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# Position of Home Buyer in India

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## ABSTRACT

*The dictionary meaning of home is “a place where one lives permanently” but in true sense home is much more than just four walls surround for many it’s a dream and also a place where his soul is attached. An individual works day and night to foothold a space where he along with his family could prosper and secure its future. But what happen if all his day and night earning is plundered through jiggery-pokery or if the real estate developer becomes bankrupt and is in not in a position to deliver the promised property and process the refund ?, This paper attempts to throw the light on the rights of home buyers and the obligations on the builders under the Real Estate (Regulation and Development) Act, 2016 which was enacted to shield the home-buyers as well as to magnify the investments in the real estate industry, this paper elucidate the power’s and functions of the Authority constituted under this act also this paper untangles the position of homebuyers in the waterfall arrangement which is a component of section 53 of insolvency and bankruptcy code and clarity on the dispute whether home buyers are operational or financial creditors for the purpose of the code.*

## I. MEANING OF TERM REAL ESTATE

The term “Real estate” refers to land as well as building. The word ‘land’ includes the air above the ground below any building or structure on it. It covers residential houses commercial offices, trading spaces such as theatre, hotel, and restaurant retail outlets industrial building factories, and also bureaucratic offices.

**The transaction includes** Sale, Purchase and, Development of land (both residential and non-residential buildings). **The main players in the real estate market include** The builders, Real estate agents, Buyers, tenants, Landlords

Definition of the term ‘immovable property’ under various acts:

- **Transfer of Property Act, 1882<sup>2</sup>**

According to (Sec-3<sup>3</sup>), “immoveable property” does not include standing timber, growing

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<sup>2</sup> Transfer of property Act, 1882 No.04, Acts of Parliament, 1882 (India).

<sup>3</sup> Transfer of property Act, 1882.§ 3.

crops or grass, thus immovable property includes buildings, houses, residential or commercial complex etc.

- **General Clauses Act, 1897** <sup>4</sup>

As per section 3(26)<sup>5</sup> “immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

- **The registration Act 1908** <sup>6</sup>

Section 2(6) <sup>7</sup> defines as under “Immovable Property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

## II. COMMON TYPES OF REAL ESTATE FRAUDS COMMITTED TO HOME BUYERS

**1. Title Deception:** it is one of the most common treachery committed by builders or developers in this kind of practice the builder or developer fool the buyers by delivering them some another property that what he had shown to them at the time of initial booking. Also Sometimes the developer raise the money for the project for which he neither have adequate funds nor he have any plot or piece of land to build it or Land mortgage fraud where the builder only hold the possession on the land and ownership title had been mortgaged and offers the land to home buyers.

**2. Hurried sales:** in this a developer creates an illusion in the minds of home buyers that there are only few selected units left for the sale and home buyers fall under this trap and buys those units without any proper research also price of such property is also kept very high. Also taking advantage of this fake hype developer hides many known facts and forces home buyer to engage into paperwork.

**3. Assured returns:** as is it well known fact that real estate is a very lucrative market so many people prefer to invest their hard earned money into it in the hope of attractive future returns and some developers take advantage of the same and make a promise to provide assured sum of return on the property on immediate booking and also sometimes issues post-dated cheque for the same but problem arises when these cheques start bouncing and developer withdrawals himself form their promise.

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<sup>4</sup> The general clause Act, 1897 No.10, Acts of Parliament, 1897 (India).

<sup>5</sup> The general clause Act, 1897.§ 3(26).

<sup>6</sup> The registration Act, 1908 No.16, Acts of Parliament, 1908 (India).

<sup>7</sup> The registration Act, 1908.§ 2(6).

**4. Delays in Possession:** Delays are the most common way from which fraud transpires home buyers use to pay a higher price for the property which promises early possession but despite of this higher investment developer tends to delay the possession of the property from months to years and sometimes possession is made on paper so that full amount can be recovered from the buyer or bank ( in case of loan ) but no clue of physical possession could be traced.

**5. Fake promises:** sometime developers make fake promise such as possession assurance, buyback offer assured return which are so lucrative that majority of people looking for an investment or actual buyers got trap into it and soon after when the time delivery of promise came developer starts taking its word back.

**6. Change in plans:** it is a common practice of builders that at the time of delivery they change their plans, when actual unit is delivered to the buyer there are difference in interiors, ceramics, electrical fittings and many other items which were shown or promised at the time of booking.

**7. Developer becoming bankrupt:** it's a common practice of builders to raise funds from one project and invest it into another and sometimes because of this practice developers are left with no funds to complete either of the project for which funds were being raised and result of which developer comes into the position that neither he could return back the funds to the buyers nor can deliver its promise. Thus buyers became the ultimate victims of non-ethical practice of developers.

To protect Home buyers from these frauds and to control the conduct of developer and promoter two central acts are enacted which are:

1. **Real Estate (Regulation and Development) Act** which directly controls the conduct of promoter, developer or builder and was enacted to protect the interest of home buyers and to prevent any mishappening in the real estate industry.
2. **Insolvency and Bankruptcy Code** Which does not directly control the conduct of developer or builder but by its nature it protects the buyer's dues and distribute it among them in a systematic procedure mentioned in it.

### III. RERA ACT

Real Estate (Regulation and Development) Act <sup>8</sup>( RERA) was introduced in Lok Sabha, the lower house on Indian parliament by then minister of housing and urban poverty alleviation

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<sup>8</sup> The Real Estate (Regulation and Development) Act, 2016 No.16, Acts of Parliament, 2016 (India).

in 2016 with an aim to protect home-buyers as well as to magnify investments in the real estate industry which is the second largest employer after agriculture and is predicted to contribute around 13% in Indian economy by 2025, RERA act was passed by Rajya Sabha, upper house of Indian parliament on 10 March 2016 and came into force on 1 May 2016 initially only 52 sections out of 92 were notified, rest other sections were implemented from 1 May 2017.

### **Salient Features of RERA**

1. **Establishment of Real Estate Regulatory Authority** – by the virtue of section 20(1)<sup>9</sup> of the RERA Act 2016 The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority which shall be a body corporate., the composition of this authority is provided under section 21<sup>10</sup> according to which authority consists of chairperson and not less than two whole time members appointment of whom shall be made by the appropriate government on the recommendation of selection committee consisting of chief justice of the high court of that jurisdiction or his nominee also the secretary of department dealing with housing and law secretary.

2. **Registration of all the real estate projects and agents** – by the virtue of section 3<sup>11</sup> and 4<sup>12</sup> of RERA act 2016 a promoter or developer of a project exceeding area of 500 square meter or the number of apartments tendered to be developed exceed 8 inclusive of all phases must make an requisition to the authority for the registration along with all the necessary details and an affidavit stating that 70% of the funds raised for the particular project shall be utilized in the same also by the virtue of section 34<sup>13</sup> all the real estate projects and agents must be registered by the authority and the same authority shall regulate their conduct and also maintain a website for public to view the registered projects and agents and ensure that promoter and developer adhere strictly with the compliances.

3. **Fast redressal mechanism:** section 43<sup>14</sup> of the RERA acts 2016 require the appropriate government to set up an appellate tribunal within one year of initiation of this Act also clause 3<sup>15</sup> requires Every bench of the Appellate Tribunal must consist of at least one Judicial Member and one Administrative or Technical Member. All the appeals of authority

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<sup>9</sup> The Real Estate (Regulation and Development) Act, 2016. § 20(1).

<sup>10</sup> The Real Estate (Regulation and Development) Act, 2016. § 21.

<sup>11</sup> The Real Estate (Regulation and Development) Act, 2016. § 3.

<sup>12</sup> The Real Estate (Regulation and Development) Act, 2016. § 4.

<sup>13</sup> The Real Estate (Regulation and Development) Act, 2016. § 34.

<sup>14</sup> The Real Estate (Regulation and Development) Act, 2016. § 43.

<sup>15</sup> The Real Estate (Regulation and Development) Act, 2016. § 43(3).

and any adjudicating body shall lie to appellate tribunal. And tribunal shall have all the powers that of a civil court.

4. **Standardisation of carpet area** – Before RERA was enacted there was not any fixed or standardised way in which carpet area could be calculated or evaluated and builders or developers used to take advantage of this loophole and charged the buyer in whatever way they wanted to do but by the virtue of section 2(k) <sup>16</sup>of Real Estate (Regulation and Development) Act 2016 "carpet area" means only the usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

5. **Functions of Real Estate Regulatory Authority in promotion of real estate-** by the virtue of section 32 <sup>17</sup>of RERA Act, 2016 it is the primary function of the authority to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector and also to make recommendation to appropriate government or any seal of power on the grounds mentioned under the section.

6. **Transfer by promoter:** in accordance with section 15(1) <sup>18</sup>of the RERA if a promoter desires to transfer majority of rights and liabilities of home buyer in a real estate project then in that case he may do so only after the written consent of 2/3<sup>rd</sup> of the allottees along with the approval of real estate regulation authority.

#### 7. Penalties under RERA

By promoter	
Offence	Penalty
<ul style="list-style-type: none"> <li>• Marketing, selling, booking, inviting for purchase without getting registered with real estate regulatory authority or</li> <li>• Violation of any other provision of section 3 of RERA.</li> </ul>	Fine which may be increased up to 10% of the estimated value of the project. <sup>19</sup>

<sup>16</sup> The Real Estate (Regulation and Development) Act, 2016. § 2(k).

<sup>17</sup> The Real Estate (Regulation and Development) Act, 2016. § 32.

<sup>18</sup> The Real Estate (Regulation and Development) Act, 2016. § 15(1).

<sup>19</sup> The Real Estate (Regulation and Development) Act, 2016. § 59.

<ul style="list-style-type: none"> <li>• Providing information which is known to be false or</li> <li>• Any other non-observance of provision contained in section 4 of RERA.</li> </ul>	Fine which may be increased up to 5% of the estimated value of the project. <sup>20</sup>
<ul style="list-style-type: none"> <li>• Non-observance with any other provision of the RERA.</li> </ul>	Fine which may be increased up to 5% of the estimated value of the project. <sup>21</sup>
<ul style="list-style-type: none"> <li>• Non-observance with order or directions issued by real estate regulatory authority</li> </ul>	Fine which may be increased up to 5% of the estimated value of the project for every day for which default continues. <sup>22</sup>
<ul style="list-style-type: none"> <li>• Non-observance with order or directions issued by Appellate tribunal.</li> </ul>	<ul style="list-style-type: none"> <li>• Fine which may be increased up to 10% of the estimated value of the project for every day for which default continues.</li> <li>• Or imprisonment up to 3 years</li> <li>• Or Both<sup>23</sup></li> </ul>
By Real Estate Agent	
Offence	Punishment.
<ul style="list-style-type: none"> <li>• Working without getting registered with real estate regulatory authority.</li> <li>• Violation of any other provision of section 9&amp;10 of RERA.</li> </ul>	Fine which may be increased up to 1000 INR or 5% of the estimated value of the project as the case may be. <sup>24</sup>
<ul style="list-style-type: none"> <li>• Non-observance with order or</li> </ul>	Fine which may be increased up to 5% of

<sup>20</sup> The Real Estate (Regulation and Development) Act, 2016. § 60.

<sup>21</sup> The Real Estate (Regulation and Development) Act, 2016. § 61.

<sup>22</sup> The Real Estate (Regulation and Development) Act, 2016. § 63.

<sup>23</sup> The Real Estate (Regulation and Development) Act, 2016. § 64.

<sup>24</sup> The Real Estate (Regulation and Development) Act, 2016. § 62.

directions issued by real estate regulatory authority	the estimated value of the project for every day for which default continues. <sup>25</sup>
<ul style="list-style-type: none"> <li>• Non-observance with order or directions issued by Appellate tribunal.</li> </ul>	<ul style="list-style-type: none"> <li>• Fine which may be increased up to 10% of the estimated value of the project for every day for which default continues.</li> <li>• Or imprisonment up to 1 years</li> <li>• Or Both<sup>26</sup></li> </ul>
By Buyer	
Offence	Punishment.
<ul style="list-style-type: none"> <li>• Non-observance with order or directions issued by real estate regulatory authority</li> </ul>	Fine which may be increased up to 5% of the estimated value of the project for every day for which default continues. <sup>27</sup>
<ul style="list-style-type: none"> <li>• Non-observance with order or directions issued by Appellate tribunal.</li> </ul>	<ul style="list-style-type: none"> <li>• Fine which may be increased up to 10% of the estimated value of the project for every <sup>28</sup>day for which default continues.</li> <li>• Or imprisonment up to 1 years.</li> <li>• Or Both</li> </ul>

8. **Jurisdiction of civil court:** in accordance with section 79 of RERA civil court does not have jurisdiction of trial of matters to which authority, adjudicating officer or tribunal is empowered.

9. This Act shall also have an overriding effect.

#### IV. INSOLVENCY AND BANKRUPTCY CODE

The insolvency and bankruptcy code 2016<sup>29</sup>(IBC) is considered to be a limestone of insolvency reforms. it's a central act enacted to organize the insolvency process of

<sup>25</sup> The Real Estate (Regulation and Development) Act, 2016.§ 65.

<sup>26</sup> The Real Estate (Regulation and Development) Act, 2016.§ 66.

<sup>27</sup> The Real Estate (Regulation and Development) Act, 2016.§ 67.

<sup>28</sup> The Real Estate (Regulation and Development) Act, 2016.§ 68.

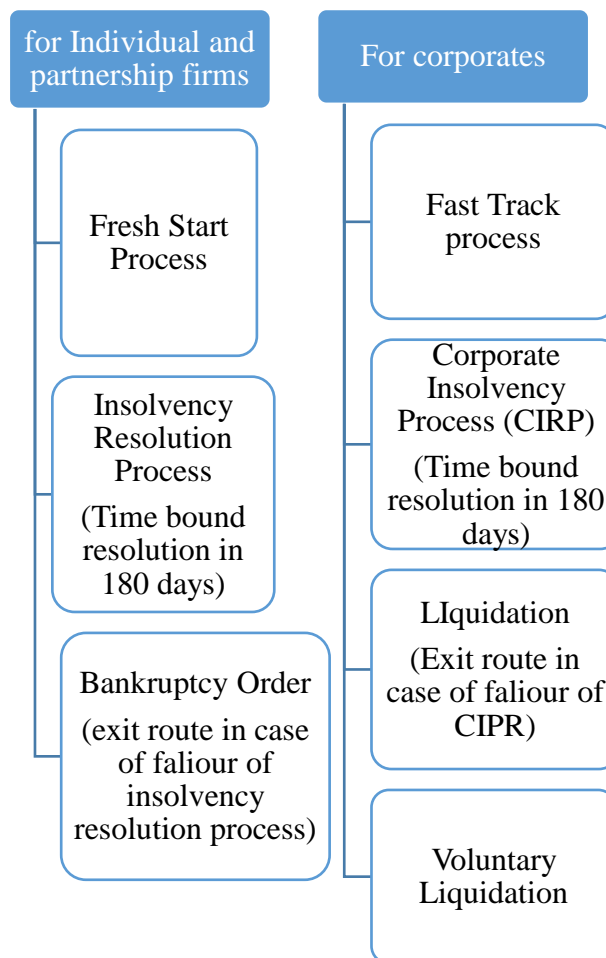
<sup>29</sup> The Insolvency and bankruptcy code, 2016 No.31, Acts of Parliament, 2016(India).



corporates, partnership firms and individual in a smooth time bound manner to give relief to creditors by maximizing the value of assets of such firms or individuals.

The code came into effect on 26<sup>th</sup> may 2016 however some of its sections were implemented later in a systematic manner for proper enforcement of the code also some of its sections are not enforced till date (22 Oct. 20) for example bankruptcy process for partnership firms and individuals.

### Broad frame work of insolvency and bankruptcy code



### How does it provide relief to home buyers?

The series of judicial development of NCLAT especially in the case of Jaypee Infratech and Amrapali Silicon City, home buyers are now considered as creditor under the code which enables them to claim their dues from the developer or builder in case, he is unable to deliver its promise and had made default.

Creditor is defined under section 3(10)<sup>30</sup> of the code according to which “creditor” means any person to whom a debit is owned and includes, financial creditor, operational creditor,

<sup>30</sup> The Insolvency and bankruptcy code, 2016. § 3(10).

secured and un secured creditor and decree holder.

The code further also defines operational and financial creditors also under section 5(20)<sup>31</sup> and 5(7)<sup>32</sup> respectively. According to which a person who wed financial debit is a financial creditor and a person who owed an operational debit is operational creditor.

## V. WHETHER HOME BUYERS ARE OPERATIONAL OR FINANCIAL CREDITORS

In the case of *Nikhil Mehta v AMR infrastructure*<sup>33</sup> it was held by the honourable supreme court of India than when a developer shows amount collected from the home buyer under the heading of borrowing and charge interest upon it and deducts TDR then that amount is considered as financial debit within the preview of section 5(8)(f)<sup>34</sup> of the insolvency and bankruptcy code 2016.

In the case of *Anil Mahindroo v Earth organic Intrastructure*<sup>35</sup> the question was posed whether the purchaser of a flat could be construed to be a 'financial creditor' and the amount paid for purchasing the flat could be termed to be a 'financial debt'. The peculiar facts were that an allotment letter was executed between the purchaser and the builder. The MOU contained an express promise made on behalf of the builder for a guaranteed return on the investment termed as 'commitment amount' till the delivery of actual possession. The purchaser had paid the entire agreed sale consideration, however, the builder stopped paying the commitment amount after a date. The NCLAT finding that the purchaser could be treated as an 'investor' and the amount paid for purchase of the flat be construed as 'financial debt'.

Through an amendment ordinance in 2018<sup>36</sup> an amendment was bought to the insolvency and bankruptcy code 2016 on the basis of recommendation by insolvency law committee to include home buyers in the definition of financial debit under section 5(8)(f) to the same meaning assigned under real estate (regulation) development act 2016.

## VI. BENEFITS OF BEING A FINANCIAL CREDITOR

1. **Voting share:** According to section 5(28)<sup>37</sup> of the insolvency and bankruptcy code the Voting right of a financial creditor is based on the proportion of the financial debt owed to such financial creditor. While operational creditors do not have voting rights-The approval of committee of creditor shall be obtained by a vote.

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<sup>31</sup> The Insolvency and bankruptcy code, 2016 § 5(20).

<sup>32</sup> The Insolvency and bankruptcy code, 2016 § 5(7).

<sup>33</sup> *Nikhil Mehta v AMR infrastructure* (2017) SCC OnLine NCLAT 377

<sup>34</sup> The Insolvency and bankruptcy code, 2016. § 5(8)(f).

<sup>35</sup> *Anil Mahindroo v Earth organic Intrastructure* (2017) SCC OnLine NCLAT 216.

<sup>36</sup> The insolvency and bankruptcy code (amendment) act, 2018. No. 26 Acts of Parliament, 2018(India).

<sup>37</sup> The Insolvency and bankruptcy code, 2016 § 5(28).

2. **Committee of creditors** - According to section 21<sup>38</sup> of the insolvency and bankruptcy code the committee of creditors will only consist of financial creditors only. And all the important decisions like approval of resolution plan and liquidation take place in committee of creditors.

3. **Initiation of Corporate Insolvency Resolution Process** – According to section 7<sup>39</sup> of the insolvency and bankruptcy code financial creditor can file an application for initiation of corporate insolvency process on the occurrence of default but according to section 8 of insolvency and bankruptcy code to initiate a corporate insolvency process the operational creditor have to serve a demand notice to debtor first.

4. **Committee of operational creditors** - if there are no financial creditors than committee of creditors will consist of operational creditors subject to maximum limit of 18 ( CIRP reg.16).

5. **Distribution** – According to section 53<sup>40</sup> the position of financial creditor is higher than operational creditors except workmen dues.

## VII. PROCEDURE OF GETTING BACK DUES THROUGH WATERFALL MECHANISM

Waterfall mechanism under insolvency and bankruptcy code is a systematic process through with different class of creditors gets their dues after the liquidation on the assets of the corporate debtor. The dues of highest priority creditor will be cleared first and process goes on that's why it is called waterfall mechanism.

Section 53<sup>41</sup> of the insolvency and bankruptcy codes defines priority of different creditors which is as follow:

1<sup>st</sup> priority: The insolvency resolution process costs and the liquidation costs paid in full.

2<sup>nd</sup> priority: following shall rank equally:

- I. workmen's dues for the period of twenty-four months preceding the liquidation commencement date
- II. debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

3<sup>rd</sup> priority: ages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date.

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<sup>38</sup> The Insolvency and bankruptcy code, 2016 § 21.

<sup>39</sup> The Insolvency and bankruptcy code, 2016 § 7.

<sup>40</sup> The Insolvency and bankruptcy code, 2016 § 53.

<sup>41</sup> *Ibid.*

4<sup>th</sup> priority: financial debts owed to unsecured creditors.

5<sup>th</sup> priority: following shall rank equally:

- I. any amount due to the Central Government and the State Government
- II. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

6<sup>th</sup> priority: any remaining debts and dues.

7<sup>th</sup> priority: preference shareholders

8<sup>th</sup> priority: equity shareholders or partners, as the case may be.

As homebuyers are considered as financial creditors thus after liquidation of the assets of developer or builder if no resolution plan is passed dues will settled on 4<sup>th</sup> priority basis.

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