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Re-Examining the Classification of Homebuyers as Financial Creditors under the Insolvency and Bankruptcy Code

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I. INTRODUCTION

India witnessed a significant economic reform with the passing of the Insolvency and Bankruptcy Code, 2016 (**IBC** and **Code**). The Code has been created to provide a legal framework for time-bound insolvency resolution of both corporation and natural persons while aiming to

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maximise the value of assets and balancing the interests of the stakeholders involved.[1]

Like any other modern insolvency regime, the IBC has also been designed to offer both a 'rescue mechanism' and 'exit route strategy' when any Corporate Debtor (**CD**) becomes insolvent. The Code offers a creditor-driven model which allows for reorganisation or insolvency resolution using a time-bound mechanism such that the market can retain credit availability without compromising on the interests or motivation of any stakeholders involved.

One of the novel features of the IBC which is unique to India is the classification of creditors as— financial creditors (**FCs**) and operational creditors (**OCs**).

While the distinction between secured and unsecured creditors is maintained as is, the new classification introduced in the form of FCs and OCs has been the subject matter of much controversy and debate.[2] Soon after the passing of the Code, one of the key tasks at hand for the judiciary was to be able to characterise who shall qualify as FCs and OCs, respectively. In doing so, an expected predicament that plagued the judicial minds was creditors who could not be characterised as either

[1] The Insolvency and Bankruptcy Code 2016, preamble.
[2] See C Scott Pryor and Risham Garg, 'Differential Treatment among Creditors under India's Insolvency and Bankruptcy Code, 2016: Issues and Solutions' (2020) 94 AM BANKR LJ 123; Sudip Mahapatra, Pooja Singhania and Misha Chandna, 'Operational Creditors in Insolvency: A Tale of Disenfranchisement' (2020) 14 NALSAR Stud L REV 78.

financial or operational, and thus began the judicial debate on the status of homebuyers under the IBC.

II. CHARACTERISATION OF CREDITORS AS FINANCIAL CREDITORS AND OPERATIONAL CREDITORS

Section 5 of the Code establishes two categories of creditors — FCs and OCs. The basis of this classification is rooted in the kind of debt owed, i.e., financial debt or operational debt.

As per the Code:

> *"'[F]inancial 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."*[3]

Further, 'financial debt' has been defined in an inclusive definition as "*a debt along with interest, if any, which is disbursed against the consideration for the time value of money…*"[4] The scope of financial debt, as given in the Code, materialises as instances of relationship between the creditor and debtor in the form of a purely financial contract.

In contrast, the Code states that an '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.*"[5]

[3] The Insolvency and Bankruptcy Code 2016, s 5(7).
[4] Ibid [s 5(8)].
[5] Ibid [s 5(20)].

Further, an 'operational debt' is defined as:

> "*[A] claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.*"[6]

As is evident, an OC is someone who has become a creditor because of a business operation and is not looking to lend money to the CD at all. They may have supplied goods to the corporation on credit or in goodwill that the payment will come later. Similarly, they may have worked for the corporation and agreed to take a salary later.

The importance of any creditor being characterised as either an FC or an OC is firstly manifested in the way the Corporate Insolvency Resolution Process (**CIRP**) can be initiated. An application for initiation of the CIRP can be filed by an FC or an OC or the CD itself.

An OC cannot initiate an application without first giving a demand notice,[7] thus giving the CD an opportunity to dispute the genuineness of the claim, thereby adding an additional layer in the application process and delaying the admission time. An FC has no such requirement to comply with.

[6] Ibid [s 5(21)].
[7] Ibid [s 8].

Secondly, the Committee of Creditors (**CoC**) to which the Code entrusts the control and decision-making power is comprised of only FCs and OCs do not have a seat at the table.[8]

Lastly, under Section 53[9] of the Code there exists an order of precedence for the distribution of assets, known as the 'waterfall mechanism' as per which unsecured FCs rank higher than the unsecured OCs.

Thus, the classification of the creditors holds immense importance under the IBC jurisprudence. The Courts have repeatedly taken the opportunity to comment on who may be characterised as an FC or an OC. The Supreme Court in *Swiss Ribbons v Union of India* has held that:

> "*Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, operational creditors can be many as opposed to financial creditors.*"

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[8] Ibid [ss 21 and 24].
[9] Ibid [s 30(2)(b)].

The Apex Court has observed that payment in advance made to a CD to supply any goods or services will also qualify as operational debt. This means that a 'purchaser' may also be an OC.[10]

The case of homebuyers in this context becomes incredibly unique and peculiar, as they have not financed the real estate project in a manner that a conventional FC would, for instance a bank but they are still classified as FCs.

III. STATUS OF HOMEBUYERS AS FINANCIAL CREDITORS UNDER THE IBC— NEED FOR RE-EXAMINATION

The case of the homebuyers and their treatment under the IBC was highlighted during the *Jaypee Infratech* case,[11] the *Supertech* case,[12] the *Amrapali Group* case,[13] etc., wherein homebuyers emerged as major stakeholders during the insolvency process. These cases revealed the growing menace of delay in the delivery of flats by real estate developers to homebuyers.

As a result of growing unrest amongst the homebuyers and the need to match the law with contemporary developments, the Insolvency Law Committee (**ILC**) recommended that homebuyers be characterised as

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[10] *Consolidated Construction Consortium Limited v Hitro Energy Solutions Private Limited* 2022/INSC/150; *Overseas Infrastructure Alliance (India) Pvt Ltd v Kay Bouvet Engineering Ltd* [2018] NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 582 of 2018, Company Petition No. CP (IB)-20(MB)/2018.
[11] *Chitra Sharma v Union of India* [2018] 18 Supreme Court Cases 575.
[12] *Ram Kishor Arora v Union Bank of India and another* [2022] NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 406 of 2022.
[13] *Bikram Chatterji v Union of India* [2019] 19 Supreme Court Cases 161.

FCs under the Code.[14] The ILC rooted its reasoning in the "*unique nature of financing in real estate projects*"[15] and observed that the situation in the Indian real estate sector is peculiar.

The Committee pointed out that the delay in construction and transfer of possession has left many homebuyers distraught. It was noted that "*out of 782 construction projects in India monitored by the Ministry of Statistics and Programme Implementation, Government of India, a total of 215 projects are delayed*".[16] While the Committee acknowledged that the aggrieved homebuyers could exercise their option to file for a claim before the National Consumer Disputes Redressal Commission (**NCDRC**) on the grounds of deficiency in service, the apprehension was that when other creditors file insolvency applications against these real estate developers, the complaints of the homebuyers before the NCDRC end up being stayed.

In this backdrop, the ILC decided to recommend treating homebuyers as FCs. The Government, acting on this recommendation, introduced the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 recognising homebuyers as FCs. This amendment implies that the homebuyers now have certain additional rights such as the ability to initiate the CIRP against the real estate developer and voting rights as members of the CoC.

[14] Report of the Insolvency Law Committee, Ministry of Corporate Affairs, Government of India (26 March 2018) 4.
[15] Ibid.
[16] Ibid [16].

In tune with the amendment, the Apex Court gave relief to thousands of homebuyers in the *Jaypee* case[17] by recognising their claims under the amended definition of FC.

A. *Characterisation of Homebuyers before the Enactment of the 2018 Amendment:*

Even before the passing of the 2018 Amendment, homebuyers were considered to be as FCs, but only in cases where the contract involved paying of 'committed returns' by the developer till the possession was handed to the homebuyer. In such transactions, homebuyers entered into contracts with the developers whereby they made a substantial payment for their flat in advance. The developer consequently undertook to pay monthly instalments to the homebuyers until the possession of the flat could be finally delivered. The NCLAT characterised these homebuyers as FCs by considering committed returns having the commercial effect of borrowing.[18] The NCLAT further held that in such cases, there is disbursal of funds "*against the consideration for the time value of money*".[19]

It is important to note that only a month after this judgment, the Insolvency and Bankruptcy Board of India released a press note dated 18 August 2017 and clarified that allottees — explicitly referring to homebuyers — were not at par with financial or operational creditors.[20]

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[17] *Chitra Sharma* (n 11) 12.
[18] *Nikhil Mehta & Sons (HUF) v AMR Infrastructures Ltd* NCLT, New Delhi, CA No.811(PB)/2018 in (IB)-02(PB)/2017.
[19] Ibid [4].
[20] Notification No IBBI/2017-18/GN/REG013 (16 August 2017).

Interestingly, homebuyers had also approached the National Company Law Tribunal (**NCLT**) as OCs; however, their applications were rejected because the scope of OCs, as defined by the Code, covers only those entities/individuals who supply goods or offer services to the CD and are entitled to receive payments for the same in return.[21]

Although this same logic was reused in the *Pioneer Urban and Land Infrastructure Case*[22] to uphold the constitutional validity of the 2018 Amendment, the same stands at odds with an NCLAT judgement on this point, which expressly held that even receivers or purchasers of good and services who have made advance payments to the CD can be considered OCs.[23] This decision is pivotal to the discussion at hand since it was delivered after the passing of the 2018 Amendment Act.

B. Legislative and Judicial Response to the Treatment of Homebuyers as Financial Creditors

On the surface, the 2018 Amendment has resolved the issue at hand and brought relief for all stakeholders involved. However, upon closer scrutiny, the conceptual gaps are patently visible and problematic. The rationale for the classification of creditors as FCs and OCs is discussed in

[21] *Col Vinod Awasthy v AMR Infrastructures Ltd* [2017] NCLT, New Delhi, CP No. (IB)10(PB)/2017.
[22] *Pioneer Urban Land and Infrastructure Ltd v Union of India* [2019] Supreme Court Writ Petition (Civil) No. 43/2019.
[23] Ibid [11].

the Bankruptcy Law Reforms Committee (**BLRC**) Report.[24] It has characterised FCs as being the only ones capable of being a voting member of the CoC. It reasoned that FCs have the "*capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations*".[25] In this reference, the Committee observed that typically, OCs are "*neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity*".[26]

Considering this rationale of the BLRC, it becomes hard to see how the ILC can subsequently deem homebuyers as FCs. Obviously, all homebuyers cannot be expected to be experts in assessing the feasibility and viability of the CDs. They also cannot be expected to modify their liabilities by taking haircuts. Given the characterisation of FCs by the BLRC (and it being upheld by the Supreme Court),[27] it is difficult to accept homebuyers being placed on the same footing as financial institutions.

This submission receives further impetus when viewed through the lens used by the NCLT and NCLAT previously when they relied on the test of 'consideration for the time value of money to determine whether a financial debt is owed at all. It can be seen in the following cases that the advance payments made to developers do not fall within the objective

[24] The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design (4 November 2015) <https://ibbi.gov.in/BLRCReportVol1_04112015.pdf>. (Last accessed on 23rd December, 2023)
[25] Ibid [84].
[26] Ibid.
[27] *Swiss Ribbons Pvt Ltd v Union of India* (2019) 4 Supreme Court Cases 17.

bounds of this test. In the *Nikhil Mehta* case,[28]'time value of money' was defined as "the *price associated with the length of time that an investor must wait until an investment matures or the related income is earned.*" The Insolvency Law Report of 2018, defined the concept as *"compensation or the price paid for the length of time for which the money has been disbursed."* The Apex Court has held that Section 5(8) cannot be interpreted so expansively so as to do away with the main pre-requisite which is 'disbursement' against 'the consideration for the time value of money'.[29]

Unsurprisingly, the 2018 Amendment was challenged based on its contravention of Article 14 of the Constitution of India as it treats "*unequals equally and equals unequally".*[30] It was contended that making homebuyers FCs would attack the very purpose with which the IBC was created as it gives an undue opportunity to the distraught homebuyers to initiate the CIRP and singlehandedly bring the entire housing project to a halt. The petitioners highlighted the plight of the fully functioning developers who are compliant with the law but will end up losing access to funding from financial institutions due to Section 7 applications. It was urged that these applications give an opportunity to the homebuyers to force the developer's hand in making payments despite the real possibility of the completion of the building projects. This puts the developer's funding at risk. This neither serves the interests of the developers nor the homebuyers. The petitioners also contended that homebuyers are better suited to be characterised as OCs, thereby limiting

[28] *Nikhil Mehta* (n 18).
[29] *Anuj Jain (RP) vs. Axis Bank Limited,* Civil Appeal Nos. 8512-8527 of 2019.
[30] *Swiss Ribbons* (n 27) 23.

their rights in decision-making vis-à-vis the CIRP and allowing the CD to dispute the claim of the homebuyers. Consequently, the 2018 Amendment was assailed as manifestly arbitrary and irrational.

However, the Apex Court upheld the constitutional validity of the impugned amendment by relying on the observations made in the ILC Report. It was observed that:

> "*The legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts.*"[31]

The court upheld the status of homebuyers as FCs by specifically noting how homebuyers cannot be characterised as OCs, thereby creating a classic 'either/or' situation. The court inter alia analysed the differences between the homebuyers and the OCs. Such examination by itself may impliedly testify that the court deems the homebuyers to be OCs but because of the definitional deficiency, it cannot hold them as such.

The court further observed that:

> "*What is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally when a person supplies goods and services, such person is the creditor,*

[31] Ibid [15].

> *and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor in as much as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found.*"[32]

This reasoning appears forced at best, since as noted above, not only suppliers but even purchasers can be classified as OCs.[33]

The court agreed with the respondents that there existed 'consideration for the time value of money' in a transaction between the homebuyers and the real estate developers as:

> "*[T]he allottee would pay less than he would have to for a complete flat/apartment, in which case the entire consideration for the flat/apartment would have to be paid upfront; as against instalments while it is being completed.*"[34]

Even this line of reasoning appears stretched beyond acceptance as the time value of money suggests the deferring of the enjoyment of the money advanced to a later time when it will be received back with or without interest. In the case of the homebuyer-real estate developer commercial relationship, the homebuyers have not deferred the use of the money they advanced, as much as the homebuyers are not waiting for

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[32] Ibid [40].
[33] Ibid [11].
[34] *Pioneer* (n 22) 31 [12].

this money to be returned. The homebuyers are instead waiting for a return on their investment in the form of a flat or an apartment. This transaction can be clearly distinguished from the one as dealt with by the NCLAT in the *Nikhil Mehta* case.[35]

Subsequently, it is also important to note the Apex Court's stance on alternative remedies available to homebuyers. It said:

> "*Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, viz. the Code.*"[36]

The Court here assumed that the homebuyers would file Section 7 applications only in case the other remedies are incapable of resolving their grievances. They specifically require a change in the management of the CD. Such an assumption is idealistic at best and fails to take account of practical realities wherein the CIRP initiation may be used as an abuse of the process of law. Even in the case of *Chitra Sharma,*[37] it has been observed that the homebuyers are particularly interested only in expediting the construction of their deliverables, or they expect to get their advance payments back.

[35] *Nikhil Mehta* (n 18) 19.
[36] *Pioneer* (n 22) 23 [28].
[37] *Chitra Sharma* (n 11) 12.

The homebuyers may not be able to appreciate that the IBC mechanism tends to have a far more coercive impact on the developer than any action that may be taken under Real Estate (Regulation and Development) Act, 2016 (**RERA**) or the Consumer Protection Act, 2019.

Post this ruling, it was validly acknowledged that allowing a single homebuyer to initiate the CIRP under the Code will flood the NCLT with Section 7 applications, which may even be against the interests of all other homebuyers of the same developer. Considering the same, the legislature passed another amendment in 2020, which introduced a threshold limit for homebuyers wherein "*at least hundred (100) homebuyers or 10% of the total homebuyers of the same project, whichever is lesser*"[38] can only file an application under Section 7. This amendment was also met with substantial backlash which culminated into a Supreme Court[39] ruling upholding the amended provision. Homebuyers had contended that the threshold limit placed made it difficult for bona fide allottees to approach the NCLT. This is because different allottees would have different dates of agreements and thus different dates of defaults. In light of the same, it was reasoned that there will be considerable difficulty for one allottee to garner the support of hundred (100) others who were similarly placed at the same time. It was also urged that the requirement that all allottees must belong to the same project was irrational as it insists that the real estate developer can be declared insolvent qua one particular project only. The Apex Court however, upheld the amendment by citing the need to restrict

[38] The Insolvency and Bankruptcy Code 2016, proviso to s 7.
[39] *Manish Kumar v Union of India* [2021 5 SCC 1].

indiscriminate litigation and protecting the real estate developer from "*frivolous and avoidable applications*".

IV. Analysing the Gaps in the Current Status of Homebuyers as Financial Creditors

The novel classification between FCs and OCs has put the legislature and the judiciary under the pressure of characterising all creditors in either of the two categories because to put the CIRP into motion, a creditor must be either an FC or an OC. The challenge that arises with a class of creditors who do not qualify as either has been ignored by way of forced classification in the absence of intelligible differentia. It is submitted that homebuyers in fact do not qualify as creditors at all. They are simply buyers of a product, in this case real estate for which they have made an advance payment. This piece of real estate even when under construction is the property of the homebuyer. Viewed through this lens, the property does not belong to the CD at all and is thus outside the scope of the liquidation process. Such an interpretation will not only protect the rights of the homebuyer but would even maintain the integrity of the CIRP. However, it is seen that the treatment of homebuyers as FCs is steered by unfortunate conceptual gaps and absurdities in application, which may be summarised as follows:

i Characterising homebuyers as FCs comes with the risk of turning the Code into a recovery tool as the High Courts and the Supreme Court allow the withdrawal of insolvency proceedings initiated at the instance of the homebuyers against real estate developers after a settlement has been arrived at between the parties.

Recently, the Apex Court allowed the withdrawal of insolvency proceedings after admission.[40] In this case, the Apex Court observed that:

> *"It is true that the procedure for preferring an application under Section 12A of the IBC is contained in Regulation 30A of the CIRP Regulations, 2016. However, as per the decision of this Court in the case of Brilliant Alloys Pvt. Ltd. v S. Rajagopal (2018 SCC Online SC 3154) the said provision is held to be directory, depending on the facts of each case... In the present case, it is to be noted that the CoC comprises 91 members, of which 70% are the members of the Flat Buyers Association who are willing for the CIRP proceedings being set aside. Therefore, in the peculiar facts and circumstances of the case, where out of 128 home buyers, eighty two(82) home buyers will get the possession within a period of one year, as undertaken by the corporate debtor, coupled with the fact that original applicants have also settled the dispute with the appellant/corporate debtor, we are of the opinion that this is a fit case to exercise the powers under Article 142 of the Constitution of India read with Rule 11 of the NCLT rules, 2016 and to permit the original applicants to withdraw the CIRP proceedings."*[41]

[40] *Amit Katyal v Meera Ahuja* [2022] 8 Supreme Court Cases 320.
[41] Ibid [7-9].

CIRP withdrawal requires the approval of 90% voting share of the CoC. From the instance quoted above, it is clear to see how if homebuyers make up more than 10% of the total debt then they are easily in a position to control or veto the withdrawal under Section 12A.

ii Furthermore, there have been instances where the Court has allowed for the real estate projects to be completed instead of pushing the developer into insolvency in the light of availability of funds as well as meeting the best interests of the homebuyers. Relying on the Corporate Debtor/Developer's affidavit claiming that the project will be completed within a period of six(6) to fifteen(15) months in a phased manner, the Supreme Court held that, "*we find that it will rather be in the interest of the home-buyers that the appellant/promoter is permitted to complete the project as undertaken by him… We find that there is every possibility that if the CIRP is permitted, the cost that the home-buyers will have to pay, would be much higher, inasmuch as the offer made by the resolution applicants could be after taking into consideration the price of escalation, etc.*"[42] It is then pertinent to question why treat homebuyers as FCs and why admit CIRP at all when it is clear that the homebuyers' foremost interest would always be in receiving the finished property.

iii It is also important to note that the parallel functioning of the RERA the Consumer Protection Act, 2019, and the IBC creates

[42] See *Anand Murti v Soni Infratech Pvt Ltd &Anr*[2021] Supreme Court, Civil Appeal No 7534 of 2021, 2022/INSC/487.

duplicity of proceedings. In the case of failure of delivery of the project within the stipulated time by any real estate developer, remedies at alternative forums like RERA and NCDRC are better suited to meet the interests of the homebuyers rather than pushing the developer into insolvency and forcing their hand into a settlement, in the fear of liquidation of an otherwise solvent and functioning enterprise.

iv Another complication attached to the treatment of homebuyers as FCs is in the determination of 'default' that is required to initiate the CIRP under Section 7. For instance, if there is a homebuyer 'H' and real estate developer 'R'. H has made advance payment and has been promised delivery of the finished flat by R in 2020. Upon each visit to the site, R extends the date for delivery of possession by three(3) to four(4) months. So far, no reasonable person objects. However, it is now 2024 and R has still not delivered possession. At this point, unlike the case of a loan agreement, the exact point of default is difficult to ascertain. In all cases of traditional FCs, the 'default' occurs whenever the debt becomes due and payable but remains unpaid.[43] In the case of homebuyers who have entered a 'committed returns scheme' the 'default' can be easily determined to have occurred whenever the monthly instalment remains unpaid. However, for all other homebuyers, it is difficult to determine what shall be deemed the moment of 'default'. The Apex Court has held that:

[43] The Insolvency and Bankruptcy Code 2016, s 3(12).

> *"....default means non-payment of a debt once it becomes due and payable.... It is of no matter that the debt is disputed so long as the debt is "due" i.e., payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."*[44]

The subsequent question is whether 'delay in delivery of possession' can be treated as 'default'.

v The NCLT is only required to be satisfied that a default exists without consideration of whether this default is disputed.[45] When viewed from the perspective of the real estate developers, they are often bound by situations beyond their control, leading to inevitable delays that may be accounted for by the NCLT. Interestingly, the NCLT has held that 'delay' shall not be considered a 'default' and homebuyers may be treated as FCs only in specific transactions wherein they have failed to receive committed returns by the developer under a 'committed returns scheme'.[46] Post 2018, it has been maintained that if the delay in delivery of possession is due to factors beyond the control of the CD, then there is no default.[47]

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[44] *Innoventive Industries Ltd v ICICI Bank Ltd* (2018) 1 SCC 407.
[45] *Anand Murti* (n 42) 84.
[46] *Pawan Dubey v JBK Developers* [2017] NCLAT New Delhi, Company Appeal (AT) (Insolvency) No. 40 of 2017, Company Petition No. (IB)-385(ND)/2017.
[47] *Parvesh Magoo v IREO Grace Realtech Private Limited* [2020] 02 NCLAT CK 0065.

vi Moreover, conceptually, the original intention behind the characterisation of FCs, which can be found in the BLRC Report, was stated as:

- *"Financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress...."*[48]

- *"Members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations."*[49]

Characterisation of the FCs can also be deduced from references made to the differentiation between OCs and FCs such as:

- *"Operational debts tend to be small amounts (in comparison to financial debts) or are recurring in nature."*[50]

[48] BLRC Report (n 24) 84.
[49] Ibid.
[50] Clause 8 of the Notes on Clauses to the Insolvency and Bankruptcy Code Bill, 2015.

- *"The possibility of disputed debts in relation to operational creditors is higher in comparison to financial creditors such as banks and financial institutions."*[51]

- *"In the running of a business, operational creditors can be many, as opposed to financial creditors, who lend finance for the set up or working of business."*[52]

It is submitted that the homebuyers are not even remotely covered by the criteria enunciated by the BLRC which the Supreme Court has since upheld in the case of *Swiss Ribbons v Union of India*.[53]

In characterising the homebuyers as FCs, the Apex Court has considered that the homebuyers may have some reasonable interest in the viability of the real estate developer. However, homebuyers principally desire only to secure their own investment, whether it be in the form of the completed flat or getting their investment back. Unlike banks and other typical FCs, the homebuyers can hardly be presumed to be interested in maintaining the developers' viability even if some of their projects end up being delayed or worse, terminated.[54] This contention is easier to comprehend when weighed against empirical evidence such as the ones presented in the *Chitra Sharma* case,[55] wherein only 8% of the total allottees were interested in receiving their investment back. Maximum

[51] Ibid.
[52] *Swiss Ribbons* (n 27).
[53] *Swiss Ribbons* (n 27) 28.
[54] *Pioneer* (n 22) 23 [44].
[55] *Chitra Sharma* (n 11) 12.

remaining allottees were desirous of possession of their completed flats/apartments.[56]

V. CONCLUSION

The empowerment of homebuyers under the Indian insolvency regime is laden with questions and controversy, which requires legislative or judicial clarification in time. It also poses a significant threat in terms of abuse of the process of law, especially in cases of compliant developers and defaulting homebuyers. Upon closer scrutiny, one may be riddled by the negative impact of characterisation of homebuyers as FCs, not only on real estate developers, but even on the homebuyers themselves. As and when the CIRP is initiated against any developer, the company is at risk of losing access to financing by banks and financial institutions. This will impact the developer's ability to complete all existing projects and cause all homebuyers to face further delays.

It is clear from the deliberation above that homebuyers do not meet any of the criteria identified by the BLRC and the ILC regarding characterisation as FCs. Unlike other FCs, their claims may be disputed, they too are many in number, and most importantly, by no stretch of the imagination, do they possess the capability to assess the viability of any business. Further, they are in no position to modify their own liabilities for the reorganisation of the CD's business.

[56] Ibid.

The menace of delayed deliveries in the real estate sector has indeed been the cause of much dismay amongst the homebuyers. However, it is submitted that the IBC has been enacted with a specific objective which has no nexus with the purely sectoral problem of delayed and mismanaged real estate projects. A solution to this sectoral issue unique to the real estate industry may be found elsewhere outside of the IBC, thereby maintaining the original spirit of the Code. Like other jurisdictions, the Indian parliament can also, for instance, opt to protect consumer pre-payments in case of insolvency proceedings.

Furthermore, it is submitted that the interests of the homebuyers as significant stakeholders can be protected even without characterising them as FCs. Instead of bestowing the right of initiating the CIRP on the homebuyers, the Tribunals can instead rely on Section 36 of the Code to ensure that the homebuyers are not arbitrarily disadvantaged in the insolvency or liquidation process. As per clause 4 of Section 36, "*assets owned by a third party which are in possession of the corporate debtor*"[57] shall be excluded from the liquidation estate assets and "*shall not be used for recovery in the liquidation*."[58] The case of the homebuyers can conveniently be interpreted as a part of this provision as the homebuyer's funds in possession of the CD and the complete/incomplete project not yet delivered to the homebuyers, both qualify as third-party assets that were never the CD's own. Their exclusion from the liquidation process prevents them from being used for the purpose of recovery and can be returned to the original owner. This can help preserve the interests of the real estate developers and the

[57] The Insolvency and Bankruptcy Code 2016, s 36(4).
[58] Ibid.

homebuyers without resorting to forceful classification which negatively impacts all stakeholders involved.

Thus, it is very important to assert that sectoral issues should not influence the policy makers to amend a universal law like the IBC.