REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO. 43 OF 2019

Pioneer Urban Land and Infrastructure Limited & Anr. …Petitioners

Versus

Union of India & Ors. …Respondents

WITH
WRIT PETITION (CIVIL) NO.99 OF 2019
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WRIT PETITION (CIVIL) NO.124 OF 2019
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WRIT PETITION (CIVIL) NO.121 OF 2019
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WRIT PETITION (CIVIL) NO.129 OF 2019
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WRIT PETITION (CIVIL) NO.941 OF 2019

J U D G M E N T

R.F. Nariman, J.

1. The large number of writ petitions that have been filed in this Court challenge the constitutional validity of amendments

made to the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"), pursuant to a report prepared by the Insolvency Law Committee dated 26th March, 2018 (hereinafter referred to as the "Insolvency Committee Report"). The amendments so made deem allottees of real estate projects to be "financial creditors" so that they may trigger the Code, under Section 7 thereof, against the real estate developer. In addition, being financial creditors, they are entitled to be represented in the Committee of Creditors by authorised representatives. The amendments so made to the Code are as follows:

PROVISIONS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 BEING CHALLENGED

1. Explanation to Section 5(8)(f):

"5. Definitions

In this part, unless the context otherwise requires, –

(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes-

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

Explanation. - For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively

assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);"

2. Section 21(6A)(b)

"21. Committee of creditors

(6A) Where a financial debt-

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors; […]

and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share."

3. Section 25A

"25A. Rights and duties of authorized representatives of financial creditors –

(1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.
(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

(4) The authorised representative shall file with the committee of creditors any instructions received by way of physical or electronic means, from the financial creditor he represents, for voting in accordance therewith, to ensure that the appropriate voting instructions of the financial creditor he represents is correctly recorded by the interim resolution professional or resolution professional, as the case may be.

Explanation – For the purposes of this section, the "electronic means" shall be such as may be specified.""

2. The Code was passed by the Parliament on 28th May, 2016. Several petitions were then filed against real estate developers under the Code by allottees who had entered into "assured returns / committed returns" agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of the agreement, the developer undertook to pay a certain amount to

allottees on a monthly basis from the date of execution of the agreement till the date of handing over of possession to the allottees. The National Company Law Appellate Tribunal (hereinafter referred to as "NCLAT") on 21st July, 2017 in **Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd.**, (Company Appeal (AT) (Insolvency) No. 07 of 2017) held that amounts raised by developers under assured return schemes had the "commercial effect of a borrowing", which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of Section 5(7) of the Code.

3. On 9th August, 2017, proceedings were initiated by IDBI Bank against a large real estate developer, Jaypee Infratech Ltd. under Section 7 of the Code before the National Company Law Tribunal (hereinafter referred to as "NCLT") Allahabad Bench, alleging that Jaypee had defaulted on a loan of Rs. 526.11 crores. On 11th September, 2017, an order was passed by this Hon'ble Court in **Chitra Sharma & Ors. v. Union of India** (Writ Petition (Civil) No.744 of 2017) in the case of Jaypee Infratech Ltd. appointing a representative of the home buyers, i.e. the allottees,

to participate in meetings of the Committee of Creditors in order that their interests be protected.

4. While this order was passed in **Chitra Sharma** (supra), qua another group of builders, namely, the Amrapali group, an order was passed on 22nd November, 2017 by this Court in **Bikram Chatterji v. Union of India** (Writ Petition (Civil) No.940 of 2017) substantially on the same lines as the order passed in **Chitra Sharma** (supra). During proceedings before this Hon'ble Court in **Chitra Sharma** (supra), this Court, *vide* order dated 21st March, 2018, recorded that it was only concerned with those home buyers who intend to obtain a refund of amounts advanced by them, being 8% of the total home buyers/allottees in Jaypee's case. Given these orders by this Court, the Insolvency Committee Report suggested that amendments be made in the Code seeking to clarify, as a matter of law, that allottees of real estate projects are financial creditors. It may be noted that three members of the Insolvency Law Committee, namely, Shri Shardul Shroff, Shri S. Sen and Shri B. Sriram, dissented with the rest of the Insolvency Law Committee on the proposed amendments. On 6th June, 2018, pursuant to this Report, the Insolvency and Bankruptcy Code Amendment Ordinance, 2018 (hereinafter referred to as the

"Amendment Ordinance") was promulgated by which the three amendments (supra) to the Code were inserted. On 17th August, 2018, the Parliament passed the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (hereinafter referred to as the "Amendment Act") incorporating the aforesaid amendments as were provided for by the Amendment Ordinance.

5. Dr. Abhishek Manu Singhvi, learned Senior Advocate, leading the charge on behalf of the real estate developers, has argued that the treatment of allottees as financial creditors violates two facets of Article 14. One, that the amendment is discriminatory inasmuch as it treats unequals equally, and equals unequally, having no intelligible differentia; and two, that there is no nexus with the objects sought to be achieved by the Code. In fact, according to the learned senior counsel the amendments fly in the face of the objects sought to be achieved by the Code, i.e. to maximise value of assets so that the shareholders of a corporate debtor do not suffer from bad management or poor management. In the facts of the present cases, according to Dr. Singhvi, the "bad eggs" alone have been looked at, and entities like his client and many others before us, who have completed building projects in time and are in every way compliant with the law, can yet be

jeopardised by Section 7 petitions filed under the Code to blackmail them into making payments which would divert funds which are otherwise to be used for the purpose of the project. According to the learned senior counsel, a perfectly good management which has several projects on its hands can be removed at the instance of one allottee and either replaced – in which case the massive funds infused by the developer himself would be set at naught – or worse still, lead to commercial death, in that, if there are no resolution plans or all resolution plans are rejected either by the Committee of Creditors or by the authorities under the Code, a perfectly solvent company would then be wound up, which would not be in the interest of anybody, least of all the bulk of allottees themselves, who would want possession of flats/apartments. According to him, therefore, these amendments are manifestly arbitrary, being excessive, disproportionate, irrational and without determining principle. For the same reason, the Petitioners' fundamental right under Article 19(1)(g) of the Constitution of India is infracted, and the amendments, not being a reasonable restriction in the public interest under Article 19(6) would, therefore, have to be struck down. Equally, according to the learned senior counsel, the deeming fiction in the explanation to Section 5(8)(f) of the Code is inconsistent with the objects sought

to be achieved by the Code and has been stretched to absurd limits, making it manifestly arbitrary. Also, the amendments made to Section 21 and the insertion of Section 25A of the Code do away with the collegiality and commercial wisdom of the Committee of Creditors, and are manifestly arbitrary on this count. He made an impassioned plea that it was surprising that these amendments were even made, in view of the fact that there is a specific legislation, namely, the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA"), which deals in detail with the real estate sector, and provides for adjudication of disputes between allottees and the developer, together with a large number of safeguards in favour of the allottee, including agreements in statutory form, which would replace the agreements entered into between the developer and the allottees. According to him, therefore, a reading of RERA would show that all concerns of the allottees would be addressed by this sector-specific legislation and that the enactment of a sledgehammer to kill a gnat would render the impugned amendments excessive, disproportionate and violative of Articles 14 and 19(1)(g) of the Constitution on this score also. In addition, the learned senior counsel scoffed at the Union's stand, in their counter affidavit before this Court, that the amendments made are

clarificatory in nature. According to Dr. Singhvi, by no stretch of imagination could allottees who have parted with money as sale consideration for an apartment be included within the definition of "financial creditor" as originally enacted by Section 5(7). In fact, the very need for a deeming fiction is so that Parliament brings in persons who are not financial creditors, by forcibly inserting a square peg in a round hole. He read to us this Court's judgment in **Swiss Ribbons v. Union of India** (2019) 4 SCC 17, in copious detail, in order to drive home the point that not a single one of several characteristics of financial creditors stated in that judgment would apply to allottees/home buyers. On the contrary, if at all they could be assimilated to anybody, it would be to operational creditors, in which event it would be enough to state that there is a pre-existing dispute between the parties, as a result of which the Code cannot get triggered. According to him, including allottees of real estate projects - a huge amorphous and disparate lot - as financial creditors, would not only be unworkable, as thousands of petitions would flood the NCLT, but would also be both arbitrary and unworkable when this large number of disparate persons is represented on the Committee of Creditors, many of whom would speak in different voices, being concerned only with their own

investment, and having no concern whatsoever for the financial betterment of the corporate debtor.

6. Shri Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of some of the Petitioners, has adopted the submissions of Dr. Singhvi. He cited judgments to buttress the Article 14 arguments made by Dr. Singhvi, and added that an explanation cannot in any way interfere with or change the enactment or any part thereof. He also argued that it would be wholly arbitrary to include allottees as financial creditors when, in fact, they possess none of the characteristics pointed out in **Swiss Ribbons** (supra) of banks and financial institutions.

7. Shri Shyam Divan, learned Senior Advocate appearing on behalf of some of the real estate developers, made an impassioned plea that in one of the writ petitions in which he appears, the real estate developer has infused over Rs. 100 crores in a particular project, through funds that are obtained from abroad. If in the case of entities like this developer, who complete projects on time and who have never defaulted, a single allottee can knock at the doors of the NCLT and obtain an admission order, the management of the corporate debtor would be removed and replaced by either somebody else, or, if not possible, the company

would be wound up. According to him, not only would this be highly arbitrary and excessive, impacting the fundamental rights under Article 19(1)(g) and 300-A, but would also have the indirect effect of dissuading foreigners from investing in this country. He also argued that Article 14 interdicts legislation whose object is itself discriminatory, and cited judgments to prove his point. He argued with great vehemence, citing judgments to buttress the proposition that a deeming fiction cannot do away with what are the essentials of being a financial creditor. According to him, there is no "debt" as defined under the Code; there is no "borrowing" as there is no temporary handing over of money which has then to be returned; there is no "disbursal" and no "sum raised" which has then to be handed back. Equally, the commercial effect of a borrowing must be qua transactions in which money is later replaced by money. According to him, in the present case, at the time that the agreement is made between the allottee and the real estate developer, what is agreed is that in return for money paid by the allottee, a flat/apartment would be allotted. It is only in the event of breach of the agreement on the part of the real estate developer that monies are to be refunded, which does not bring allottees within the definition of "financial creditor". He also argued, adopting Dr. Singhvi's arguments, that all other categories of

financial creditors would involve these elements, and if read *noscitur a sociis* with the other clauses, Section 5(8) of the Code would also make it clear that persons can only be included if there is a borrowing, at the end of which the borrowing is returned - with or without interest. He thus agreed with Dr. Singhvi's argument that what was sought to be inserted by the amendment is a square peg in a round hole.

8. Shri Jayant Bhushan, learned Senior Advocate appearing on behalf of some of the Petitioners, then followed. He stressed the facts of Writ Petition No.357 of 2019 to show that huge sums have been infused into a large number of projects by the developers themselves, all such projects being constructed in accordance with RERA. According to him, if the amendments pass muster, as many as 5000 workers engaged across these real estate projects together with 600 employees would be directly impacted. NCLT applications have been filed by allottees of only 14 units out of 19,062 units sold. According to him, his client has never defaulted in repayment of amounts borrowed from banks/financial institutions and, in fact, upon initiation of the insolvency process, on account of one petition filed by one allottee, IDFC invoked a standby letter of credit and thereby recovered the

entire amount due to them being approximately Rs. 100 crores prematurely. Therefore, large solvent real estate developers would be crippled if the Code were to be applied in this fashion to them. Apart from buttressing arguments already made on Articles 14 and 19(1)(g), he relied on judgments to show that a claim for unliquidated damages becomes a debt only on adjudication, which does not take place when a Section 7 application is heard. According to him, since the NCLT can only go into "default" and as the definition of "default" itself is vague and ambiguous, the said definition should be struck down as being manifestly arbitrary. He also added, citing the same judgment as Shri Neeraj Kaul, namely, **S. Sundaram Pillai v. V.R. Pattabiraman** (1985) 1 SCC 591, that an explanation cannot enlarge the scope of the original provision. He also made a without-prejudice argument that even if allottees are not permitted to trigger the Code, they may still be protected by making suitable amendments for their inclusion in the Committee of Creditors, so that they may have a voice in the future of the corporate debtor, which will impact the flats/apartments to be given to them or refunds to be made, as the case may be.

9. Shri Gopal Sankaranarayanan, learned Senior Advocate, followed Shri Bhushan and argued on the various facets of Articles

14 and 19(1)(g). He also sought directions to recalcitrant States to immediately set up the requisite authorities under RERA and made an impassioned plea that the words "claims as may be specified" in Section 15(1)(c) of the Code be struck down. According to him, real estate developers and borrowers are treated as equals when they are, in fact, unequals. Also, real estate developers are discriminated against when compared with other entities supplying goods or services. The amendments made are, therefore, excessive and disproportionate being manifestly arbitrary. He also buttressed Dr. Singhvi's argument that a square peg is fitted into a round hole as none of the identifying traits of financial creditors as explained in **Swiss Ribbons** (supra) are present insofar as allottees are concerned. He added that, in any case, RERA looks after all possible difficulties of allottees, who may in addition, invoke the arbitration clause for resolution of disputes with the real estate developer contained in most agreements.

10. Shri Krishnan Venugopal, learned Senior Advocate, who followed Shri Gopal Sankaranarayanan, placed before us the Global Derivatives Study Group and extracts from Philip Wood's Project Finance, Subordinated Debt and State Loans; and

Principles of International Insolvency by the same author. He then relied on 'The ACT Borrower's Guide to the LMA's Investment Grade Agreements' produced by Slaughter & May to explain the genesis of Section 5(8) generally and 5(8)(f) of the Code in particular. He then relied upon a number of judgments, which according to him made it clear that a deeming fiction is enacted when the position in reality is completely different, and hence, a deeming fiction is introduced when something is not otherwise covered under the main provision. On this basis, he contended that the amendment to Section 5(8)(f) of the Code was prospective in nature. He also cited judgments to show that time for completion of a project can never be said to be of the essence of the agreement between the builder and the allottee, and this being so, a builder cannot be said to be in default when he does not deliver a flat/apartment within the time specified, but later. According to him, since Section 5(8) of the Code is a "means and includes" definition clause, it is exhaustive and therefore, to then introduce by way of amendment something extra by means of a deeming fiction would thus not be permissible in law. Shri Krishnan Venugopal also referred to extracts from various authorities to demonstrate that even qua credit and conditional sale agreements, ultimately Section 5(8) is concerned only with

transactions in which finance is involved. He also pointed out, with reference to Chapter 11 Bankruptcy Proceedings in the United States, that once a company has been stigmatised as being bankrupt or having gone into bankruptcy, several persons who earlier dealt with the company disengaged themselves, as a result of which the Company's power to do business gets severely hampered.

11. The tail of the arguments on behalf of the Petitioners then wagged in the persona of several other counsel who added titbits here and there. Shri Bhandari, appearing for one of the writ Petitioners, gave a chart of a comparative analysis between the 'UNCITRAL Legislative Guide on Insolvency Law' (2005) (hereinafter referred to as the "UNCITRAL Legislative Guide") ,which forms the basis of the Code, and the Bankruptcy Law Reforms Committee Report (2015), argued that the impugned amendments went against several features of this UNCITRAL Legislative Guide. He contended that, first and foremost, the fundamental difference between financial and operational creditors was ignored. Secondly, he contended that by treating home buyers, who are in substance operational creditors, as financial creditors, infracts the principle of equitable treatment of

similarly situated creditors. Further, the UNCITRAL Legislative Guide states that recognition of existing creditor's rights before the commencement of the insolvency proceedings by the insolvency law is important. He contended that by treating a home buyer as a financial creditor, the Code creates rights which such home buyer never had earlier. He further contended that by involving such persons in the negotiation process by putting them on the Committee of Creditors would infract the principle that, given their number and the diverse interests that they have, coupled with no knowledge or any commercial expertise of the corporate debtor, they should not and ought not to be allowed to participate in the Committee of Creditors. Also, insolvency law and other laws should be harmoniously construed, which harmony is disrupted when the Code is applied to cases which should really fall under RERA. Shri Bhandari was followed by Shri J. Gupta, who argued that instead of deeming that allottees/home buyers be regarded as financial creditors, they ought to be regarded as operational creditors in which case, defences available in such cases would then be available. Shri Pulkit Deora then showed us accounting standards in which it became clear that advances received from home buyers by developers cannot, from an accounting perspective, be treated as financial liabilities and the amendments

in doing so, therefore, violate the aforesaid standards and become manifestly arbitrary. Also, after going into the definition of “claim”, “financial debt” and “operational debt”, he argued that a financial debt is a crystallised claim which is due, as opposed to an operational debt which may simply be a claim upon breach of contract that may be disputed and therefore not due. On this basis he contended that to put home buyers in the financial creditor category, instead of the operational creditor category, would then blur this distinction and do away with a vital defence available to the real estate developer in the case of operational debts. Shri Rana Mukherjee, appearing through Shri K. Poddar, argued that home buyers would not fall within the category of either financial or operational creditors and should therefore be subsumed only within RERA, which is a complete code dealing with the real estate industry. He further argued that RERA is a special Act as opposed to the Code, which is a general Act and ought, therefore, to prevail. Also, as the adjudication process envisaged under RERA would be done away with if the Code is to be applied, the application of the Code to home buyers would be manifestly arbitrary. M/s. Kejriwal and P. Aggarwal have argued that on the facts of their cases, *force majeure* events occurred as a result of which possession could not be handed over. They also pointed out that,

from a practical point of view, the NCLT in such cases does not go into defences which would demonstrate that delays in handing over possession cannot be attributed to the developer, and being a summary proceeding, merely goes ahead and admits a Section 7 petition despite the fact that the developer is not at fault in not handing over the flat/apartment in time. Shri S. Malhotra repeated some of the submissions that have already been noted hereinabove. Shri P.S. Bindra argued that we should apply the Amendment Act only prospectively, either from 2018 itself or at the very earliest from 1st December, 2016. He also argued that if this Court were to uphold the vires of the Amendment Act, his clients ought to be at liberty to take various defences under the agreement between his client and allottees, which this Court should make clear in the event of allottees knocking at the doors of the NCLT.

12. Mrs. Madhavi Divan, learned Additional Solicitor General, relying strongly upon **Swiss Ribbons** (supra), argued that the Amendment Act would clearly be covered by the ratio laid down by this Court in **Swiss Ribbons** (supra), which is that sufficient play in the joints must be given to the legislature when it comes to economic legislation, and every experiment that the legislature

bona fide undertakes should not be interfered with by the Court. She referred copiously to the Insolvency Committee Report which led to the enactment of the Amendment Act, and stated that the real reason for including allottees as financial creditors is because, in substance, they finance the project in which they will ultimately be given flats/apartments. She contended that a cursory look at the agreement between developers and such allottees would show that at every stage in the building process, certain amounts have to be paid which are then supposed to be utilised in constructing the apartments/flats. This is what makes them different from other operational creditors. Also, in the case of operational creditors, it is the person who stands in the place of the developer, who either sells goods or renders service for which he is to be paid. The exact opposite obtains in the case of home buyers/allottees who in fact fund their own flats/apartments. She was at great pains to point out that it must never be forgotten that the Code is not a recovery mechanism. When a home buyer approaches the NCLT, if his petition is admitted, he does not get his money back in the near foreseeable future and has to stand in line and await either the vagaries of a resolution plan which gives him some percentage of the monies owed to him, and/or completes the project for him. In the event of winding up, he has

then to stand in line and receive whatever is available. As opposed to this, home buyers/allottees can and do approach the authorities under RERA in which, upon showing breach on the part of the real estate developer, they would be able to claim whatever has been paid by them in full together with interest thereon. This being the case it is wholly incorrect to paint a picture, as was done by learned senior counsel appearing on behalf of the Petitioners, that trigger-happy allottees *mala fide* invoke the Code to put pressure on developers to refund their money given as advances. Also, it is wholly incorrect to say that highly solvent companies would go in the red and then be wound up under the Code. If in fact such companies are solvent, the Committee of Creditors may decide to continue the same management or may decide to accept resolution plans from other developers so that the real estate development company continues as a going concern. Winding up is only a last resort, which will never really occur in the case of well managed corporate entities. She referred in copious detail to NCLT and NCLAT judgments in which it was held that, save and except allottees who had agreements in which a fixed monthly return was guaranteed by the developer, allottees were held to be neither operational nor financial creditors, resulting in great hardship to them. She took us through the various sections of the

Code afresh and argued that Section 5(8)(f), even read without the explanation, would, on its plain language, include real estate development agreements. For this purpose, she relied upon the definition of “payment” which would include “recompense” and on the definition in Collin’s English dictionary of “borrow” which is “to obtain or receive money on loan for temporary use intending to give either money or something equivalent back to the lender”. In the facts of these cases, she contended that the “something equivalent” would be the flat/apartment. She also relied upon the definition of “commercial” to show that the profit element is important. She stressed the fact that the “time value of money” is present qua both allottee and builder as the allottee would pay less than he would have to for a complete flat/apartment, in which case the entire consideration for the flat/apartment would have to be paid upfront; as against instalments while it is being completed. Qua the builder, she contended that the time value of money would be the money paid by way of advances by allottees which would be used to finance the building of the flats/apartments in the project. She also relied strongly upon Section 18 of RERA to show that in order to be a financial creditor, it is enough that a right recognised by Section 18 in favour of the allottee to payment would exist, and therefore, would be included within the definition

of “financial debt” read with “debt” contained in Section 5(8) and Section 3(11) of the Code respectively. She also referred to and relied upon Section 4(2)(l)(D) of RERA to show that 70% of advances received by the developer from allottees must be put into an escrow account, which can only be used for the project at hand, showing therefore that even statutorily, monies paid by way of advance are in the nature of a financing transaction. She then cited judgments to show how the *noscitur a sociis* principle cannot be used when express wider language is used in one of the sub-clauses of a particular provision, making it clear that it is meant to be read by itself, and not in conjunction with what precedes and succeeds it. She also cited judgments to show that the expression “deemed” is also to put a certain matter beyond doubt and argued that an explanation can be inserted by the legislature as additional support to what is already contained in the main provision. She added that deeming fictions put in explanations are not something unknown to the law, and cited judgments to buttress her contention. She also cited judgments to show that when “means” is used separately from “includes”, the definition clause would be inclusive, as opposed to when “means and includes” is used, and therefore argued that since Section 5(8) is not exhaustive, the category of home buyers could be added therein. Also, according

to her, “means” and “includes” when interpreted by courts, is different from the legislature itself amending the provision so as to add something therein. Legislative activity cannot be confused with interpretational activity by the courts. She then argued, referring to the provisions of RERA in some detail, that a complete information bank is provided by RERA, which is provided by the real estate developer himself, from which, like information utilities under the Code, information, *inter alia*, as to defaults made by the real estate developer would be available. According to her, therefore, all that the NCLT would have to be supplied with by the allottee in his Section 7 petition would be this information, and, after receiving a reply from the real estate developer, would then easily be able to decide whether a real estate developer owes money in the form of compensation payable for late completion of the project, and/or refund of money paid by the allottee. It would be open for the real estate developer in its defence to say that no amount is due and payable from the allottee, in that, the allottee is himself in breach of conditions laid down by the agreement read with the RERA, and rules and regulations made thereunder. According to her, therefore, the NCLT would be able to decide such applications in the same manner as would be decided in the case of banks and financial institutions. She also rebutted the

argument that the collegiality of creditors will be affected by inserting home buyers into their committee by stating that home buyers, like banks and financial institutions, and unlike other operational creditors, are vitally concerned with the well-being of the corporate debtor, as otherwise the real estate project would never come to fruition. In rebutting the challenge to Section 21(6A) and Section 25A, she said there may be teething problems with regard to how an authorised representative is to vote on the Committee of Creditors, but stated that the legislature is in the process of ironing out these creases and referred to the recent Insolvency and Bankruptcy Code (Amendment) Bill, 2019 which has just been passed by Parliament. She also argued that home buyers may themselves finance up to 100% of a project, and in case they finance a project by 100%, the Code would not work unless they were recognised as financial creditors as, not being financial or operational creditors, no Committee of Creditors could be set up at all; and for this purpose she relied upon the proviso to Section 21(8) of the Code, read with Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. She argued, therefore, that on point of fact, if allottees of real estate projects were to be kept out of the Committee of Creditors, that itself would

be manifestly arbitrary as in most cases they finance the project to the tune of at least 50%, going up to 100%. She also stated that each project was usually carried out by a 'special purpose vehicle', being a corporate entity on its own, and therefore, the bogey of destabilisation of a management which has brought in large funds for many projects, and which would be replaced for all projects, would not be correct.

13. Shri Tushar Mehta, learned Solicitor General of India broadly supported the detailed arguments of Mrs. Madhavi Divan, learned Additional Solicitor General, by buttressing the same by citing various judgments and authorities. According to him also, given the fact that **Swiss Ribbons** (supra) gives the legislature free play in the joints when it comes to economic legislation and experimentation in this sphere, **Swiss Ribbons** (supra) itself is more or less a complete answer to all constitutional challenges that may be made to the Amendment Act.

14. A number of counsel then appeared for allottees in individual cases. These counsel argued, by referring copiously to NCLT and NCLAT orders, consumer forum judgments and High Court judgments, that the consumer fora, and the authorities under RERA are not meaningful remedies for allottees at all. According

to them, loopholes made in the rules by various States still allow one-sided agreements by real estate developers to continue to govern the relationship between allottee and real estate developer long after RERA has come into force. This has been done, for example, by defining ‘Completion Certificate’ to include partial completion certificates of projects (or parts of projects), so that such partial certificates given to the real estate developer before coming into force of RERA would make the provisions of RERA inapplicable. Also, it has been pointed out that real estate developers have been successful in arguing that RERA has now shut out the consumer fora so far as allottees are concerned, and referred to stay orders by which consumer fora for a long period of time were unable to proceed with cases filed by allottees before them, until the National Consumer Disputes Redressal Commission finally decided that the Consumer Protection Act, 1986 was an additional remedy and continued to be an additional remedy to the remedies provided under RERA. They also pointed out that the authorities themselves under RERA jostled the allottees about, as when an allottee went to the Real Estate Regulatory Authority and obtained orders against developers, such orders were nullified by some Appellate Tribunal orders, stating that they should be sent to the adjudicating officer who

alone could decide disputes between allottees and real estate developers. Separately, in answer to the argument that the admission of a Section 7 application would be fatal to the management of the corporate debtor, and that one single allottee could destabilise the management of the corporate debtor and not just the project undertaken by the corporate debtor, they pointed out that there were 5 stages at which it would be open for the real estate developer to compromise with the allottee in question, before the sledgehammer under the Code comes down on the erstwhile management. They pointed out that settlements have taken place at: (i) the stage of the Section 7 notice itself before replies were filed by the real estate developer; (ii) after the NCLT issues notice on a Section 7 application and before admission; (iii) after the hearing and before the order admitting the matter; (iv) post-admission, and before appointment of the Committee of Creditors where both the NCLT and NCLAT use their inherent power to permit settlements; and (v) even post setting-up of the Committee of Creditors, whereby settlements can be arrived at under Section 12A of the Code with the concurrence of 90% of the creditors. On this basis, they pointed out that long before the chopper comes down on the management of the corporate debtor, all these opportunities are given to the management of the

corporate debtor to settle with the individual allottee, showing thereby that there is no real infraction of Article 14, 19(1)(g) or 300-A of the Constitution. They also argued that the provisions of Section 7(4) of the Code giving the NCLT 14 days within which to ascertain the existence of a default is directory as has been held in **Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited and Ors.** 2017 (16) SCC 143. They made an impassioned plea, relying upon the background to RERA, to argue that if these beneficial amendments were to be struck down, they would be back in the same position as they were before enactment of other measures, which have not really worked to afford them relief.

The Legislature's right to experiment in matters economic

15. In **Swiss Ribbons** (supra), this Court was at pains to point out, referring, *inter alia,* to various American decisions in paragraphs 17 to 24, that the legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts. In paragraph 120 of the said judgment, this Court held:

> "**120.** The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so- called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners."

It is in this background that the constitutional challenge to the Amendment Act will have to be decided.

***Raison d'être* for the Insolvency Code (Second Amendment) Act of 2018**

16. The Insolvency Committee Report is of crucial importance in understanding why the legislature thought it fit to categorise home buyers as financial creditors under the Code. The recommendations made by the said Insolvency Law Committee are set out hereinbelow *in extenso:*

“RECOMMENDATIONS PROPOSING AMENDMENTS TO THE CODE AND RELEVANT SUBORDINATE LEGISLATION

1. DEFINITIONS

Financial debt

1.1 Section 5(8) of the Code defines ‘financial debt’ to mean a debt along with interest, if any, which is disbursed against the consideration for the time value of money and *inter alia* includes money borrowed against payment of interest, etc. The Committee’s attention was drawn to the significant confusion regarding the status of buyers of under-construction apartments (“**home buyers**”) as creditors under the Code. Multiple judgments have categorised them as neither fitting within the definition of ‘financial’ nor ‘operational’ creditors. In one particular case, they have been classified as ‘financial creditors’ due to the assured return scheme in the contract, in which there was an arrangement wherein it was agreed that the seller of the apartments would pay ‘assured returns’ to the home buyers till possession of property was given. It was held that such a transaction was in the nature of a loan and constituted a ‘financial debt’ within the Code. A similar judgment was given in *Anil Mahindroo & Anr v. Earth Organics Infrastructure*. But it must be noted that these judgments were given considering the terms of the contracts between the home buyers and the seller and are fact specific. Further, the IBBI issued a claim form for “creditors other than financial or operational creditors”, which gave an indication that home buyers are neither financial nor operational creditors.

1.2 Non-inclusion of home buyers within either the definition of ‘financial’ or ‘operational’ creditors may be a cause for worry since it deprives them of, first, the right to initiate the corporate insolvency resolution process (“**CIRP**”), second, the right to be on the committee of creditors (“**CoC**”) and third, the

guarantee of receiving at least the liquidation value under the resolution plan. Recent cases like *Chitra Sharma v. Union of India* and *Bikram Chatterji v. Union of India* have evidenced the stance of the Hon'ble Supreme Court in safeguarding the rights of home buyers under the Code due to their current disadvantageous position.

1.3 To completely understand the issue, it is imperative that the peculiarity of the Indian real estate sector is highlighted. Delay in completion of under-construction apartments has become a common phenomenon and the records indicate that out of 782 construction projects in India monitored by the Ministry of Statistics and Programme Implementation, Government of India, a total of 215 projects are delayed with the time over-run ranging from 1 to 261 months. Another study released by the Associated Chambers of Commerce and Industry of India, revealed that 826 housing projects are running behind schedule across 14 states as of December 2016. Further, the Committee agreed that it is well understood that amounts raised under home buyer contracts is a significant amount, which contributes to the financing of construction of an asset in the future.

1.4 The current definition of 'financial debt' under section 5(8) of the Code uses the words *"includes",* thus the kinds of financial debts illustrated are not exhaustive. The phrase *"disbursed against the consideration for the time value of money"* has been the subject of interpretation only in a handful of cases under the Code. The words "time value" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.

1.5 On a review of various financial terms of agreements between home buyers and builders and

the manner of utilisation of the disbursements made by home buyers to the builders, it is evident that the agreement is for disbursement of money by the home buyer for the delivery of a building to be constructed in the future. The disbursement of money is made in relation to a future asset, and the contracts usually span a period of 4-5 years or more. The Committee deliberated that the amounts so raised are used as a means of financing the real estate project, and are thus in effect a tool for raising finance, and on failure of the project, money is repaid based on time value of money. On a plain reading of section 5(8)(f), it is clear that it is a residuary entry to cover debt transactions not covered under any other entry, and the essence of the entry is that "amount should have been raised under a transaction having the commercial effect of a borrowing." An example has been mentioned in the entry itself i.e. forward sale or purchase agreement. The interpretation to be accorded to a forward sale or purchase agreement to have the texture of a financial contract may be drawn from an observation made in the case of *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd.:*

"A forward contract to sell product at the end of a specified period is not a financial contract. It is essentially a contract for sale of specified goods. It is true that some time financial transactions seemingly restructured as sale and repurchase. Any repurchase and reverse repo transaction are sometimes used as devices for raising money. In a transaction of this nature an entity may require liquidity against an asset and the financer in return sell it back by way of a forward contract. The difference between the two prices would imply the rate of return to the financer." (emphasis supplied)

1.6 Thus, not all forward sale or purchase are financial transactions, but if they are structured as a tool or means for raising finance, there is no doubt that the amount raised may be classified as financial debt under section 5(8)(f). Drawing an analogy**, in the case of home buyers, the amounts raised**

under the contracts of home buyers are in effect for the purposes of raising finance, and are a means of raising finance. Thus, the Committee deemed it prudent to clarify that such amounts raised under a real estate project from a home buyer fall within entry (f) of section 5(8).

1.7 Further, it may be noted that the amount of money given by home buyers as advances for their purchase is usually very high, and frequent delays in delivery of possession may thus, have a huge impact. For example, in *Chitra Sharma v. Union of India* the amount of debts owed to home buyers, which was paid by them as advances, was claimed to be INR Fifteen Thousand Crore, more than what was due to banks. Despite this, banks are in a more favourable position under the Code since they are financial creditors. Moreover, the general practice is that these contracts are structured unilaterally by construction companies with little or no say of the home buyers. A denial of the right of a class of creditors based on technicalities within a contract that such creditor may not have had the power to negotiate, may not be aligned with the spirit of the Code.

1.8 The Committee also discussed that section 30(2)(e) of the Code provides that all proposed resolution plans must not contravene any provisions of law in force, and thus, the provisions of Real Estate (Regulation and Development) Act, 2016 ("**RERA**") will need to be complied with and resolution plans under the Code should be compliant with the said law.

1.9. Finally, the Committee concluded that the current definition of 'financial debt' is sufficient to include the amounts raised from home buyers / allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. However, given the confusion and multiple interpretations being taken, at this stage, it may be prudent to explicitly clarify that such creditors fall

> within the definition of financial creditor, by inserting an explanation to section 5(8)(f) of the Code. Accordingly, in CIRP, they will be a part of the CoC and will be represented in the manner specified in paragraph 10 of this report, and in the event of liquidation, they will fall within the relevant entry in the liquidation waterfall under section 53. The Committee also agreed that resolution plans under the Code must be compliant with applicable laws, like RERA, which may be interpreted through section 30(2)(e) of the Code. It may be noted that there was majority support in the Committee for the abovementioned treatment of home buyers. However, certain members of the Committee, namely Sh. Shardul Shroff, Sh. Sudarshan Sen and Sh. B. Sriram, differed on this matter."
>
> (emphasis supplied)

17. When it came to devising a mechanism by which several persons may be represented by one authorised representative, the Insolvency Law Committee concluded:

> "10.8 In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security holders, deposit holders, and all other classes of financial creditors which exceed a certain number, through an authorised representative. This can be done by adding a new provision to section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by the NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditor to the extent

> of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through regulations to enable efficient voting by the representative. Also, regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time."

18. 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 home buyers contributes significantly to the financing of the construction of such flats/apartments. This being the case, it was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under Section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.

19. Shri Shardul Shroff, whose dissent was provided to us in the form of an e-mail, after finding that self-financed home buyers

may be financial creditors, but a home buyer who is a borrower is not, then went on to state:

> *"**8.** If the home buyers have taken loans from banks, then it is such lenders who should be on the table on the CoC as special status creditors.*
>
> ***9.** Our report ought to be altered to the extent that home buyers financiers should be treated as unsecured financial creditors and they should be representatives of the home buyers. There should be no direct right given to home buyers to be on the CoC."*

Even the dissent of Shri Shroff recognises that in the case of home buyers, who have taken loans from banks, such banks ought to be on the Committee of Creditors. If such banks ought to be on the Committee of Creditors as representatives of the home buyers, and they are to vote only in accordance with the home buyer's instructions, why should the home buyer himself then not be on the Committee of Creditors, and why should it make any difference as to whether he has borrowed money from banks in order to pay instalments under the agreement for sale or whether he does it from his own finances? These matters have not been addressed by the dissenting view which in principle, as we have seen, supports home buyers who have taken loans as against home buyers who have used their own finances. Perhaps the real reason for Shri Shroff's dissent is the fact that unsecured, as

opposed to secured, financial creditors are being put on the Committee of Creditors. If there is otherwise good reason as to why this particular group of unsecured creditors, like deposit holders, should be part of the Committee of Creditors, it is difficult to appreciate how such a group can be excluded.

The Real Estate (Regulation and Development) Act, 2016 (RERA) and its impact on the real estate sector

20. The Statement of Objects and Reasons of RERA reads as follows:

> **STATEMENT OF OBJECTS AND REASONS**
>
> "1. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While the sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.
>
> 2. In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardisation of business practices and transactions in the real estate sector. The proposed Bill provides for

> the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.
>
> 3. The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardisation in the sector, thus paving the way for accelerated growth and investments in the long run."

21. It may be stated that Sections 2, 20 to 39, 41 to 58, 71 to 78 and 81 to 92 of this statute were brought into force on 1st May, 2016. Sections 3 to 19 which deal with registration of real estate projects and real estate agents; functions and duties of promoters; rights and duties of allottees, together with Section 40 which deals with recovery of interest or penalty or compensation and enforcement of orders qua the same; the Sections dealing with offences and penalties, viz., Sections 59 to 70 and Sections 79 and 80 which bar the jurisdiction of Civil Courts and deal with

cognizance of offences under the RERA were all brought into force one year later i.e. on the 1st day of May, 2017. This was for the reason that the “appropriate Government” as defined in Section 2(g), which means the various State Governments and Union Territories, were given a period of one year to establish/appoint the Real Estate Regulatory Authority, the adjudicating officer and the Appellate Tribunal, consequent upon which the aforesaid Sections were brought into force one year later - in the hope and expectation that the appropriate Government would set up the aforesaid authorities within the period of one year from 1st May, 2016. The relevant provisions of RERA are set out hereunder:

> “2. **Definitions**. --In this Act, unless the context otherwise requires, —
>
> (a) "adjudicating officer" means the adjudicating officer appointed under sub-section (1) of section 71;
>
> xxx xxx xxx
>
> (d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

(e) "apartment" whether called block, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more floors or any part thereof, in a building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying an any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;

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(g) "appropriate Government" means in respect of matters relating to, —

(i) the Union territory without Legislature, the Central Government;

(ii) the Union territory of Puducherry, the Union territory Government;

(iii) the Union territory of Delhi, the Central Ministry of Urban Development;

(iv) the State, the State Government;

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(i) "Authority" means the Real Estate Regulatory Authority established under sub-section (1) of section 20;

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(s) "development" with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes re-development;

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(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

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3. **Prior registration of real estate project with Real Estate Regulatory Authority**. --(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder,

shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation. —For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

4. **Application for registration of real estate projects**. --(1) Every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed by the regulations made by the Authority.

(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —

(a) a brief details of his enterprise including its name, registered address, type of enterprise (proprietorship, societies, partnership, companies, competent authority), and the particulars of registration, and the names and photographs of the promoter;

(b) a brief detail of the projects launched by him, in the past five years, whether already completed or being developed, as the case may be, including the current status of the said projects, any delay in its completion, details of cases pending, details of type of land and payments pending;

(c) an authenticated copy of the approvals and commencement certificate from the competent authority obtained in accordance with the laws as may be applicable for the real estate project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the competent authority for each of such phases;

(d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;

(e) the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including firefighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy;

(f) the location details of the project, with clear demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project;

(g) proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees;

(h) the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any;

(i) the number and areas of garage for sale in the project;

(j) the names and addresses of his real estate agents, if any, for the proposed project;

(k) the names and addresses of the contractors, architect, structural engineer, if any and other persons concerned with the development of the proposed project;

(l) a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating:—

(A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person;

(B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details;

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;

(D) that seventy per cent. of the amounts realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction

and the land cost and shall be used only for that purpose:

Provided that the promoter shall withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project:

Provided further that the amounts from the separate account shall be withdrawn by the promoter after it is certified by an engineer, an architect and a chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project:

Provided also that the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice, and shall produce a statement of accounts duly certified and signed by such chartered accountant and it shall be verified during the audit that the amounts collected for a particular project have been utilised for that project and the withdrawal has been in compliance with the proportion to the percentage of completion of the project.

Explanation.— For the purpose of this clause, the term "schedule bank" means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934;

(E) that he shall take all the pending approvals on time, from the competent authorities;

(F) that he has furnished such other documents as may be prescribed by the rules or regulations made under this Act; and

(m) such other information and documents as may be prescribed.

(3) The Authority shall operationalise a web based online system for submitting applications for

registration of projects within a period of one year from the date of its establishment.

5. **Grant of registration**.— On receipt of the application under sub-section (1) of section 4, the Authority shall within a period of thirty days.

(a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number, including a Login Id and password to the applicant for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project; or

(b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(2) If the Authority fails to grant the registration or reject the application, as the case may be, as provided under sub-section (1), the project shall be deemed to have been registered, and the Authority shall within a period of seven days of the expiry of the said period of thirty days specified under sub-section (1), provide a registration number and a Login Id and password to the promoter for accessing the website of the Authority and to create his web page and to fill therein the details of the proposed project.

(3) The registration granted under this section shall be valid for a period declared by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be.

6. **Extension of registration.--** The registration granted under section 5 may be extended by the

Authority on an application made by the promoter due to *force majeure*, in such form and on payment of such fee as may be prescribed:

Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:

Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

Explanation.— For the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

7.**Revocation of registration.--** (1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that—

(a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;

(b) the promoter violates any of the terms or conditions of the approval given by the competent authority;

(c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation.—For the purposes of this clause, the term "unfair practice" means a practice which, for the purpose of promoting the sale or development of any real estate project adopts any

unfair method or unfair or deceptive practice including any of the following practices, namely:—

(A) the practice of making any statement, whether in writing or by visible representation which,—

(i) falsely represents that the services are of a particular standard or grade;

(ii) represents that the promoter has approval or affiliation which such promoter does not have;

(iii) makes a false or misleading representation concerning the services;

(B) the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;

(d) the promoter indulges in any fraudulent practices.

(2) The registration granted to the promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

(3) The Authority may, instead of revoking the registration under sub-section (1), permit it to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

(4) The Authority, upon the revocation of the registration,—

(a) shall debar the promoter from accessing its website in relation to that project and specify his

name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;

(b) shall facilitate the remaining development works to be carried out in accordance with the provisions of section 8;

(c) shall direct the bank holding the project back account, specified under sub clause (D) of clause (I) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;

(d) may, to protect the interest of allottees or in the public interest, issue such directions as it may deem necessary.

8. **Obligation of Authority consequent upon lapse of or on revocation of registration.--**Upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority:

Provided that no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act:

Provided further that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of

refusal for carrying out of the remaining development works.

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11. **Functions and duties of promoter.--**(1) The promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including—

(a) details of the registration granted by the Authority;

(b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;

(c) quarterly up-to-date the list of number of garages booked;

(d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;

(e) quarterly up-to-date status of the project; and

(f) such other information and documents as may be specified by the regulations made by the Authority.

(2) The advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

(3) The promoter at the time of the booking and issue of allotment letter shall be responsible to make

available to the allottee, the following information, namely:—

(a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;

(b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

(4) The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;

(c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or

other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;

(5) The promoter may cancel the allotment only in terms of the agreement for sale:

Provided that the allottee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

(6) The promoter shall prepare and maintain all such other details as may be specified, from time to time, by regulations made by the Authority.

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13. **No deposit or advance to be taken by promoter without first entering into agreement for sale.** (1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

(2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

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18. **Return of amount and compensation** --(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or

revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

19. **Rights and duties of allottees** --(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub-clause (C) of clause (I) of sub-section (2) of section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

(6) Every allottee, who has entered into an agreement or sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges,

maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

(8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(11) Every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

20. **Establishment and incorporation of Real Estate Regulatory Authority** -- (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this Act:

Provided that the appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority:

Provided further that, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be:

Provided also that until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under this Act:

Provided also that after the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated, shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.

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31. **Filing of complaints with the Authority or the adjudicating officer.**-- (1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed.

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34. **Functions of Authority** --The functions of the Authority shall include—

(a) to register and regulate real estate projects and real estate agents registered under this Act;

(b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;

(c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;

(d) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;

(e) to fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoter or the real estate agent, as the case may be;

(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

(g) to ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;

(h) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act.

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36. **Power to issue interim orders**. --Where during an inquiry, the Authority is satisfied that an act in contravention of this Act, or the rules and regulations made thereunder, has been committed and continues to be committed or that such act is about to be committed, the Authority may, by order, restrain any promoter, allottee or real estate agent from carrying on such act until the conclusion of such inquiry of until further orders, without giving notice to such party, where the Authority deems it necessary.

37. **Powers of Authority to issue directions**. --The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

38. **Powers of Authority.** --(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that—

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely,

then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India.

39. **Rectification of orders**. --The Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act:

Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

40. **Recovery of interest or penalty or compensation and enforcement of order, etc.-**

(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such

manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed.

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43. **Establishment of Real Estate Appellate Tribuna**l-- (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the — (name of the State/Union territory) Real Estate Appellate Tribunal.

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44. **Application for settlement of disputes and appeals to Appellate Tribunal**-- (1) The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.

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58. **Appeal to High Court**. --(1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation.—The expression "High Court" means the High Court of a State or Union territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

59. **Punishment for nonregistration under section 3.**-- (1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent of the estimated cost of the real estate project as determined by the Authority.

(2) If any promoter does not comply with the orders, decisions or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten per cent of the estimated cost of the real estate project, or with both.

60. **Penalty for contravention of section 4**. --If any promoter provides false information or contravenes the provisions of section 4, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project, as determined by the Authority.

61. **Penalty for contravention of other provisions of this Act**.-- If any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

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71. **Power to adjudicate**.-- (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, (68 of 1986), on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of

the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.

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72. **Factors to be taken into account by the adjudicating officer**.-- While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:—

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused as a result of the default;

(c) the repetitive nature of the default;

(d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

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79. **Bar of jurisdiction**. --No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

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> 88. **Application of other laws not barred**-- The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.
>
> 89. **Act to have overriding effect**.-- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

22. A perusal of the aforesaid provisions would show that, on and from the coming into force of the RERA, all real estate projects (as defined) would first have to be registered with the Real Estate Regulatory Authority, which, before registering such projects, would look into all relevant details, including delay in completion of other projects by the developer. Importantly, the promoter is now to make a declaration supported by an affidavit, that he undertakes to complete the project within a certain time period, and that 70% of the amounts realised for the project from allottees, from time to time, shall be deposited in a separate account, which would be spent only to defray the cost of construction and land cost for that particular project. Registration is granted by the authority only when it is satisfied that the promoter is a *bona fide* promoter who is likely to perform his part of the bargain satisfactorily. Registration of the project enures only for a certain period and can only be extended due to *force majeure* events for

a maximum period of one year by the authority, on being satisfied that such events have, in fact, taken place. Registration once granted, may be revoked if it is found that the promoter defaults in complying with the various statutory requirements or indulges in unfair practices or irregularities. Importantly, upon revocation of registration, the authority is to facilitate the remaining development work, which can then be carried out either by the “competent authority” as defined by the RERA or by the association of allottees or otherwise. The promoter at the time of booking and issue of allotment letters has to make available to the allottees information, *inter alia*, as to the stage-wise time schedule of completion of the project. Deposits or advances beyond 10% of the estimated cost as advance payment cannot be taken without first entering into an agreement for sale. Importantly, the agreement for sale will now no longer be a one-sided contract of adhesion, but in such form as may be prescribed, which balances the rights and obligations of both the promoter and the allottees. Importantly, under Section 18, if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale, he must return the amount received by him in respect of such apartment etc. with such interest as may be prescribed and must, in addition,

compensate the allottee in case of any loss caused to him. Under Section 19, the allottee shall be entitled to claim possession of the apartment, plot or building, as the case may be, or refund of amount paid along with interest in accordance with the terms of the agreement for sale. In addition, all allottees are to be responsible for making necessary payments in instalments within the time specified in the agreement for sale and shall be liable to pay interest at such rate as may be prescribed for any delay in such payment. Under Section 31, any aggrieved person may file a complaint with the authority or the adjudicating officers set up by such authority against any promoter, allottee or real estate agent, as the case may be, for violation or contravention of the RERA, and rules and regulations made thereunder. Also, if after adjudication a promoter, allottee or real estate agent fails to pay interest, penalty or compensation imposed on him by the authorities under the RERA, the same shall be recoverable as arrears of land revenue. Appeals may be filed to the Real Estate Appellate Tribunal against decisions or orders of the authority or the adjudicating officer. From orders of the Appellate Tribunal, appeals may thereafter be filed to the High Court. Stiff penalties are to be awarded for breach and/or contravention of the provisions of the RERA. Importantly, under Section 72, the

adjudicating officer must first determine that the complainant has established “default” on the part of the respondent, after which consequential orders may then follow. Under Section 88, the provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force and under Section 89, RERA is to have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

The Insolvency and Bankruptcy Code, 2016 vis-à-vis the Real Estate (Regulation and Development) Act, 2016

23. Section 238 of the Code reads as follows:

> “238. The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

24. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject matter is concerned. Also, the non-obstante clause of RERA came into force on 1st May, 2016, as opposed to the non-obstante clause of the Code which came into force on 1st December, 2016. Further, the amendment with which we are

concerned has come into force only on 6th June, 2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of learned senior counsel for the Petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. 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. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1st May, 2016, remedies before those authorities would come into effect only on and from 1st May, 2017 making it clear that the provisions of the Code, which came into force on 1st December, 2016, would apply in addition to the RERA.

25. In **KSL & Industries Ltd. v. Arihant Threads Ltd.** (2015) 1 SCC 166, a Three Judge Bench of this Court held that the Sick

Industries Companies (Special Provisions) Act, 1985 (hereinafter referred to as the “Sick Act”) would prevail over the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the “Recovery Act”) - both statutes containing non-obstante clauses. After going into the scheme of both the statutes, this Court referred in particular to Section 34(2) of the Recovery Act and then held as follows:

> “**35.** This special law, which deals with the recovery of debts due to banks and financial institutions, makes the procedure for recovery of such debts exclusive and even unique. The non obstante clause in sub-section (1) confers an overriding effect on the provisions of the RDDB Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Sub-section (2), however, makes the RDDB Act additional to and not in derogation or annulment of the five Acts mentioned therein i.e. the Industrial Finance Corporation Act, 1948; the State Financial Corporations Act, 1951; the Unit Trust of India Act, 1963; the Industrial Reconstruction Bank of India Act, 1984 and the Sick Industrial Companies (Special Provisions) Act, 1985.
>
> **36**. Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term “*in derogation of*” means “*in abrogation or repeal of*”. *The Black's Law Dictionary* sets forth the following meaning for “derogation”:

"*derogation*.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force."

It is clear that sub-section (1) contains a non obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law.

37. The effect of sub-section (2) must necessarily be to preserve the powers of the authorities under SICA and save the proceedings from being overridden by the later Act i.e. the RDDB Act.

38. We, thus, find a harmonious scheme in relation to the proceedings for reconstruction of the company under SICA, which includes the reconstruction of debts and even the sale or lease of the sick company's properties for the purpose, which may or may not be a part of the security executed by the sick company in favour of a bank or a financial institution on the one hand, and the provisions of the RDDB Act, which deal with recovery of debts due to banks or financial institutions, if necessary by enforcing the security charged with the bank or financial institution, on the other.

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48. In view of the observations of this Court in the decisions referred to and relied on by the learned counsel for the parties we find that, the purpose of the two enactments is entirely different. As observed earlier, the purpose of one is to provide ameliorative measures for reconstruction of sick companies, and the purpose of the other is to provide for speedy recovery of debts of banks and financial institutions. Both the Acts are "special" in this sense. However, with reference to the specific purpose of reconstruction of sick companies, SICA must be held to be a special

law, though it may be considered to be a general law in relation to the recovery of debts. Whereas, the RDDB Act may be considered to be a special law in relation to the recovery of debts and SICA may be considered to be a general law in this regard. For this purpose we rely on the decision in *LIC* v. *Vijay Bahadur* [(1981) 1 SCC 315 : 1981 SCC (L&S) 111] . Normally the latter of the two would prevail on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a non obstante clause. In this case, however, the express intendment of Parliament in the non obstante clause of the RDDB Act does not permit us to take that view. Though the RDDB Act is the later enactment, sub-section (2) of Section 34 thereof specifically provides that the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of, the other laws mentioned therein including SICA.

49. The term "not in derogation" clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA in any way. This, in effect must mean that Parliament intended the proceedings under SICA for reconstruction of a sick company to go on and for that purpose further intended that all the other proceedings against the company and its properties should be stayed pending the process of reconstruction. While the term "proceedings" under Section 22 of SICA did not originally include the RDDB Act, which was not there in existence. Section 22 covers proceedings under the RDDB Act."

26. In view of Section 34(2) of the Recovery Act, this Court held that despite the fact that the non-obstante clause contained in the Recovery Act is later in time than the non-obstante clause contained in the Sick Act, in the event of a conflict, the Recovery Act i.e. the later Act must give way to the Sick Act i.e. the earlier

Act. Several judgments were referred to in which ordinarily a later Act containing a non-obstante clause must be held to have primacy over an earlier Act containing a non-obstante clause, as Parliament must be deemed to be aware of the fact that the later Act is intended to override all earlier statutes including those which contained non-obstante clauses. This statement of the law was departed from in **KSL & Industries** (supra) only because of the presence of a Section like Section 88 of RERA contained in the Recovery Act, which makes it clear that the Act is meant to be in addition to and not in derogation of other statutes. In the present case, it is clear that both tests are satisfied, namely, that the Code as amended, is both later in point of time than RERA, and must be given precedence over RERA, given Section 88 of RERA.

27. In fact, in **Bank of India v. Ketan Parekh** (2008) 8 SCC 148, this Court held that Section 9A of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as the "Special Court Act") must be considered to be legislation that is subsequent to the Recovery Act, since Section 9A was introduced by amendment, into the Special Court Act after the Recovery Act. Needless to add, both statutes contained non-obstante clauses. This Court held:

> "**28.** In the present case, both the two Acts i.e. the Act of 1992 and the Act of 1993 start with the non obstante clause. Section 34 of the Act of 1993 starts with non obstante clause, likewise Section 9-A (*sic* 13) of the Act of 1992. But incidentally, in this case Section 9-A came subsequently i.e. it came on 25-1-1994. Therefore, it is a subsequent legislation which will have the overriding effect over the Act of 1993. But cases might arise where both the enactments have the non obstante clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case the dominant purpose is covered by that contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons. However, so far as the present case is concerned, it is more than clear that Section 9-A of the Act of 1992 was amended on 25-1-1994 whereas the Act of 1993 came in 1993. Therefore, the Act of 1992 as amended to include Section 9-A in 1994 being subsequent legislation will prevail and not the provisions of the Act of 1993."
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> (emphasis supplied)

28. It is clear, therefore, that even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, viz. the Code.

29. As a matter of fact, the Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor. This is to take place by replacing the management of the

corporate debtor by means of a resolution plan which must be accepted by 66% of the Committee of Creditors, which is now put at the helm of affairs, in deciding the fate of the corporate debtor. Such resolution plan then puts the same or another management in the saddle, subject to the provisions of the Code, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. It is only as a last resort that winding up of the corporate debtor is resorted to, so that its assets may be liquidated and paid out in the manner provided by Section 53 of the Code. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions. The object of RERA is to see that real estate projects come to fruition within the stated period and to see that allottees of such projects are not left in the lurch and are finally able to realise their dream of a home, or be paid compensation if such dream is shattered, or at least get back monies that they had advanced towards the project with interest. At the same time, recalcitrant allottees are not to be tolerated, as they must also perform their part of the bargain, namely, to pay instalments as and when they become due and payable. Given the different spheres within which these two enactments operate, different

parallel remedies are given to allottees – under RERA to see that their flat/apartment is constructed and delivered to them in time, barring which compensation for the same and/or refund of amounts paid together with interest at the very least comes their way. If, however, the allottee wants that the corporate debtor's management itself be removed and replaced, so that the corporate debtor can be rehabilitated, he may prefer a Section 7 application under the Code. That another parallel remedy is available is recognised by RERA itself in the proviso to Section 71(1), by which an allottee may continue with an application already filed before the Consumer Protection fora, he being given the choice to withdraw such complaint and file an application before the adjudicating officer under RERA read with Section 88. In similar circumstances, this Court in **Swaraj Infrastructure Private Limited v. Kotak Mahindra Bank Limited** (2019) 3 SCC 620 has held that Debt Recovery Tribunal proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and winding up proceedings under the Companies Act, 1956 can carry on in parallel streams (see paragraphs 21 and 22 therein).

Financial and Operational Creditors

30. In **Innoventive Industries v. ICICI Bank & Anr.** (2018) 1 SCC 407, this Court after setting out some of the sections of the Code, laid down the Scheme of the Code when it came to financial and operational creditors triggering the Code against a Corporate debtor. This Court held:

> "**27.** The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5(21) means a claim in respect of provision of goods or services.
>
> **28.** When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to *any* financial creditor of the

corporate debtor — it need not be a debt owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the

operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise."

(emphasis supplied)

31. Likewise, in **Swiss Ribbons** (supra), this Court while repelling a challenge to the constitutional validity of the Code based on a purported infraction of Article 14, differentiated between financial and operational creditors. In so doing, it made it clear that the context of the decision dealt with banks and financial institutions as financial creditors as opposed to operational creditors who could be corporations or individuals to whom monies

were owed for goods and/or services. In certain circumstances, financial creditors could also be individuals, such as debenture holders and fixed deposit holders, who were then spoken of as follows:

> "**42.** A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.
>
> **43.** A financial creditor may trigger the Code either by itself or jointly with other financial creditors or such persons as may be notified by the Central Government when a "default" occurs. The Explanation to Section 7(1) also makes it clear that the Code may be triggered by such persons in respect of a default made to any other financial creditor of the corporate debtor, making it clear that once triggered, the resolution process under the Code is a collective proceeding in rem which seeks, in the first instance, to rehabilitate the corporate debtor. Under Section 7(4), the adjudicating authority shall, within the prescribed period, ascertain the existence of a default on the basis of evidence furnished by the financial creditor; and under Section 7(5), the adjudicating authority has to be satisfied that a default has occurred, when it may, by order, admit the application, or dismiss the application if such default has not occurred. On the other hand, under Sections 8 and 9, an operational creditor may, on the occurrence of a default, deliver a demand notice which must then be replied to within the specified period.

What is important is that at this stage, if an application is filed before the adjudicating authority for initiating the corporate insolvency resolution process, the corporate debtor can prove that the debt is disputed. When the debt is so disputed, such application would be rejected.

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46. However, the Insolvency Law Committee (ILC), in its Report of March 2018 dealt with debenture-holders and fixed deposit-holders, who are also financial creditors, and are numerous. The Report then went on to state:

"10.6. For certain securities, a trustee or an agent may already be appointed as per the terms of the security instrument. For example, a debenture trustee would be appointed if debentures exceeding 500 have been issued [Section 71(5), Companies Act, 2013] or if secured debentures are issued [Rule 18(1)(*c*), Companies (Share Capital and Debenture) Rules, 2014]. Such creditors may be represented through such pre-appointed trustees or agents. For other classes of creditors which exceed a certain threshold in number, like home buyers or security-holders for whom no trustee or agent has already been appointed under a debt instrument or otherwise, an insolvency professional (other than IRP) shall be appointed by NCLT on the request of IRP. It is to be noted that as the agent or trustee or insolvency professional i.e. the authorised representative for the creditors discussed above and executors, guarantors, etc. as discussed in Para 9 of this Report, shall be a part of the CoC, they cannot be related parties to the corporate debtor in line with the spirit of proviso to Section 21(2).

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10.8. In light of the deliberation above, the Committee felt that a mechanism requires to be provided in the Code to mandate representation in meetings of security-holders, deposit-holders, and all other classes of financial creditors which exceed a certain

number, through an authorised representative. This can be done by adding a new provision to Section 21 of the Code. Such a representative may either be a trustee or an agent appointed under the terms of the debt agreement of such creditors, otherwise an insolvency professional may be appointed by NCLT for each such class of financial creditors. Additionally, the representative shall act and attend the meetings on behalf of the respective class of financial creditors and shall vote on behalf of each of the financial creditors to the extent of the voting share of each such creditor, and as per their instructions. To ensure adequate representation by the authorised representative of the financial creditors, a specific provision laying down the rights and duties of such authorised representatives may be inserted. Further, the requisite threshold for the number of creditors and manner of voting may be specified by IBBI through regulations to enable efficient voting by the representative. Also, Regulation 25 may also be amended to enable voting through electronic means such as e-mail, to address any technical issues which may arise due to a large number of creditors voting at the same time."

47. Given this Report, the Code was amended and Sections 21(6-A) and 21(6-B) were added, which are set out hereinbelow:

"**21.** ***Committee of Creditors***. —

(1)-(6) * * *

(6-A) Where a financial debt—

(*a*) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(*b*) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (*a*) or sub-section (6), the interim resolution professional shall make an

application to the adjudicating authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorised representative who shall be appointed by the adjudicating authority prior to the first meeting of the Committee of Creditors;

(*c*) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors,

and such authorised representative under clause (*a*) or clause (*b*) or clause (*c*) shall attend the meetings of the Committee of Creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(*i*) under clauses (*a*) and (*c*) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(*ii*) under clause (*b*) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs."

48. Also, Regulations 16-A and 16-B of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (the CIRP Regulations) were added, with effect from 4-7-2018, as follows:

"**16-A.** ***Authorised representative***.—(1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of Regulation 12, to act as the authorised representative of the creditors of the respective class:

Provided that the choice for an insolvency professional to act as authorised representative in Form CA

received under sub-regulation (2) of Regulation 12 shall not be considered.

(2) The interim resolution professional shall apply to the adjudicating authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of Regulation 12.

(3) Any delay in appointment of the authorised representative for any class of creditors shall not affect the validity of any decision taken by the committee.

(4) The interim resolution professional shall provide the list of creditors in each class to the respective authorised representative appointed by the adjudicating authority.

(5) The interim resolution professional or the resolution professional, as the case may be, shall provide an updated list of creditors in each class to the respective authorised representative as and when the list is updated.

Clarification: The authorised representative shall have no role in receipt or verification of claims of creditors of the class he represents.

(6) The interim resolution professional or the resolution professional, as the case may be, shall provide electronic means of communication between the authorised representative and the creditors in the class.

(7) The voting share of a creditor in a class shall be in proportion to the financial debt which includes an interest at the rate of eight per cent per annum unless a different rate has been agreed to between the parties.

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting

of the committee attended by him in the following manner, namely:

Number of creditors in the class	*Fee per meeting of the committee (Rs)*
10-100	15,000
101-1000	20,000
More than 1000	25,000

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

16-B. ***Committee with only creditors in a class***. — Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s).”

49. It is obvious that debenture-holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

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61. Insofar as set-off and counterclaim is concerned, a set-off of amounts due from financial creditors is a rarity. Usually, financial debts point only in one way—amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to

challenge before the adjudicating authority under Section 60."

The Article 14 Challenge (I): Discrimination

32. Learned counsel for the Petitioners have emphasised that treating allottees to be financial creditors is discriminatory inasmuch as unequals are treated equally, equals are treated unequally, and both are without any intelligible differentia having any nexus with the objects of the Code. It is argued that discrimination arises, equals being treated as unequal, as real estate developers are differentiated from other entities who supply goods or services and would, therefore, be discriminated against as, in the case of real estate developers, all that an allottee would have to show is that a debt is due to him, whereas in the cases of persons supplying goods or services if there exists any pre-existing dispute between the operational debtor and the person who purchases the goods or avails of the services, the operational debtor would be outside the clutches of the Code. It was also argued that unequals are treated as equals as banks and financial institutions are completely different from real estate developers, as has been recognised in **Swiss Ribbons** (supra), and to treat

these unequals as equals by making real estate developers financial debtors, again infracts Article 14.

33. When Article 14 is alleged to have been infracted by legislation which is economic in nature, it is important to first restate a few fundamental principles. In **Ram Krishna Dalmia v. Justice S.R. Tendolkar** (1959) SCR 279, this Court laid down the oft quoted principles that apply when challenges on the ground of discrimination are made to statutes. This Court held:

> "…The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish—
>
> (*a*) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
>
> (*b*) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

> (*d*) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
>
> (*e*) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
>
> (*f*) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and un-known reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. (at page 297, 298)"

34. This principle has been re-iterated by this Court in **State of Bihar v. Shree Baidyanath Ayurved Bhawan (P) Ltd.** (2005) 2 SCC 762 at 783 and more recently in **Karnataka Live Band Restaurants Assn. v. State of Karnataka** (2018) 4 SCC 372 at 393 where this Court re-iterated the principles to test legislation on the touchstone of Article 14 as laid down by this Court in **Ram Krishna Dalmia** (supra), wherein as extracted above, this Court held that the legislature is free to recognise degrees of harm and

confine its application to those cases where the need is deemed to be the clearest.

35. In **State of Gujarat and Anr. v. Shri Ambica Mills Ltd., Ahmedabad, etc.** (1974) 4 SCC 656, this Court dealt with classifications that are under-inclusive and held, particularly with regard to economic legislation, that such under-inclusion would not result in the death-knell of such laws on the anvil of Article 14. This Court put it thus:

> "**53.** The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. [See Joseph Tussman and Jacobusten Brook The Equal Protection of the Law, 37 California Rev 341]
>
> **54.** A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would someday bring about his downfall employed such a classification.

56. The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate — difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape — and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr Justice Holmes, in urging

tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. [Missouri, *K&T Rly* v. *May*, 194 US 267, 269] What, then, are the fair reasons for non-extension? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters? Should it, by its judgment, force the legislature to choose between inaction or perfection?

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66. That the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adaption of remedies cannot be required, that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner [See “General Theory of Law and State”, p. 161] .

67. In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the

path to judicial wisdom and institutional prestige and stability. [See “General Theory of Law and State”, p. 161]

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71. The Court must be aware of its own remoteness and lack of familiarity with local problems. Classification is dependent on the peculiar needs and specific difficulties of the community. The needs and difficulties of the community are constituted out of facts and opinions beyond the easy ken of the Court [See “General Theory of Law and State”, p. 161] . It depends to a great extent upon an assessment of the local condition of these concerns which the legislature alone was competent to make.”

36. In **V.C. Shukla v. State (Delhi Administration)** 1980 Supp. SCC 249, this Court further elaborated:

“**11.** In a diverse society and a large democracy such as ours where the expanding needs of the nation change with the temper of the times, it is extremely difficult for any legislation to make laws applicable to all persons alike. Some amount of classification is, therefore, necessary to administer various spheres of the activities of the State. It is well settled that in applying Article 14 mathematical precision or nicety or perfect equanimity are not required. Similarity rather than identity of treatment is enough. The courts should not make a doctrinaire approach in construing Article 14 so as to destroy or frustrate any beneficial legislation. What Article 14 prohibits is hostile discrimination and not reasonable classification for the purpose of legislation. Furthermore, the legislature which is in the best position to understand the needs and requirements of the people must be given sufficient latitude for making selection or

> differentiation and so long as such a selection is not arbitrary and has a rational basis having regard to the object of the Act, Article 14 would not be attracted. That is why this Court has laid down that presumption is always in favour of the constitutionality of an enactment and the onus lies upon the person who attacks the statute to show that there has been an infraction of the constitutional concept of equality. It has also been held that in order to sustain the presumption of constitutionality, the court is entitled to take into consideration matters of common knowledge, common report, the history of the times and all other facts which may be existing at the time of the legislation. Similarly, it cannot be presumed that the administration of a particular law would be done with an "evil eye and an unequal hand". Finally, any person invoking Article 14 of the Constitution must show that there has been discrimination against a person who is similarly situate or equally circumstanced. In the case of *State of U.P.* v. *Deoman Upadhyaya* [AIR 1960 SC 1125 : (1961) 1 SCR 14 : (1961) 2 SCJ 334] Subba Rao, J., observed as follows:
>
> "No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is wellnigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress."

37. Equally, it is important to note that classification need not be perfect. In **Venkateshwara Theatre v. State of A.P.** (1993) 3 SCC 677 this Court held:

"**20.** Article 14 enjoins the State not to deny to any person equality before the law or the equal protection of the laws. The phrase "equality before the law" contains the declaration of equality of the civil rights of all persons within the territories of India. It is a basic principle of republicanism. The phrase "equal protection of laws" is adopted from the Fourteenth Amendment to the U.S. Constitution. The right conferred by Article 14 postulates that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Since the State, in exercise of its governmental power, has, of necessity, to make laws operating differently on different groups of persons within its territory to attain particular ends in giving effect to its policies, it is recognised that the State must possess the power of distinguishing and classifying persons or things to be subjected to such laws. It is, however, required that the classification must satisfy two conditions, namely, (*i*) it is founded on an intelligible differentia which distinguishes those that are grouped together from others; and (*ii*) the differentia must have a rational relation to the object sought to be achieved by the Act. It is not the requirement that the classification should be scientifically perfect or logically complete. Classification would be justified if it is not palpably arbitrary. (See : *Re, Special Courts Bill, 1978* [(1979) 1 SCC 380 : (1979) 2 SCR 476, 534-36] .) If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. (See: *Khandige Sham Bhat* v. *Agricultural I.T.O.* [(1963) 3 SCR 809, 817: AIR 1963 SC 591: (1963) 48 ITR 21])

(emphasis supplied)

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23. Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e. differently placed, are treated similarly. In such a case failure on the part of the legislature to classify the persons who are dissimilar in separate categories and applying the same law, irrespective of the differences, brings about the same consequence as in a case where the law makes a distinction between persons who are similarly placed. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.

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29. In the instant case, we find that the legislature has prescribed different rates of tax by classifying theatres into different classes, namely, air-conditioned, air-cooled, ordinary (other than air-conditioned and air-cooled), permanent and semi-permanent and touring and temporary. The theatres have further been categorised on the basis of the type of the local area in which they are situate. It cannot, therefore, be said that there has been no attempt on the part of the legislature to classify the cinema theatres taking into consideration the differentiating circumstances for the purpose of imposition of tax. The grievance of the appellants is that the classification is not perfect. What they want is that there should have been further classification amongst the theatres falling in the same class on the basis of the location of the theatre in each local area. We do not think that such a contention is well founded."

38. Also, in **Mardia Chemicals Ltd. v. Union of India** (2004) 4 SCC 311, this Court held that Parliamentary intent cannot be thwarted even if it operates a bit harshly on a small section of the public, if otherwise made in the larger public interest. This Court said:

> "**74.** A reference has also been made for similar observations in *Srinivasa Enterprises* v. *Union of India* [(1980) 4 SCC 507] at SCC pp. 513-14 and in *Jalan Trading Co. (P) Ltd.* v. *Mill Mazdoor Sabha* [AIR 1967 SC 691 : (1967) 1 SCR 15] at SCR p. 36. While referring to the observations made in *Collector of Customs* v. *Nathella Sampathu Chetty* [AIR 1962 SC 316 : (1962) 3 SCR 786 : (1962) 1 Cri LJ 364] at SCR pp. 829-30 it is submitted that the intent of Parliament shall not be defeated merely for the reason that it may operate a bit harshly on a small section of public where it may be necessary to make such provisions of achieving the desired objectives to ensure that the nefarious activities of smuggling, etc. had to be necessarily curbed. In *Fatehchand Himmatlal* [(1977) 2 SCC 670] where debts of the agriculturists were wiped off, this Court observed:
>
> "*44*. Every cause claims its martyr and if the law, necessitated by practical considerations, makes generalizations which hurt a few, it cannot be helped by the Court. Otherwise, the enforcement of the Debt Relief Act will turn into an enquiry into scrupulous and unscrupulous creditors, frustrating through endless litigation, the instant relief to the indebted which is the promise of the legislature." (SCC p. 689, para 44)"

The principle contained in **Swiss Ribbons** (supra), that far greater deference is accorded to economic legislation, as the legislature is given free play in the joints and is at liberty to conduct economic experiments in public interest, finds an early application in **Shri Ambica Mills** (supra), and applies on all fours in this case. Sub-paras (b), (c), (d) and (f) of **Ram Krishna Dalmia** (supra) are all also attracted in the present case.

39. It is also important to remember that the Code is not meant to be a debt recovery mechanism [see paragraph 28 of **Swiss Ribbons** (supra)]. It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. This is because, the moment a petition is admitted under Section 7, the resolution professional must first advertise for and find a resolution plan by somebody, usually another developer, which has then to pass muster under the Code, i.e. that it must be approved by at least 66% of the Committee of Creditors and must

further go through challenges before NCLT and NCLAT before the new management can take over and either complete construction, or pay out or refund amounts. Depending on the kind of resolution plan that is approved, such home buyer/allottee may have to wait for a very long period for the successful completion of the project. He may never get his full money back together with interest in the event that no suitable resolution plan is forthcoming, in which case, winding up of the corporate debtor alone would ensue. On the other hand, if such allottee were to approach the Real Estate Regulatory Authority under RERA, it is more than likely that the project would be completed early by the persons mentioned therein, and/or full amount of refund and interest together with compensation and penalty, if any, would be awarded. Thus, given the *bona fides* of the allottee who moves an application under Section 7 of the Code, it is only such allottee who has completely lost faith in the management of the real estate developer who would come before the NCLT under the Code hoping that some other developer takes over and completes the project, while always taking the risk that if no one were to come forward, corporate death must ensue and the allottee must then stand in line to receive whatever is given to him in winding up. Given the reasons of the Insolvency Committee Report, which show that

experience of the real estate sector in this country has not been encouraging, in that huge amounts are advanced by ordinary people to finance housing projects which end up in massive delays on the part of the developer or even worse, i.e. failure of the project itself, and given the state of facts which was existing at the time of the legislation, as adverted to by the Insolvency Committee Report, it is clear that any alleged discrimination has to meet the tests laid down in **Ram Krishna Dalmia** (supra), **V.C. Shukla** (supra), **Shri Ambica Mills** (supra), **Venkateshwara Theatre** (supra) and **Mardia Chemicals** (supra).

40. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by learned counsel on behalf of the Petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally,

when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where

customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving “exchange”, i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the

information from information utilities under the Code, makes it easy for home buyers/allottees to approach the NCLT under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors. This being the case, it is clear that there cannot be said to be any infraction of equal protection of the laws.

41. Shri Shyam Divan relying upon **Nagpur Improvement Trust and Anr. v. Vithal Rao and Ors.** (1973) 1 SCC 500 at paragraph 26 and **Subramanian Swamy v. Director, Central Bureau of Investigation and Anr.** (2014) 8 SCC 682 at paragraphs 44, 58 and 68 argued that the object of the amendment is itself discriminatory in that it seeks to insert into a "means and includes" definition a category which does not fit therein, namely, real estate developers who do not, in the classical sense, borrow monies like banks and financial institutions. According to him, therefore, the object itself being discriminatory, the inclusion of real estate developers as financial debtors should

be struck down. We have already pointed out how real estate developers are, in substance, persons who avail finance from allottees who then fund the real estate development project. The object of dividing debts into two categories under the Code, namely, financial and operational debts, is broadly to sub-divide debts into those in which money is lent and those where debts are incurred on account of goods being sold or services being rendered. We have no doubt that real estate developers fall squarely within the object of the Code as originally enacted insofar as they are financial debtors and not operational debtors, as has been pointed out hereinabove. So far as unequals being treated as equals is concerned, home buyers/allottees can be assimilated with other individual financial creditors like debenture holders and fixed deposit holders, who have advanced certain amounts to the corporate debtor. For example, fixed deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors. Financial contracts in the case of these individuals need not involve large sums of money. Debenture holders and fixed deposit holders, unlike real estate holders, are involved in seeing that they recover the amounts that are lent and are thus not directly involved or interested in assessing the viability of the corporate debtors. Though not having the expertise or

information to be in a position to evaluate feasibility and viability of resolution plans, such individuals, by virtue of being financial creditors, have a right to be on the Committee of Creditors to safeguard their interest. Also, the question that is to be asked when a debenture holder or fixed deposit holder prefers a Section 7 application under the Code will be asked in the case of allottees of real estate developers – is a debt due in fact or in law? Thus, allottees, being individual financial creditors like debenture holders and fixed deposit holders and classified as such, show that they within the larger class of financial creditors, there being no infraction of Article 14 on this score.

42. The presumption that the legislature has understood and correctly appreciated the need of its people and that the amendment to the Code is directed to problems made manifest by experience, as was pointed out by the Insolvency Law Committee findings (supra) demonstrates that the presumption of constitutionality that attaches to the Amendment Act has not been displaced by the Petitioners.

43. It was also argued with reference to Regulation 9A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that home

buyers would really fall within “other creditors” as a residuary class, who would have to stand in line with their claims which would be made to the resolution professional once the Code is triggered. Regulation 9A reads as follows:

> “9A. **Claims by other creditors.**
>
> (1) A person claiming to be a creditor, other than those covered under regulations 7, 8, or 9, shall submit proof of its claim to the interim resolution professional or resolution professional in person, by post or by electronic means in Form F of the Schedule.
>
> (2) The existence of the claim of the creditor referred to in sub-section (1) may be proved on the basis of –
>
> (a) the records available in an information utility, if any, or
>
> (b) other relevant documents sufficient to establish the claim, including any or all of the following:—
>
> (i) documentary evidence demanding satisfaction of the claim;
>
> (ii) bank statements of the creditor showing non-satisfaction of claim;
>
> (iii) an order of court or tribunal that has adjudicated upon non-satisfaction of claim, if any.”

We have already held that given the fact that home buyers/allottees give advances to the real estate developer and thereby finance the real estate project at hand, are really financial

creditors. Given this finding, this plea of the Petitioners must also be rejected. This challenge must also, therefore, fail.

The Article 14 Challenge (II): Manifest arbitrariness; Article 19(1)(g) and Article 300-A

44. Counsel for the Petitioners argued that a square peg has been fitted in a round hole and have thus stated that doing so would not only be contrary to the objects sought to achieved by the Code, but would be directly contrary to **Swiss Ribbons** (supra) in that every characteristic of financial creditors vis-à-vis operational creditors would show that real estate developers are assimilated to operational and not financial debtors. For this purpose, in the written argument presented by Dr. Singhvi, relying upon **Swiss Ribbons** (supra) it is stated that:

"FINDINGS IN SWISS RIBBONS P. LTD. V. UOI, (2019) 4 SCC 17 ON NATURE OF OPERATIONAL CREDITORS (OCs)/ FINANCIAL CREDITORS (FCs) VIS-À-VIS ALLOTTEES

S.No.	FINDINGS IN SWISS RIBBONS W.R.T. RATIONALE BEHIND DISTINCTION BETWEEN FINANCIAL AND OPERATIONAL CREDITORS	REASON FOR NON-APPLICABILITY OF DISTINCTION BETWEEN FCs and OCs (AS EXPLAINED IN SWISS RIBBONS) IN CASE OF HOMEBUYERS/ ALLOTTEES
1.	**Nature of security**:	

	"it is clear that most financial creditors, particularly banks and financial institutions, are secured creditors whereas most operational creditors are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like." *[Para 44]*	Real estate allottees/ homebuyers are unsecured creditors and are therefore more akin to OCs rather than FCs
2.	"The **nature of loan agreements** with financial creditors is different from contracts with operational creditors for supplying goods and services. ● Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. ● Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. ● In the running of a business, operational	● Real estate allottees make payments to the corporate debtors in lieu of services rendered – i.e., construction of apartments. In several cases, payments are also made on a construction-linked payment basis. ● Each individual allottee will be owed a sum that is often much smaller than the amount owed to a single bank/financial institution. ● Real estate allottees are large in number – often hundreds or thousands,

	creditors can be many as opposed to financial creditors, who lend finance for the set up or working of business. It is obvious that debenture holders and persons with home loans may be numerous and, therefore, have been statutorily dealt with by the aforesaid change made in the Code as well as the Regulations. However, as a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor. ● Also, financial creditors have specified repayment schedules, and defaults entitle financial creditors to recall a loan in totality. Contracts with operational creditors do not have any such stipulations. ● Also, the forum in which dispute resolution takes place is completely different. Contracts with operational creditors can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of	depending on the size of the developer and the number of development projects. ● There are no repayment schedules in apartment buyer agreements – as the payments have been made by allottees towards grant of possession of their units in a project – and the date of possession is further subject to force majeure and other circumstances. Refund of money by the developer only arises in the event that the allottee validly terminates/ cancels the agreement and not otherwise. ● Agreements between allottees and developers have arbitration clauses. Further, there is often the possibility of a genuine dispute in case of allottees' claims – e.g., where date of possession stands extended on account of force majeure circumstances and

	genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these *qua* operational debts are matters to be proved in arbitration or in the courts of law. On the other hand, financial debts made to banks and financial institutions are well-documented and defaults made are easily verifiable." *[Para 43, 44]*	therefore allottees' right to receive refund has not yet arisen, where there has been delay on part of allottees in making payments to the developer, where termination/cancellation of the agreement is not as per terms of the agreement, etc. These are not easily verifiable/available and are required to be examined by a court of law / during an arbitration.
3.	**Regarding role and involvement of FCs vis-à-vis OCs**: "financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum	Allottees are interested in securing their single time investment, and not the financial well-being of, or ensuring the continuity of, the corporate debtor as a going-concern. Further, allottees in different real estate projects of a corporate debtor, may have different interests confined only to that particular development, with no interest in the overall well-being or rearrangement or viability of the Company. If such allottees are vested with

	recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code." *[Para 45]*	decision making powers concerning the business of the enterprise as a whole, it is unlikely that sound financial decisions will be taken having regard to the overall status of the entity which will undoubtedly defeat the very purpose and objective of the CIRP process.
4.	**Regarding participation in the COC meetings:** "Under the Code, the committee of creditors is entrusted with the primary responsibility of financial restructuring. They are required to assess the viability of a corporate debtor by taking into account all available information as well as to evaluate all alternative investment opportunities that are available. The committee of creditors is required to evaluate the resolution plan on the basis of feasibility and viability." "Since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor. Even at the time of	● Allottees do not have the expertise or information to be in a position to evaluate the feasibility and viability of resolution plans keeping in mind the business of the corporate debtor as a whole. Expecting allottees to carry out such a function and role is entirely impractical. ● Allottees are interested in securing their single time investment, and not the financial well-being of, or ensuring the continuity of, the corporate debtor as a going-concern. ● Allottees in different real estate projects of a corporate debtor, may have different interests confined only to that particular development,

	granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since financial creditors have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business." *[Para 67, 69]*	with no interest in overall well-being or rearrangement or viability of the Company. If such allottees are vested with decision making powers concerning the business of the enterprise as a whole, it is unlikely that sound financial decisions will be taken having regard to the overall status of the entity which will undoubtedly defeat the very purpose and objective of the CIRP process. Interests of other stakeholders, including other financial creditors, suppliers, small creditors, labour, etc. are unlikely to be considered appropriately.
5.	**Regarding process for initiation of corporate insolvency resolution process:** • Information with respect to debt incurred by financial debtors: "It is clear from these Sections that information in respect	• In practice, real estate allottees do not upload information in respect of amounts owed to them by developers with the Information Utilities.

		of debts incurred by financial debtors is easily available through information utilities which, under the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 [**"Information Utilities Regulations"**], are to satisfy themselves that information provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information. Apart from the record maintained by such utility, Form I appended to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, makes it clear that the following are other sources which evidence a financial debt: (a) Particulars of security held, if any, the date of its creation, its estimated value as per the creditor; (b) Certificate of registration of charge	• Most of the sources evidencing a financial debt as listed do not apply to real-estate allottees.

	issued by the registrar of companies (if the corporate debtor is a company); (c) Order of a court, tribunal or arbitral panel adjudicating on the default; (d) Record of default with the information utility; (e) Details of succession certificate, or probate of a will, or letter of administration, or court decree (as may be applicable), under the Indian Succession Act, 1925; (f) The latest and complete copy of the financial contract reflecting all amendments and waivers to date; (g) A record of default as available with any credit information company; (h) Copies of entries in a bankers book in accordance with the Bankers Books Evidence Act, 1891." [*Para 48, 49*] ● With respect to set-offs: "a set-off of amounts due from financial creditors is a	● In the case of real estate allottees, amounts are also due and payable by the allottees to the developer – i.e., payments owed to the

	rarity. Usually, financial debts point only in one way – amounts lent have to be repaid." *[Para 55]* ● Requirement of proving 'default' in case of section 7 applications: Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due and payable" and is not paid by the debtor. It is for this reason that a financial creditor has to prove "default" as opposed to an operational creditor who merely "claims" a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by financial creditors under Section 7 and by operational creditors under Sections 8 and 9 of the Code becomes clear. *[Para 59]*	developer as per the schedule under the Apartment Buyer's Agreement, interest on delayed payments. Set-off of amounts is therefore quite common in the case of allottees. ● In the case of real estate allottees, in most cases, the default has not yet occurred since the date of possession is often extended on account of *force majeure* and other circumstances. As a result, in such a case, the right of the allottees to terminate/cancel their agreement with the developer and seek a refund of amounts paid would not have arisen in the first place.

"

45. As has been pointed out by us hereinabove, it is clear that the context of **Swiss Ribbons** (supra) was a challenge under Article 14 stating that financial creditors have been discriminated against because there is no real difference between financial and operational creditors, and that such artificial distinction made by the Code, not having been made anywhere else in the world, would be discriminatory, having no rational relation with the object sought to be achieved by the Code and would have, therefore, to be struck down under Article 14. As has been pointed out by us hereinabove, the context of this argument was financial institutions and banks on the one hand vis-à-vis operational creditors i.e. those who supply goods and services, on the other. It is in this context that the various differences that have been pointed out hereinabove were made. However, the judgment itself recognises - as has been pointed out by us hereinabove - in paragraphs 46 to 49, that it was not dealing with individual financial creditors, such as debenture holders, fixed deposit holders and home buyers. To apply a judgment rendered in a wholly different context to the facts in the present cases would itself be an arbitrary exercise. What has been stated hereinabove as to allottees being individual financial creditors like deposit holders and debenture holders, applies on all fours to repel this argument based on another facet

of Article 14. In fact, the object of the Code, as originally set out in paragraphs 27 and 28 of **Swiss Ribbons** (supra) is as follows:

> "**27.** As is discernible, the Preamble gives an insight into what is sought to be achieved by the Code. The Code is first and foremost, a Code for reorganisation and insolvency resolution of corporate debtors. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code. This, in turn, will promote entrepreneurship as the persons in management of the corporate debtor are removed and replaced by entrepreneurs. When, therefore, a resolution plan takes off and the corporate debtor is brought back into the economic mainstream, it is able to repay its debts, which, in turn, enhances the viability of credit in the hands of banks and financial institutions. Above all, ultimately, the interests of all stakeholders are looked after as the corporate debtor itself becomes a beneficiary of the resolution scheme—workers are paid, the creditors in the long run will be repaid in full, and shareholders/investors are able to maximise their investment. Timely resolution of a corporate debtor who is in the red, by an effective legal framework, would go a long way to support the development of credit markets. Since more investment can be made with funds that have come back into the economy, business then eases up, which leads, overall, to higher economic growth and development of the Indian economy. What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort if there is either no resolution plan or the resolution plans submitted are not up to the

> mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern. (See *ArcelorMittal* [*ArcelorMittal (India) (P) Ltd.* v. *Satish Kumar Gupta*, (2019) 2 SCC 1] at para 83, fn 3).
>
> **28.** It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."

A reading of these paragraphs will show these very objects are sub-served by treating allottees as financial creditors. The Code is thus a beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees, who are vitally interested in the financial

health of the corporate debtor, so that a replaced management may then carry out the real estate project as originally envisaged and deliver the flat/apartment as soon as possible and/or pay compensation in the event of late delivery, or non-delivery, or refund amounts advanced together with interest. Thus, applying the **Shayara Bano v. Union of India** (2017) 9 SCC 1 test, it cannot be said that a square peg has been forcibly fixed into a round hole so as to render Section 5(8)(f) manifestly arbitrary i.e. excessive, disproportionate or without adequate determining principle. For the same reason, it cannot be said that Article 19(1)(g) has been infracted and not saved by Article 19(6) as the Amendment Act is made in public interest, and it cannot be said to be an unreasonable restriction on the Petitioner's fundamental right under Article 19(1)(g). Also, there is no infraction of Article 300-A as no person is deprived of its property without authority of a constitutionally valid law.

46. It was also argued that the UNCITRAL Legislative Guide, from which most of the provisions of the Code derive their succour, have also been breached. This is for the reason that financial contracts being different from operational contracts, the one should not be confused with the other. Also, treatment of similarly

situated creditors should be the same, and as allottees are like operational creditors, they should not be treated as financial creditors. We have already answered these questions in the context of discrimination and manifest arbitrariness and have found that, in point of fact, real estate allottees are really in the nature of financial creditors, and thus the UNCITRAL Legislative Guide has been followed, and not breached. Equally, it was argued that creating new creditors' rights in Insolvency Law, as opposed to recognising existing creditors' rights, will infract the UNCITRAL Legislative Guide. As will be pointed out hereinbelow, since allottees of real estate projects have always been subsumed within Section 5(8)(f), no new rights or claims have been created. It was also contended that since allottees are then said to have no expertise or knowledge in the working of the corporate debtor, they cannot participate effectively in the Committee of Creditors, and should therefore be kept out. The same answer as has been given hereinabove, i.e. that allottees, like individual financial creditors who are already on the Committee of Creditors, are to have a voice in determining the corporate debtor and their own future. This contention, therefore, also fails.

47. One other argument that is made on behalf of the counsel for the Petitioners is that allottees of flats/apartments who do not want refunds, but who want their flats/apartments constructed so that they may occupy and live in their flats/apartments, will be jeopardised, as a single allottee who does not want the flat/apartments, but wants a refund of amounts paid for reasons best known to him, can trigger the Code and upset the construction and handing over of such flats/apartments to the vast bulk of allottees of a project who may be genuine buyers who wish to occupy such flats/apartments as roofs over their heads. Another facet of this argument is that the bulk of such persons will never be on the Committee of Creditors, as they may not be persons who trigger the Code at all. These arguments are met by the fact that all the allottees of the project in question can either join together under the explanation to Section 7(1) of the Code, or file their own individual petitions after the Code gets triggered by a single allottee, stating that in addition to the construction of their flat/apartment, they are also entitled to compensation under RERA and/or under the general law, and would thus be persons who have a “claim”, i.e. a right to remedy for breach of contract which gives rise to a right to compensation, whether or not such right is reduced to judgment, and would therefore be persons to whom a

liability or obligation in respect of a “claim” is due. Such persons would, therefore, have a voice in the Committee of Creditors as to future plans for completion of the project, and compensation for late delivery of the flat/apartment. This contention therefore also has no legs to stand upon.

48. It was then argued that placing allottees as financial creditors is directly contrary to the object of the Code in maximising the value of assets and putting the corporate debtor back on its feet. We may only state that if a Section 7 application is admitted in favour of an allottee, and if the management of the corporate debtor is in fact a strong and stable one, nothing debars the same erstwhile management from offering a resolution plan, subject to Section 29A of the Code, which may well be accepted by the Committee of Creditors in which home buyers now have a voice. Equally, to assume that the moment the insolvency resolution process starts, corporate death must ensue is wholly incorrect. If the real estate project is otherwise viable, resolution plans from others may well be accepted and the best of these would then work in order to maximise the value of the assets of the corporate debtor. Corporate death, as has been stated in **Swiss Ribbons** (supra) is the last resort under the Code after all

other available options have failed. This argument again need not deter us further.

49. It was then stated that there will be a flood of petitions before the NCLT, and as the NCLT has to decide within a period of 14 days, there will only be a summary decision in which a complicated agreement entered into between home buyer and real estate developer will not be gone into in order to discover whether a debt is due and payable. Coupled with this argument, is the alternative argument that, given the fact that RERA adequately looks after the rights and interests of allottees, to apply the Code would then be manifestly arbitrary, as a management which may have infused large funds to develop the real estate project would then be summarily removed. A supplementary argument was made that this would also infract Article 19(1)(g) and 300-A, as a person who invests a huge sum of money from its own resources or borrowed resources, would then be left in the lurch the moment the insolvency resolution process is admitted.

50. The answer to these contentions is provided by reading some of the provisions of RERA. Under paragraph 3 of the Statement of Objects and Reasons of RERA, one of the important reasons for enacting the RERA is to “establish symmetry of

information between the promoter and purchaser". This is achieved through Section 4, where every promoter in its application to the authority for registration under sub-clause (2)(b), has to include the current status of the project, any delay in its completion, details of cases pending, payments pending etc. Equally, under sub-clause (g), the proforma of the allotment letter, agreement for sale and conveyance deed proposed to be signed with the allottee are all to be furnished. Also, under sub-clause (l)(C), the time period within which he undertakes to complete the project is also to be stated. Above all, under Section 4(3) read with Section 11, the authority is to operationalise a web-based online system in which the promoter shall, upon receiving his Login Id and password, create a webpage on the website of the authority to enter all details as required by Section 4(2), including quarterly update of the status of the project and the stage-wise time schedule of completion of the project. Also, under Section 7, the Authority may revoke registration for various reasons, and under Section 7(4)(a) shall debar the promoter from accessing its website in relation to that project, and thereafter specify its name in the list of defaulters and display its photograph on the website and inform other Real Estate Regulatory Authorities in other States and Union Territories about such revocation. Equally,

under Section 13(2), the prescribed agreement for sale, which is to be entered into between the promoter and allottee, must clearly state the date on which possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee in the case of default and such other particulars, as may be prescribed. We were then referred to the 'Andaman and Nicobar Islands Real Estate (Regulation and Development) (General) Rules, 2016' to give us a flavour of what is actually prescribed by the Rules made by States and Union Territories under RERA. Here, Rule 14 of these Rules speaks of details to be published on the website; and among other details, Rule 14(1)(d) states that the following details shall be uploaded by the promoter:

> **"14. Details to be published on the website.-** (1) The Authority shall ensure the following information, as applicable, shall be made available on its website in respect of each project registered under the Act, namely –
>
> xxx xxx xxx
>
> (d) the promoter shall upload the following updates on the webpage for the project, within fifteen days from the expiry of each quarter, namely:-
>
> (i) list of number and types of apartments or plots, booked;
> (ii) list of number of garages booked;

(iii) status of the project-

(A) Status of construction of each building with photographs;
(B) Status of construction of each floor with photographs;
(C) Status of construction of internal infrastructure and common areas with photographs.

(iv) status of approvals,-

(A) Approvals received;
(B) Approvals applied and expected date of receipt;
(C) Approvals to be applied and date planed for application;
(D) Modifications, amendment or revisions, if any, issued by the competent authority with regard to any sanctioned plans, layout plans, specifications, license, permit or approval for the project;"

Also, Rules 15 and 16 provide for interest payable by the promoter and timelines for refund as follows:

"**15. Interest payable by promoter and allottee**- The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest Marginal Cost of Lending Rate plus two per cent.

Provided that in case the State Bank of India Marginal Cost of Lending Rate is not in use it would be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

> **16. Timelines for refund**- Any refund of monies along with the applicable interest and compensation, if any, payable by the promoter in terms of the Act or the rules and regulations made thereunder, shall be payable by the promoter to the allottee within forty-five days from the date on which such refund along with applicable interest and compensation, as the case may be, become due."

It can thus be seen that just as information utilities provide the kind of information as to default that banks and financial institutions are provided under Sections 214 to 216 of the Code read with Regulations 25 and 27 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017, allottees of real estate projects can come armed with the same kind of information, this time provided by the promoter or real estate developer itself, on the basis of which, *prima facie* at least, a "default" relating to amounts due and payable to the allottee is made out in an application under Section 7 of the Code. We may mention here that once this *prima facie* case is made out, the burden shifts on the promoter/real estate developer to point out in their reply and in the hearing before the NCLT, that the allottee is himself a defaulter and would, therefore, on a reading of the agreement and the applicable RERA Rules and Regulations, not be entitled to any relief including payment of compensation and/or refund, entailing a dismissal of the said application. At this stage also, it is important

to point out, in answer to the arguments made by the Petitioners, that under Section 65 of the Code, the real estate developer can also point out that the insolvency resolution process under the Code has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency. This the real estate developer may do by pointing out, for example, that the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment. They can also point out that in a real estate market which is falling, the allottee does not, in fact, want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is clear that it is very difficult to accede to the Petitioners' contention that a wholly one-sided and futile hearing will take place before the NCLT by trigger-happy allottees who would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death.

51. At this juncture it is necessary to deal with the argument of the Petitioners that as the NCLT is given only 14 days in which to

adjudicate on “default”, the NCLT cannot, in such a summary proceeding, give detailed findings based on arguments raised by the allottees which are then countered with reference to a large number of documents and complicated statutory provisions, and which entail detailed arguments, which are then put forward by real estate developers.

52. This Court, while dealing with timelines provided qua operational creditors, in **Surendra Trading Company** (supra), held that the timelines contained in the provisos to Section 7(5), Section 9(5) and Section 10(4) of the Code are all directory and not mandatory. This is for the obvious reason that no consequence is provided if the periods so mentioned are exceeded. Though this decision is not in the context of the 14-day period provided by Section 7(4), we are of the view that this judgment would apply squarely on all fours so that the period of 14 days given to the NCLT for decision under Section 7(4) would be directory. We are conscious of the fact that under Section 64(1) of the Code, the NCLT President or the Chairperson of the NCLAT may, after taking into account reasons by the NCLT or NCLAT for exceeding the period mentioned by statute, extend the period of 14 days by a period not exceeding 10 days. We may note that

even this provision is directory, in that no consequence is provided either if the period is not extended, or after the extension expires. This is also for the good reason that an act of the court cannot harm the litigant before it. Unfortunately, both the NCLT and NCLAT do not have sufficient members to deal with the flood of applications and appeals that is before them. The time taken in the queue by applicants who knock at their doors cannot, for no fault of theirs, be put against them. This Court, in **State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti** (2018) 9 SCC 472, has held in the context of Section 34(5) of the Arbitration and Conciliation Act, 1996, that the absence of any consequences for infraction of a procedural provision implies that such a provision must be interpreted as being directory and not mandatory. The Court held thus:

> "**19.** It will thus be seen that Section 34(5) does not deal with the power of the Court to condone the non-compliance thereof. It is imperative to note that the provision is procedural, the object behind which is to dispose of applications under Section 34 expeditiously. One must remember the wise observation contained in *Kailash* [*Kailash* v. *Nanhku*, (2005) 4 SCC 480] , where the object of such a provision is only to expedite the hearing and not to scuttle the same. All rules of procedure are the handmaids of justice and if, in advancing the cause of justice, it is made clear that such provision should be construed as directory, then so be it.

xxx xxx xxx

> **21.** Section 80, though a procedural provision, has been held to be mandatory as it is conceived in public interest, the public purpose underlying it being the advancement of justice by giving the Government the opportunity to scrutinise and take immediate action to settle a just claim without driving the person who has issued a notice having to institute a suit involving considerable expenditure and delay. This is to be contrasted with Section 34(5), also a procedural provision, the infraction of which leads to no consequence. To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness."

This argument must also therefore be rejected.

Challenge to Section 21(6A) and 25A of the Code

53. In the challenge to Section 21(6A) and Section 25A of the Code, it has been argued by learned counsel for the Petitioners that the allottees would fall in the following five categories and cannot be said, therefore, to be a homogenous class. A glance at the five categories would show, they argue, that they have, in fact, conflicting interests. These five categories are stated to be as follows:

a) “Those who have taken possession and have executed sale deeds, with or without further claims for delay compensation;
b) Those who have taken possession but are yet to execute sale deeds, with or without further claims for delay compensation;
c) Those who are yet to receive possession and seek possession, with or without delay compensation; or
d) Those who are yet to receive possession and seek to obtain refunds of sale consideration with interest.
e) Each of the above may be without or without NCDRC/RERA orders/decrees.”

54. It has been argued that different instructions may be given by different allottees making it difficult for the authorised representatives to vote on the Committee of Creditors and that in any case, the collegiality of the secured creditors will be disturbed. To this the answer is that like other financial creditors, be they banks and financial institutions, or other individuals, all persons who have advanced monies to the corporate debtor should have the right to be on the Committee of Creditors. True, allottees are unsecured creditors, but they have a vital interest in amounts that are advanced for completion of the project, maybe to the extent of 100% of the project being funded by them alone. As has been correctly argued by the learned Additional Solicitor General, under the proviso to Section 21(8) of the Code if the corporate debtor has no financial creditors, then under Regulation 16 of the

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, up to 18 operational creditors then become the Committee of Creditors or, if there are more than 18 operational creditors, the highest in order of debt owed to operational creditors to the extent of the first 18 are then represented on the Committee of Creditors together, with a representative of the workers. If allottees who have funded a real estate project of the corporate debtor to the extent of 100% are neither financial creditors nor operational creditors, the mechanism of the Committee of Creditors, who is now to take decisions after the Code is triggered as to the future of the corporate debtor, will be non-existent in a case where there are no operational creditors and no secured creditors, because 100% of the project is funded by the allottees. Even otherwise, as correctly argued by the learned Additional Solicitor General, it would in fact be manifestly arbitrary to omit allottees from the Committee of Creditors when they are vitally interested in the future of the corporate debtor as they have funded anywhere from 50% to 100% of the project in most cases.

55. On this point, we were referred to the Insolvency and Bankruptcy Code (Amendment) Bill, 2019, which has just passed

through the Parliament, to amend the provisions of the Code in various aspects. What is interesting is the insertion of Section 25A(3A) as follows:

> "**5.** In section 25A of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely-
>
> "(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote:
>
> Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of sub-section (3)."

Given the fact that allottees may not be a homogenous group, yet there are only two ways in which they can vote on the Committee of Creditors – either to approve or to disapprove of a proposed resolution plan. Sub-section (3A) goes a long way to ironing out any creases that may have been felt in the working of Section 25A in that the authorised representative now casts his vote on behalf of all financial creditors that he represents. If a decision taken by a vote of more than 50% of the voting share of the financial creditors that he represents is that a particular plan be either

accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision. As has been stated by us in **Swiss Ribbons** (supra), the legislature must be given free play in the joints to experiment. Minor hiccups that may arise in implementation can always be sorted out later. Thus, any challenge to the machinery provisions contained in Sections 21(6A) and 25A of the Code must be repelled.

The doctrine of 'Reading Down'

56. Several counsel appearing on behalf of the Petitioners made alternative submissions stating that if the Constitutional validity of the impugned provisions is to be upheld, then the amendment to the Code needs to be read-down so as to make it conform with Article 14 and 19(1)(g) and 300-A. Different suggestions were given as to reading down these provisions by different counsel. According to some of them, before an order admitting a Section 7 application is made, all the financial creditors of the corporate debtor could be called to the NCLT so that the NCLT can then ascertain their views. If the vast majority of them were to state that they would prefer to remain outside the Code, then the Section 7 application filed by a single allottee ought to be dismissed. Another learned counsel stated that there should be a

threshold limit by which at least 25% of the total number of allottees of the project should be reached before they could trigger the Code. Other learned counsel suggested that at the stage of the Section 7 application, an inquiry be made to see if the corporate debtor is otherwise well-managed and is solvent, in which case the Section 7 application ought to be dismissed. Shri Jayant Bhushan, learned Senior Advocate appearing on behalf of some of the Petitioners, also suggested that allottees ought not to be allowed to trigger the Code at all, but that if the Code is otherwise triggered, they can be members of the Committee of Creditors to take decisions that will be beneficial to them. It was also suggested that, before the Code is triggered by an allottee, there should be a finding of "default" from the authorities under RERA. This is not unknown to law, and this Court has itself stated, in another context, that a jurisdictional finding by the Telecom Regulatory Authority of India must first be obtained before the Competition Commission of India gives a finding on unfair competition in the telecom sector, and the case of **Competition Commission of India v. Bharti Airtel Limited and Ors.** (2019) 2 SCC 521 was relied upon for this purpose. All these arguments were really made based on the presumption that some allottees who may now want to back out of the transaction and get a return

of their money owing to factors which may be endemic to them, or owing to the fact that the market may have slumped as a result of which the investment made by them in the flat/apartment would fall flat requiring them to pull out of the transaction, would then be able to trigger the Code *mala fide,* and a reading down of these provisions would, therefore, obviate such problem. All these arguments have been refuted in detail earlier in this judgment. In a Section 7 application made by an allottee, the NCLT's 'satisfaction' will be with both eyes open – the NCLT will not turn a Nelson's eye to legitimate defences by a real estate developer, as outlined by us hereinabove. There is, therefore, no necessity to read into or read down any of these provisions. Also, in **Cellular Operators Association of India v. TRAI** (2016) 7 SCC 703, this Court held that when a provision is cast in definite and unambiguous language, it is not permissible either to mend or bend it, even if such recasting is in accord with good reason and conscience. This Court said:

> "**50.** But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to

infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely, the judgment of the Federal Court in *Hindu Women's Rights to Property Act, 1937, In re* [*Hindu Women's Rights to Property Act, 1937, In re*, 1941 SCC OnLine FC 3 : AIR 1941 FC 72] . In that judgment, the word “property” in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land, which would be outside the Central Legislature's powers under the Government of India Act, 1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word “property”, the Federal Court held: (SCC OnLine FC)

“… If the restriction of the general words to purposes within the power of the legislature would be to leave an Act with nothing or next to nothing in it, *or an Act different in kind, and not merely in degree*, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the legislature intended the general words which it has used to be construed only in the narrower sense: *Owners of SS Kalibia* v. *Wilson* [*Owners of SS Kalibia* v. *Wilson*, (1910) 11 CLR 689 (Aust)] , *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*Vacuum Oil Co. Pty. Ltd.*v. *Queensland*, (1934) 51 CLR 677 (Aust)] , *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.* [*R.* v. *Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co.*, (1910) 11 CLR 1 (Aust)] and *British Imperial Oil Co. Ltd.* v. *Federal Commr. of Taxation* [*British Imperial Oil Co. Ltd.* v. *Federal Commr. of Taxation*, (1925) 35 CLR 422 (Aust)] .”

(emphasis in original)

51. This judgment was followed by a Constitution Bench of this Court in *DTC* v. *Mazdoor Congress* [*DTC* v. *Mazdoor Congress*, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] . In that case, a question arose as to whether a particular regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant, J., this Court stated: (SCC pp. 728-29, para 255)

"*255*. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. *However, when the provision is cast in a definite and*

> *unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience*. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."
>
> (emphasis in original)

57. Given the fact that the Amendment Act has been held to be constitutionally valid, and considering that its language is clear and unambiguous, it is not possible to accede to the contentions of the Petitioners to read down the clear provisions of the Amendment Act in the manner suggested by them.

Interpretation of Section 5(8)(f) of the Code

58. Section 5(8)(f) of the Code has been set out in the beginning of this judgment. What has been argued by learned counsel on behalf of the Petitioners is that Section 5(8)(f), as it originally stood, is an exhaustive provision which must be read *noscitur a sociis,* and if so read, sub-clause (f) must take colour from the other clauses of the provision, all of which show that the

sine qua non of a “financial debt” is a loan of money made with or without interest, which must then be returned as money. This, according to the learned counsel for the Petitioners, is clear from even a cursory reading of Section 5(8). Secondly, according to learned counsel for the Petitioners, by no stretch of imagination, could an allottee under a real estate project fall within Section 5(8)(f), as it originally stood and the explanation must then be read prospectively i.e. only on and from the date of the Amendment Act. Several sub-arguments were made on the effect of deeming fictions generally and on the functions of an explanation to a Section. Let us address all of these arguments.

59. First and foremost, a financial debt is defined as meaning a “debt”. “Debt” is defined by Section 3(11) of the Code as follows:

> “**3. Definitions.-** In this Code, unless the context otherwise requires, -
>
> xxx xxx xxx
>
> (11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

This definition in turn takes us to the definition of “claim” in Section 3(6) and “default” in Section 3(12) of the Code which read as follows:

> “(6) “claim” means-

> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
>
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> xxx xxx xxx
>
> (12) "default" means non-payment of debt when whole or any part of the instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;"

60. Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person. "Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. Learned counsel for the Petitioners relied upon the judgment in **Union of India v. Raman Iron Foundry** (1974) 2 SCC 231, and, in particular relied strongly upon the sentence reading:

> "**11.**...Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority."

It is precisely to do away with judgments such as **Raman Iron Foundry** (supra) that "claim" is defined to mean a right to payment or a right to remedy for breach of contract whether or not such right is reduced to judgment. What is clear, therefore, is that a debt is a liability or obligation in respect of a right to payment, even if it arises out of breach of contract, which is due from any person, notwithstanding that there is no adjudication of the said breach, followed by a judgment or decree or order. The expression "payment" is again an expression which is elastic enough to include "recompense", and includes repayment. For this purpose, see **Himachal Pradesh Housing and Urban Development Authority and Anr. v. Ranjit Singh Rana** (2012) 4 SCC 505 (at paragraphs 13 and 14 therein), where the Webster's Comprehensive Dictionary (International Edn.) Vol. 2 and the Law Lexicon by P. Ramanatha Aiyar (2nd Edn., Reprint) are quoted.

61. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the

consideration for time value of money. “Disbursement” is defined in Black’s Law Dictionary (10th ed.) to mean:

> “1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.”

In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression “disbursed” refers to money which has been paid against consideration for the “time value of money”. In short, the “disbursal” must be money and must be against consideration for the “time value of money”, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee “disburses” money in the form of advance payments made towards construction of the real estate project. We were shown the ‘Dictionary of Banking Terms’ (Second edition) by Thomas P. Fitch in which “time value for money” was defined thus:

> “**present value:** today’s value of a payment or a stream of payment amount due and payable at

> some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the *time value of money.* Today's value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis."

That this is against consideration for the time value of money is also clear as the money that is "disbursed" is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

62. Shri Krishnan Venugopal took us to the ACT Borrower's Guide to the LMA's Investment Grade Agreements by Slaughter and May (Fifth Edition, 2017). In this book "financial indebtedness" is defined thus:

> "**Definition of Financial Indebtedness (Investment Grade Agreements)**
>
> **"Financial Indebtedness"** means any indebtedness for or in respect of:
>
> (a) moneys borrowed;

(b) any amount raised by acceptance under any acceptance credit facility or dematerialised equivalent;
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) the amount of any liability in respect of any lease or hire purchase contract which would, in accordance with GAAP, be treated as a balance sheet liability [(other than any liability in respect of a lease or hire purchase contract which would, in accordance with GAAP in force [prior to 1 January 2019] / [prior to [ ]] /[ ] have been treated as an operating lease)];
(e) receivables sold or discounted (other than any receivables to the extent they are sold on a non -recourse basis);
(f) any amount raised under any other transaction (including any forward sale or purchase agreement) of a type not referred to in any other paragraph of this definition having the commercial effect of a borrowing;
(g) any derivative transaction entered into in connection with protection against or benefit form fluctuation in any rate or price (and, when calculating the value of any derivative transaction, only the marked to market value (or, if any actual amount is due as a result of the termination or close- out of that derivative transaction, that amount) shall be taken into account);
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution; and
(i) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (h) above."

63. When compared with Section 5(8), it is clear that Section 5(8) seems to owe its genesis to the definition of “financial indebtedness” that is contained for the purposes of Investment Grade Agreements. Shri Venugopal argued that even insofar as derivative transactions are concerned, it is clear that money alone is given against consideration for time value of money and a transaction which is a pure sale agreement between “borrowers” and “lender” cannot possibly be said to fit within any of the categories mentioned in Section 5(8). He relied strongly on the passage in Slaughter and May’s book which are extracted hereinbelow:

> “**Any amount raised having the “commercial effect of a borrowing”**
>
> A wide range of transactions can be caught by paragraph (f), including for example forward purchases and sales of currency and repo agreements. Conditional and credit sale arrangements could also be covered here as could certain redeemable shares.
>
> The precise scope of this limb can be uncertain. Ideally, from the Borrower’s perspective, if there are additional categories of debt which should be included in “Financial Indebtedness”, these should be described specifically and this catch- all paragraph, deleted. A few strong Borrowers do achieve that position. Most, however are required to accept the “catch-all” and will therefore need to consider which of their liabilities might be

> caught by it, and whether specific exclusions might be required."

64. What is clear from what Shri Venugopal has read to us is that a wide range of transactions are subsumed by paragraph (f) and that the precise scope of paragraph (f) is uncertain. Equally, paragraph (f) seems to be a "catch all" provision which is really residuary in nature, and which would subsume within it transactions which do not, in fact, fall under any of the other sub-clauses of Section 5(8).

65. And now to the precise language of Section 5(8)(f). First and foremost, the sub-clause does appear to be a residuary provision which is "catch all" in nature. This is clear from the words "any amount" and "any other transaction" which means that amounts that are "raised" under "transactions" not covered by any of the other clauses, would amount to a financial debt if they had the commercial effect of a borrowing. The expression "transaction" is defined by Section 3(33) of the Code as follows:

> (33) "transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

As correctly argued by the learned Additional Solicitor General, the expression "any other transaction" would include an

arrangement in writing for the transfer of funds to the corporate debtor and would thus clearly include the kind of financing arrangement by allottees to real estate developers when they pay instalments at various stages of construction, so that they themselves then fund the project either partially or completely.

66. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (Second Edition, 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. They are set out hereinbelow:

> “**borrow-**vb **1.** to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. **2.** to adopt (ideas, words, etc.) from another source; appropriate. **3.** Not standard. to lend. **4.** (intr) Golf. To putt the ball uphill of the direct path to the hole: make sure you borrow enough.”
>
> xxx xxx xxx
>
> **“commercial.** -adj. **1.** of or engaged in commerce. **2.** sponsored or paid for by an advertiser: *commercial television.* **3.** having profit as the main aim: *commercial music.* **4**. (of chemicals, etc.) unrefined and produced in bulk for use in industry. **5**. a commercially

sponsored advertisement on radio or television."

67. A perusal of these definitions would show that even though the Petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers. The "something equivalent" in these matters is obviously the flat/apartment. Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same – the real estate

developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even without adverting to the explanation introduced by the Amendment Act.

68. However, Dr. Singhvi strongly relied upon the report of the Bankruptcy Law Reforms Committee of November, 2015 and in particular paragraph 3 of 'Box 5.2 – Trigger for IRP' which states that financial creditors are persons where the liability to the debtor arises from a "solely" financial transaction. This Committee report, which led to the enactment of the Code, is an important guide in understanding the provisions of the Code. However, where the provisions of the Code, as construed in the light of the objects of the Code, are clear, the fact that from a huge report one word is picked up to indicate that all financial creditors must have debtors who owe money "solely" from financial transactions cannot possibly have the effect of negating the plain language of Section 5(8)(f) of the Code. In fact, what is important is that the threshold limit to trigger the Code is purposely kept low – at only one lakh rupees – making it clear that small individuals may also trigger the

Code as financial creditors (as financial creditors include debenture holders and bond holders), along with banks and financial institutions to whom crores of money may be due.

69. That this amendment is in fact clarificatory is also made clear by the Insolvency Committee Report, which expressly uses the word “clarify”, indicating that the Insolvency Law Committee also thought that since there were differing judgments and doubts raised on whether home buyers would or would not be included within Section 5(8)(f), it was best to set these doubts at rest by explicitly stating that they would be so covered by adding an explanation to Section 5(8)(f). Incidentally, the Insolvency Law Committee itself had no doubt that given the ‘financing’ of the project by the allottees, they would fall within Section 5(8)(f) of the Code as originally enacted.

70. And now some of the other arguments on behalf of the Petitioners need to be met. According to learned counsel for the Petitioners, the expression “means and includes” would indicate that that the definition section is exhaustive, and this being so, alien subject matter such as home buyers cannot be inserted therein. For this proposition, they relied upon **P. Kasilingam and**

Ors. v. P.S.G. College of Technology and Ors. (1995) Supp (2) SCC 348 at paragraph 19 where this Court held as under:

> "**19.** We will first deal with the contention urged by Shri Rao based on the provisions of the Act and the Rules. It is no doubt true that in view of clause (3) of Section 1 the Act applies to all private colleges. The expression 'college' is, however, not defined in the Act. The expression "private college" is defined in clause (8) of Section 2 which can, in the absence of any indication of a contrary intention, cover all colleges including professional and technical colleges. An indication about such an intention is, however, given in the Rules wherein the expression 'college' has been defined in Rule 2(*b*) to mean and include Arts and Science College, Teachers' Training College, Physical Education College, Oriental College, School of Institute of Social Work and Music College. While enumerating the various types of colleges in Rule 2(*b*) the rule-making authority has deliberately refrained from including professional and technical colleges in the said definition. It has been urged that in Rule 2(*b*) the expression "means and includes" has been used which indicates that the definition is inclusive in nature and also covers categories which are not expressly mentioned therein. We are unable to agree. A particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See : *Gough* v. *Gough* [(1891) 2 QB 665 : 60 LJ QB 726] ; *Punjab Land*

Development and Reclamation Corpn. Ltd. v. *Presiding Officer, Labour Court* [(1990) 3 SCC 682, 717 : 1991 SCC (L&S) 71] .) The word 'includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions". (See : *Dilworth* v. *Commissioner of Stamps* [1899 AC 99, 105-106 : (1895-9) All ER Rep Ext 1576] (Lord Watson); *Mahalakshmi Oil Mills* v. *State of A.P.* [(1989) 1 SCC 164, 169 : 1989 SCC (Tax) 56] The use of the words "means and includes" in Rule 2(*b*) would, therefore, suggest that the definition of 'college' is intended to be exhaustive and not extensive and would cover only the educational institutions falling in the categories specified in Rule 2(*b*) and other educational institutions are not comprehended. Insofar as engineering colleges are concerned, their exclusion may be for the reason that the opening and running of the private engineering colleges are controlled through the Board of Technical Education and Training and the Director of Technical Education in accordance with the directions issued by the AICTE from time to time. As noticed earlier the Grants-in-Aid Code contains provisions which, in many respects, cover the same field as is covered by the Act and the Rules. The Director of Technical Education has been entrusted with the functions of proper implementation of those provisions. There is nothing to show that the said arrangement was not working satisfactorily so as to be replaced by the

> system sought to be introduced by the Act and the Rules. Rule 2(*d*), on the other hand, gives an indication that there was no intention to disturb the existing arrangement regarding private engineering colleges because in that rule the expression 'Director' is defined to mean the Director of Collegiate Education. The Director of Technical Education is not included in the said definition indicating that the institutions which are under the control of Directorate of College Education only are to be covered by the Act and the Rules and technical educational institutions in the State of Tamil Nadu which are controlled by the Director of Technical Education are not so covered."

71. On the other hand, the learned Additional Solicitor General countered this submission by reference to **Krishi Utpadan Mandi Samiti v. Shankar Industries** (1993) Supp (3) SCC 361 (2), where, at paragraphs 5 and 12, this Court held:

> "**5.** Section 2(*a*) of the Act defines 'agricultural produce' and reads as under:
>
> "2. (*a*) 'agricultural produce' means such items of produce of agriculture, horticulture, viticulture, apiculture, sericulture, pisciculture, animal husbandry or forest as are specified in the Schedule, and includes admixture of two or more of such items, and also includes any such item in processed form, and further includes gur, rab, shakkar, khandsari and jaggery."
>
> xxx xxx xxx
>
> **12.** We have considered the arguments advanced on behalf of the parties and have perused the record. A perusal of the

> definition of agricultural produce under Section 2(*a*) of the Act shows that apart from items of produce of agriculture, horticulture, viticulture, piculture, sericulture, pisciculture, animal husbandry or forest as are specified in the Schedule, the definition further 'includes admixture of two or more such items' and thereafter it further 'includes taking any such item in processed form' and again for the third time the words used are 'and further includes gur, rab, shakkar, khandsari and jaggery'. It is a well settled rule of interpretation that where the legislature uses the words 'means' and 'includes' such definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or included in such definition. Thus the meaning of 'agricultural produce' in the above definition is not restricted to any products of agriculture as specified in the Schedule but also includes such items which come into being in processed form and further includes such items which are called as gur, rab, shakkar, khandsari and jaggery."

72. This statement of the law, as can be seen from the quotation hereinabove, is without citation of any authority. In fact, in **Jagir Singh & Ors. v. State of Bihar & Anr.** (1976) 2 SCC 942 at paragraphs 11 and 19 to 21 and **Mahalakshmi Oil Mills v. State of Andhra Pradesh & Ors.** (1989) 1 SCC 164, at paragraphs 8 and 11 (which has been cited in **P. Kasilingam** (supra)), this Court set out definition sections where the expression "means" was followed by some words, after which came the expression "and includes" followed by other words, just

as in the **Krishi Utpadan Mandi Samiti** (supra) case. In two other recent judgments, **Bharat Coop. Bank (Mumbai) Ltd. v. Coop. Bank Employees Union** (2007) 4 SCC 685, at paragraphs 12 and 23, and **State of West Bengal and Ors. v. Associated Contractors** (2015) 1 SCC 32 at paragraph 14, this Court has held that wherever the expression “means” is followed by the expression “and includes” whether with or without additional words separating “means” from “includes”, these expressions indicate that the definition provision is exhaustive as a matter of statutory interpretation. It has also been held that the expression “and includes” is an expression which extends the definition contained in words which follow the expression “means”. From this discussion, two things follow. **Krishi Utpadan Mandi Samiti** (supra) cannot be said to be good law insofar as its exposition on “means” and “includes” is concerned, as it ignores earlier precedents of larger and coordinate benches and is out of sync with later decisions on the same point. Equally, Dr. Singhvi’s argument that sub-clauses (a) to (i) of Section 5(8) of the Code must all necessarily reflect the fact that a financial debt can only be a debt which is disbursed against the consideration for the time value of money, and which permeates clauses (a) to (i), cannot be accepted as a matter of statutory interpretation, as the expression

"and includes" speaks of subject matters which may not necessarily be reflected in the main part of the definition.

73. In any event, as was correctly argued by learned Additional Solicitor General Mrs. Madhavi Divan, the legislature is not precluded by way of amendment from inserting words into what may even be an exhaustive definition. What is an exhaustive definition is exhaustive for purposes of interpretation of a statute by the Courts, which cannot bind the legislature when it adds something to the statute by way of amendment. On this score also, there is no substance in the aforesaid argument.

74. It was then argued, relying on a large number of judgments that Section 5(8)(f) must be construed *noscitur a sociis* with sub-clauses (a) to (e) and (g) to (i), and so construed would only refer to loans or other financial transactions which would involve money at both ends. This, again, is not correct in view of the fact that Section 5(8)(f) is clearly a residuary "catch all" provision, taking within it matters which are not subsumed within the other sub-clauses. Even otherwise, in **Controller of Estate Duty v. Kantilal Trikamlal** (1976) 4 SCC 643, this Court has held that when an expression is a residuary one, *ejusdem generis* will not apply. It was thus held:

> "**21**…We have also to stress the expression "other right" in the explanation which is of the widest import and cannot be constricted by reading it *ejusdem generis* with "debt". "Other right", in the context, is expressly meant considerably to widen the concept and therefore suggests a somewhat contrary intention to the application of the *ejusdem generis* rule. We may derive instruction from Green's construction of the identical expression in the English Act. [Section 45 (2)]. The learned author writes:
>
> "A disclaimer is an extinguishment of a right for this purpose. Although in the event the person disclaiming never has any right in the property, he has the right to obtain it, this inchoate right is a 'right' for the purposes of Section 45(2). The *ejusdem generis* rule does not apply to the words 'a debt or other right' and the word 'right' is a word of the widest import. Moreover, the expression 'at the expense of the deceased' is used in an ordinary and natural manner; and is apt to cover not only cases where the extinguishment involves a loss to the deceased of a benefit he already enjoyed, but also those where it prevents him from acquiring the benefit."

Also, in **Subramanian Swamy v. Union of India** (2016) 7 SCC 221, this Court held:

> "**70.** The other aspect that is being highlighted in the context of Article 19(2) is that defamation even if conceived of to include a criminal offence, it must have the potentiality to "incite to cause an offence". To elaborate, the submission is the words "incite to cause an offence" should be read to give attributes and characteristics of criminality to

the word “defamation”. It must have the potentiality to lead to breach of peace and public order. It has been urged that the intention of clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact but not as an actionable claim under the common law by an individual and, therefore, the word “defamation” has to be understood in that context, as the associate words are “incitement to an offence” would so warrant. Mr Rao, learned Senior Counsel, astutely canvassed that unless the word “defamation” is understood in this manner applying the principle of *noscitur a sociis*, the cherished and natural right of freedom of speech and expression which has been recognised under Article 19(1)(*a*) would be absolutely at peril. Mr Narasimha, learned ASG would contend that the said rule of construction would not be applicable to understand the meaning of the term “defamation”. Be it noted, while construing the provision of Article 19(2), it is the duty of the Court to keep in view the exalted spirit, essential aspects, the value and philosophy of the Constitution. There is no doubt that the principle of *noscitur a sociis* can be taken recourse to in order to understand and interpret the Constitution but while applying the principle, one has to keep in mind the contours and scope of applicability of the said principle.

71. In *State of Bombay* v. *Hospital Mazdoor Sabha* [*State of Bombay* v. *Hospital Mazdoor Sabha*, AIR 1960 SC 610 : (1960) 2 SCR 866] , it has been held that it must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the

legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the said rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service.

72. In *Bank of India* v. *Vijay Transport* [*Bank of India* v. *Vijay Transport*, 1988 Supp SCC 47 : AIR 1988 SC 151] , the Court was dealing with the contention that a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used. For the said purpose, reliance was placed on *R.L. Arora (2)* v. *State of U.P.* [*R.L. Arora (2)* v. *State of U.P.*, (1964) 6 SCR 784 : AIR 1964 SC 1230] . Dealing with the said aspect, the Court has observed thus: (*Vijay Transport case* [*Bank of India* v. *Vijay Transport*, 1988 Supp SCC 47 : AIR 1988 SC 151] , SCC p. 51, para 11)

"*11*. … It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but

that has not been ruled by this Court to be the only and the surest method of interpretation."

73. The Constitution Bench, in *Godfrey Phillips India Ltd.* v. *State of U.P.* [*Godfrey Phillips India Ltd.* v. *State of U.P.*, (2005) 2 SCC 515] , while expressing its opinion on the aforesaid rule of construction, opined: (SCC pp. 550 & 551, paras 81 & 83)

"*81*. We are aware that the maxim of *noscitur a sociis* may be a treacherous one unless the "*societas*" to which the "*socii*" belong, are known. The risk may be present when there is no other factor except contiguity to suggest the "*societas*". But where there is, as here, a term of wide denotation which is not free from ambiguity, the addition of the words such as "including" is sufficiently indicative of the *societas*. As we have said, the word "includes" in the present context indicates a commonality or shared features or attributes of the including word with the included.

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83. Hence on an application of general principles of interpretation, we would hold that the word "luxuries" in Entry 62 of List II means the activity of enjoyment of or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average member of society and not articles of luxury."

74. At this juncture, we may note that in *Ahmedabad (P) Primary Teachers' Assn.* v. *Administrative Officer* [*Ahmedabad (P) Primary Teachers' Assn.* v. *Administrative Officer*, (2004) 1 SCC 755 : 2004 SCC (L&S) 306] , it has been stated that *noscitur a sociis* is a legitimate rule of construction to construe the words in an Act of Parliament with reference to the

words found in immediate connection with them. In this regard, we may refer to a passage from Justice G.P. Singh, *Principles of Statutory Interpretation* [(13th Edn., 2012) 509.] where the learned author has referred to the lucid explanation given by Gajendragadkar, J. We think it appropriate to reproduce the passage:

"It is a rule wider than the rule of *ejusdem generis*; rather the latter rule is only an application of the former. The rule has been lucidly explained by Gajendragadkar, J. in the following words:

'This rule, according to *Maxwell* [Maxwell, *Interpretation of Statutes* (11th Edn., 1962) 321.] , means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general.'"

The learned author on further discussion has expressed the view that meaning of a word is to be judged from the company it keeps i.e. reference to words found in immediate connection with them. It applies when two or more words are susceptible of analogous meanings are coupled together, to be read and understood in their cognate sense. [*Principles of Statutory Interpretation* by G.P. Singh (8th Edn.) 379.] *Noscitur a sociis* is merely a rule of construction and cannot prevail where it is clear that wider and diverse etymology is intentionally and deliberately used in the provision. It is only when and where the intention of the legislature in associating wider words with words of narrowest significance is doubtful or

> otherwise not clear, that the rule of *noscitur a sociis* is useful."

75. It is clear from a reading of these judgments that *noscitur a sociis* being a mere rule of construction cannot be applied in the present case as it is clear that wider words have been deliberately used in a residuary provision, to make the scope of the definition of "financial debt" subsume matters which are not found in the other sub-clauses of Section 5(8). This contention must also, therefore, be rejected.

76. It remains to deal with arguments on the effect of a deeming fiction. Under the explanation added to Section 5(8)(f), any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

77. In every case in which a deeming fiction is to be construed, the observations of Lord Asquith in a concurring judgment in **East End Dwellings Co. Ltd. v. Finsbury Borough Council** (1952) Appeal Cases 109 are cited. These observations read as follows:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or

> accompanied it…. The statute says that you must imagine a certain state of affairs. It does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

These observations have been followed time out of number by the decisions of this Court. (See for example, **M. Venugopal v. Divisional Manager, LIC** (1994) 2 SCC 323 at page 329).

78. But then it was argued that, relying upon **Commissioner of Income Tax, Bombay v. Bombay Trust Corporation** AIR 1930 PC 54 at 55, that the reason that a deeming fiction is introduced is that the subject matter of that fiction is not so in reality, which why Parliament requires such subject matter be treated as if it were real. To similar effect are the observations in **K. Kamaraja Nadar v. Kunju Thevar and Ors.** AIR 1958 SC 687 at paragraph 28, where this Court put it thus:

> "The effect of such a legal fiction, however, is that a position which otherwise would not obtain is deemed to obtain under those circumstances."

79. It was also argued, relying upon **Delhi Cloth & General Mills Co. Ltd. and Anr. v. State of Rajasthan and Ors.** (1996) 2 SCC 449, that a deeming fiction can only be as to facts and cannot be the deeming of a legal position. It was further argued relying

upon **Daiichi Sankyo Company Limited v. Jayaram Chigurupati and Ors.** (2010) 7 SCC 449, that a deeming provision cannot be destructive of the main provision and cannot be construed as such.

80. A closer look at **Delhi Cloth & General Mills Co. Ltd**. (supra) would show that the judgment in essence followed this Court's judgment in **Shri Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors.** 1969 (2) SCC 283, in that the validating statute in question had not cured the defect that was pointed out. This becomes clear on a reading of paragraph 16 and 17 of the judgment which read as follows:

> "**16.** The Validating Act provides that, notwithstanding anything contained in Sections 4 to 7 of the 1959 Act or in any judgment, decree, order or direction of any court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes. This provision requires the deeming of the legal position that the villages of Raipura and Ummedganj fall within the limits of the Kota Municipality, not the deeming of facts from which this legal consequence would flow. A legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the legal consequences that follow.

> **17.** Sections 4 to 7 remained on the statute book unamended when the Validating Act was passed. Their provisions were mandatory. They had admittedly not been followed. The defect of not following these mandatory provisions in the case of the villages of Raipura and Ummedganj was not cured by the Validating Act. The curing of the defect was an essential requirement for the passing of a valid validating statute, as held by the Constitution Bench in the case of *Prithvi Cotton Mills Ltd.* [(1969) 2 SCC 283 : (1970) 1 SCR 388] It must, therefore, be held that the Validating Act is bad in law and it must be struck down."

81. It was in this context that it was stated that the fiction of a legal consequence cannot be deemed, whereas facts which preceded such consequence can so be deemed. In the present case, the deeming provision, as has been held by us, is only clarificatory of the true legal position as it already obtained. The present case does not concern itself with validating statutes at all. The ratio of this judgment, therefore, would have no application to this case.

82. Equally, in **Daiichi Sankyo Company Limited** (supra), it was found that the deeming provision contained in sub-clause (2) of Regulation 2(1)(e) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 flew in the face of the very idea of "persons

acting in concert", as a result of which it was held that a deeming fiction cannot do away with the very concept of "persons acting in concert" contained in the main provision. In the present case however, far from doing away with the concept of a "financial creditor", we have already found that the deeming provision is only clarificatory of the fact that allottees are to be considered as "financial creditors" for the reasons already given by us hereinabove.

83. Although a deeming provision is to deem what is not there in reality, thereby requiring the subject matter to be treated as if it were real, yet several authorities and judgments show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain. Thus, Stroud's Judicial Dictionary of Words and Phrases (Seventh Edition, 2008), defines "deemed" as follows:

> "**Deemed**"-, as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some

> matter or things has- the way in which it is to be adjudged ; this need not import artificiality or fiction; it may simply be the statement of an indisputable conclusion."

84. In **Hindustan Cooperative Housing Building Society Limited v. Registrar, Cooperative Societies and Anr.** (2009) 14 SCC 302, this Court in dealing with legal fictions generally quoted a large number of authorities thus at paragraph 17:

> "**17.** "*13*. … It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James, L.J. in *Levy, Re, ex p Walton* [(1881) 17 Ch D 746 : (1881-85) All ER Rep 548 (CA)] : (Ch D p. 756)
>
> '… When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.'
>
> After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate. [Ed.: This latter sentence does not form part of what was observed by James, L.J. in *ex p Walton*, (1881) 17 Ch D 746 : (1881-85) All ER Rep 548 (CA) but is a paraphrase of what was observed by the Supreme Court in *State of Bombay* v. *Pandurang Vinayak*, 1953 SCR 773 at p. 778. See also *Ali M.K.* v. *State of Kerala*, (2003) 11 SCC 632 : 2004 SCC (L&S) 136, SCC at p. 639, para 13.]

[See *Hill* v. *East and West India Dock Co.* [(1884) 9 AC 448 (HL)] , *State of Travancore-Cochin* v. *Shanmugha Vilas Cashewnut Factory* [AIR 1953 SC 333] , *American Home Products Corpn.* v. *Mac Laboratories (P) Ltd.* [(1986) 1 SCC 465] and *Parayankandiyal Eravath Kanapravan Kalliani Amma* v. *K. Devi* [(1996) 4 SCC 76] .] In an oft quoted passage, Lord Asquith stated:

'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact, existed, must inevitably have flowed from or accompanied it. … The statute [states] that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.'

(See *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952 AC 109 : (1951) 2 All ER 587 (HL)] at AC pp. 132-33.)

'… The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.'

[Per Lord Radcliffe in *St. Aubyn* v. *Attorney General (No. 2)* [1952 AC 15 : (1951) 2 All ER 473 (HL)] , AC p. 53.]

14. 'Deemed', as used in statutory definitions [is meant]

'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion.' (Per Windener, J. in *Hunter Douglas Australia Pty.* v. *Perma Blinds* [(1970) 44 Aust LJ R 257] .)

15. When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per Cave, J., in *R.* v. *Norfolk County Court* [(1891) 60 LJ QB 379]).

'When a statute gives a definition and then adds that certain things shall be "deemed" to be covered by the definition, it matters not whether without that addition the definition would have covered them or not.' (Per Lord President Cooper in *Ferguson* v. *McMillan* [1954 SLT 109] .)

16. Whether the word 'deemed' when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see *St. Leon Village Consolidated School Distt.* v. *Ronceray* [(1960) 23 DLR (2d) 32]).

'…. I … regard its primary function as to bring in something which would otherwise be

> excluded.' (Per Viscount Simonds in *Barclays Bank* v. *IRC* [1961 AC 509 : (1960) 3 WLR 280 : (1960) 2 All ER 817 (HL)] at AC p. 523.)
>
> 'Deems' means 'is of opinion' or 'considers' or 'decides' and there is no implication of steps to be taken before the opinion is formed or the decision is taken. [See *R.* v. *Brixton Prison (Governor), ex p Soblen* [(1963) 2 QB 243 : (1962) 3 WLR 1154 : (1962) 3 All ER 641 (CA)] at QB p. 315.]" [Ed.: As observed in *Ali M.K.* v. *State of Kerala*, (2003) 11 SCC 632 : 2004 SCC (L&S) 136, SCC at pp. 639-40, paras 13-16.]"

In the present case, it is clear that the deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within the enacting part contained in Section 5(8)(f) of the Code.

85. It was also argued that an explanation does not enlarge the scope of the original section and for this purpose **S. Sundaram Pillai** (supra) was relied upon. This very judgment recognises, in paragraph 46, that an explanation does not ordinarily enlarge the scope of the original Section. But if it does, effect must be given to the legislative intent notwithstanding the fact that the legislature has named a provision as an explanation. [See **Hiralal Ratanlal Etc. v. State of U.P and Anr. Etc.** (1973) 1 SCC 216 at 225, followed in paragraph 51 of **Sundram Pillai** (supra)]. In any case, it has been found by us that the explanation was added by the

Amendment Act only to clarify doubts that had arisen as to whether home buyers/allottees were subsumed within Section 5(8)(f). The explanation added to Section 5(8)(f) of the Code by the Amendment Act does not in fact enlarge the scope of the original Section as home buyers/allottees would be subsumed within Section 5(8)(f) as it originally stood as has been held by us hereinabove. As a matter of statutory interpretation, that interpretation, which accords with the objects of the statute in question, particularly when we are dealing with a beneficial legislation, is always the better interpretation or the "creative interpretation" which is the modern trend of authority, and which is reflected in the concurring judgment of **Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr.** (2017) 15 SCC 133 at paragraphs 122 and 127. This argument must, therefore, also be rejected.

86. We, therefore, hold that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

Conclusion

i. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.

ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.

Postscript

87. We have been informed that most of the States and Union Territories have established/appointed adjudicating officers, the Real Estate Regulatory Authority, as well as the Appellate Tribunal

as under the RERA. Yet, despite the fact that 1st May, 2017 has long gone, some recalcitrant States and Union Territories have yet to do the needful. We direct that in those States in which the needful has not been done, in that, only interim or no adjudicating officer/Real Estate Regulatory Authority and/or Appellate Tribunal have been appointed/established, such States/Union Territories are directed to appoint permanent adjudicating officers, a Real Estate Regulatory Authority and Appellate Tribunal within a period of three months from the date of this judgment. Copies of this judgment be sent to the Chief Secretaries of all the States and Union Territories immediately. To be placed for compliance by affidavits filed by the Chief Secretaries of these States and Union Territories within 3 months as aforesaid. Post these matters in the second week of January, 2020.

88. Given the declaration of the constitutional validity of the Amendment Act, it is absolutely necessary that the NCLT and the NCLAT are manned with sufficient members to deal with litigation that may arise under the Code generally, and from the real estate sector in particular. For this purpose, an affidavit be filed by the Union of India within three months from today as to the steps taken in this behalf. Copy of this judgment be sent to

the Ministry of Law and Justice, Government of India immediately. To come up with the compliance report by States and Union Territories as aforesaid in the second week of January, 2020.

89. All writ petitions and the civil appeal are disposed of in the light of this judgment. Stay orders granted by this Court to continue until the NCLT takes up each application filed by an allottee/ home buyer to decide the same in light of this judgment. No order as to costs.

……J.
(R.F. Nariman)

……J.
(Sanjiv Khanna)

……J.
(Surya Kant)

New Delhi;
August 9, 2019