

A background image showing a group of business professionals in a meeting. In the foreground, two hands are shaking in a firm grip. To the right, a person is holding a tablet computer. In the background, another person is pointing at a document on a table. The overall scene is professional and collaborative.

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ARTICLE

Insolvency proceeding at its peak.

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Insolvency proceeding at its peak....

RBI moving towards Insolvency process:

With the increase in pressure on banks for the recovery of the loans and advances, immense efforts were taken by the Reserve Bank of India ("RBI") to safeguard the monies of the people at large. Lot of internal discussion and meeting were called upon and also the separate committee were formed, where the healthy discussion took place, for identifying the major players in the market forming the major contributors in the "Non-Performing Assets". The main focus of such meeting, were to direct all the Banks to initiate the Insolvency Resolution Process against such big entities on top priority.

Internal Advisory Committee ("IAC") was duly constituted by RBI, majorly with the Independent Board members, with main focus on identification of the major accounts of NPA in the Indian banking system, and to refer such matter before NCLT for resolution under Insolvency and Bankruptcy Code (IBC) at top priority in their first meeting held on June 12, 2017. Database of RBI speaks about more than Rs. 5,000 crores as NPA, forming 60% or more which are classified as NPA as on March 31, 2016 (which is still ongoing as on date). Rs. 5,000 crores are huge amount with tremendous pressure on banking system to recover the same either at fair value or at market value, which can be justified in case if the company goes into liquidation process.

RBI focused very aggressively in the matter of such NPA against the big players in the market, whereby recommending all the Banks to finalize the resolution plan within six months, which ideally to be finalized only once the matter is admitted by Hon'ble NCLT and the Interim Resolution Professional is appointed by NCLT to initiate the Insolvency Resolution Process. Further in their discussion, IAC members strongly recommended 12 accounts forming 25% of the current gross NPAs for immediate action under IBC.

The same was issued by RBI vide its Press Release dated June 13, 2017:
https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=40743

Impact of Real Estate (Regulation and Development) Act:

There is huge impact of RERA in the real estate business for the safeguard of the interest of buyers. As the main theme for the commencement of the RERA is to safeguard the interest of all the stakeholders, RERA came into effective from May 1, 2016 with most of the procedural part of RERA came into effective from May 1, 2017. Further, it was mandatory for all the ongoing projects to get registered under RERA within 3 months, which ended on July 31, 2017. The main advantage of RERA, that based on contractual relation between builder and buyer, buyers can approach the relevant authority under RERA to settle their claims. Therefore, to ensure that the penalties are not imposed, promoters are required to be fully compliant with the provisions of RERA.

On commencement of RERA and after registration of project, all the parties can move to Regulatory Authority for any dispute settlement, can raise complaint in case of delay in transfer of possession, etc. This law is itself has separate set of procedure to ensure that the interest is protected and that the transparency is built between all the parties in terms of information, details and progress of the project. It would be at the discretion of the Regulatory Authority to admit the complaint and to settle the disputes between the parties.

Hence, RERA laid down separate process for the registration procedure, compliance requirement and dispute settlement and that the fine or penalty imposed or any order been passed by the regulatory authority will not preclude the jurisdiction of other authority in any other law and provisions.

Impact of Insolvency and Bankruptcy Code:

Insolvency and Bankruptcy Code (“IBC”) is the law which gives the direction towards the revival of the debtors or in case of failure in revival procedure, to appoint a liquidator to carry out the procedure of liquidation. On default by the Corporate Debtors, an applicant can move to the NCLT for the initiation of the Insolvency Resolution Process under Section 7 & 8 of IBC. On admission of the petition, NCLT will order to appoint a qualified Insolvency Professional as “Interim Resolution Professional” to call for all the claims from the creditors of the Corporate Debtors and that to produce the same before NCLT.

Once petition is admitted, IRP has to make a public announcement to call upon all the claims from the creditors. Financial creditors and operational creditors are eligible to submit their claims in the prescribed format within the stipulated timeframe. Ambiguity lies here in identifying the class of creditors and based on that, the further procedure is required to be dealt with.

Before going for a liquidation, IRP or RP as the case may be, has to submit the Resolution Plan to NCLT, where the necessary financial information and the proposed plan will be submitted to revive the operation and business of the Corporate Debtors. Insolvency Professional would be required to take all the necessary steps to ensure that the resolution plan gets approved by NCLT.

Insolvency process is open for both type of creditor, i.e. financial creditors and operational creditors. Based on the application made and post admission of the petition, IRP or RP, will possess all the authority of the company. All the decision-making authorities will get transferred from the Board of Directors and shareholders to Resolution Professional. Committee of Creditors will be constituted based on the claims being submitted by the Creditors. Hence all the function of the company gets shifted to the Committee of Creditors till the time NCLT does not approve the resolution plan.

Hence, IBC also laid down separate process for the revival, rehabilitation and liquidation of the corporate debtors. However, the IBC regulations are more dominate and aggressive in terms of discharging the justice between both the parties before the Tribunal. This regulation opens the door for financial and operational creditors, irrespective of the sector in which the corporate debtors deals its business into. Hence, IBC has its overriding effect directly or indirectly in many areas and hence it can have considered to be more dominating in the law of justice as on date.

Who is Operational Creditors?

Section 5(20) of IBC defines the Operational Creditor as, *“Operational Creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.*”

Operational debts generally arise from the supply of goods or services by the creditor to the Corporate debtors for carrying out the operation by them and that the Corporate Debtors default in making the payment of the supply of goods or services.

Who is Financial Creditors?

Section 5(7) of IBC defines Financial Creditor as *“Financial Creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.”*

Referring Section 24 (3) of IBC, the resolution professional will have to give notice of meeting of Committee of Creditors to the operational creditors only in case if the amount of their aggregate dues is more than 10% of the debts. Hence, Operational Creditors will nowhere form part of Committee, but will be entitled to take part in the meeting of the committee only in case if the debts are more than 10% of the total debts of the corporate debtors.

IBC build up demarcation between operational creditor and financial creditors for specific purpose that the financial creditors are financially sound and that they are at better position to take the decision in the committee meeting. Since the entire process gets shifted to the Committee members, it should be very much clear on the part of constitution of the committee members.

In the matter of Jaypee Infratech Limited:

In reference to the above-mentioned Press note, IDBI Bank Limited filed a petition before Allahabad Bench of NCLT against Jaypee Infratech Limited, for the recovery of debts amounting to Rs. 526 crores. The main business of Jaypee Infratech is to build the roads, highways and they are also into real estate business. One of the biggest project “Yamuna Expressway” connecting Delhi to Agra, was constructed by Jaypee Infratech.

Jaypee Infratech Limited was constructing the project for the homebuyers in Noida, Wish Town Project, with more than 30000 flats across the belt of Noida-Greater Noida Expressway. Because of lack of funds, the project came to standstill in the early 2017, whereby only 5500 flats were handed over to the homebuyers. There were 305 towers out of which 250 towers were incomplete and it was assured by the management of Jaypee Group, that the project will restart by end of April 2017 along with the release of construction schedule of all the towers. Jaypee Group confirmed the approval to complete the sale of its cement plant for Rs. 16,500 Crore to Ultra Tech cement, which helped the company to seek the extension of working capital of Rs. 1,800 crores from banks.¹

Buyer also lodged an FIR against Builder for not transferring the possession of the home. The delay caused due to lack of financial availability. Hence, it was promised to restart the project once again after the availability of working capital from bank.

The management of Jaypee Group said that their main priority is to complete the project, which was delayed for long period of time. And in case, if the refund is asked for, then it would not be possible to return the funds collected from the homebuyers, as it is difficult to raise the funds from the market to refund the same amount and this will hamper the interest of all the stakeholders at large, as this will not allow the promoter to complete the project. It was also assured that the details of the progress in the projects will be updated to the buyers and will also be updated on the website of the company.

¹<http://timesofindia.indiatimes.com/city/noida/jaypee-gets-bank-funds-to-restart-work-at-wish-town-next-week/articleshow/58231238.cms>

Amendment in Insolvency Law dated August 16, 2017:

In absence of specific regulation for accepting the claims from the creditors other than Financial Creditors and Operational Creditors (including workmen and employees), there was no scope for other creditors to submit their claims. However, Insolvency and Bankruptcy Board of India vide its notification dated August 16, 2017 made the amendment in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations (“CIRP Regulations”), whereby the new regulation 9A was inserted after Regulation 9.

Extract of Regulation

“9A. Claims by other creditors.

(1) A person claiming to be a creditor, other than those covered under regulations 7, 8, or 9, shall submit proof of its claim to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule.

(2) The existence of the claim of the creditor referred to in sub-section (1) may be proved on the basis of –

(a) the records available in an information utility, if any, or

(b) other relevant documents sufficient to establish the claim, including any or all of the following: —

(i) documentary evidence demanding satisfaction of the claim;

(ii) bank statements of the creditor showing non-satisfaction of claim;

(iii) an order of court or tribunal that has adjudicated upon non-satisfaction of claim, if any.”

With the insertion of Regulation 9A., wide area kept open for the creditors other than financial creditors and operational creditors. With effective to the amendment, new form also introduced, whereby the creditors as classified under Regulation 9A will be required to submit the claims in the prescribed format, and have to follow the similar procedure to submit their claims as financial creditors and operational creditors are required to follow.

Applicability of both the regulation in the matter of Jaypee Infratech:

- 1) In reference of the above discussion, IDBI Bank Limited moved to the NCLT for the recovery of the debts from Jaypee group of companies for their monies of Rs. 526 crores. Since Corporate Debtors bowered monies from the bank and financial institution and failed to repay the debts, Bank moved for insolvency procedure. Hence, as Financial Creditors, Bank filed petition as Section 7 of IBC, and the same got admitted by NCLT Bench of Allahabad. Based on the public announcement² made by the IRP appointed in this matter, all the creditors are required to submit their claims by August 24, 2017.

Subsequent to the amendment in the CIRP Regulation, the homebuyers got the relief, where the biggest question raised as to how and in which form, homebuyers can submit the claims to the IRP as appointed. Form F is introduced, where other creditors are required to submit their claims to the IRP. This is one of the biggest relief to the homebuyers, as they were forming the biggest stake in the amount contributed to the builders for the ongoing project. Hence, it was essential for the Board of Insolvency to come up with such clarification. Once the company goes into rehabilitation or liquidation, there will be very less scope for the homebuyers to claim their dues in RERA.

- 2) If we see from RERA perspective, the aggrieved buyers are required to route their disputes to the regulatory authority as defined in RERA act and rules. The entire procedure of RERA is different and it does not go into the depth of rehabilitation or liquidation. Complaint needs to be filed online through the portal and that individual homebuyers shall file separate application unlike in IBC.

There are more than 30000 flats which are in disputes, calculating as one homebuyers each flat, there will be more than 30000 homebuyers for one project. Practically it would be difficult for the Regulatory Authorities to grant for the personal hearing in case if all the homebuyers file the complaint under RERA and the settlement of their dues. This itself will delay in providing justice to the homebuyers, as the procedure is lengthy and time consuming in totality.

²<http://www.jaypeeinfratech.com/communication/2017/2-Public-Announcement-EN.pdf>

Our Take:

It is very much clear with the amendment that the homebuyers are eligible to submit their claims to the IRP in "Form F" as notified by IBBI dated August 16, 2017. However, whether the said amendment will benefit the homebuyers and will the homebuyers will be able to get their money back home or not is to be seen. As it is to be noted that, homebuyers are not operational creditors but they are classified as other creditors. In case if the resolution plan gets approved, then the claims of the operational creditors gets secured, in reference to the Regulation 38 of CIRP Regulations, where the operational creditors are paid at the liquidation value and such payment is made in priority to any financial creditor, such payment is required to be made before thirty days from the date when the resolution plan is approved by the NCLT.

It can be seen that even if the Company get revived through Resolution Plan, the interest of the operational creditor is taken care. As resolution plan has to provide the liquidated value of operational value and the same is required to be paid within 30 days after the approval of NCLT. But, as homebuyers are not operational creditor, they are not covered under the said Regulation. Though in majority cases, there is very less funds available to settle the claims of operational creditors. Further, if the company goes into liquidation, they will rank in pari passu with the operational creditor after the payment of following dues in order of reference:

- (a) Insolvency resolution process costs and liquidation costs paid in full;*
- (b) The following debts which shall rank equally between and among the following:*
 - (i) Workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and*
 - (ii) Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;*
- (c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;*
- (d) Financial debts owed to unsecured creditors;*
- (e) The following dues shall rank equally between and among the following:*
 - (i) Any amount due to the Central Government and the state government including the amount to be received an account of the Consolidated Fund of India and the Consolidated Fund of a state, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;*
 - (ii) Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;*
- (f) Any remaining debts and dues;*
- (g) Preference shareholders, if any; and*
- (h) Equity shareholders or partners, as the case may be.*

As already mentioned above, in majority cases the amount available to operational creditor is very less or NIL, which will be now shared among operational creditor and homebuyers, chances of the refund of the money already paid by the homebuyers will be very less.

Therefore, in both the case of revival or liquidation, the settlement of the claims by the homebuyers are put into big question mark, whether the claims will get settled or not. The entire purpose of the amendment as notified and other procedure in the Insolvency Law will serve or not, is matter of justice by the authority.



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