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MumbaiMirror

SC upholds rights of homebuyers as financial creditors

Mumbai Mirror / Aug 10, 2019, 06.00 AM IST



The apex court said only genuine homebuyers can invoke insolvency proceedings against builders.

The Supreme Court on Friday upheld the constitutional validity of amendments made to the Insolvency and Bankruptcy Code (IBC) which conferred the 'financial creditors' status to homebuyers and entitled them to be a part of the Committee of Creditors (CoC) to safeguard their interest.

The apex court's verdict came as a big relief for lakhs of harassed homebuyers who are facing difficulties due to delayed possession and incomplete projects. As financial creditors now, they will have a say in the resolution process of a cash-strapped realtor.

A three-judge bench headed by Justice RF Nariman held as "constitutionally valid" the amendments made to the IBC in August 2018 and said it "does not infringe" upon the rights of real estate developers and is neither "arbitrary" nor "discriminatory".

It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from homebuyers contributes significantly to the financing of the construction, said the bench, also comprising Justices Sanjiv Khanna and Surya Kant.

"This being the case, it was important, therefore, to clarify that homebuyers are treated as financial creditors so that they can trigger the code under section 7 and have their rightful place on the CoC when it comes to making important decisions as to the future of the building construction company," the bench said.

As per section 7 of the IBC, a home buyer, who is now a financial creditor, may trigger the insolvency proceedings against the real estate developer.

The bench said that since home buyers give advances to the real estate developer and finance the project, they are "financial creditors".

The top court said the Real Estate (Regulation and Development) Act (RERA), 2016, which regulates the real estate sector, is to be "read harmoniously" with the IBC and in case of conflict, the IBC would prevail.

"The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies," it said.

"Homebuyers stand empowered with this final word from the SC. Homebuyers will now have the option to knock at the door of NCLT under IBC or RERA. Approaching NCLT by a single homebuyer can bring to halt the pending cases of other homebuyers not only in the same project but also in other projects of the same developer. In such cases, housing regulator under RERA is rendered helpless," said Shirish Deshpande, consumer activist and chairman of Mumbai Grahak Panchayat.

Forum for People's Collective Efforts (FPCE), a national-level non-profit, fighting for the rights of home buyers, said the ruling will now make the IBC an alternative platform for seeking relief other than RERA. "As doubts about legal validity of said amendment is now cleared, home buyers as a member in Committee of Creditors (CoC) will be also able to protect their interest better if builders themselves or banks or any other stakeholders drag company to NCLT," said Abhay Upadhyay, president of FPCE.

Advocate Tanuj Lodha from Lodha & Lodha Advocates said that IBC and RERA will have different purposes as far as the home buyers are

concerned. "While IBC would protect the rights of home buyers as a class, amongst the Committee of Creditors once the Insolvency proceedings have started, RERA would be more suitable for homebuyers to enforce their rights with respect to refund, interest, compensation, possession. Though the Homebuyers right to invoke insolvency of the company in case of breach of contract has been upheld by the Apex court, the order makes it clear that NCLT will have to look into the financial position of the developer amongst other things before admitting the application of the allottee," he said.

Lodha said IBC proceedings by an individual allottee to seek refund, possession, compensation may not hold good against solvent developers since the admission may mean removal of management and restructuring of the company. Besides this if the company goes into liquidation post the IRP process, the home buyers being unsecured creditors will stand to lose a lot, he said.

"RERA, being a special act for the real estate sector, would continue to be the fastest and the most cost effective way for individual allottees or group of allottees to enforce their rights , regarding refund, interest, compensation , without throwing the entire company to IRP process. Further Apex court has also held that in case of conflict between the Code and RERA, Code shall prevail, which would mean that once the Application under section 7 or section 9 of IBC is admitted, proceeding in RERA shall be suspended and the Resolution shall happen as per IBC."