

SUPREME COURT HAS BRIDGED A GAP WHERE IBC FELL SHORT; LEGISLATURE MUST CLOSE IT IN LAW

Deliver the homes first

THE SUPREME COURT'S (SC) February 5 order in the Supertech matter answers a question that has vexed the insolvency ecosystem since the Insolvency and Bankruptcy Code (IBC) first confronted real estate stress: whose claim deserves primacy when a developer collapses, the bank or the homebuyer? Hopefully, the 7th amendment to the IBC, slated for the ongoing Budget session of Parliament, will provide an authoritative answer.

Invoking Article 142 to uphold the National Company Law Appellate Tribunal's December 2024 direction appointing NBCC to complete Supertech's 16 stalled housing projects, the court held that other claims will be considered only after homes, as promised by the developer, are delivered to the buyers. Any surplus, it added, may thereafter be distributed among other claimants in a manner the tribunals consider just and equitable.

The IBC rests on a distinction between financial creditors and operational creditors. Financial creditors—banks, financial institutions, and bondholders—sit on the committee of creditors and exercise commercial wisdom over the fate of the corporate debtor. Operational creditors—suppliers, service providers, and employees—have claims but no governance rights. The 2018 amendment deemed homebuyers to be financial creditors and gave them representation at the decision-making table through authorised representatives. However, resemblance to banks is only formal. A bank can absorb haircuts, write off losses against capital, and move on to the next transaction. A family that has paid instalments for 15 years towards a flat in Noida cannot do the same.

The court does not engage with the doctrinal question of whether homebuyers are properly classified as financial creditors. Instead, through Article 142, it establishes a hierarchy of outcomes: homes first, creditor recoveries next. This is a judicial assertion that in real estate insolvencies, the delivery of the promised

MS SAHOO RAGHAV PANDEY

Respectively Emeritus Fellow, Insolvency Law Academy, and Assistant Professor, NLU Delhi



product to the consumer must take precedence over the distribution of the debtor's estate among its creditors.

This reliance on Article 142 is both the order's strength and vulnerability. The provision empowers the SC to pass such orders as are necessary to do "complete justice", particularly when existing legal frameworks prove inadequate. Here, over 50,000 homes booked between 2010 and 2012 had remained undelivered for over a decade. Faced with such prolonged failure of the statutory process, the court stepped in.

Extraordinary remedies do not create a stable doctrine. Article 142 is inherently case-specific and does not substitute for a clear statutory rule governing future real estate insolvencies. The next bench confronted with the next failed developer will have to decide afresh whether the facts warrant a similar invocation.

The Supertech order nonetheless carries implications beyond the immediate relief to homebuyers. It reinforces an emerging principle that in real estate insolvencies, project completion is the primary objective, with financial distribution a secondary consideration. This inverts the usual logic of the IBC, where resolution plans are evaluated primarily for the value they deliver to creditors. In Supertech, the relevant metric becomes consumer delivery.

The SC also directed that no court or forum shall interfere with the implemen-

tation of the NBCC takeover, effectively creating a litigation-free corridor for completing stalled projects. This reflects a recognition that repeated litigation has often compounded delays in large real estate insolvencies and frustrated the objective of delivering homes.

The deeper structural issue, however, remains unresolved. Real estate firms in India occupy a position that the IBC was

not originally designed to address. They are hybrids: conventional businesses that borrow from banks and engage contractors, but also financial intermediaries that collect customer funds to finance construction. When such hybrids fail, the insolvency framework struggles to reconcile the competing claims of lenders and consumers. The 2018 amendment addressed this by pulling homebuyers into the creditor framework. The Supertech

order addresses it by pushing creditor claims behind consumer delivery. Both are workarounds.

The treatment of homebuyers under the IBC, therefore, remains misaligned with their actual economic position. Classifying them as financial creditors was an act of legislative compassion, but it placed ordinary families, who had invested life savings into homes, within a commercial decision-making apparatus designed for institutional lenders. A more durable solution would recognise homebuyers as customers whose claims arise from the

promise of a home rather than from a financial investment and accordingly deserve priority in the resolution process. Though it does not articulate the issue in these words, the Supertech order moves towards that destination through judicial rather than legislative means.

The logic for such priority is not unfamiliar in financial regulation. The Financial Resolution and Deposit Insurance Bill, 2017, for example, proposed a priority structure for financial service providers that placed customer claims ahead of other claimants. Similar principles already operate in insurance liquidation and the protection of client assets under securities law. Customers who pay money for a promised product bear a different risk from creditors who lend money. The customer's claim is specific and contractual; the creditor's claim is inherently risk-adjusted.

Applying this logic to real estate insolvencies would not require a separate insolvency regime, a path that risks fragmenting the framework. A more modest but consequential amendment could place the obligation to deliver homes ahead of creditor distributions in the insolvency waterfall for real estate corporate debtors. That would achieve legislatively what the SC has achieved through Article 142, but with the predictability and stability that judicial improvisation cannot.

The Supertech order is, therefore, a welcome intervention. It brings relief to thousands of families who have waited far too long for their homes. At the same time, it signals to the legislature and regulators that the IBC's treatment of homebuyers remains a work in progress. Nearly a decade after the code's enactment, real estate insolvencies still depend on episodic judicial intervention rather than a settled statutory framework.

Each intervention, from Amrapali to Jaypee to Supertech, strengthens the case for reform: a waterfall mechanism that protects the homebuyer as a customer. The Supreme Court has acted where the IBC fell short. The task of completing the framework now rests with the legislature.

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