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IBC is for genuine roofs, not punters: SC lays down new home-buyer litmus test

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On 12 September 2025 a two-Judge Bench of Justices J.B. Pardiwala and R. Mahadevan delivered what is already being called the “speculative-investor bible” for insolvency courts. In four connected civil appeals led by Mansi Brar Fernandes v. Shubha Sharma & Ors. (C.A. 3826/2020), the Supreme Court drew a bright line between a family that merely wants a flat to live in and a deal-maker who treats an apartment as a derivative that must yield 300 per cent in twelve months. Holding that the Insolvency & Bankruptcy Code is a “remedial shield for sick companies and genuine home-buyers, not a sword for risk-free windfalls”, the Court simultaneously:

(a) affirmed that buyers who enter buy-back or assured-return schemes are “speculative investors” and cannot trigger corporate insolvency;

(b) set aside, on equity grounds, the technical objection that the 2019 amendment requiring 100 allottees to act together could be invoked when the NCLT had already reserved orders; and

(c) issued a 12-point charter to the Centre and States to fill tribunal vacancies, create a revival fund, make RERA fearsome and protect the constitutional right to shelter under Article 21.

The facts that framed the dispute

Gayatri Infra Planner Pvt. Ltd. launched “Gayatri Life” in Greater Noida. In April 2016 Ms Mansi Brar Fernandes paid ?35 lakh for four flats under a memorandum of understanding that gave the developer the sole option to buy back the units at ?1 crore within a year. If the option was not exercised she would get possession without paying the balance. The builder extended the MoU twice, issued post-dated cheques that bounced, and neither handed over keys nor repaid the money. Fernandes first filed a cheque-bouncing complaint under Section 138 of the Negotiable Instruments Act and then knocked on the doors of the National Company Law Tribunal with a Section 7 IBC petition. The NCLT admitted the case on 2 January 2020, but the National Company Law Appellate Tribunal reversed the admission in November 2020, branding her a “speculative investor”. A cross-appeal by the company’s directors, Shubha Sharma and Ashlesh Gupta, argued that the 2019 ordinance which mandates at least 100 allottees (or 10 per cent) to act together was blatantly ignored.

In a parallel universe, Ms Sunita Agarwal had invested ?25 lakh in Antriksh Infratech’s “Urban Greek” project in Dwarka. Her MoU promised 25 per cent assured return or a 4-BHK after two years, whichever she chose. The NCLT admitted her petition ex-parte in September 2019; the NCLAT applied the Gayatri-ratio and set aside the admission in August 2021. Both buyers, armed with the same counsel, carried the battle to the Supreme Court while the developers supported their cases with the Pioneer Urban Land and Infrastructure Ltd. judgment that distinguishes a genuine allottee from a punter.

Rival arguments in the apex court

Senior counsel for the buyers contended that the buy-back clauses were drafted by the builders, not demanded by the purchasers; that the transactions had the commercial effect of borrowing and were duly reflected as financial debt in the companies’ books; and that once default is shown the burden shifts to the corporate debtor to prove malicious or speculative invocation. They also invoked the doctrine actus curiae neminem gravabit – an act of the court shall prejudice no one because the 2019 ordinance came after the NCLT had reserved its order but before pronouncement, making compliance impossible.

Developers responded that the agreements were structured to deliver abnormal, risk-free returns; that no balance consideration was ever demanded; that the buyers never followed up construction progress; and that allowing them to start insolvency would convert the IBC into a coercive recovery tool, derail projects and harm thousands of genuine end-users. They also submitted that the threshold amendment is not procedural but mandatory and that non-compliance must result in deemed withdrawal.

Supreme Court’s reasoning

The Bench began by reiterating that the right to shelter is intrinsic to life under Article 21 and that the State must ensure timely delivery of homes. Yet, it cautioned, the IBC is “revival-oriented, not a debt-recovery mechanism”. Citing Pioneer Urban, Swiss Ribbons and Manish Kumar, the Court held that the presence of assured-return, compulsory buy-back or disproportionate exit premium converts a housing contract into a “financial derivative masquerading as real estate”. It framed a non-exhaustive checklist for tribunals: nature of the contract, number of units, departure from the RERA model agreement, insistence on refund plus usurious interest, and absence of any steps towards possession. Applying these parameters, the Bench found that both

appellants were clearly chasing profit, not roofs. The MoUs were buy-back instruments; possession was never visualised; and the invocation of the IBC followed only after cheques bounced – classic markers of speculation.

On the second issue, the Court accepted that the 2019 ordinance (requiring collective action) applied to pending, non-admitted petitions. However, where the NCLT had already reserved judgment, a buyer could not be asked to perform the impossible. Equity demanded that the subsequent compliance made in appeal should cure the defect. Accordingly, the NCLAT's finding on inapplicability of the ordinance was set aside, but only to this limited extent.

Directions for the future

To ensure that genuine buyers are not caught in cross-fire and that the real-estate sector is not held hostage to "trigger-happy investors", the Court issued sweeping directives inter alia:

- Fill NCLT and NCLAT vacancies within three months and create dedicated IBC benches; retired judges may be empanelled ad-interim.
- Constitute an expert committee (chaired by a retired High Court judge) to suggest commercially viable reforms within six months.
- Empower RERA authorities with infrastructure, legal members and swift enforcement machinery; every RERA must frame escrow-disbursement SOPs within six months for nascent projects.
- Consider a revival/bridge-fund under NARCL or expansion of the SWAMIH fund, subject to CAG audit and public disclosure.
- Mandate project-wise rather than company-wise CIRP unless circumstances dictate otherwise.
- Make e-filing, video-conferencing and case-management systems the default for IBC litigation.
- Require registration of all new residential sales with revenue authorities on payment of at least 20 per cent consideration.
- Insist on an affidavit before the Revenue Officer from any buyer above 50 years who signs assured-return contracts, confirming awareness of risk.

Concluding paragraph

The Supreme Court has thus ring-fenced the insolvency process for the very purpose Parliament intended: resurrection of viable projects and protection of home-buyers who actually want a key to their front door. Investors who swap bricks for balance-sheets are free to chase developers through RERA, consumer fora or civil courts, but they cannot drag a company into CIRP merely because their high-yield bet turned sour. If the 12-point charter is implemented in letter and spirit, India may yet rescue thousands of stalled towers without letting speculators convert the IBC into a private debt-recovery bureau. For the middle-class dream of a safe roof, the judgment is a timely monsoon; for the deal-maker with a calculator, the message is clear: the home-code is not an option market.

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