

# POSITION OF HOMEBUYERS UNDER THE INSOLVENCY AND BANKRUPTCY CODE WITH RESPECT TO RECENT AMENDMENTS: AN ANALYSIS

*B. Sai Tanushya\**

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## ABSTRACT

*The original text of the Insolvency and Bankruptcy Code, 2016, did not recognize homebuyers as Financial or Operational Creditors. Due to this, homebuyers were unable to initiate Corporate Resolution Process against defaulting real estate developers or builders. In 2018, homebuyers were given the status of Financial Creditors through an amendment to the Insolvency and Bankruptcy Code, 2016. The author seeks to analyze the rationale behind the same amendment and its implications. This paper will further discuss the 2020 Amendment to the Code and its subsequent impact on homebuyers*

\* 3<sup>rd</sup> Year Under-Graduate student at School of Law, Christ University, Bengaluru.

**INTRODUCTION:**

The Insolvency and Bankruptcy Code of 2016<sup>1</sup> (“**IBC**”) was passed on 28<sup>th</sup> May, 2016. The IBC sought to bring the legal framework surrounding insolvency proceedings and disputes under the umbrella of a single legislation. The main objective of the Code is to “consolidate and amend the laws having reorganization and insolvency resolution”<sup>2</sup> issues as the subject-matter. The IBC thereby repealed the Sick Industrial Companies (Special Provisions) Act, 1985,<sup>3</sup> with effect from 1<sup>st</sup> December, 2016.

The Code also mandated to set up an Insolvency and Bankruptcy Board of India (“**IBBI**”) and the same was established on 1<sup>st</sup> October, 2016. The IBBI is said to be the regulator for overseeing the Insolvency Professionals, Insolvency Professional Agencies, etc. and is also responsible for the implementation of the Code.<sup>4</sup>

The National Company Law Tribunal (“**NCLT**”), a quasi-judicial body constituted under Section 408 of the Companies Act, 2013<sup>5</sup>, is the adjudicating authority under the IBC for hearing matters related to insolvency resolution of corporate persons.<sup>6</sup> The NCLT has immunity from other courts and tribunals granting a stay action against an action initiated by it. Appeals against the orders of the NCLT are heard by the National Company Law Appellate Tribunal (“**NCLAT**”).<sup>7</sup> All appeals against the NCLAT orders must be made at the Supreme Court of India.<sup>8</sup>

In the case of a debtor being unable to repay the debts, the creditor is provided with a mechanism to initiate an Insolvency Resolution Process against the debtor.<sup>9</sup> A company may, by

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<sup>1</sup> Insolvency and Bankruptcy Code, No. 31, Acts of Parliament, 2016 (India).

<sup>2</sup> Insolvency and Bankruptcy Code, Preamble, No. 31, Acts of Parliament, 2016 (India).

<sup>3</sup> Sick Industrial Companies (Special Provisions) Act, No. 1, Acts of Parliament, 1986 (India).

<sup>4</sup> Insolvency and Bankruptcy Board of India, Insolvency and Bankruptcy Board of India, <https://www.ibbi.gov.in/>.

<sup>5</sup> Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

<sup>6</sup> Insolvency and Bankruptcy Code, §5, No. 31, Acts of Parliament, 2016 (India).

<sup>7</sup> Insolvency and Bankruptcy Code, § 61, No. 31, Acts of Parliament, 2016 (India).

<sup>8</sup> Insolvency and Bankruptcy Code, § 182, No. 31, Acts of Parliament, 2016 (India).

<sup>9</sup> Insolvency and Bankruptcy Code, § 6, No. 31, Acts of Parliament, 2016 (India).

itself, choose to go for a voluntary insolvency resolution process for liquidation or revival. The Code also makes a distinction between the two types of creditors- Financial and Operational Creditor.<sup>10</sup>

### CONCEPT OF A FINANCIAL CREDITOR UNDER THE IBC:

The Insolvency and Bankruptcy Code, 2016, has defined a “Financial Creditor” as “*a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred*”.<sup>11</sup> Therefore, a Financial Creditor is someone who lends money to a debtor against the consideration of time value of money and the relation between a Financial Creditor and a debtor is purely that of a financial contract.<sup>12</sup> An Operational Creditor, on the other hand, is someone who has provided the debtor with goods or services.<sup>13</sup>

It becomes pertinent to understand the meaning of a Financial Debt in determining whether a creditor is a Financial Creditor or not. “Financial Debt” has been defined in the Code as a “*debt with interest, if any, which has been disbursed against the consideration of time value of money*.”<sup>14</sup> The definition is inclusive in nature. In *Nikhil Mehta and Sons v. AMR Infrastructure Company*<sup>15</sup>, the NCLAT observed that “the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid over a period of time in a single or series of payments in the future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future.” In another case, the NCLAT held that interest, on the debt, is not a sine qua non for the debt to fall under the purview of “Financial Debt” under Section 5(8) of the IBC.<sup>16</sup>

When a default to a financial debt occurs, a financial creditor, may by itself or jointly with other financial creditors, file an application for an Insolvency Resolution Process before the

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<sup>10</sup> Ambika Shekhawat, *Insolvency and Bankruptcy Code*, SSRN Electronic Journal (2019).

<sup>11</sup> Insolvency and Bankruptcy Code, § 5(7), No. 31, Acts of Parliament, 2016 (India).

<sup>12</sup> *Supra* note 10.

<sup>13</sup> Insolvency and Bankruptcy Code, § 5(20), No. 31, Acts of Parliament, 2016 (India).

<sup>14</sup> Insolvency and Bankruptcy Code, § 5(8), No. 31, Acts of Parliament, 2016 (India).

<sup>15</sup> *Nikhil Mehta and Sons v AMR Infrastructure, Company Appeal (AT) (Insolvency) No. 7 of 2017 (July 21, 2017)*.

<sup>16</sup> *Shailesh Sangani v. Joel Cardoso, Company Appeal (AT) (Insolvency) No. 616 of 2018*.

NCLT.<sup>17</sup> The NCLT appoints an Interim Resolution Professional<sup>18</sup>, who then constitutes a Committee of Creditors (“CoC”) comprising of all the Financial Creditors of the corporate debtor.<sup>19</sup> The CoC prevents a Financial Creditor from proceeding individually and rather incentivizes them to have a collective approach towards the insolvency resolution.<sup>20</sup> The Code prevents the Operational Creditors from having a right to be part of the CoC, thereby giving a preferential treatment to the Financial Creditors at this stage of the Insolvency Resolution Process.<sup>21</sup> The CoC may also replace the Interim Resolution Personnel at any given point of time.<sup>22</sup>

### **POSITION OF HOMEBUYERS BEFORE THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT), 2018:**

Prior to the amendment in 2018, homebuyers were neither considered to be Financial Creditors nor Operational Creditors under the IBC. This was due to the fact that homebuyers did not lend out money for a rate of interest and the Code does not bring immovable property under the ambit of “goods and services” to constitute an Operational debt.<sup>23</sup> Therefore, the homebuyers were unable to initiate insolvency proceedings against real estate developers. Since homebuyers could also not be a part of the CoC, the real estate developers were able to side-line the claims of the homebuyers as the latter could only retrieve their money from the balance of proceeds after payments are made for insolvency costs, financial debts, workmen and government dues, etc. by the developer/builder.<sup>24</sup> The only recourse available to them was through the Consumer Courts in India and the Real Estate (Regulation and Development) Act, 2016,<sup>25</sup> (“**RERA**”).

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<sup>17</sup> Insolvency and Bankruptcy Code, § 7, No. 31, Acts of Parliament, 2016 (India).

<sup>18</sup> Insolvency and Bankruptcy Code, § 16, No. 31, Acts of Parliament, 2016 (India).

<sup>19</sup> Insolvency and Bankruptcy Code, § 21, No. 31, Acts of Parliament, 2016 (India).

<sup>20</sup> Supra note 10 at 2.

<sup>21</sup> *Ibid.*

<sup>22</sup> Insolvency and Bankruptcy Code, § 22, No. 31, Acts of Parliament, 2016 (India).

<sup>23</sup> Shubham Borkar, *Effect Of Insolvency And Bankruptcy Code Amendment On Home Buyers - Real Estate and Construction*, India Articles on All Regions including Law, Accountancy, Management Consultancy Issues (Oct. 16, 2018), <https://www.mondaq.com/india/real-estate/745916/effect-of-insolvency-and-bankruptcy-code-amendment-on-home-buyers>.

<sup>24</sup> Karan Sahi, *The Continuing Saga of Homebuyers under Insolvency and Bankruptcy Code*, IndiaCorpLaw (Aug. 27, 2018), <https://indiacorplaw.in/2018/08/continuing-saga-homebuyers-insolvency-bankruptcy-code.html>.

<sup>25</sup> India and the Real Estate (Regulation and Development) Act, No.16, Acts of Parliament, 2016 (India).

The Ministry of Finance and Corporate Affairs set up an Insolvency Law Committee on 16<sup>th</sup> November, 2017, “to make recommendations to the Government on issues arising from the implementation of the Insolvency and Bankruptcy Code, 2016, as well as on the recommendations received from various stakeholders”.<sup>26</sup> The said Committee submitted its report in March, 2018. One of its major findings was that homebuyers had to suffer due to the lack of proper recognition in the Code. The Committee cited the case of *Chitra Sharma v. Union of India*<sup>27</sup>, in order to establish the fact that the banks, or any other secured financial creditor, will be in a more favourable position to recover from the defaulter than homebuyers, even if the debt owed to the latter was much higher. The Committee observed that it was common to have contracts, between builders and homebuyers, be structured unilaterally with minimal say of the homebuyers which in turn would not align with the spirit of the Code because the homebuyers are being denied their rights of a creditor due to technicalities within a contract which reduces the negotiating power of the creditor. Thus, the Committee stated that it was “prudent” to clarify that, amounts raised from a home buyer for a real estate project fall within entry (f) of Section 5(8), which defines a Financial Debt.<sup>28</sup>

#### **IMPACT OF THE 2018 AMENDMENT OF THE IBC ON HOMEBUYERS:**

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, (“**2018 Amendment**”) came into force on the 6<sup>th</sup> of June, 2018. The 2018 Amendment, based on the recommendations of the Insolvency Law Committee, added two new clauses as an explanation under Section 5(8)(f) which made it clear that homebuyers also fall under the purview of Financial Creditors under the IBC.

The explanation under the new Section, 5(8)(f) is read as follows:

*“(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate*

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<sup>26</sup>Insolvency Law Committee Report,  
[http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee\\_12042019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf).

<sup>27</sup> *Chitra Sharma v. Union of India*, Writ Petition No. 744 of 2017.

<sup>28</sup> *Supra* note 26.

*project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016."*<sup>29</sup>

The 2018 Amendment came as a huge sigh of relief for homebuyers as they had been elevated to the status of Financial Creditors which also meant that the homebuyers could now be a part of the CoC. The 2018 Amendment was opposed by many real estate developers who filed numerous petitions challenging the constitutional validity of the 2018 Amendment. But, the Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited v. Union of India*<sup>30</sup>, rejected close to 200 petitions filed by the real estate developers and held that the said amendment did not violate any provision of the Constitution of India. Another question of law which the Supreme Court had to address was regarding the conflict between the IBC and RERA. The Court, in this regard, stated that the IBC shall prevail over the RERA in event of any conflict between both the laws and that the RERA should be read in harmony with the IBC.<sup>31</sup> The Court further stated that homebuyers are free to avail remedies under the Consumer Protection Act, 1986 (which has been repealed by the Consumer Protection Act, 2019), RERA or the IBC. Another consequence of this amendment will be that homebuyers will now be asked to submit financial information, which includes records of debt and instances of default, along with other required information in a specified manner.<sup>32</sup>

The 2018 Amendment did not provide details regarding the filing of cases by homebuyers at the NCLT. The plain text of the said amendment would mean that even a single homebuyer can file a petition against a developer at the NCLT. There would be problems if multiple homebuyers initiate multiple proceedings against one single developer. This indeed would be against one of the implied objectives of the IBC, which is to resolve disputes in a time-bound manner, as there would be delays due to many cases piling up at the NCLT.

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<sup>29</sup> The Insolvency and Bankruptcy Code (Second Amendment) Act, NO. 26, Acts of Parliament, 2018 (India).

<sup>30</sup> *Pioneer Urban Land and Infrastructure Limited v. Union of India*, Writ Petition No.43 of 2019.

<sup>31</sup> \* It may be noted that although both these laws have an overriding effect on the other laws, in effect at that time, Section 14 of the IBC clearly states that once a corporate debtor has been taken to the NCLT, all other legal proceedings against them shall be come to a halt. \*

<sup>32</sup> Insolvency and Bankruptcy Code, § 215(2), No. 31, Acts of Parliament, 2016 (India).

Although the 2018 amendment served as a boon to homebuyers, there are certain aspects which need more clarity. The issues surrounding the 2018 Amendment are as follows<sup>33</sup>: -

**(a) *Representation at the CoC:***

One of the main issues is regarding the representation of the homebuyers at the CoC. For example, in the case of *IDBI Bank Ltd. v. Jaypee Infratech Ltd.*,<sup>34</sup> there were almost 27,000 homebuyers to whom the debtor owed money. The 2018 Amendment does not make it clear whether all the homebuyers will be a part of the CoC or only a chosen few would represent all of them at the CoC.

**(b) *Interests of different parties at the CoC may not align with each other:***

The CoC witnesses' debates on financial technicalities for a resolution plan. This can be understood by professional and experienced bankers while on the other hand, an average homebuyer may not be able to fully comprehend the technicalities. Therefore, the homebuyers may end up blocking or voting for a financially sound resolution simply due to the fact that they were not able to understand its benefits or intricacies. There may also be a clash of interest where a bank would naturally ask for liquidation of the corporate debtor whereas the homebuyers might be against the entire process of liquidation and would want their homes instead of truncated amount of their investments. Hence, giving a seat for homebuyers at the CoC might not have been a very wise decision.

**(c) *No clarity on whether Homebuyers are secured or unsecured creditors:***

The IBC differentiates between a secured and an unsecured creditor. According to Section 53 of the Code, secured creditors are given priority and a more favourable position over the unsecured ones while settling debts. A bank, for example, is a secured creditor as the borrower offers some security in the form of land. The 2018 Amendment does not make it clear whether a homebuyer is a secured or an unsecured creditor. The definition of a 'secured creditor' has not yet been amended to include homebuyers. The position of a homebuyer will depend on what is mentioned in the agreement or contract with the real

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<sup>33</sup> *Supra* note 24 at 4.

<sup>34</sup> *IDBI Bank Ltd. v. Jaypee Infratech Ltd.*, CA No.26/2018 in Company Petition No. (IB)77/AD/2017.

estate company. If the homebuyer is an unsecured creditor under the agreement or contract and the real estate company does get into liquidation, then the homebuyer will be in a worse position. The entire purpose of giving homebuyers the status of financial creditors might be rendered redundant due to the ambiguity surrounding the question of what kind of priority would be given to homebuyers while repaying debts.

**(d) Third party interests:**

It is not always that homebuyers pay the entire amount of the flat on their own. Most often, they take loans from banks. While borrowing such loans, the homebuyer, the bank and the developer enter into a tri-party agreement as the homebuyer subrogates his/her rights in favour of the lending bank, thereby creating third party interests. In the case of *Ajay Walia v. M/s. Sunworld Residency Private Limited*<sup>35</sup>, the NCLT held that if a homebuyer has subrogated his rights in favour of the bank, then such a homebuyer will not be treated as a financial creditor. The position of financial institutions wanting to step in as allottees, by invoking their rights as lenders when homebuyers do not repay loans to buy flats, is still an unsettled issue.<sup>36</sup>

**THE 2020 AMENDMENT OF THE INSOLVENCY AND BANKRUPTCY CODE:**

The Insolvency and Bankruptcy Code (Amendment) Act, 2020, (“**2020 Amendment**”) was passed by the Government of India on 13<sup>th</sup> March, 2020. Section 3 of the 2020 Amendment added the following provisions to Section 7 of the IBC:

*“...Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent of the total number of such allottees under the same real estate project, whichever is less.*

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<sup>35</sup> *Ajay Walia v. M/s. Sunworld Residency Private Limited Company Appeal (AT) (Insolvency) No. 533 of 2018.*

<sup>36</sup> Vardaan Bajaj, *The unexamined aspects of treating homebuyers as financial creditors under the IBC*, Bar and Bench (Feb. 16, 2019, 12:57 PM), <https://www.barandbench.com/columns/unexamined-aspects-treating-homebuyers-financial-creditors-under-ibc>.



*Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.”<sup>37</sup>*

The 2020 Amendment essentially means that now a single homebuyer cannot approach the NCLT against a real estate developer. There should be at least 100 homebuyers (allottees) or 10% of the total number of homebuyers to file a joint application at the NCLT against the defaulting real estate developer. Further, the 2020 Amendment shall also apply to “all existing petitions”, which are yet to be admitted under the Code, and will be given a 30-day time period, from the commencement of the said Act, to get the required threshold of homebuyers, failing which the petitions shall be withdrawn.

Although the 2020 Amendment does not take away the status of Financial Creditors given to the homebuyers, it does place some hurdles before the homebuyers for approaching the NCLT. The *two major problems* for the homebuyers are- the threshold for number of allottees filing the petition [i] and the retrospective nature of the 2020 Amendment [ii]. The 2020 Amendment’s threshold only applies to a certain category of Financial Creditors, i.e. the homebuyers. Therefore, the new amendment does not tinker with the 2018 Amendment, upheld by the Supreme Court, but makes it look like a carrot and stick approach.

The 2020 Amendment seeks to ease the burden on the NCLT with respect to the piling up of cases. According to the Ministry of Corporate Affairs’ estimate, as on 30<sup>th</sup> September, 2019, there were 1,821 pending cases filed at the NCLT by homebuyers against builders since June,

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<sup>37</sup> The Insolvency and Bankruptcy Code (Amendment) Act, No. 1, Acts of Parliament, 2020 (India).

2018.<sup>38</sup> The said Amendment relieves the real estate developers and builders from the filing of frivolous petitions against them by homebuyers.

The Government through an official Notification, dated 24<sup>th</sup> March, 2020, had also increased the threshold for default payment by companies from ₹ 1 lakh to ₹1 crore.<sup>39</sup> The creditors can, now, only file a petition for a default payment of ₹ 1 crore or above. Bearing the fact in mind that these changes were made during the times of COVID-19 lockdown, which resulted in immense economic slowdown all around the globe leading to cash crunch and mounting liquidity concerns, it is indeed a wise decision to give the developers more “space and flexibility” for allocation of funds.<sup>40</sup> More and more developers are now using their personal reserves to meet the demand of labour, while in reality there is not much of productive work being done due to the unforeseen circumstances amidst COVID-19.

#### **HOMEBUYERS AND THE 2020 AMENDMENT:**

The 2020 Amendment received a lot of flak when it was in the Ordinance stage itself. Forum for People's Collective Efforts (“**FPCE**”) had vehemently opposed the said Amendment from its very beginning as it leads to greater problems to the homebuyers. FPCE even labeled the 2020 Amendment as “illogical, illegal and regressive”.

The introduction of the new provisions has added more burden on the homebuyers and the entire purpose of them being referred to as Financial Creditors may now stand defeated. It is unreasonable to expect homebuyers to have the contact details of each other in order to come together to file a joint application as the real estate developers do not give out such data to the public. Sale being a continuous process, it is also difficult to determine how many flats are being

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<sup>38</sup> D Dhanuraj, *RERA AND IBC: The real solutions for real estate*, The Financial Express (Jan. 1, 2020, 1:00 AM), <https://www.financialexpress.com/opinion/rera-and-ibc-the-real-solutions-for-real-estate/1808937/>.

<sup>39</sup> MINISTRY OF CORPORATE AFFAIRS NOTIFICATION New Delhi, the 24th March, 2020 [F. No. 30/9/2020-Insolvency].

<sup>40</sup> Ashwini Kumar Sharma, *How will the recent amendment to IBC impact the rights of homebuyers?* Livemint (Apr. 20, 2020, 09:49 AM), <https://www.livemint.com/money/personal-finance/how-will-the-recent-amendment-to-ibc-impact-the-rights-of-homebuyers-11587355953173.html>.

sold and as to how many homebuyers are needed to constitute the 10% of the total homebuyers to file a petition. Such circumstances will surely affect the rights of homebuyers in filing a petition under Section 7 of the IBC. Remedies under RERA will also be rendered futile if the NCLT grants a moratorium period for the same real estate developer, who has defaulted the homebuyer as well, under a petition filed by other Financial Creditors.

The 2020 Amendment has been drafted in such a way that it protects or favours the errant real estate developers rather than the innocent homebuyers, who would have probably invested their life-savings in the flats, and this can be understood by just a bare reading of the said Amendment. Due to such provisions, the concept of a Welfare State loses its prominence and it is the corporate which is able to gain the upper hand.<sup>41</sup>

The Supreme Court of India in January, 2020, provided partial relief to the homebuyers when it held that the NCLT will have to maintain status quo with respect to the applications already filed by homebuyers and investors against defaulting developers.<sup>42</sup> The Supreme Court further stated that the constitutional validity of the 2020 Amendment shall be decided once the Court has heard arguments from the Government of India and also from the side of the homebuyers.

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<sup>41</sup> Jatin Rajput, *Homebuyers & IBC (Amendment) Act, 2020: Four Years, Two Amendments and Journey still Continues*, IBC Laws (May 6, 2020), <https://ibclaw.in/homebuyers-ibc-amendment-act-2020-four-years-two-amendments-and-journey-still-continues-advocate-jatin-rajput/>.

<sup>42</sup> Renu Yadav & Neil Borate, *IBC amendment: Supreme Court provides partial relief to homebuyers*, Livemint (Jan. 13, 2020, 05:42 PM), <https://www.livemint.com/money/personal-finance/ibc-amendment-supreme-court-provides-partial-relief-to-homebuyers-11578916969286.html>.

**CONCLUSION:**

For many, a house is a life-long investment. There is a lot of emotional attachment to these houses as well. At times, owning a house is the utmost dream for some. Real estate developers attempt to take advantage of innocent homebuyers and dupe the latter of their life savings. It was pretty evident from the opposition to the 2018 Amendment, by the developers, that want to frustrate the rights of homebuyers and not empower them by giving them more rights under the IBC. This also shows that developers may want to continue with their unethical or immoral ways of duping the homebuyers for gaining profits. Although the 2018 Amendment did empower the homebuyers, the 2020 Amendment places difficulties for homebuyers to approach the NCLT. The 2020 Amendment strategically seeks to reduce the number of petitions filed by homebuyers and yet not, completely take away their rights as Financial Creditors. What the law makers should understand is that giving an ear to the people who are on the defaulting side of law will only lead them to further continue with their wrongdoings. Laws should be made as strict and water tight as possible in order to ensure that real estate developers do not exploit the loopholes in them. Therefore, the Supreme Court's decision on the validity of the 2020 Amendment pertaining to Article 14 of the Constitution of India, 1950, will decide the future of the rights of homebuyers under the IBC.

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