tribunal (NCLT). It has been more than five years since the NCLT authorized, under the appointment of an interim resolution professional (IRP) in May 2016, to replace the directors of the company on August 1, 2017. However, the resolution process is still going on. As per the law, it should have been over in 45 days, but at its current legal status, it will not finish for another few years.

After Jaypee invited interested parties with resolution plan, a volley of cases was filed in the

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Supreme Court on several contentious issues. One concern was that due to these litigations, the CIRP process could not be completed within the specified period of 360 days.

Ashish Gupta, one of the homebuyers in the project and petitioner in the Supreme Court, says, "There are about 20,000 flats in the Jaypee InfraTech project, out of which over 3,000 flats were already constructed and delivered to homebuyers before the beginning of the CIRP. In the last five years since the appointment of the IRP, 1,000 more flats have been constructed."

There was a ray of hope for homebuyers when, on November 6, 2019, the apex court settled most of the litigations around the project and asked the IRP to complete the CIRP in 90 days. However, since then, there has been a legal ping-pong involving the Supreme Court, the NCLT, NBCC and Sunilokha. The last entry's plan was eventually submitted to the NCLT, where it is pending approval.

Among 22,000 homebuyers, are still waiting for their flats for more than a decade in this project. If the legal process around the resolution plan steps at this pace, then homebuyers will continue to face mounting trauma. The ongoing legal process at the NCLT involves the Vinayak Expressway Industrial Development Authority (VIDIA), KICL Bank, Bank of Baroda and Jaypee Associates Ltd, out of which only VIDIA has completed its application to court.

The CIRP appears to be a long process to many, but some observers feel that this is the correct way to resolve such projects. Aksh Kamra, an advocate and veteran of insolvency matters, says, "If the [insolvency] law is followed strictly without giving any leeway to anyone, I do not think the CIRP will fail."

However, homebuyers feel that the final approval of the resolution plan will take place in the Supreme Court only, and it will take a lot of time for that process to reach there and get completed.

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Insolvency Innovation for the Builder

The resolution of real estate projects under the insolvency law has given rise to a debate about its ability to maintain strict timelines. Many

legal experts feel that the CIRP is successful in cases where the project size is small. But, in big projects, due to the involvement of a large number of homebuyers and other stakeholders, pressing competing interests in courts delay the whole process indefinitely.

While the Jaypee InfraTech case is ongoing along in courts, the National Company Law Appellate Tribunal (NCLAT), the appellate body for NCLT judgments, passed an order in the Supreme Insolvency case which is being seen outside the purview of the insolvency law. The NCLAT ordered to initiate the CIRP in the whole company, but it asked the IRP to form a committee of creditors (CoC) for only one project, Kurliga II in Greater Noida. The builder has over 20 such projects in various locations in the NCR.

This constitution of CoC for one project instead of all is against the regular practice of the CIRP. In the last two years, the NCLAT has passed similar orders in other cases as well. This is being termed "reverse CIRP" in legal circles.



THE [Unitech] board pleads for immunity against any misdoing in every hearing. It does not have any teeth or hunger [to hurry the process]. Since... [the directors] have been appointed by the court, they look at it for every decision

AMIT GUPTA Homebuyer and Petitioner in the Unitech Case

Legal and corporate experts say that the NCLAT might have experimented a little with an intent to safeguard the interest of all stakeholders. However, no such provision exists in the Insolvency and Bankruptcy Code of 2016. "The so-called reverse CIRP has been a debatable thing, as the existing insolvency law does not apply on anything so thin. It is some sort of [judicial] window," advocate Vinit Rao from Integral law firm says.

Legal experts agree that the NCLAT has eroded the law. However, they say that it presents a better solution than what is provided in the existing law. "I think that the NCLAT has done it in the interest of homebuyers," says advocate M.L. Lakshy. He feels that the tribunal is of the view that if these projects are running well, there is no need to disturb them. "So, it has ordered to constitute CoC only for one project," he adds.

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Sectoral Distribution of CIRPs*

After the Insolvency and Bankruptcy Code, 2016, was enacted, insolvency tribunals are deluged with bankruptcy claims. While the manufacturing sector is the most affected, realty firms form a sizeable portion of companies under insolvency proceedings.



continuation of pending cases, recovery, etc., are prohibited. "When the insolvency resolution proceedings are only in the case of one project of the company, why should the whole company get the benefit of Section 23(2) in benefit to the builder, but homebuyers who are into litigation against the company in other projects suffer," insolvency advocates say, requesting anomaly.

He feels that the reverse CIRP doctrine benefits real estate promoters in ways more than one and puts homebuyers and financial creditors at a disadvantage. "Just imagine what happens in case a sick project goes into liquidation. The project's financial creditors, such as banks, will lose their money. On the other hand, the value of other projects will be maximised for the benefit of the company. This is a winning situation for the real estate company, but not for all stakeholders," he adds.

This class of experts feels that the primary use of the CIRP is the maximisation of assets of the whole company, thereby finding a balanced resolution for the entire company and its creditors, and not just a selected few, something that the reverse CIRP doctrine negates.

Insufficient Redress

While the Jaypee InfraTech case is being dealt with under the insolvency law, the irregularities of the Amrapali real estate firm took a divergent course despite the initiation of the CIRP as the petition

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ALL CRUCIAL DECISIONS ABOUT BANKRUPT REAL ESTATE COMPANIES EVENTUALLY END UP IN THE SUPREME COURT. OVER THE YEARS, AS BENCHES CHANGE, NO ONE DOMINANT JUDICIAL PRECEDENT IS VISIBLE IN MANAGING INSOLVENCY CASES OF LARGE REALTY FIRMS

For instance, one of the allegations against Amrapali was that it offered huge discounts to influential people and sold flats at throwaway prices to oblige them, causing financial losses to the company. In the process of making recoveries for that under-valuation, the court receiver is making even these homebuyers liable to pay who had got a genuine discount of Rs 100 to Rs 200 per square feet from the builder.

Chalvresh Jain, a civil engineer, who often consults in real estate matters, is one among the Amrapali homebuyers. He says that the apex court has entrusted the court receiver with several responsibilities, such as arranging funds from the bank, selling of Amrapali's assets to create a fund and monitoring the construction work of NBCC, among others. "I think the court receiver has failed on all counts. He could arrange only Rs 1,000 crore, which is not enough to complete the project," Chalvresh alleges.

Another buyer, Jagdish Singh, agrees with Chalvresh and says that the court receiver does not have the kind of team and human resource one needs to deal with a huge company like the Amrapali Group. "The court receiver has a small team of lawyers, and his insufficient staff is incapable to deal with the complaints of 42,000 homebuyers. As a result, buyers feel frustrated due to delay and judicial grievance reduction mechanism from the office of the court receiver," Singh says.

SOME EXPERTS FEEL THAT THE PURPOSE OF THE CIRP IS MAXIMISATION OF ASSETS OF THE WHOLE COMPANY AND NOT JUST A SELECTED FEW, SOMETHING THAT THE REVERSE CIRP DOCTRINE NEGATES

When contacted, Venkataramani said that a lot of work has happened since he took over and he wanted to concentrate on his work rather than responding to queries.

It is not that all homebuyers are unhappy with Venkataramani's efforts. Ganesh Anand, president of the management committee of Amrapali

of Bank of Baroda. Amrapali homebuyers filed a petition in the Supreme Court because the initiation of the CIRP allowed a moratorium on further litigation, due to which no court case against the builder could go on.

On July 28, 2023, the Supreme Court passed a well-reasoned order under which it replaced the petitioner of the company with a senior advocate R. Venkataramani as the court receiver. Around 42,000 homebuyers heaved a sigh of relief.

The apex court also appointed the government-owned construction company NBCC to complete the company's pending projects. Today, when more than three years have gone by, the buyers feel that the court receiver has not only failed to live up to their expectations but added new problems.



I strongly disapprove of the way the Amrapali, Unitech or Jaypee [cases] are being handled. There exists a complete composite scheme under RERA... In Uttar Pradesh, stalled projects have been completed under the provisions of RERA

VIKAS SINGH Senior Advocate

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has spent a lot of time on ancillary cases, such as the Enforcement Directorate case, to look into spreading of money or allegations of the Chandras inflicting jail authorities, among others. These cases overshadowed the issue of homebuyers' interest," says a homebuyer.



Jaypee, Amrapali and Unitech were exceptionally big and complicated projects, but in other approaches can be worked out of homes to buyers in of utmost priority and must be done on time

MANOJ GAUR CMD, GAUJRS GROUP

The Supreme Court replaced the Chandras with the government-appointed nominee in the board of directors that included top names such as NBCC ex-chairman A.K. Mittal, HDPC managing director Irena Sud Karnad, former managing director of the State Bank of India, B. Sriram and Narayan Hanumanth of the Hindustani Group.

The apex court also appointed former Supreme Court judge Justice A.M. Sapre to assist and approve the plans and decisions of the board. Besides, it involved another agency, Regency India Limited, to manage the payments and costs of the construction plan that the board approves, which is stated to resume in February 2024 with a deadline of completion of all projects within eight to 10 months.

Given the legal proceedings against the Chandras, the board wants to tread with caution and safeguard its interests. "The board members for insolvency against any misdoing in every hearing. It does not have any teeth or hunger [to hurry the process]. Since they have been appointed by the court, they look at the court for every single decision," says Ash Gupta, a petitioner who represents the hopes of Unitech's Supreme project in Gurgaon.

The Quasi-Judicial Model

The real estate community acknowledges that the across rate of the CIRP is low, an impression verified in a report published by Grant Thornton in February 2023. It says, "[T]he number of cases being resolved for real estate under the IBC currently stands at just about 5% of those admitted." The corresponding success rate in all cases being resolved under the insolvency law is 16%.

Experts say that the solution to stalled real estate projects should be explored outside the insolvency law. Senior advocate Vikas Singh says, "I strongly disapprove of the way the Amrapali, Unitech or Jaypee [cases] are being handled. There exists a complete composite scheme under RERA. There is a number of housing in these stalled projects. In Uttar Pradesh, stalled projects have been completed under the provisos of RERA. I think that that is the only way a default of the

THOUGH BANKS MAY GET THEIR MONEY BACK WITH SMALL OR HEAVY HAIRCUT, INORDINATE DELAYS IN PROJECT COMPLETION AND FINANCIAL LOSSES MAKE HOMEBUYERS THE ULTIMATE LOSERS

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Moreover, 50% of the directors have excused themselves from completing the trusteeship job. "Their resignations have caused huge uncertainty among buyers," a homebuyer says.

Homebuyers allege that since the rescue process has not started yet, everything looks tentative. They say that the biggest challenge might be the cash flow. In case the available funds fall short of the bids that will be received to complete the project. Moreover, it has been more than three years since the Supreme Court took up the case. But, to date, only tentative plans have been put in place, and no construction activity has resumed as the stalled projects.

There are observers who disagree with the whole resolution approach taken by the Supreme Court in this case. "I think that it would have been better had the CIRP been initiated in the Unitech case. At least, the construction process would have begun, even if at a slow pace," a senior financial consultant says, requesting anomaly. Gupta notes that over the apex court knows that it made an exception. "The court itself has said in one of the orders that the process that it has followed in the Unitech case will not be adopted in the case of any other company," he says.

THE STAKEHOLDERS FEEL THAT THE LESSON LEARNED FROM EXISTING RESOLUTION MODELS IS TO INVOLVE THE BUILDERS IN THE COMPLETION OF THE STALLED PROJECTS

On the face of it, this approach looks a realistic solution, but experts say that its success largely depends on the very positive and cooperative attitude of the builder. R.L. Pathak, a senior officer of the Uttar Pradesh regulator, says that all stakeholders should promise this model. "When a builder's insolvency lands in the NCLT, all stakeholders suffer a loss, because say other company that offers a resolution plan proposes a heavy haircut on the debts of financial creditors, like banks. Not only that, development authorities, having operational creditors, lose their dues, too," he says.

The cooperation of the real estate developer is quite another story though. The roots of the NCR real estate mess lie in builder's inability or unwillingness to complete projects on time or over. The various judicial solutions and the RERA route involve raising extra funds to complete projects. The bankruptcy proceedings essentially emerge from the lack of funds. Who provides these extra funds, if it is possible at all in the situation that promoters and owners need to address without equanimity. Though banks may get their money back with small or heavy haircut, inordinate delays and financial losses make homebuyers the ultimate losers. Unfortunately, even courts have failed in their duty to fix legal responsibility on those who have deceived homebuyers their rights to enjoy their property. "If a clear framework emerges to resolve these issues, homebuyers are likely to stay where they are,"

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