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Interests of the homebuyers seem to have travelled from being 'orphaned' to a 'secured child'. The struggle continues to become the 'preferred child'

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The foremost question for determination upon the advent of the Insolvency and Bankruptcy Code, 2016 (IBC) has been its sizeable and sweeping impact upon the anxious and frictional relationship between homebuyers and builders amidst an environment of delayed and incomplete real estate projects.

As jurisprudence on the subject rapidly and incessantly evolves, it becomes greatly significant to take stock on whether the homebuyers' desperation for recognition as an aggrieved class coupled with the amendments in law have had the force of 'liberating' the homebuyers from their position of uncertainty and vulnerability and the effects of the same on the market.

1. The homebuyers' ability to initiate the corporate insolvency resolution process (CIRP) against a builder/developer;
2. In case of liquidation, the homebuyers role in the committee of creditors making the resolution plan; and
3. The homebuyers' precedence in receiving payments in comparison to other creditors in the process of distribution of assets.

In the nascent stages of the Code, in and around February to August 2017, home buyers flocking to the National Company Law Tribunal (NCLT), the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court were deemed as 'orphaned' and even struggled to be considered as a creditor under the Code. Various cases such Col Vinod Awasthy v. AMR Infrastructure [NCLT, Principal Bench, Delhi], Pawan Dubey v. JBK Developers, [NCLAT and SC] to name a few, did not provide homebuyers an entry to seek reliefs under the Code. In fact, they did not even have a designated form under which they could file their claims.

The first shift occurred by an amendment in the Insolvency Resolution Process for Corporate Persons Regulations, 2016 introduced on August 16, 2017 that for the first time, allowed homebuyers to raise their claims to the insolvency professional by filling a Form F titled 'Claim by other Creditors.' Thus, although they were to be considered as creditors, this form did not allow homebuyers to possess any rights over the property in itself. Further, under the 'waterfall' of entities, homebuyers were placed as merely residuary creditors only above preference shareholders and equity shareholders under Section 53 of the IBC below workmen, secured creditors, employees, unsecured creditors and government dues.

With the intervention of the ministry of housing and urban affairs seeking a review of the same, a 14-member Committee was formulated to discuss and deliberate upon the changes in the IBC on November 16, 2017. Subsequent to a proposal, an Ordinance titled as the Insolvency and Bankruptcy (Amendment) Ordinance 2018 was promulgated on August 6, 2018.

The said Ordinance provides a platform to homebuyers to be treated as financial creditors, thereby having a precedence to other creditors in the waterfall while having a place in the committee of creditors. As a result, there has

been a clear trajectory to the shift in favour of the homebuyers to not only be heard but also be part of the resolution. For now, the interests of the homebuyers seem to have travelled from being 'orphaned' to a 'secured child'. The struggle continues to become the 'preferred child.'

The steps ahead

The pool of homebuyers would no doubt comprise of investors (looking for return on investment) and end-users (looking for a roof above their heads). There can be little doubt that the folks who spent their life earnings to secure a home for themselves and their families should be given priority over all others.

Refund, with or without interest, as has become so very apparent in the case of Jaypee, is not the preference of the overwhelming majority of homebuyers. The aim should be on delivery of projects. Thus, any resolution plan must necessarily factor in the aspirations and requirements of the homebuyers to ensure the delivery of their 'dream homes'.

(The author is a founder member and senior partner at Zeus Law. Nikhil Mathur Associate also contributed to the article.)