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## IS IBC DILUTING THE IMPACT OF RERA?

### INTRODUCTION

The Real Estate (Regulation and Development) Act, 2016 (“**RERA**”) was designed to fill the absence of a concrete central enactment which would regulate the real estate sector. More particularly, RERA is an attempt made by the Central Government to reduce the amount of delays and laches which usually occurs in completion of real estate projects. The legislative intent of the RERA is to resolve the disputes between Promoters and Flat buyers (Allottees) in a socialistic and speedy manner without any prior obligation to follow the ‘Moratorium Period’ of 330 days required for Insolvency Proceedings triggered by the Flat buyers u/s 7 of the Insolvency Bankruptcy Code Act, 2016 (“**IBC**”) against the Promoters.

Due to economic recession India’s real estate and construction sector has fallen down and is in deep trouble. Moreover, residential projects worth 66 billion USD are facing the tactical delays which are naturally experienced during the pendency of Insolvency proceedings. Nearly 4.54 lakh units running behind their completion dates due to various reasons.<sup>1</sup>

With the help of few numbers and statistics this article attempts to portray the ground reality of the disputes between flat buyers and promoters engaged in insolvency proceedings. It also analyses the judgement passed by NCLAT in *Rajesh Goyal .v. Babita Gupta* [193\(IBC\)157/2020](#) (**‘Rajesh Goyal’**) and comments on its future repercussions. Further, it concludes that due to wide approach of the Tribunals established under IBC, the impact and objects of RERA is slowly and gradually being diluted. Finally, the author suggests that RERA should be the first preferred remedy for flat buyers.

### RAJESH GOYAL.V. BABITA GUPTA & ORS<sup>2</sup>

National Company Law Appellate Tribunal (“**NCLAT**”) passed a unique judgement in *Rajesh Goyal*, dated 5<sup>th</sup> February, 2020, which is briefly analyzed hereinbelow;

#### **Facts**

The Allottees, who were Financial Creditors initially moved an application under Section 7 of IBC for initiation of ‘Corporate Insolvency Resolution Process’ (“**CIRP**”) against the Promoter. The

Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by an impugned order dated 19<sup>th</sup> September, 2019 admitted the application. Thereafter, Mr. Rajesh Goyal (Promoter) filed an appeal to NCLAT on the ground that the Respondents (Allottees) are themselves defaulters as per the ratio of the Supreme Court in '*Pioneer Infrastructure*'. It was highlighted by the appellant that the project is on verge of completion and that the Appellant had spent more amount than the amount collected from the 'Financial Creditors' for the said project and in fact the expenses were made in terms of the requirements as prescribed under RERA.

### **Judgment**

Considering the amount invested by the promoter and status of the project, the NCLAT in exercise of its '*Inherent powers*' under Rule 11 of the NCLAT Rules, 2016, allowed the promoter of the corporate debtor under CIRP to reinvest in the corporate debtor's real estate projects as a '*Financial creditor*'. It further held that if the projects are completed, creditors are paid back and if a completion certificate is received from the Interim Resolution Professional and other conditions are fulfilled, the CIRP process would be closed and the unsold flats and apartments would be handed over to the promoter.

### **FUTURE CONSEQUENCES**

The judgement passed in *Rajesh Goyal* case is very unique as it gives an option during CIRP stage to the corporate debtor to pull out the additional funds for the completion of real estate project from any third party investor who can act as 'Financial Creditor', to keep the 'Corporate Debtor' (company) as a going concern.

This position was affirmed in *Flat Buyers Association Winter Hills - 77, Gurgaon* [138\(IBC\)103/2020](#) which clarified that such Financial Creditors are not bound to take part in CIRP filed by Flat buyers. Therefore, in such cases it would be open for such Financial Creditors to file a Recovery Suit under Civil Procedure Code before Civil Court for recovery of money from the Promoter, which would increase the difficulty or otherwise can even stall the construction of project through an interim Order of Civil Court, till the payment of the entire amount by the Promoter.

On the other hand, it would be more appropriate and effective for the Flat buyers to file a complaint under Section 18 of the RERA<sup>3</sup>. As complaints filed under RERA have to be disposed off within 60 days from the date of filing, it is comparatively less time consuming than CIRP under IBC.

### **CONCLUSION**

The Minister of State for Corporate Affairs, stated in a written reply in the Lok Sabha on November 18<sup>th</sup>, 2019, that since June 2018 (after getting the financial creditor status), a total 1,821 cases have been filed by homebuyers against builders under the IBC<sup>4</sup>.

According to CARE Ratings, a credit ratings company, "A total of 2,542 cases were admitted into Corporate Insolvency Resolution Process (CIRP) till the end of September 2019. Out of these, (31%) of the cases belonged to the real estate and construction sector and there is hardly any case related to a real estate company where the IRP has successfully charted a resolution plan."<sup>5</sup>

In such circumstances, the approach of NCLAT in *Rajesh Goyal* of exercising and giving a wide

interpretation to the 'Inherent powers' conferred under Rule 11 of the NCLAT Rules<sup>6</sup>, surpasses the spirit of RERA and the same will empower the judges of Tribunal to distinguish or not follow the provisions of RERA in future cases. Thus, it could be concluded that due to proactive approach of the Tribunals established under IBC, the impact of RERA is slowly and gradually being diluted and disputes between Flat buyers and developers are excessively flavored with the IBC. Further, the CIRP should be allowed to be initiated only if more than 50 % of the flat buyers agree to do so. Considering the amount of delay and laches which occur in CIRP, RERA should be the first preferred remedy by the innocent flat buyers.

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