

## The Builder-Buyer Battle for Real Estate: Deciphering Post Covid-19 Psychology

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### INTRODUCTION

1. Since the early 2000s, the Real Estate industry in India started seeing significant changes. Now with multiple players, mushrooming projects, billboards, and advertisements offering myriad schemes with near impossible return promises, real estate seemed to be the magical stairway to financial heaven. Some industrial players were seasoned while many were wide-eyed rookies with a taste only for short term profit. The latter's funds were mostly cash routed and dubious and the fund application was even more so. While the offers were tempting to the buyer, the contents of the contract usually secured the builder and builder alone. The offers were grandiose, but promises were seldom kept and clearly siphoning was the norm. Consequently, the number of delayed & incomplete projects far outnumbered the timely delivered ones.
2. The good old saying goes- "if it seems to be too good to be true, it probably is". That is exactly what happened to a majority of the investors who went 'all in' with their investments into such schemes; most came out with their fingers burnt. Some builders claimed that this collapse was triggered by the radical Governmental interference in the form of the Regulatory law RERA, tax revamp by way of GST and the so-called demon of Demonetization. Subtly though, some builders also accepted that this was the consequence of crony capitalism and the bubble burst was bound to happen one day or other. Whatever be the reason, the real estate economy went on a downward spiral and continues to do so.
3. The buyers now faced their biggest challenge- enforcement of their rights in the middle of a tailspin. The Consumer Forums, although liberal in terms of relief, could not offer any expeditious solutions. It is interesting to note that for a forum which is expected to dispose of cases within a year, the National Commission was granting adjournment dates in excess of twelve months. RERA grievance redressal mechanism, although seemingly promising, was not effectuated timely and was not functioning efficiently. Project restructuring seemed a far-fetched dream with the banks rolling down the shutters.
4. The only glimmer of hope for the buyers seemed to be the Insolvency and Bankruptcy Code, 2016, which after protracted litigation and multiple amendments recognized the position of property buyers as 'Financial Creditors'<sup>[1]</sup>. This conferred upon the buyers the power to trigger Insolvency proceedings under Section 7 of the Code against the Real Estate Company. For the first time, panic set in amongst the builders. Not only was this a summary and expeditious proceeding, an unsettled claim of debt would result in replacement of the management and investigation into the affairs of the Company.

5. The consequences were Bipolar - on the one hand there was expeditious settlement of claims (either by way of refund or delivery of alternate property) and on the other, many a Real Estate Company shut shop and resigned to Insolvency. Although the revival of the Companies Post Insolvency was a rarity, the interference of the Hon'ble Supreme Court in a few cases saw a revival of some projects and restoration of some degree of sanity amidst the chaos.

## THE BATTLE

6. The builders, not used to this treatment, protested. What followed thereafter, was a contest worthy of a movie script:
- i. *Round 1 to builders:* The amendment to Section 7 of the IBC, which gave the buyers the Status of Financial Creditors, was challenged by a builder before the Hon'ble Supreme Court in Pioneer Urban's case[2]. While issuing notice in the matter, the operation of the said amendment was stayed by the Hon'ble Supreme Court on 21<sup>st</sup> January 2019. This stay proved to be a gamechanger as every builder would now file a petition and seek a similar order. This stalled every real estate matter before the National Company Law Tribunal's (NCLT's) across India for a period of 7 months.
  - ii. *Round 2 to buyers:* The next round belonged to the buyers as the Hon'ble Supreme Court would dismiss the builder's challenge and uphold the law guarding the buyers vide its detailed judgment dated 9<sup>th</sup> August, 2019[3]. The stay on proceedings was vacated. The Supreme Court also clarified that RERA proceedings were independent of IBC and one does not impede the other.
  - iii. *Round 3 to builders:* One of the clarifications in the above judgment was that the NCLT would keep in mind that the cases before it were genuinely meant for resolution of insolvency and not merely ones filed by trigger happy buyers or speculative investors seeking to arm-twist the builders. Harping on this, affidavits were filed in pending cases before the NCLT by the builders calling many cases to be motivated ones and not genuine claims. Delaying proceedings seemed to be a latent intent.
  - iv. *Round 4 to buyers:* The NCLT would have none of it. It was made clear in Sunil Handa's and other cases[4], that a buyer who approaches the NCLT after expiry of the date of delivery mentioned in the agreement, is no speculative investor. A builder may keep offering the property thereafter in the guise of extended RERA dates, but the buyer is not so bound. These orders were followed by a series of declaration of insolvencies furthering the economic tailspin.
  - v. *Round 5-drawn:* Necessity is the mother of invention; be it products or litigative strategies. Rejuvenated, the builder's now sought to defend future cases on the point of 'Force Majeure' i.e. that the non-delivery of property was due to uncontrollable circumstances such as delay by the authorities in issuing permits and licenses on time. Therefore, it was argued that there was no default. This found favour with NCLAT in Raheja's case[5]. But this did not extend much to

other cases, as in most cases the default was not owing to uncontrollable circumstances but owing to the builder's own fault.

- vi. *Round 6 to Builders:* Frantically, the builder's made representation after representation before the Government and sought an intervention citing an impending doom. Already troubled by the GDP projections, the Government introduced a purported salvaging measure in the December of 2019 vide an Ordinance[6]. The Ordinance, like never before, introduced a new rule only for Real Estate Allottees:- lone wolves allowed no more. The allottees could now file an IBC case in a pack [100 buyers or 10% of buyers in a project] or not at all. Why a group? 10% of what? How does one know the total allottees? Why is a builder secured and not a manufacturer? Why is a real estate buyer worse off than even a tea supplier to the builder? What if the group is made and one backs off? Questions were many and answers, few. To add insult to injury, the Ordinance also gave an ultimatum- make friends and meet the quorum in 30 days or even pending petitions would go.
- vii. *Round 6 to buyers:* Shocked by the irrationality of the amendment, the buyers approached the Hon'ble Supreme Court vide various Writ Petitions[7] in Manish Kumar's Case, Sanjib Kumar's case etc. Fortunately, the Hon'ble Supreme Court issued notice in the matter and granted 'status quo' saving the pending proceedings from dismissal[8]. Pending this challenge, the legislature gave its thumbs up to the ordinance[9] compelling the buyers to challenge this also.
- viii. *Round 7 stalemate:* Just when the turbulence was thought to be over, the Hon'ble NCLAT passed an unprecedented order in Umang Realtech's case[10] and held that when a Builder Company is declared insolvent, it is not the company that becomes insolvent but the project alone. This was conceptually unheard of.
- ix. *Round 8 to buyer:* The equations were changed again when the NCLAT hinted at excluding the decree holder buyers i.e. those buyers who have doubly affirmed their position as Financial Creditors [through orders of RERA, Consumer Court, Civil Court etc.] from the stranglehold of the mandatory 'pack filing' amendments[11].
- x. *Round 9 the Story continues:* Normally, one would believe that if I say I have a right- I am good and If the Court say's I have the same right- I am doubly good. For unexplainable reasons, the Company Tribunals seem to have different views on this point. It is settled law that a real estate buyer who has documents to establish default on the part of the Builder can directly trigger insolvency proceedings without having this position affirmed by any court. If that is so, then a buyer who has gotten their right doubly affirmed through a RERA/Arbitration/Consumer Court order, should be doubly good to file an Insolvency case? Obviously. Surprisingly, the NCLAT seems to have different views on this point. In Ugro Capital's case[12] the NCLAT said 'yes' and in HDFC Bank's case[13] it shockingly said 'No'. Fortunately, reason seems to prevail owing to the Supreme Court's comforting superior view in Vashdeo's case[14] wherein observations indicate that a Decree Holder is no lesser than a decree holder and entitled to file an Insolvency Case.
- xi. *Round 10 to COVID:* To add fuel to the to the raging inferno, the year 2020 gifted mankind with COVID 19. In a drastic bid to save the economy, the following amendments were made to the

IBC:

- Earlier, an Insolvency case could be filed for a default of Rs. 1 lakh-now it is 1 Crore[15].
- Sections 7-10 of IBC have been sought to be suspended for 6 months to avoid an economic collapse, thereby putting IBC itself in a limbo[16].

Interestingly, the ordinance has not been assented to by the Hon'ble President. It may be possible that all have realized that the economy is not linear but circular. If the fear of paying is taken away from the defaulter, then the fear of recovering sets in with the creditor. Either is not good for business.

## WAY FORWARD

7. One thing is clear- that everything is unclear. The future of IBC from a real estate buyer's perspective is no less than a complex calculus problem. The suspension may or may not happen. The challenge to the threshold provisions may or may not find the assent of the Hon'ble Supreme Court. Even if the same doesn't find favour, it may be possible that the amendment is partly struck down to save pending proceedings. The Hon'ble Supreme Court may or may not hold that decree holders are outside the scope of the amendment. The various forums may reach a consensus on what happens to a group which achieves a threshold on the date of filing but loses the quorum when a few people are settled during the proceedings OR Not.
8. In this tumultuous scenario, only the sane and calm minds can prevail. To begin with it is important to not restrict one's view to the IBC alone but keep an open mind to pursue the various legal remedies available in law-singularly or in multiples. This requires a logical analysis of the possible consequences, reasoned prediction of the future, evaluation of the remedy mechanisms available, classification of cases to choose the right mechanisms and pursuing only that route which is optimum. A detailed analysis of the same is done hereinbelow.

HEADS	NATIONAL COMPANY LAW TRIBUNAL (NCLT)	REAL ESTATE REGULATORY AUTHORITY (RERA)	CONSUMER FORUMS	ARBITRATOR	CIVIL COURT	EOW COMPLAINT/ CRIMINAL COURTS
<b>Governing Law</b>	Insolvency and Bankruptcy Code, 2016 and Rules and Regulations	Real Estate (Regulation and Development) Act, 2016 and Rules and Regulations	Consumer Protection act, 1986 and Rules & Regulations	Arbitration and Conciliation Act, 1996 and Rules and Regulations	Indian Contract Act, 1872 Code of Civil Procedure, 1908	Indian Penal Code, 1861 Code of Criminal Procedure, 1973

<b>How to file</b>	E–filing along with the physical filling . Only urgent filing permitted in Covid-19 period	E-Filing AND/OR Physical filing Filling permitted during Covid-19 period	Complaint to be filed in respective Consumer forum with evidences	Nomination of arbitrator directly/through institution or Petition to be filed before the concerned High court for appointment of arbitrator	Petition to be filed before the concerned Civil court	Complaint to be filed before EOW / Complaint to be filed before concerned magistrate
<b>Pecuniary Jurisdiction (Minimum Default Limit)</b>	Due to Covid – 19, the monetary limit has been raised from 1 lac to by 1 Crore Although the language of the notification is unclear, whether this limit is to apply to filed and pending matters (retrospective) OR fresh defaults and filing (prospective) is yet to be seen.	No Limit	Upto 20 lakhs – District Consumer forum 20 lakhs – 1 Cr. – State Consumer Dispute Redressal Commission. Above 1 Cr. – National Consumer Dispute Redressal Commission. [If 2019 Amendment is notified then the limit will be changed to Ø Upto 1 Cr- District Forum, Ø 1Cr to 10 Cr- State Commission Ø 10 Cr and above- National Commission]	No limit	District courts – upto 20,00,000 High court – beyond 20 lakhs [Taking example of Delhi]	In case of EOW – 6 Crores and above.
<b>Applicant Threshold</b>	100 Allottees or 10% of the total no. of Allottees.	No Limit	No Limit. Can File individually or as a group of consumers.	No Limit	No Limit	No Limit

<b>Estimate Litigation time</b>	3 months – 1 year	5months – 1 year [Add 1 year more for completion of execution of orders passed]	4-7 Years [including execution proceedings]	1 Award to be passed within 12 months	3 years – 7 years	2-7 years
<b>Remedies available</b>	Initiation of Corporate Insolvency Resolution Process. Investigation into Company affairs and dubious transactions	Order of possession or Refund of the amount along with penalty	Order of possession or Refund of the amount along with interest and penalty	Award for refund or possession.	Refund of the amount along with compensation and interest	Arrest of the Builders / Developers.
<b>Court Expenses</b>	25,000/-	1,000/-	Rs. 200 – For cases involving Rs.5,00,000/- Rs. 400 – For cases involving Rs.10,00,000/- Rs. 500 – For cases involving Rs.20,00,000/-	Expenses of the arbitrator along with court expenses	Court fees computed as per local laws proportionate to amount claimed. equivalent to the amount of the property.	No court fees.

<p><b>Execution of Order</b></p>	<ul style="list-style-type: none"> <li>· Self-executing order.</li> <li>· Insolvency Resolution Professional (IRP) appointed will take the process forward by calling for claims, constituting committee of creditors (buyers to be represented by representative IRP's) and inviting resolution proposals.</li> </ul>	<p>Application to be filed online</p>	<p>Application to be filed in the same court</p>	<p>Through Civil court</p>	<p>Application to be filed in the same court</p>	<p>No provision</p>
	<ul style="list-style-type: none"> <li>· IRP, when later confirmed as Resolution Professional (RP), can also initiate investigation proceedings into the affairs of the company with the sanction of the NCLT.</li> </ul>					

**Advantages**

- Expeditious Remedy
- Summary Procedure
- Limited defense available to builder
- Builders fear loss of control of company and potential investigations and hence settle faster.
- IRP has ample power to request NCLT for investigations into fund siphoning, fraudulent or preferential transactions etc. and revive the company
- Even projects which have bombed can be revived through effective resolution plan
- Physical as well as e-courts systems
- Summary Procedure
- Relatively faster proceeding than regular civil or consumer proceedings
- Ample powers to issue directions, direct payment of compensation with interest and imposition of penalties.
- Can ignore unfair terms in agreement and pass orders in the interest of justice
- Detailed hearing procedure with summary evidence process.
- Cases where default is not crystal clear but requires evidence examination can also be effectively prosecuted.
- Can ignore unfair terms in agreement and pass orders in the interest of justice
- Power to order payment of punitive damages.
- Detailed hearing process with evidence
- Dates of hearing are shorter and effective.
- Faster than Civil Court
- State takes over the prosecution.
- Siphoned funds can be traced by lifting the corporate veil and investigating persons involved.
- Fear of arrest and imprisonment causes builders to settle matters by complying or giving good offers.
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**Limitations**

- Minimum threshold of 100 buyers or 10% buyers difficult to satisfy.
- Temporary suspension of Code and enhanced default limit of 1 crore
- Default must be crystal clear and there shouldn't be any contributory default from buyer's end.
- Documentation of debt and default must be well maintained
- Compared to IBC, proceedings still not as expeditious.
- RERA authority appointment and functioning not consistent across India.
- Relatively softer stand taken by RERA authorities
- Implementation of orders still in the conventional manner of execution which is ineffective and time taking.
- Extremely time taking procedure owing to pendency
- Execution process although better than regular civil courts, still time taking.
- Summary evidence procedures also consumes substantial time.
- No fear of consequence upon erring builders.
- Even summary procedure takes substantial time.
- Arbitrator appointment procedure usually rigged in the agreement in favour of the builder.
- No power to impose punitive damages or penalties.
- No fear of consequence among erring builders.
- Execution process slow and arduous.
- Builder can delay proceedings by approaching Civil Courts
- Expensive proceedings initially
- Terms of agreement play an important role in decision making
- Extremely slow
- Unnecessary technicalities
- Execution of order is also a detailed process.
- Even if favorable order is passed the same is seldom given effect to owing to appeals filed.
- Expensive proceedings initially
- No fear of consequence on builder
- Cannot easily ignore terms of the written agreement even when they are slightly unfair.
- Time taking process sometimes.
- Outcome severely dependent on the attitude and capability of the regional Police and concerned officers.
- If builder is granted bail, then they are seen to delay proceedings and seldom seek to comply.

<b>When advisable</b>	<p>Advisable in cases of mass default by builder with or without substantial delays, improper sanctions, fraudulent or duplicate transactions, unilateral alterations etc.</p>	<p>Advisable if the project is substantially completed and errors are minor. Particularly when the project is on the right track and violations are not in mass scale but individualistic in nature. Also suitable in cases where default is not crystal clear but needs some probing of evidence.</p>	<p>Advisable if default is unclear and requires detailed examination of evidence particularly in cases of mutual defaults. Even cases where documentation is unavailable would be better routed through the Consumer Courts.</p>	<p>Advisable only if default is unclear and requires examination of evidence particularly in cases of mutual defaults. This too only when regional RERA is dysfunctional for any reason.</p>	<p>Advisable only if default is unclear and requires detailed examination of evidence particularly in cases of mutual defaults. This too only when regional RERA is dysfunctional for any reason.</p>	<p>In cases of mass fraud, illegal constructions, forged or collusive license procurement, dual allotment of same property, construction completely contrary to agreed terms, suspicion of fund siphoning etc.</p>
<b>When avoidable</b>	<p>If the project is substantially completed, substantially compliant in terms of permissions/licenses, not severely delayed and only very few units remain incomplete. Mainly in cases of builders who a bona fide in their approach and default is only minor and mendable.</p>	<p>When there is mass fraud and project itself is stunted, then IBC and RERA proceedings can be pursued simultaneously.</p>	<p>Avoidable in all cases than the advisable scenarios mentioned above.</p>	<p>Only to be pursued as the last option and that too when the builder is known to have a history of honoring arbitral awards.</p>	<p>To be avoided unless no other option available</p>	<p>If it is a simple case of one-off default or delay from the end of the builder owing to uncontrollable circumstances or inefficient planning.</p>

## CONCLUSION

9. What happened to the real estate sector is not unprecedented and surely not incomprehensible. Any industry which is unregulated, cash driven and fancy priced will meet such a fate. Everyone will suffer at one point or the other. This suffering can last for 'sometime' or a 'lifetime' depending on the choices the buyers make. As the good old saying goes, 'every cloud has a silver lining'- the same applies to economics.

10. The most common responses from the end of the real estate consumers in the face of this catastrophe (often heavily encouraged by some members of the profession) is that *'EVERY BUILDER IS A CHEAT'* and *'ONLY SUPREME COURT CAN SOLVE THIS ISSUE'*. Unfortunately, neither of this is true nor is there a singular efficacious solution to the issue at hand. ***Solutions, like value, begin in the mind and become better and better when more and more minds work in unison.***
11. Contrary to the current popular belief, there are many builders who have delivered on their promises over decades and earned substantial goodwill through quality work. It is their toil that had given impetus to the growth spurt of 2000s in the first place. Now when a segment remains unregulated for too long, becomes cash dependent, attracts fly by night operators and finds support from the roguish segments of the government, it is but obvious that the 'one bad apple can spoil a bunch' or rather 'many bad apples can spoil a bunch' scenario will operate.
12. It is indeed heartwarming to see that the Hon'ble Supreme Court has taken an unprecedented and even borderline activist approach to try and resolve the issue with some success. Although, not all pervading, it has at least instilled hope in the minds of the buyers. But even with all its powers, the Supreme Court cannot conduct business or create value and surely not interfere in every potential collapse. This requires a consensual operation between buyer groups, builders, governmental entities, professionals, and brokers.
13. It is clear that the above scenario seems easier said than done. If these players had come together to begin with, this situation would not have arisen in the first place. Therefore, the advice is simple:
- Co-ordinate with other buyers in the project and engage in regular discussions
  - Know that there is no 'one size fits all' solution
  - Use the table above and choose the best recourse
  - Know that litigation is not the end but only the means; it is unwise to get addicted to it
  - Mediation is the medicine that will benefit everyone- the litigative recourse is to ensure power balance and to strong arm the builder into mediation.
  - Settlement may be in cash, constructed property, alternate property etc.- keep an open mind. A bird in the hand is worth two in the bush.
  - The more the number of open minds, the faster the resolution and the sooner real estate starts regaining lost value for everyone.
  - If a builder is genuine, accommodate slight delays and re-negotiate
  - If the builder a fleeing cheat, then prosecute with all might
14. It must be confessed that while none of the suggested recourses above guarantee expedite results; if pursued wisely and with an open mind, the majority of the disputes can be settled without any substantial value erosion.

## Reference

[1] Vide Explanation to Section 5(8)(f) of IBC inserted via IBC (2<sup>nd</sup> Amendment) Act, 2018 dt. 17.8.18 w.e.f. 6.6.18

[2] Pioneer Urban Land and Infrastructure Limited and Anr. Vs. UOI &Ors. WP (C)No. 43/2019

[3] ibid

[4] M/s Sunil Handa & Ors v Today Homes Noida India Ltd. Judgment Dated 20.8.19 in C.P. No. I.B-923 (PB/2018) and Vijay Kumar Suri & Ors. v Earth Buildprop Pvt. Ltd. Judgment Dated. 13.5.19 in C.P. No. IB 1747 PB 2018

[5] Navin Raheja v Shilpa Jain & Ors, F.O. dated 22.1.20 in Company Appeal (AT) Insolvency No. 864/2019

[6] The IBC (Amendment) Ordinance, 2019 No. 16 of 2019 Dt. 28.12.19

[7] Manish Kumar v UOI WP © 26/2020, Sanjib Kumar v UOI & Ors. WP No. 53/20 etc.

[8] See Order dated 13.1.20 in WP © 26/2020, WP No. 53/20

[9] The Insolvency and Bankruptcy Code (Amendment) Act, 2020 dated 13.3.20 to operate w.e.f. 28.12.19

[10] Flat Buyers Associations Winterhills-77 Gurgaon v Umang Realtech Pvt. Ltd. F.O. Dt. 4.2.20 in NCLAT Company Appeal (AT) (Ins) No. 926/2019

[11] Akriti Agnihotri & anr v Blackberry Realcon Pvt. Ltd. F.O. Dt. 13.3.20 in NCLAT Company Appeal (AT) (Ins) No. 419/2020

[12] Ugro Capital Ltd. v Bangalore Dehydration & Drying Ltd. NCLAT Company Appeal (AT) (Ins) No. 984/2019 F.O. dated 22.1.20

[13] HDFC Bank Ltd. v BhagwanDas Auto Finance Ltd. NCLAT Company Appeal (AT) (Ins) No. 1329/2019 F.O. dated 9.12.19

[14] Vashdeo R. Bhojwani v Abhyudaya Co-operative Bank Ltd. and Anr. C.A. No. 11020/18 F.O. Dated. 2.9.19

[15] Notification S.O. No. 1205 (E) dated 24.3.20

[16] The IBC (Amendment) Ordinance, 2020 dated 22.4.20

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