

# HOMEBUYERS CANNOT BE MADE TO SUFFER, IF FRAUD HAS BEEN COMMITTED BY DEVELOPERS

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The recent Supreme Court judgment in the case of *Bikram Chatterjee v. Union of India*<sup>1</sup> while dealing with provisions of IBC Code has strengthened the position of the homebuyers.

## Background

The Amrapali group (hereinafter referred to as the “**Developer**”) was extensively involved in real estate projects in northern India and had proposed to construct approximately 42,000 flats on land leased by Noida and Greater Noida Authorities (hereinafter the leased land shall be referred to as the “**said Plot**” and Noida and Greater Noida Authorities shall be referred to as “**Noida Authorities**”).

The Developer had undertaken construction of several housing projects on the said Plots. To raise finance for these projects Developer had availed of credit facilities from various banks (“**Banks**”) by mortgaging the said Plot in favour of the Banks on the basis of a conditional NOC obtained from Noida Authorities and had collected substantial

advance payments from homebuyers, towards the purchase consideration of the flats to be constructed under the housing projects. These projects were registered by the Developer with the competent authorities as mandated by the provisions of Real Estate Regulatory Authority, 2013 (“**RERA**”). The Developer however defaulted in completing the projects within the time frame specified in RERA registration. The Developer also defaulted in repayment of dues to the Banks and payment of lease charges to Noida authorities thereby rendering the mortgage of the said Plot in favour of Banks on the basis of a conditional NOC invalid.

Pursuant to the default by the Developer, the homebuyers approached consumer dispute redressal forums to protect the flats purchased by them, while Bank of Baroda

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## PREFERRED CITATION

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<sup>1</sup> 2019 SCC OnLine SC 901

initiated corporate insolvency resolution proceedings under the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) before the National Company Law Tribunal (“**NCLT**”) claiming to be a secured creditor in view of mortgage of the said Plot and as a result of which having a charge over the flats constructed upon the said Plot subsequently sold to the homebuyers. In view of the overlap of these proceedings before various forms some of the homebuyers filed several writ petitions before the Supreme Court of India to prevent the secured creditors from claiming rights over the flats purchased by them.

In the above writ petitions, the Hon’ble Supreme Court directed a forensic audit of accounts which *inter alia* revealed illegal diversion of funds by the Developer, for purposes other than development of the housing projects. The Hon’ble Supreme Court also found that the Developer was not authorized to mortgage the said Plots on the basis of a conditional NOC obtained from the Noida Authorities without satisfying the condition of paying the lease premium to them and thus no valid mortgage was created in favour of the Banks. The Banks were also negligent in verifying the validity of the mortgage created in their favour and in monitoring the end use of funds and thereby preventing unlawful diversion thereof at the hands of Developer thereby leaving the homebuyers in the lurch without timely

delivery of their homes. Further, the Hon’ble Supreme Court has also held the Noida Authorities and its officials responsible for acting in collusion with the Developers by continuing to lease lands in favour of the Developers subsequent to their initial default in making payments towards the lease charges and also permitting subsequent sub-lease of their lands by the Developers. The Developers have acted in gross violation of their duties stipulated under RERA by not completing the housing projects and not obtaining completion certificate and occupancy certificate in a timely manner. The Hon’ble Supreme Court therefore came to rescue of the homebuyers by adopting a very pragmatic and practical course as laid down in this Judgment.

### **Key takeaways**

The Supreme Court has held that:

- a) In specific the Supreme Court has held that no valid mortgage could not have been created in favor of the Banks since the NOC obtained by the Banks from Noida Authority was conditional on account of the promoters/ builders paying the entire lease premium, and this condition wasn’t satisfied.
- b) Banks must continuously monitor the utilization of the credit facilities disbursed by them and ensure that

- the facilities are utilized for the sanctioned purposes.
- c) Banks and local authorities sanctioning construction of housing projects must act in furtherance of the public trust and ensure that projects are completed in a timely manner so as to ensure that faith in the real estate sector is maintained.
  - d) Homebuyers cannot be made to suffer if fraud has been committed by Developers even if there they are not in possession of registered transfer deeds/ agreements and their interest has to be protected as long as they have performed their part of the contract i.e. making payment towards the purchase consideration of the flats.
  - e) The Noida Authorities have been directed to issue the completion certificate, occupation certificate and partial completion certificate as the case may be and to execute a tripartite agreement and registered deeds in favour of the homebuyers despite failure on part of the Noida Authorities and Banks to take steps to prevent diversion of funds.
  - f) NBCC, a government authority has been directed to complete the projects after cancellation of the RERA license of the promoter/ builder and hand over the completed projects to the homebuyers.
  - g) The homebuyers have been directed to deposit the outstanding amount in a bank account opened with UCO Bank in the branch of the Hon'ble Supreme Court which will be invested in fixed deposit to be disbursed as per the directions of the Hon'ble Supreme Court.
  - h) Noida Authorities and Banks shall have no right to sell the flats of the homebuyers or the land leased out for the realization of their dues. Their dues shall have to be recovered from the sale of properties attached, by the Hon'ble Supreme Court, into which the funds have been previously diverted.
  - i) All companies/directors and persons in whose hands money of the homebuyers is available as per the report of the forensic auditors shall deposit the amount in the Court.

### **Way forward**

While safeguarding the interests of the homebuyers on the principles of natural justice and good conscience, the Hon'ble Supreme Court has directed that Banks should henceforth monitor and ensure that the funds that have been disbursed are being used solely for the purposes for which they have been disbursed. However, it is yet to be

seen what kind of mechanisms do banks set up for this and how practically viable is this for banks. Also the Hon'ble Supreme Court has in the current scenario ordered NBCC to complete the housing projects commenced by the Developer and hand them over to the homebuyers. This cannot be a permanent solution to every Developer failing to complete housing projects in a timely manner. RERA must be followed at all times and should be enforced every time there is a violation committed against homebuyers and/or Developers.

Further what one needs to note is that homebuyers should ideally seek remedy under RERA as opposed to IBC because under RERA gives the opportunity to homebuyers not only to finally own their home but also at various other stages of default committed by Developers whereas under IBC the interests of homebuyers being a financial creditor are compromised on a *pari passu* terms. Although it is clear that RERA shall supersede other laws in cases where the interest of homebuyers are concerned, it is yet to be seen what are the other scenarios under which Section 238 of IBC shall be overridden.