



SUPREME COURT JUDGMENT IN CHALLENGE TO IBC AMENDMENT ACT, 2020-

IMPLICATIONS FOR HOMEBUYERS

The Hon'ble Supreme Court, in the matter of Manish Kumar v Union of India & Anr. W.P. (c) No. 26 of 20, and connected matters including Sanjib Kumar v UOI W.P. © No. 53/20, Farzana Parveen &Ors v UOI & Ors. W.P. (C) No. 714/20, Dharma Pal Singh v UOI &Ors, W.P. (C) No. 806/20, Suniel Virrmaani &Ors v UOI W.P. (C) No. 850/20 and certain other matters, rendered a common judgment on 19.1.20.

The various petitions challenged various aspects of Insolvency and Bankruptcy (Amendment) Act, 2020 whereby various changes/amendments were made to the provisions of the Insolvency and Bankruptcy Code, 2016 (Hereinafter referred to as 'IBC'). The majority of the Petitions were filed by aggrieved Property Buyers (Residential/Commercial/Plot-holders etc.) who challenged the amendments to Section 7 of the IBC as being violative of the fundamental rights guaranteed under articles 14, 19,21 and 300-A of the Constitution of India.

The Hon'ble Supreme Court, vide its judgment dated 19.1.20, disposed the batch petitions with certain directions and clarifications- without striking down the law in itself.

What was the old law?

As per the old IBC law (pre amendment), the buyers could file individual IBC applications before the National Company Law Tribunal (NCLT) against the Real Estate Companies (to get the latter declared insolvent), if and when there was a default on the part of the latter to ensure timely delivery of property OR refund the money with interest. In most cases, the builders, fearing Insolvency would settle the claims of the property buyers quickly. This remedy was faster and much more effective than RERA or Consumer Courts and hence preferred by the buyers.

What was the problematic 2020 IBC amendment that the buyers challenged?

As per the 2020 Amendment to the IBC, the system of filing Individual Applications was closed. The new law provided that an Insolvency Case can be filed by property buyers/allottees only if they filed in a group representing '**10% of allottees of the real estate project OR 100 buyers, whichever is lesser**'. The new law also provided that all pending applications would have to be modified to satisfy the new minimum quota within 30 days or else, they would be deemed withdrawn. This shocked the buyers who chose to challenge the same before the Supreme Court.

What was argued before the Supreme Court?

The undersigned led the arguments for the buyers before the Supreme Court along-with various Counsels for their respective clients. Although the arguments were extensive, the same can be summarized as follows:

- i. The amendments are arbitrary, discriminatory and unconstitutional and violative of the Fundamental Rights of the buyers under Articles 14, 19, 21 and 300-A of the Constitution of India. The same would effectively close the doors of IBC to buyers and extend unfair protection to



fraudulent Real Estate Companies. Therefore, the amendments should be struck down and the old legal position should be restored.

- ii. If in the event that the above arguments are not entertained by the Supreme Court, then the limitations in the law must be smoothened by the Supreme Court to ensure that the new law can be implemented practically and the buyers can exercise their rights. The various limitations in the new law were pointed out.

What did the Supreme Court hold?

The first part of the arguments was rejected by the Supreme Court. The Supreme Court observed that the amendments are harsh, but they are not violative of Fundamental Rights of the buyers. The amendments are needed to protect the economy and to safeguard the larger public interest. The amendments should apply to pending applications also to ensure that there is no collapse of the Courts and economic systems owing to flooding of applications. The buyers are free to exercise other remedies under RERA or other laws if they find the IBC route too difficult.

The second part of the arguments was entertained by the Supreme Court. The Supreme Court provided detailed clarifications on how the new law should be implemented. Issues such as how to calculate allottee numbers, date of default, how to tackle disagreements within the buyer groups after filing, what is the date for calculating the minimum quota etc., future of pending applications, court fees etc., were clarified by the Supreme Court.

What are the implications of the Supreme Court judgment?

The implications of the Supreme Court judgment are summarized in the following table for ease of understanding:

Sl. No.	Queries	Answer
1.	Can the buyers file Individual IBC applications as per the old law?	No. the old law no longer exists. Buyers can now file IBC applications only in a group and not individually.
2.	Is the IBC amendment of 2020 here to stay?	Yes. The 2020 amendment is the new law and the Supreme Court has upheld it as valid.
3.	As of today, how can the buyers avail the legal remedy under the new provisions of IBC?	The buyers have to file the case before the NCLT in a group by way of a joint application. The group should have either 10% of the total allottees of the Real Estate Project OR 100 buyers from the same project, whichever is lesser.
4.	Do the buyers forming the applicant group have to be from the same Real Estate Project?	Yes. All the members of the buyer group filing the case have to be from the same Real Estate Project of the Debtor Real Estate Company.
5.	If a group of 100 buyers can be made, then is it necessary to ensure that	No. Only one of the conditions have to be satisfied. If there are 100 buyers from the same project, they can proceed to file the case. They don't have to satisfy 10%.



Sl. No.	Queries	Answer
	the are more than 10% of the allottees?	
6.	What if the group doesn't have 100 buyers who are willing to file a case?	Then the buyers should create a group which has at least 10% of the allottees of the project and file the application jointly.
7.	Who is an allottee as per law?	The term 'allottee' will carry the same meaning as defined in Section 2(d) of RERA Act. Any person who has booked an apartment/plot/building etc. or who has an allotment letter or agreement to sell etc., assignee, transferee etc. is an allottee.
8.	Is there any difference in the rights of Residential Allottees and Commercial Allottees?	No. Under IBC there is no difference between the two. Both can file cases in groups if above conditions are satisfied.
9.	What is the meaning of the term 'Real Estate Project'?	The term real estate project will carry the same meaning as defined in Section 2(zn) of RERA Act. Practically, it means a single colonized construction. Supreme Court has clarified that this has to be decided from case to case.
9.	For the purpose of 10% calculation, will multiple purchasers of same property be deemed multiple allottees or single allottee?	<p>If more than one person (friends, family members etc.) buy one property jointly, they will be treated as a single allottee and not multiple allottees. One unit= One allottee</p> <p>For example, if there are three apartments in a project and each of these apartments are held by three couples-Couple A, Couple B and Couple C. Then the 10% will be calculated as follows: Total units: 3 Total purchasers: 6 Total Allottees = Total units = 3 10% of Total allottees =10% of 3 = 0.3 Round off figure: 1 Minimum people who can file a case: 1 (either husband or wife holding a single property can file).</p>
9A.	If a person has more than one apartment allotted to him/her in the same project will he/she be considered one allottee?	No. The allottee status is calculated unit-wise and not person wise. The same person may be considered more than one allottee depending on the number of units he/she holds. i.e. a person holding 3 properties in a project will be considered 3 allottees for calculating 10% (both in numerator and denominator).



Sl. No.	Queries	Answer
10.	Builders keeps doing bookings on a daily basis. How can one calculate total bookings to create a buyer team of more than 10%?	<p>The Supreme Court has clarified that as per Section 11 of RERA and the state Rules, the builders have to update the status of bookings on their website. The RERA authorities have been directed by the Supreme Court to enforce this strictly.</p> <p>Buyers can use this data to be updated about current state of bookings and calculate the minimum quota of 10% accordingly.</p> <p>Further, the Supreme Court has also asked the buyers to actively participate in buyers associations (as is required under RERA Act) to keep themselves updated on the information. It is their duty under Section 19 of the RERA Act.</p>
11.	What if I satisfy 10% quota today and file a case but before the hearing or during the case hearing- builder allows a few more bookings. Will I not fall short of 10% quota? Will my case be dismissed?	<p>The relevant date for achieving 10% is the date of filing the case. If the buyers carry 10% representation on the date of filing the case, it doesn't matter if the builder does more bookings thereafter.</p> <p>For Example: If a builder has got booking for 100 flats in a project as per its website data on 20.1.21 and the buyers make a team of 10 people (10% of 100) and file an IBC case on 20.1.21, then the buyers have satisfied the condition. It doesn't matter if the builder does more bookings during the pendency of the case; the change in number of bookings wont affect the required quota after the case is filed.</p>
12.	Suppose the buyers file a case with 10% buyer group but some of the buyers back out of the case or settle with the builder after the case filing. What happens then?	As clarified above the relevant date is the date of filing the case. If some people back out thereafter and the quorum goes below 10%, it won't affect the case
13.	How is the monetary limit of 1 Crore to file a case be calculated?	If the total debt amount defaulted exceeds 1 Crore, it is sufficient to maintain a case. It is not necessary that individual allottees need to show individual default in excess of 1 crore.



Sl. No.	Queries	Answer
14.	Does the case for which Debt and Default is claimed have to be related to the applicants only? Can a group of buyers, file a case on behalf of others who have suffered in the same project	'No' to question 1 and 'yes' to question 2. If there are documents to show a default in excess of 1 Crore by the Real Estate Company and that default is not time barred (not more than 3 years since default), then the group of allottees can file a case. The default can be related to all the allottees, some of the allottees or even none of the applicant allottees. Even if a third party allottee has a default in excess of 1 Crore, other buyers in a group can file a representative claim against the same Real Estate Company.
15.	What is the time limitation to file an IBC case?	Normally an IBC case can be filed in 3 years. For example, if the builder promised a delivery by April 2017 and defaulted, then an IBC case can be filed by April 2020. This time period to file a case can be extended u/s 5 of Limitation Act by the NCLT if sufficient cause for the same is shown.
16.	What happens to time limit in a group? What if the default dates are different for different members of a group?	It doesn't matter if the default dates are different. All applicants must be Real Estate Allottees of the same project and represent 10% of Total allotments OR be 100 in number. The main debts and defaults must be in excess of 1 crore and the same should preferably be not more than 3 years old (from date of default). If in the group, there are some allottees whose default itself has not happened OR some others whose defaults are older than 3 years, it won't affect the merits of the case.
17.	What happens to the pending cases?	The pending cases have to be withdrawn and refiled after achieving the relevant 10% quota OR 100 buyer group. The time given as per the law to do this was one month from 28.12.2019 till 28.01.2020. Since this time has expired, the Supreme Court has extended the time to do the same. The buyers can form fresh groups now and re-file the cases and the NCLT will grant time extension if specifically applied for.
18.	Is there any benefit in refiling within 2 months from 19.1.21?	Yes. The Supreme Court has clarified that if the pending applications are withdrawn and refiled within 2 months with proper application to excuse delay, the NCLT would accept the same without asking for any Court fee payment afresh. To this extent, the Court Fee will be waived.

Krishnamohan K Menon, AOR Supreme Court
Chaitanyashil Priyadarshi, Advocate
Dania Nayyar, Advocate
Parul Sachdeva, Advocate

New Delhi
20.1.2021

Disclaimer: The Bar Council of India does not permit advertisement or solicitation by advocates in any form or manner and Mimansa Law Offices complies with this fully. This is for informational purposes for our clients only and is not intended to be, and should not be construed as a solicitation.

Mimansa Law Offices: New Delhi Offices: C-6/50 Block-C6, Safdarjung Development Area, Hauz Khas, New Delhi, Delhi 110016
Contact: +91 (11) 2656 2650
Email: mail@mimansalaw.in
Website: <http://www.mimansalaw.in/>