Manish Kumar vs Union Of India on 19 January, 2021

Author: K.M. Joseph

Bench: K.M. Joseph, Navin Sinha, Rohinton Fali Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION(C) NO.26 OF 2020

MANISH KUMAR ..... PETITIONER(S)

VERSUS

UNION OF INDIA AND ANOTHER ..... RESPONDENT(S)

WITH

WRIT PETITION (C) NO. 53/2020
WRIT PETITION (C) NO. 28/2020
WRIT PETITION (C) NO. 47/2020
WRIT PETITION (C) NO. 27/2020
WRIT PETITION (C) NO. 73/2020
WRIT PETITION (C) NO. 328/2020
WRIT PETITION (C) NO. 210/2020
WRIT PETITION (C) NO. 191/2020
WRIT PETITION (C) NO. 164/2020
WRIT PETITION (C) NO. 163/2020
WRIT PETITION (C) NO. 166/2020
WRIT PETITION (C) NO. 173/2020
WRIT PETITION (C) NO. 182/2020
WRIT PETITION (C) NO. 176/2020
WRIT PETITION (C) NO. 177/2020
WRIT PETITION (C) NO. 257/2020

WRIT PETITION (C) NO. 341/2020

WRIT PETITION (C) NO. 267/2020

WRIT PETITION (C) NO. 333/2020

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WRIT PETITION (C) NO. 337/2020
WRIT PETITION (C) NO. 388/2020
WRIT PETITION (C) NO. 402/2020

WRIT PETITION (C) NO. 390/2020
WRIT PETITION (C) NO. 393/2020
WRIT PETITION (C) NO. 783/2020
TRANSFERRED CASE(C) NO. 228/2020
WRIT PETITION (C) NO. 579/2020
WRIT PETITION (C) NO. 806/2020
WRIT PETITION (C) NO. 714/2020
WRIT PETITION (C) NO. 642/2020
WRIT PETITION (C) NO. 805/2020
WRIT PETITION (C) NO. 19/2020
WRIT PETITION (C) NO. 33/2020
WRIT PETITION (C) NO. 75/2020
WRIT PETITION (C) NO. 165/2020
WRIT PETITION (C) NO. 850/2020
WRIT PETITION (C) NO. 374/2020
WRIT PETITION (C) NO. 229/2020
WRIT PETITION (C) NO. 228/2020
WRIT PETITION(C) NO. 209/2020

J U D G M E N T

K.M. JOSEPH, J.

1. The petitioners have approached this Court under Article 32 of the Constitution of India. They call in question Sections 3, 4 and 10 of the Insolvency and Bankruptcy Code (Amendment) Act 2020 (hereinafter referred to as 'the impugned amendments', for short). Section 3 of the impugned amendment, amends Section 7(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code', for short). Section 4 of the impugned amendment, incorporates an additional Explanation in Section 11 of the Code. Section 10 of the impugned amendment inserts Section 32A in the Code.

2. Section 7(1) of the Code before the amendment read as follows:

> "7. Initiation of corporate insolvency resolution process by financial creditor:
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> (1) A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred." Explanation- For the purposes of this sub section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

The amendment to the same by Section 3 of the impugned amendment incorporates 3 provisos to Section 7(1), which reads as under:

"Provided that for the financial creditors, referred to in clauses (a) and

(b) of sub-section (6A) of section 21, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such creditors in the same class or not less than ten per cent. of the total number of such creditors in the same class, whichever is less:

> Provided further that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less:
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> Provided also that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission."

3. Section 11 before the amendment read as follows:

> “11. Persons not entitled to make application. - The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely: -
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> (a) a corporate debtor undergoing a corporate insolvency resolution process; or
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> (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
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> (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
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> (d) a corporate debtor in respect of whom a liquidation order has been made.

Explanation 1 [I]. - For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.” The explanation which was inserted through the impugned amendment reads as follows:

> “Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses

(a) to (d) from initiating corporate insolvency resolution process against another corporate debtor."

4. Section 32A inserted through the impugned amendment reads as follows:

"32A. (1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not—

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not—

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation.—For the purposes of this sub-section, it is hereby clarified that,—

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

WHO ARE THE PETITIONERS?

5. More than the lion's share of the petitioners are allottees under real estate projects and hereinafter referred to as allotees. They have trained the constitutional gun at the impugned provisos.

6. Under the second proviso, a new threshold has been declared for an allottee to move an application under Section 7 for triggering the insolvency resolution process under the Code. The threshold is the requirement that there should be at least 100 allottees to support the application or 10 per cent of the total allottees whichever is less. Moreover, they should belong to the same project. Almost all (except in two petitions), the petitioners also had under the erstwhile regime which permitted even a single allottee to move an application under Section 7 filed petitions singly or with less than the number required under the proviso and they are visited with the provisions of the third proviso as per which such of those applications under section 7 which had not been admitted would stand withdrawn within 30 days, if the newly declared threshold of 100 allottees or 10 per cent of the allottee whichever is lower was not garnered by the applicant/applicants.

7. In some of the petitions, the petitioners are money lenders, that is, they have stepped in to provide finance for the real estate projects. They are also visited with the requirement which is imposed upon them under the first impugned proviso which is on similar lines as those comprised in the second proviso.

8. Then, there is, no doubt, Section 32A, which stands impugned by the creditors and allottees. THE CODE

9. The Code was enacted in the year 2016. It is one of the most important economic measures contemplated by the State to prevent insolvency, to provide last mile funding to revive ailing businesses, maximise value of assets of the entrepreneurs, balance the interest of all the stakeholders and even to alter the order of priority of payment of Government dues. The Code is divided into five parts. The first part is shortest portion. Part II deals with what we are concerned with in these cases and it purports to deal with insolvency resolution and liquidation for corporate persons. 'Corporate person' has been defined in Section 3(7) as follows:

> "3(7). "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider."

10. Section 3(8) defines 'corporate debtor' which provides that a corporate debtor means a person who owes a debt to any person.

11. We may notice that Chapter II of Part II which consists of Sections 6 to 32 deal with the corporate insolvency resolution process. Chapter III deals with ordinary liquidation process in regard to corporate person. Chapter IV of Part II consisting of four sections deal with fast-track insolvency resolution process. Chapter V which consists of Section 59 only deals with voluntary liquidation of corporate person. Chapter VI deals with miscellaneous aspects. Chapter VII Part II deals with Penalties.

12. Part III deals with insolvency resolution and bankruptcy code for individuals and partnership firms. It may be noticed at once that partnership firms with limited liability as defined in the Limited Liability Partnership Act, 2008 fall within the definition of the word 'Corporate person' and insolvency and liquidation process in regard to the same is found in Part II of the Code. It is in regard to Insolvency resolution and bankruptcy for the other partnership firms which one has to look to the provisions of Part III. Part III begins with Section 78 and ends with Section 187. The further provisions relate to the regulation of insolvency professional agencies and information utilities. They are all key instrumentalities for the effective working of the Code. Equally, it may be apposite to bear in mind Section 238A. It reads as follows:

> "238A. Limitation - The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority,

> the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be."

13. Shri Krishna Mohan Menon, learned counsel for the petitioners(allottees) in some of the petitions has addressed the following submissions before us:

> The impugned amendment clearly falls foul of the mandate of Articles 14, 19 (1)(g), 21 and 300A of the Constitution. The amendment by virtue of section 3 of the Amendment Act introducing the second proviso in Section 7(1) of the Code makes a hostile discrimination between financial creditors, the category, to which the petitioners belong and the other financial creditors.
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> Secondly, it is contended that the amendment imposing a threshold restriction is afflicted with the vice of palpable and hostile discrimination qua operational creditors. The purported protection sought to be accorded to the real estate developer, cannot form the premise for inflicting violation of constitutionally protected freedom under Article 19(1)(g) just as much as it also constitutes an insupportable invasion of the grand mandate of equality. Next, he would submit that there are inherent leakages in the impugned provisions which would make it unworkable.
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> Thereafter, learned counsel would submit that the impugned amendment is also bad in law for the reason that it is manifestly arbitrary. Yet another argument addressed by Shri Krishna Mohan Menon, learned counsel is that the amendment has the legally pernicious effect of creating a class within a class, a result, which is frowned upon by the law.

14. Learned counsel would expatiate and submit that under the Code, the law provides for a period of 14 days for the Adjudicating Authority to decide whether an application under Section 7 should be admitted. Section 12 declares an inflexible time limit for the insolvency resolution process to be terminated. The whole purport of the provisions of the Code and the manner in which it is structured is geared to achieve a laudable object. The Code aims at improving the ranking of India in the matter of ease of doing business. It is an economic measure which is intended to transform India into a country which would attract capital and investment. The Code has indeed resulted in a transformation of attitudes of the key players, in that it has come to be perceived as a law not merely on paper but one with teeth to it. He would point out that this Court in its decision in the Pioneer's Case Pioneer Urban Land and Infrastructure Ltd. and another v. Union of India and others1 has elaborately dealt with the apprehension that allowing the home buyers 1 (2019) 8 SCC 416 like the petitioners who finance the builder's activities to invoke the CIRP process will lead to misuse of the provisions and allayed the unfounded fears. Yet the legislature has ventured to place unjustifiable clogs on the right of one category of financial creditors alone which is impermissible. The spectre of a speculative investor running riot and playing havoc has been adequately addressed by this Court. There is no worthwhile data of misuse by home buyers. He points out the judgments passed by NCLAT where the financial creditors, who are home buyers, approach the Tribunal and the cases

reflect gross and inordinate delay of nearly five years justifying the approach made by the home buyers under the Code. In other words, there were genuine cases where the debtor had become insolvent and hence the home buyer had complete justification in knocking at the doors of the competent Tribunal under the Code. He took us through the reports of the Parliamentary Committee and complained that no reasons are discernible to justify the amendments. Equally, he commended for our acceptance the observations in the dissent notes and contended that they fortify the submissions.

15. In regard to the comparison sought to be made, with similar requirements in Sections 397, 398 read with 399 of the Companies Act, 1956 and Section 241 and 244 of the Companies Act, 2013, he would submit that there are significant distinctions.

16. Firstly, he would submit that in the case of shareholders approaching the Tribunal under the Companies Act, they would be armed with the details regarding shareholding which are always available having regard to the scheme of the Companies Act. On the other hand, he points that in regard to home buyers who have sunk their hard-earned money in real estate projects there is no system under which they could obtain data or information regarding the persons similarly circumstanced and whose co-operation and support is necessary under the impugned amendment to activise the Code.

17. Secondly, he would submit that having regard to the explanation in Section 244 of the companies Act, 2013, it brings about clarity in regard to the situation where there is a joint holding. The absence of any such similar provision in Section 7 of the Code is emphasised in an attempt at persuading the court to overturn the law. He would further point out the practical difficulties in the working of the amended law. He submits that the date of default of various home buyers may be different. Therefore, to forge a common complaint impelling a group of home buyers to come together is impracticable and not workable'. He would submit that legislature cannot be permitted to take away through one hand what it has given by the other.

18. Learned Counsel would further contended that as far as the third proviso is concerned while accepting the position that the 14 days period for disposal of the matter under the Code has been understood to be directory and not mandatory, at the same time, it cannot be the law that a case should grace the docket endlessly and never witness an end and the retrospectivity which it reflects clearly renders it arbitrary.

19. Shri Shikhil Suri, learned Counsel for the petitioner in Writ Petition (Civil) No. 191 of 2020 would submit that the impugned amendment is arbitrary being in the teeth of the principles laid down in Pioneer (supra). The object of the law would stand defeated he contends. The Ordinance would not only deprive the petitioner of her right under Section 7 but it also violates Article 14 of the Constitution of India. The threshold limit is unreasonable and arbitrary. It is excessive and irrational. It is not in public interest. He also points out that there exists adequate shield against a single allottee misusing the Code. The threshold is thrust upon only on the home buyer and is not applicable across the board for other financial creditors. It is discriminatory. There is no rationale. It treats equals unequally and unequals as equals. There is no intelligible differentia. The law does not

permit classes among financial creditors. There is breach of the guarantee of equal protection of law. The threshold in Section 4, namely, default of Rupees One crore is the one which applies to all creditors. It is inexplicable as to how only in regard to home buyers, a different threshold should be insisted upon. The remedy of the home buyer is defeated. The Ordinance was brought in haste without proper discussion and debate. The amendment takes away the vested right of the home buyers. There is no intelligible differentia bearing a nexus with the object and purpose of the Act. He also emphasised the practical difficulties involved in arranging the necessary numerical strength under the impugned provision.

20. Shri Piyush Singh, learned counsel for the petitioners would submit that once the right is conferred to make an application, then it cannot come conditioned with threshold limit as is provided in the impugned provisos. Secondly, he would point out that there is manifest arbitrariness. That apart, he would also contend that there is hostile discrimination qua other corporate debtor. The builder who is a corporate debtor, in other words, is given a more favourable treatment than other corporate debtors which is afflicted with the vice of hostile discrimination. He also complained of both under and over inclusiveness in the impugned provisions. Next, learned counsel submits that the very object is discriminatory. Drawing our attention to both Chitra Sharma and others v. Union of India and others2 and Pioneer (supra), he would highlight that having regard to the background in which the rights of the home buyer was recognised as being one of that of a financial creditor, the amendment is clearly impermissible. He would also submit that having regard to the stand taken by the Government in the case before this Court, in particular, Pioneer (supra), the principles of promissory estoppel will apply and prevent enactment of the impugned provisions. He would expatiate and submit that the conditions which have been imposed render the remedy illusory. He drew our attention to Order 1 Rule 8 of the Code of Civil Procedure and also took us to the explanation therein. He would submit that the proviso is not on similar lines as Order 1 Rule 8. This is for the reason that under the procedure under Order 1 Rule 8, the numerical stipulation in the impugned Provisos is not insisted upon. Once persons 2 (2018) 18 SCC 575 having same interest institute a civil suit, after following the procedure all persons having the same interest become involved and what is more would be bound by the decision. Section 12 of the Consumer Protection Act which also captures and embodies the principle of Order 1 Rule 8 ensures the protection of class interest and also protect class interest without putting stiff barriers as threshold limits as done by the impugned amendment. He pointed out that the real estate owners do not take any loan from financial institutions. They raise capital exclusively from the allottees virtually. In such circumstances, to put this threshold limit is clearly impermissible. He drew our attention to the judgment of the Court in Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P3. , to buttress his submission regarding availability of principles of promissory estoppel. There is manifest arbitrariness in the provisions. He complained that the RERA has not been constituted in all the States. He also made an attempt at pointing out the perception that the amendment is to confer an unmerited advantage 3(1979) 2 SCC 409 on the builder. This he purported to do by drawing our attention to an article in a newspaper. He essentially projected this argument as a thinly disguised argument of malice against the law giver. He also sought to draw support from the judgment of this Court in Nagpur Investment Trust and others v. Vithal Rao and others4. He reiterated the principle of hostile discrimination. He drew our attention to the definition of the word ‘allottee’ in RERA. It is here that he complained of the provision being under inclusive and over inclusive. The legislature,

he points out should have waited and at best could have acted if there is impeachable and empirical evidence warranting such a drastic incursion into the vested right of the home buyer. He also highlights that in law there can only be one default. A home buyer who before the amendment could by himself set the law into motion, is now left at the mercy of similarly circumstanced persons which itself is rendered impossible by the absence of an information generating mechanism which is accessible. He would also point out that the dates of the agreements of 4(1973) 1 SCC 500 different home buyers would be different. Depending on the dates of the agreements being different, it is incontrovertible, he points out that the date of default would be different. He would pose the question as to how in such circumstances the law could insist upon a home buyer assembling together other homebuyers and that too one hundred in number or one-tenth of the total number of allottees. Allottees are spread all over the world. It is inconceivable as to how the provision can be worked in a reasonable and fair manner.

21. Shri Rahul Rathore, learned Counsel for the petitioners in some of the writ petition would apart adopting the contentions, contend that insolvency has been predicated project wise. He would submit that under the impugned amendment, the allottees are to be culled out from among a particular project. In other words, the requirement under the provision is that the applicants must be 100 allottees or one-tenth of the allottees of a particular real estate project. He would point out that a corporate body may be having different projects. If that be so, there is no rationale in insisting that the said corporate body has become insolvent, qua the particular project in which the applicants are interested. Insolvency, in other words, would be a financial malaise, which afflicts the corporate body as a whole, qua all its projects. If the allottees can be drawn from other projects undertaken by the company then maybe it may have rendered the provisions more reasonable appears to be the argument of the petitioner. But this is not so. The provisions are irrational. The home buyer is a person who invests his life time savings. He is in a weak position already. Instead of conferring protection on him, the homebuyer is being saddled with more oppressive and burdensome conditions. There is no platform for the exchange and availability of information with details regarding the allottees. The Limitation Act applies as held by this Court. He would also appear to rely on the theory of a single default. The conditions are impossible to fulfil. The home buyer is being shut out at the very threshold.

22. Shri Dinesh C. Pandey, learned Counsel would also contend that Section 6 of the General Clauses Act would protect all the pending applications.

23. Shri Dhruv Gupta, learned Counsel appearing in W.P. (C) No.177 of 2020 complained against retrospectivity spelt out by the impugned provisions. The right which was a vested right was substantive in nature. The law could only be prospective. He draws our attention to the judgment of this Court in B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates5. He also lays store by the principles laid down by this Court in Swiss Ribbon Pvt. Ltd. & Ors. v. Union of India & Ors.6 and also in The Pioneer (supra).

24. Ms. Purti Marwaha Gupta, learned counsel in W.P.(C) No. 75 of 2020 adopted the contentions of Shri Krishna Mohan Menon. Learned counsel would make submissions qua section 32A which is yet another provision which is challenged. She drew our attention to Section 2(u) and 20 of the

Prevention of Money Laundering Act, 2002. She would submit but for Section 32A, the properties 5 (2019) 11 SCC 633 6 (2019) 4 SCC 17 which are acquired could be attached but that is pre- empted by Section 32A. The civil remedies open are taken away in regard to acts of crime. Section 14 of the Act which deals with Moratorium is referred to in this regard.

25. Shri A.D.N. Rao, learned Counsel would submit that a substantive right cannot be taken away by a procedural requirement. The home buyers have been conferred the substantive right to invoke the code by moving an application under Section 7. This right cannot be taken away by providing for a procedure and what is more which is impossible to attain. He drew our attention to the decision of this Court in Garikapati Veeraya v. N. Subbiah Choudhry7. He would submit that the law as on the date of initiation should prevail and it cannot be taken away by the amendment which is made subsequently. Apparently, the learned counsel is making his submission qua the 3rd proviso inserted in Section 7(1) of the Code. He seeks to drawn support from judgment of this court in Thirumalai 7 AIR 1957 SC 540 / 1957 SCR 488 Chemicals Limited v. Union of India and others8. He also contends that a proviso cannot override the main provision. In this regard, he relied upon the judgment of this court in Delhi Metro Rail Corporation Ltd. v. Tarun Pal Singh and others9. He would in fact point out with reference to facts that the orders were reserved in the application under Section 7 in November, 2019. The proviso came to be inserted on 28th December 2019. Resultantly, when the order came to be pronounced regarding admission of the application under Section 7, the authorities stood overtaken by the amendment. All of this is for no fault of the litigant who at the time when the application was moved was governed by a different regime which did not contain the harsh and arbitrary provisions. He would also point out practical difficulty in finding out other allottees.

26. Smt. Tasleem Ahmadi, learned Counsel would submit that an amendment as impugned in this case has the effect of setting at nought the directions and decision 8 (2011) 6 SCC 739 9 (2018) 14 SCC 161 of this court. She would complain that an amendment has been engrafted without removing the premise on which Pioneer was decided. She drew our attention to the judgment of this Court in State of Karnataka and others v. The Karnataka Pawn Brokers Association and others10 (paragraphs-16, 20, 23 and 24).

27. Shri Aditya Parolia, learned Counsel would submit that while the legislature has the freedom to experiment the power does not exist beyond certain limits. It cannot create provisions which are arbitrary. Unequals are treated equally. The objections of the home buyers were not discussed. The draft was not discussed. In this regard he points to the dissent of Shri TK Rangarajan. There is no intelligible differentia to distinguish the home buyers from the other creditors. The class action under the Consumer Protection Act is denied under the code. Even a decree holder under the aegis of RERA is denied relief. He also points out the lack of information required to properly work the statute. Allottees are 10 (2018) 6 SCC 363 spread across the globe. The real estate investor siphons off major amounts. The default is in rem.

28. Shri Pallav Mongia, learned Counsel would point out that home buyers would continue to be financial creditors. The proviso cannot take away the said right. Unequals are being made equal. Information regarding allottees is not available. He refers to the report of the Parliamentary

Committee. He also complains about the absence of undisputed documents. As regards information relating to allottees he would make the point that the Code itself does not provide for a mechanism for a home buyer to glean information. He is being called upon to collect information with reference to another enactment namely RERA. This should be treated as fatal to the constitutionality of the impugned amendments. He would further submit that the provision is bad for it being vague. The argument of vagueness is addressed with reference to the following:

1. The date of default.

2. The court fee payable when there is more than one applicant.

3. The threshold amount of default stipulated under section 4 namely Rs. One crore at present.

4. He also would complain against the retrospectivity involved.

29. Shri Rana Mukherjee, learned Senior Counsel appears in writ petition where first proviso is called in question, he represents the cause of money lenders. He drew our attention to paragraph-43 of the Pioneer (supra). He pointed out that the requirement that the applicants must be of the same class and there must be 100 of them rendered the provisions unachievable. He drew our attention to Sections 244 and 245 of the Companies Act, 2013. He pointed out that the threshold under the said Act could be relaxed whereas under the code the law giver has inflicted the requirement as an inflexible mandate. He also complained of there being no information qua the requirement of 10 percent. He drew our attention to Rule 8A. He would submit that actually Parliament had in mind the home buyer. The insertion of the 1st proviso betrays a mistaken roping in of the category of creditors represented by his clients. He sought to draw considerable support from the judgment of this Court in Vasant Ganpat Padvave (D) by LRs & Ors. v. Anant Mahadev Sawant (D) Through LRs. & Ors.11 of his compilation. He commended for our acceptance the principle that the law must be considered having regard to consequences it produces. He requested that the court may bear in mind the requirement that the law in its application must produce fair results.

30. Per contra, the stand of the Union, as projected through Smt. Madhavi Divan, learned ASG, and through the Written Submissions submitted, can be summed-up as follows:

The impugned amendments are perfectly valid.

The amendments are part of an economic measure.

There was a Report of an Expert Committee. The Expert Committee recommended imposing a threshold amendment in respect of certain classes of financial creditors. It is modelled on the 11 2019 (12) SCALE 572 Companies Act. There are other statutory examples of such threshold requirements. The impugned provisions conform to the principle of reasonable classification. Intelligible differentia distinguishes the allottees and debenture holders and security holders covered by the

> provisos from the other financial creditors. The amendments were necessitated from experience. There is a rational nexus between the differentia and the objects. The amendment, as far as the impugned provisos are concerned, are essentially an extension of Sections 21(6A) and Section 25A of the Code, under which, the debenture holders and security holders, on the one hand, and allottees, on the other, are treated differently. The provisions are not manifestly arbitrary, they are, indeed, workable.

Having regard to the Explanation in Section 7(1), the default qua any financial creditor, even if, he is not an applicant, can be made use of by other allottees or debenture holders and security holders.

31. It is pointed out further that the constitutional validity of Sections 21(6A) and 25A of the Code, was upheld by this Court in Pioneer (supra). In this regard, attention is also drawn to the observations of this Court in paragraph-43 of Pioneer (supra). On the strength of the said observations, it is contended that this court has recognized that allottees/home buyers are not a homogenous group. This Court also recognized, it is pointed out, that the deposit-holders and security-holders form a sub-class/class of financial creditors, who are treated a little differently, on account of the sheer number of such creditors coupled with the heterogeneity within the group that may cause difficulties in the decision-making process. The provisions were introduced for ironing out the logistical/procedural complications that may arise on account of the peculiar nature of these groups. The provisions impugned in the present litigation merely supplement Sections 21(6A) and Section 25A of the Code. The rationale in the said judgment should be applied in this case also. It is further pointed out that the challenge in Pioneer (supra) was mounted by the developers and the home buyers accepted the provisions, as being necessary to iron out the creases. The ASG drew support from judgments of this Court which are as follows:

> i. Ameerunnissa Begum and others v. Mahboob Begum and others12;
>
> ii. State of Jammu and Kashmir v. Triloki Nath Khosa and others13;
>
> iii. Murthy Match Works and others v. Assistant Collector of Central Excise and another14;
>
> iv. Ajoy Kumar Banerjee and others v. Union of India and others15;
>
> v. Ashutosh Gupta v. State of Rajasthan and others16;

32. It is contended that there is a rational nexus with the objects of the Code insofar as the impugned provisos are concerned and the classification is permissible under Article 14 of the Constitution. She 12 (1953) SCR 404 13 (1974) 1 SCC 19 14 (1974) 4 SCC 428 15 (1984) 3 SCC 127 16 (2002) 4 SCC 34 drew our attention to the Statements of Objects and Reasons appended to the amendment Bill to the Code, 2019, which introduced sub-Section 3A in Section 25A. It reads as follows:

> "[...]
>
> 2. The Preamble to the Code lays down the objects of the Code to include "the insolvency resolution" in a time bound manner for maximisation of value of assets in order to balance the interests of all the stakeholders. Concerns have been raised that in some cases extensive litigation is causing undue delays, which may hamper the value maximisation. There is a need to ensure that all creditors are treated fairly, without unduly burdening the Adjudicating Authority whose role is to ensure that the resolution plan complies with the provisions of the Code.

Various stakeholders have suggested that if the creditors were treated on an equal footing, when they have different preinsolvency entitlements, it would adversely impact the cost and availability of credit. Further, views have also been obtained so as to bring clarity on the voting pattern of financial creditors represented by the authorised representative.

[...]

(d) to insert sub-section (3A) in section 25A of the Code to provide that an authorised representative under sub- section (6A) of section 21 will cast the vote for all 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, in order to facilitate decision making in the committee of creditors, especially when financial creditors are large and heterogeneous group;"

33. Thus, the Statement of Objects and Reasons recognizes the heterogeneity within the class and the need to streamline, smoothen and facilitate the process so as to avoid unnecessary delay. There is also a concern about extensive litigation causing delays and hampering the maximization of value, it is pointed out. Multiple applications by members of this large class of financial creditors, in such a class, would also add to the burden of the Adjudicating Authority, choke-up its docket and delay the process. This would be counterproductive to the object of the Code which seeks to ensure time-bound Resolution Process for the maximization of total value of assets. Reference is made to the Report of the Insolvency Law Committee, dated February, 2020, which recommended the insertion of a minimum number of financial creditors in a class. It reads as follows:

> "ii. Application for Initiation of CIRP by Class of Creditors- As CIRP can be initiated by a single financial creditor, such as a homebuyer or a deposit holder, that belongs to a certain class of creditors following a minor dispute, it might exert undue pressure on the corporate debtor and might jeopardize the interests of the other creditors in the class who are not in favor of such initiation. It is being recommended that there should be a requirement for a minimum threshold number of certain financial creditors in a class for initiation of the CIRP. So, an amendment to section 7(1) to provide that for a class of creditors falling within clause
>
> (a) or (b) of Section 21(6A), the CIRP may only be initiated by at least a hundred such creditors or 10 percent of the total number of such creditors in a class.

4. APPLICATION FOR INITIATION OF CIRP BY CLASSES OF CREDITORS 4.1. Section 7 of the Code allows a financial creditor to initiate a CIRP against a corporate debtor upon the occurrence of default, either by itself, or jointly with other financial creditors. 4.2. It was brought to the Committee that for classes of financial creditors referred to in sub-clauses (a) and (b) of Section 21(6A) of the Code - such as deposit holders, bondholders and homebuyers - there was a concern that the CIRP can be initiated by only one or few such financial creditors following minor disputes. This may exert undue pressure on the corporate debtor, and has the potential to jeopardise the interests of the other creditors in the class who are not in favour of the initiation of CIRP. This may also impose additional burden upon the Adjudicating Authority to hear objections to heavily disputed applications. The Committee noted that this may be antithetical to the value of a time-bound resolution process, as the already over-burdened Adjudicating Authorities are unable to list and admit all such cases filed before them.

4.3. The Committee discussed that classes of creditors such as homebuyers and deposit holders have every right as financial creditors to initiate CIRP against a corporate debtor that has defaulted in the repayment of its dues. However, it was acknowledged that initiation of CIRP by classes of similarly situated creditors should be done in a manner that represents their collective interests. It was felt that a CIRP should be initiated only where there is enough number of such creditors in a class forming a critical mass that indicates that there is in fact largescale agreement that the issues against a corporate entity need to be resolved by way of a CIRP under the Code. This may well be a more streamlined way of allowing a well-defined class of creditors to agree upon initiating what is a collective process of resolution under the Code.

4.4. In this regard, and specific to the interests of homebuyers, the Committee also noted that in cases where a homebuyer cannot file an application for initiation of CIRP for having failed to reach the aforesaid critical mass, she would still have access to alternative fora under the RERA and under consumer protection laws. For instance, as recognised by the Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited and Ors. v Union of India, the remedies under the Code and under the RERA operate in completely different spheres. The Code deals with proceedings in rem, under which homebuyers may want the corporate debtor's management to be removed and replaced so that the corporate debtor can be rehabilitated. On the other hand, the RERA protects the interests of the individual investor in real estate projects by ensuring that homebuyers are not left in the lurch, and get either compensation or delivery of their homes. Thus, if there is a failure to reach a critical mass for initiation of CIRP, it may indicate that in such cases another remedy may be more suitable.

4.5. Accordingly, it was agreed that there should be a requirement to have the support of a threshold number of financial creditors in a class for initiation of CIRP.

4.6. In this regard, the Committee considered if a cue may be taken from the requirements for filing of class actions suits as provided under the Companies Act, 2013. Class action suits may inter alia be filed by a hundred members or depositors or by at least 5 per cent of the total number of members or depositors of the company.14 Similar to this requirement, and keeping with the extant situation of classes of creditors under the Code, it was suggested that Section 7 of the Code could be amended

in respect of such classes of creditors to allow initiation by a collective number of at least a hundred such creditors or at least ten percent of the total number of such creditors forming part of the same class. Thus, the Committee agreed that Section 7(1) of the Code may be amended to provide that for classes of creditors falling within clauses (a) and (b) of Section 21(6A), the CIRP may only be initiated by at least a hundred such creditors, or ten percent of the total number of such creditors in a class.

4.7. The Committee also noted that the collective number of homebuyers that form the threshold amount for initiation of a CIRP, should belong to the same real estate project. This would allow homebuyers that have commonality of interests, i.e. allottees under the same real estate project, to come together to take action for initiating CIRP against a real estate developer. Thus, in such cases, the CIRP may be initiated by at least a hundred such allottees or ten percent of the total number of such allottees belonging to the same real estate project.

4.8. However, to ensure that there is no prejudice to the interests of any such creditor in a class whose application has already been filed but not admitted by the Adjudicating Authority, the Committee agreed that a certain grace period may be provided within which such creditor in a class may modify and file its application in accordance with the above-stated threshold requirements. However, if the creditor is unable to fulfil the threshold requirements to file such modified application within the grace period provided, the application filed by such creditor would be deemed withdrawn." (Emphasis supplied)

34. In the Statement of Objects and Reasons to the Second Amendment Bill, 2019, promulgated as an Ordinance, and thereafter, as the impugned Act, it was, inter alia, stated that it was necessitated to prevent potential abuse of the Code by certain classes of financial creditors, inter alia. This was necessary to prevent the derailing of the time-bound CIRP, which was designed to secure the maximization of value of the assets. The provision only supplements the protection under Sections 65 and 75 of the Code. The intelligible differentia is projected as follows:

> i. Numerosity;
>
> ii. Heterogeneity;
>
> iii. Lack of special expertise and individuality in decision making. It is sought to be contrasted with institutional decision-making which is associated with banks and financial institutions;
>
> iv. Typicality in determination of default. In other words, in the case of banks and financial institutions, records of public utilities, would show a default. In the case of allottees, records must be accessed through data publicly available under RERA;

35. The object and rationale of the impugned provisions are stated to be as follows:

i. Preventing multiple individual applications, which has the effect of not only crowding the docket of the Adjudicating Authority and further holding up a process in which time is of the essence;

ii. Safeguarding the interest of hundreds or even thousands of allottees who may oppose the application of a single home-buyer;

iii. Balancing the interest of members of the same sub-

Class as also other financial creditors and other operational creditors. The availability of remedies to the members of the sub-class under RERA, in the case of allottees;

iv. Lastly, the process becomes smoother and cost-

effective. Unnecessary financial bleeding of the corporate debtor who is already in difficulty, is avoided.

36. Time is of the essence of the Code. Proceedings are in the nature of proceedings in rem. It impacts the rights of creditors, including similarly placed creditors. It is therefore, reasonable and logical to place the threshold. The minimum threshold is a minimum requirement. The threshold is kept low and reasonable. This Court has upheld subclassification provided there is a rational basis. She drew support from the following decisions;

i. Indra Sawhney and others v. Union of India and others17;

ii. Lord Krishna Sugar Mills Limited and another v.

Union of India and another18;

iii. State of Kerala and another v. N.M. Thomas and others19;

iv. State of West Bengal and another v. Rash Behari Sarkar and another20;

v. State of Kerala v. Aravind Ramakant Modawdakar and others21.

17 1992 Supp.(3) SCC 217 18 (1960) 1 SCR 39 19 (1976) 2 SCC 310 20 (1993) 1 SCC 479 21 (1999) 7 SCC 400

37. She sought to distinguish the judgment of this Court in Sansar Chand Atri v. State of Punjab and another22, which was relied on by the petitioners on the basis that this Court in the said case, only frowned upon creating a class within a class without rational basis. In this case, there was a rational basis for creating a sub-class. Differential treatment is also contemplated under UNCITRAL Legislative Guide and the Guidelines.

38. There is no basis in the contention that the amendments go against the law laid down in Pioneer (supra). The question involved in the said case was not whether there can be a different treatment to the real estate allottees for the purpose of initiating CIRP. Secondly, it is pointed out that the Legislature is free to make laws to deal with problems that manifest with experience. The numerical threshold was felt necessary with experience and recommendations of an Expert Committee. There has been a manifold increase of claim petitions filed by single or handful of 22 (2002) 4 SCC 154 allottees resulting in an already overburdened Adjudicating Authorities being flooded with such petitions. The amendment is consistent with the Pioneer (supra) judgment. The uniqueness of the allottees as a class of financial creditors, has been recognized in Pioneer (supra). The fact that they constituted a distinct and separate class of financial creditors meriting distinct treatment, has been approved in Pioneer (supra). The minimum threshold requirement is a procedural requirement. There is no deviation from Pioneer (supra) in a manner which is irreconcilable with it. The legislation, being an economic measure, free play in the joints, must be accorded to the Legislature. The impugned amendment is reasonable, minimal and proportionate. The data gathered by the respondent discloses that between June, 2016 and 5th June, 2018, there were 253 cases filed by allottees in the N.C.L.T.. However, between 6th June, 2018 and 28th December, 2019, as many as 2201 cases were filed by the allottees. Thereafter, pursuant to the Ordinance between December 29th, 2019 and August 26th, 2020, there is a sharp fall, as, nearly in eight months, only 130 cases were filed. It is pointed out that the argument, based on estoppel and malice against the Legislature, is untenable. There can be no estoppel against the Legislature and the decision of this Court in Union of India and others v. Godfrey Philips India Ltd.23, is relied on. The concept of transferred malice is alien in the field of legislation. In this regard, reference is placed on decisions of this Court in K. Nagaraj and others v. State of A.P. and another24 and State of Himachal Pradesh v. Narain Singh25.

39. The right to file an application under Section 7 is a statutory right and it can be conditioned. Reliance is placed on judgment of this Court in Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad and others26. There is no inherent or absolute right to file an application under Section 7 of the Code. The Legislature is well within its power to impose conditions for the exercise of such statutory rights. It is further contended that the third proviso 23 (1985) 4 SCC 369 24 (1985) 1 SCC 523 25 (2009) 13 SCC 165 26 (1999) 4 SCC 468 inserted in Section 7(1) does not affect any vested right of the creditors who have already filed applications for initiating CIRP. A vested right has been the subject matter of several decisions. In this regard reliance is placed on the following judgments:

i. Howrah Municipal Corporation and others v. Ganges Rope Co. Ltd. and others27;

ii. Arcelormittal India Private Limited v. Satish Kumar Gupta and others28;

iii. Swiss Ribbons Private Limited and another v. Union of India and others29;

iv. Karnail Kaur and others v. State of Punjab and others30;

v. Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta and Others31.

27 (2004) 1 SCC 663 28 (2019) 2 SCC 1 29 (2019) 4 SCC 17 30 (2015) 3 SCC 206 31 (2019) SCCONLINE SC 1478

40. Mere right to take advantage of a statute is not a vested right. In this regard, the following case law is relied upon:

i. Director of Public Works and another v. Ho Po Sang and Others32;

ii. M.S. Shivananda v. Karnataka State Road Transport Corporation and others33;

iii. Lalji Raja and Sons v. Hansraj Nathuram34;

iv. Kanaya Ram and others v. Rajender Kumar and others35;

41. The third proviso is enacted to protect the collective interests of others in a class of creditors. Before admission of the application for insolvency, no vested right accrues in favour of the allottee. The amendment, therefore, cannot be said to have retrospective application in a manner that impairs vested rights. Prior to admission, there is no vested 32 [1961]3 WLR 39 33 (1980) 1 SCC 149 34 (1971) 1 SCC 721 35 (1985) 1 SCC 436 right. Insistence on compliance with the new provisos cannot be regarded as having retrospective operation taking away vested rights. It is done to avoid needless multiplicity and to ensure that no single allottee would be able to achieve admission and its consequences, without having a threshold of his compatriots on board.

42. Placing reliance on judgment of this Court, in Garikapati Veeraya(supra), it is contended that even a vested right can be taken away by the Legislature, if a subsequent enactment so expressly provides or if it so by necessary implication. A minimum threshold requirement is a common feature of class action litigation. There are several legislations which provide for a minimum threshold in order to initiate class action. Section 245 of the Companies Act, 2013 and 241 of the said Act are relied upon. Sections 397 and 398 of the Companies Act, 1956, read with Section 399, contemplated a minimum threshold requirement for seeking relief under Sections 397 and 398. Reference is placed on the Bhabha Committee Report (Company Law Committee) in 1952. So also, is support, sought to be drawn from the judgment of this Court in J.P. Srivastava & Sons (P) Ltd. and others v. Gwalior Sugar Co. Ltd. and others36. Under the Consumer Protection Act, this Court, rendered the judgment in Anjum Hussain and others v. Intellicity Business Park Private Limited and others37. A minimum threshold adds, authenticity and weightage to the claim in a class action, proving it to be a common grievance and not a mere obstruction in the work of the opposite party. Reference is made to Rule 23 of Federal Rules of Civil Procedure in the United States, which provide for class action suits. The said Rules contemplate numerosity, commonality, typicality and adequacy of representation. It is pointed out that joint filing was not only not alien to Section 7 but it was interwoven into its very DNA. Even as originally enacted, Section 7 contemplated joint filing by financial creditors. Uniqueness of the Code lies in the fact that the financial creditors may file an

application based on a default that occurred in respect of the third-party financial creditor, who 36 (2005) 1 SCC 172 37 (2019) 6 SCC 519 may choose not to file an application itself. At the triggering stage, an application under Section 7 partakes the character of an application in rem proceeding rather than in personam one. The impugned amendment merely extends the same rationale.

43. It is further pointed out that Debenture Trustees are defined in Section 2(bb)of the Securities and Exchange Board of India Debenture Trustees Regulations, 1993, as a Trustee of a trust deed for securing any issue of debentures of a body corporate. Debenture is a long-term bond issued by a company or an unsecured loan that a company issues without a pledge of assets, as for example, interest bearing bond. Debenture Trustees are registered under Chapter 2 of the said Regulations. The Regulations provide for responsibilities and duties of Debenture Trustees. In the case of a debenture-holder and other security- holder, there is a Debenture Trustee to protect their interest from the inception under SEBI.

44. As far as absence of information, so far as debenture holders are concerned, necessary information regarding them is available in the public domain, under Section 88(1)(b) and Section 88(1)(c) of the Companies Act, 2013, which obliges every company to maintain a register of its debenture holders and security holders. A penalty for non-compliance is contemplated under Section 88(5). Section 95 of the Companies Act, 2013 provides that registers, required to be maintained by the Company under Section 88, shall be kept in the registered office. Without payment of fees, the register is open to inspection by any member, debenture holder or other security holder. Extracts and copies of such registered can be obtained. Reference is also made to Rule 4 of the Companies (Management and Administration) Rules, 2014, which contemplates a separate register in Form - FMG-II for debenture holders. It contains all details of the debenture holder, including the e-mail id, address, etc.. Thus, there is a reservoir of information available for complying with the requirement under the first proviso.

45. As regards the allottees are concerned, the submission, is as follows:

> Reference is made to Section 19 of RERA.
>
> Thereunder, Section 19(9) obliges every allottee of a real estate project to participate towards the Association of Allottees. Section 11 (4)(e) of RERA also obliges the Promoter to enable the formation of such an Association. RERA compels the constitution of such an Association, prior to the allotment. This is for the reason that an Association plays an important role during the development of the project. It is pointed out that under Section 8 of RERA, upon lapse of or revocation of the registration, the Authority is obliged to take such action, as it may deem fit, including the carrying out of the remaining development works. The Association of allottees have been given the right of first refusal for carrying out the remaining development works.
>
> Section 11(4) contemplates the obligations to be discharged by the Promoter towards the Association. Reference is also made to Section 4(2)(c) of RERA. Under Section 17

of the RERA, the Promoter is to execute a registered conveyance in regard to the undivided proportionate title in the common areas to the Association of the allottees.

Physical possession of the common areas is to be handed over to the Association of the Allottees.

Under Section 31 of RERA, the Association can file complaint with the Authority. Apart from this, it is also pointed out that under Section 11(1)(b), the Promoter is bound to create a webpage on the website of the RERA Authority and enter thereon the quarterly up-to-date list of the number and the types of the plots/apartments as may be booked.

46. Shri Sajan Poovayya, learned senior Counsel who appears on behalf of respondent no. 4 in Writ Petition No. 191 of 2020, which is a builder, also supported the Union. The second proviso, he contends is a logical and legitimate method to strike a fair balance between all stakeholders. It makes the Code workable. The object of the Amendment Act is to prevent the use of the Code for an extraneous purpose and not to shield and protect an errant real estate developer. He has referred to the facts pertaining to his client by way of an example of the misuse which has happened under the earlier regime. He drew support from paragraph-41 of the judgment in Pioneer (supra). Second proviso is an independent provision to made the Code workable. He drew our attention to paragraph-43 of this court in 1985 1 SCC

591. As regards the information, he also pointed out Section 11 of RERA, pointing to the information which is available in public domain. Illustratively, he drew our attention to the Haryana Real Estate Regulatory Authority, (Gurugram, Quarterly Progress Report Regulations), 2018, under which the format provides various details which include the names of the allottees and the date of booking, inter alia. He also points out that there is no unfair discrimination. CHALLENGE TO PLENARY LEGISLATION; GROUNDS

47. The grounds on which plenary law can be challenged are well established. In the first two decades decisions of this Court unerringly point to three grounds which render legislation vulnerable. A law can be successfully challenged if contrary to the division of powers, either the Parliament or the State Legislature usurps power that does not fall within its domain thus, rendering it incompetent to make such law. Secondly, a law made contravening Fundamental Rights guaranteed under Part III of the Constitution of India would be visited with unconstitutionality and declared void to the extent of its contravention. Needless to say, a law within the meaning of Article 19 of the Constitution would remain valid qua a non-citizen (see in this regard The State of Gujarat and others v. Shri Ambica Mills Ltd., Ahmedabad and Others38). Thirdly, apart from Fundamental Rights, the supremacy of the Constitution vis-a-vis the ordinary legislation, even when the law is plenary legislation, is preserved with a view that legislation must be in conformity with the other provisions of the Constitution.

48. While on breaches of the Fundamental Right, furnishing a plank of attack against plenary law, it is necessary to notice a challenge to law under Article 14, was essentially confined to the law, being

class legislation. In other words, a law, if it manifested reasonable classification for treating different 38 (1974) 4 SCC 656 persons or things differently, the law would pass muster. Interestingly, even while the theory of reasonable classification had come to be proclaimed in the first year of the Republic, and what is more followed in State of West-Bengal v. Anwar Ali39, the following doubts were expressed by Justice Vivian Bose:

> "82. I can conceive of cases where there is the utmost good faith and where the classification is scientific and rational and yet which would offend this law. Let us take an imaginary cases in which a State legislature considers that all accused persons whose skull measurements are below a certain standard, or who cannot pass a given series of intelligence tests, shall be tried summarily whatever the offence on the ground that the less complicated the trial the fairer it is to their sub- standard of intelligence. Here is classification. It is scientific and systematic. The intention and motive are good. There is no question of favouritism, and yet I can hardly believe that such a law would be allowed to stand. But what would be the true basis of the decision? Surely simply this that the judges would not consider that fair and proper. However much the real ground of decision may be hidden behind a screen of words like 'reasonable', 'substantial', 'rational' and 'arbitrary' the fact would remain that judges are substituting their own judgment of what is right and proper and reasonable and just for that of the legislature; and up to a point that, I

39 AIR 1952 SC 75 think, is inevitable when a judge is called upon to crystallise a vague generality like article 14 into a concrete concept. Even in England, where Parliament is supreme, that is inevitable, for, as Dicey tells us in his Law of the Constitution:

> "Parliament is the supreme legislator, but from, the moment Parliament has uttered its will as law-giver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or the Houses of Parliament, if the Houses were called upon to interpret their own enactments." But the following caveat by the learned Judge is worth noticing:

> "83. This, however, does not mean that judges are to determine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a narrow margin within which judges, who are human, will always be influenced by subjective factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land and they must be given the widest latitude to exercise their

> functions within the ambit of their powers, else all progress us barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits, lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people of not. Cases of this type must be decided solely on the basis whether the Constitution forbids it." (Emphasis supplied)
>
> 49. The seed of this idea had a muted growth. It was in the decision of this Court in E.P. Royappa v. State of Tamil Nadu and Another40 that this Court laid bare a new dimension in the majestic provisions of Article 14.

This Court took the view that arbitrariness and fairness are sworn enemies. The guarantee of Article 14 is not confined in other words to it being a prohibition against equals being discriminated against or unequals being treated alike. State action must be fair and not arbitrary if it is to be pass muster in a court of law. It is essentially following the dicta laid down as aforesaid that this Court in the case of Shayara Bano v. Union of India41, wherein one of us (Justice Rohinton F. Nariman), speaking for the majority, held as follows:

> "101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian 40 (1974) 4 SCC 3 41 (2017) 9 SCC 1 Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle.

Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." (Emphasis supplied)

50. This view, namely, that be it a plenary law if it is found to be manifestly arbitrary it become vulnerable has been followed in the following decisions, among other judgments:

> (1) Navtej Singh Johar and Others v. Union of India and Others42;
>
> (2) Joseph Shine v. Union of India43;
>
> (3) Justice K.S. Puttuswamy and Others v. Union of India and Others44.

(4) Hindustan Construction Company Ltd. and Others v.

Union of India and Others45.

51. Yet another ground recognised by this Court is that a law, be it the offspring of a Legislature, it falls foul of Article 14 if it is found to be vague – (see in this regard Shreya Singhal v. Union of India46). It must be elaborated and we must remember that the case involved overturning Section 66A of the Information Technology Act which purported to create a criminal offence, the ingredients of which were found to be vague.

52. While, on the basis, furnished under law, for impugning the plenary legislation, we may notice two grounds, which have been urged before us by some of the 42 (2018) 10 SCC 1 43 (2019) 3 SCC 39 44 (2017) 10 SCC 1 45 AIR 2020 SC 122 46 (2015) 5 SCC 1 petitioners. It has been urged that the law was created by way of pandering to the real estate lobby and succumbing to their pressure or by way of placating their vested interests. Such an argument is nothing but a thinly disguised attempt at questioning the law of the Legislature based on malice. A law is made by a body of elected representatives of the people. When they act in their legislative capacity, what is being rolled out is ordinary law. Should the same legislators sit to amend the Constitution, they would be acting as members of the Constituent Assembly. Whether it is ordinary legislation or an amendment to the Constitution, the activity is one of making the law. While malice may furnish a ground in an appropriate case to veto administrative action it is trite that malice does not furnish a ground to attack a plenary law [See in this regard K. Nagaraj and others v. State of Andhra Pradesh and another47 and State of Himachal Pradesh v. Narain Singh48].

47(1985) 1 SCC 523 48(2009) 13 SCC 165

53. Yet another ground which has been urged in these cases is that when this Court decided Pioneer (supra) the Union of India defended the amendment to the Code which included the insertion of the explanation to Section 5(8)(f) of the Code. It was this explanation which made it clear that home buyers would be financial creditors. All grounds urged by the financial creditors were fiercely countered by the very same Union of India by contending that the home buyers are financial creditors and what is more, there existed sufficient safeguards against abuse of power by the individual home buyers. What is contended before us by some of the petitioners is that the supreme legislature is in such circumstances estopped by the principle of promissory estoppel from enacting the impugned enactment.

54. A supreme legislature cannot be cribbed, cabined or confined by the doctrine of promissory estoppel or estoppel. It acts as a sovereign body. The theory of promissory estoppel, on the one hand, has witnessed an incredible trajectory of growth but it is incontestable that it serves as an effective deterrent to prevent injustice from a Government or its agencies which seek to resile from a representation made by them, without just cause [See in this regard Union of India and others v. Godfrey Philips India Ltd.49 – Paragraph-13]. UNRAVELLING THE WORKING OF THE CODE AS REGARDS CORPORATE DEBTOR

55. The Code was passed by Parliament in the year 2016 however, under Section 1(3) provisions were to come into force on such day as the Central Government was to appoint. The provisions of the Code stand enforced from 2017.

56. Part II of the code applies to matters relating to Insolvency and Liquidation of Corporate Debtors where the minimum amount of default is Rupees One crore as it stands [Section 4]. Under Section 6 of the Code when any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself is permitted to initiate the corporate insolvency resolution process (hereinafter 49 (1985) 4 SCC 369 referred to as CIRP) in respect of the corporate debtor in the manner provided under Chapter II. Chapter II consists of Section 6 to Section 32A. Section 7 (1) provides that a financial creditor by himself or joining with other financial creditors or any other person on behalf of the financial creditor as may be notified by the Central Government may file an application under Section 7 for initiating the CIRP before the adjudicating authority when a default has occurred. The adjudicating authority defined in Section 5(1) of the Code is the NCLT constituted under Section 408 of the Companies Act 2013. The unamended Section 7(1) read as follows:

> "7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred." Explanation - For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."
>
> 57. The three impugned provisos which we have already noted and which have been inserted vide the impugned amendment have been sandwitched in between the provisions of sub-section (1) and the explanation.

Sub- section 2 of Section 7 provides that the financial creditor shall make the application which shall be in such manner and form and accompanied by such fee as may be prescribed.

58. Section 3(26) defines the word `prescribed' as meaning prescribed by rules made by the Central Government. Section 239, inter alia, confers power on the Central Government to make rules for carrying out the provisions of the Code. Accordingly, the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 came to be made and were enforced from 1.12.2016. Rule 4 reads as under:

> "4. Application by financial creditor.— (1) A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

(2) Where the applicant under sub-rule (1) is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

(3) The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

(4) In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf."

59. Rule 8 contemplates withdrawal of application. It reads as follows:

"8. Withdrawal of application — The Adjudicating Authority may permit withdrawal of the application made under rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."

60. It must be noticed that Rules 6 and 7 deal with applications by operational creditors and corporate applicants respectively. Rule 10 (1) (2) and (3) read as follows:

"10. Filing of application and application fee –

(1) Till such time the rules of procedure for conduct of proceedings under the Code are notified, the application made under sub-section (1) of section 7, sub-section (1) of section 9 or sub-section (1) of section 10 of the Code shall be filed before the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the National Company Law Tribunal Rules, 2016.

(2) An applicant under these rules shall immediately after becoming aware, notify the Adjudicating Authority of any winding-up petition presented against the corporate debtor.

(3) The application shall be accompanied by such fee as specified in the Schedule."

61. Form 1 is the application prescribed in relation to an application to be filed by the financial creditor. It reads as follows:

"FORM 1 (See sub-rule (1) of rule 4) APPLICATION BY FINANCIAL CREDITOR(S) TO INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER CHAPTER II OF PART II UNDER CHAPTER IV OF PART II OF THE CODE.

[*strike out whichever is not applicable] (Under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016) [Date] To, The National Company Law Tribunal [Address] From, [Names and addresses of the registered

officers of the financial creditors] In the matter of [name of the corporate debtor] Subject: Application to initiate corporate insolvency resolution process in the matter of [name of the corporate debtor] under the Insolvency and Bankruptcy Code, 2016.

Madam/ Sir, [Names of the financial creditor(s)], hereby submit this application to initiate a corporate insolvency resolution process in the matter of [name of corporate debtor]. The details for the purpose of this application are set out below:

Part-I PARTICULARS OF APPLICANT (PLEASE PROVIDE FOR EACH FINANCIAL CREDITOR MAKING THE APPLICATION)

1. NAME OF FINANCIAL CREDITOR

2. DATE OF INCORPORATION OF FINANCIAL CREDITOR

3. IDENTIFICATION NUMBER OF FINANCIAL CREDITOR

4. ADDRESS OF THE REGISTERED OFFICE OF THE FINANCIAL CREDITOR

5. NAME AND ADDRESS OF THE PERSON AUTHORISED TO SUBMIT APPLICATION ON ITS BEHALF (ENCLOSE AUTHORISATION)

6. NAME AND ADDRESS OF PERSON RESIDENT IN INDIA AUTHORISED TO ACCEPT THE SERVICE OF PROCESS ON ITS BEHALF (ENCLOSE AUTHORISATION) PART-II PARTICULARS OF THE CORPORATE DEBTOR

1. NAME OF THE CORPORATE DEBTOR

2. IDENTIFICATION NUMBER OF CORPORATE DEBTOR

3. DATE OF INCORPORATION OF CORPORATE DEBTOR

4. NOMINAL SHARE CAPITAL AND THE PAID-UP SHARE CAPITAL OF THE CORPORATE DEBTOR AND/OR DETAILS OF GUARANTEE CLAUSE AS PER MEMORANDUM OF ASSOCIATION (AS APPLICABLE)

5. ADDRESS OF THE REGISTERED OFFICE OF THE CORPORATE DEBTOR

6. DETAILS OF THE CORPORATE DEBTOR AS PER THE NOTIFICATION UNDER SECTION 55(2) OF THE CODE-

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(i)    ASSETS AND INCOME
(ii) CLASS OF CREDITORS OR
       AMOUNT OF DEBT
(iii) CATEGORY OF CORPORATE
```

PERSON
(WHERE APPLICATION IS UNDER
CHAPTER IV OF PART II OF THE
CODE)

Part-III

PARTICULARS OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL

1. NAME, ADDRESS, EMAIL ADDRESS AND THE REGISTRATION NUMBER OF THE PROPOSED INTERIM RESOLUTION PROFESSIONAL Part-IV PARTICULARS OF FINANCIAL DEBT

1. TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT

2. AMOUNT CLAIMED TO BE IN DEFAULT AND THE DATE ON WHICH THE DEFAULT OCCURRED (ATTACH THE WORKINGS FOR COMPUTAION OF AMOUNT AND DAYS OF DEFAULT IN TABULAR FORM) Part-V PARTICULARS OF FINANCIAL DEBT [DOCUMENTS, RECORDS AND EVIDENCE OF DEFAULT]

1. PARTICULARS OF SECURITY HELD, IF ANY, THE DATE OF ITS CREATION, ITS ESTIMATED VALUE AS PER THE CREDITOR.

ATTACH A COPY OF A CERTIFICATE OF REGISTRATION OF CHARGE ISSUED BY THE REGISTRAR OF COMPANIES (IF THE CORPORATE DEBTOR IS A COMPANY)

2. PARTICULARS OF AN ORDER OF A COURT, TRIBUNAL OR ARBITRAL PANEL ADJUDICATING ON THE DEFAULT, IF ANY (ATTACH A COPY OF THE ORDER)

3. RECORD OF DEFAULT WITH THE INFORMATION UTILITY, IF ANY (ATTACH A COPY OF SUCH RECORD)

4. 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 (10 OF 1925) (ATTACH A COPY)

5. THE LATEST AND COMPLETE COPY OF THE FINANCIAL CONTRACT REFLECTING ALL AMENDMENTS AND WAIVERS TO DATE (ATTACH A COPY)

6. A RECORD OF DEFAULT AS AVAILABLE WITH ANY CREDIT INFORMATION COMPANY (ATTACH A COPY)

7. COPIES OF ENTRIES IN A BANKERS BOOK IN ACCORDANCE WITH THE BANKERS BOOKS EVIDENCE ACT, 1891 (18 OF 1891) (ATTACH A COPY)

8. LIST OF OTHER DOCUMENTS ATTACHED TO THIS APPLICATION IN ORDER TO PROVE THE EXISTENCE OF FINANCIAL DEBT, THE AMOUNT AND DATE OF DEFAULT I, hereby certify that, to the best of my knowledge, [name of proposed insolvency professional], is fully qualified and permitted to act as an insolvency professional in accordance with the Insolvency and Bankruptcy Code, 2016 and the associated rules and regulations.

[Name of the financial creditor] has paid the requisite fee for this application through [state means of payment] on [date].

Yours sincerely, Signature of person authorised to act on behalf of the financial creditor Name in block letters Position with or in relation to the financial creditor Address of person signing Instructions Please attach the following to this application:

Annex I Copies of all documents referred to in this application.

Annex II Written communication by the proposed interim resolution professional as set out in Form 2.

Annex III Proof that the specified application fee has been paid.

Annex IV Where the application is made jointly, the particulars specified in this form shall be furnished in respect of all the joint applicants along with a copy of authorisation to the financial creditor to file and act on this application on behalf of all the applicants."

62. The schedule prescribes the fees which is contemplated under Rule 10(3). It, inter alia, provides that for an application by a financial creditor (whether solely or jointly a sum of Rupees Twenty-five thousand). Sub-section 3 of Section 7 provides that financial creditor along with the application shall furnish record of the default recorded by the information utility or all such other record or evidence before as may be specified. The word 'specified' has been defined in Section 3 (32) as meaning specified by regulations made by the Board and the term 'specify' is to be construed accordingly.

63. Section 7(3) (b) requires the financial creditor who makes the application to furnish the name of the Resolution Professional proposed as an Interim Resolution Professional (hereafter referred to as "RP" and "IRP" respectively). Section 5(27) defines the word 'Resolution Professional' for the purpose of Part 2 to mean an insolvency professional appointed to conduct the CIRP and includes an interim resolution professional. In turn Section 3(19) defines 'insolvency professional' as the person enrolled under Section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under Section 207.

Sub-Section (5) of Section 7 proclaims that when adjudicating authority is satisfied that a default has occurred and the application under sub-section is complete and that there is no disciplinary proceedings pending against the proposed resolution professional, it may by order admit an application. Inter alia on the ground that default has not occurred, it is open to adjudicating authority to reject the application. If rejection is intended, the proviso obliges the adjudicating authority to issue a notice to rectify any defect in the application (this is for the reason that under sub-Section 5 apart from there being no default, if there is any disciplinary action against the proposed resolution professional, the application is liable to be rejected) This is apart from the application being otherwise defective. The application is to contain other information as may be specified under regulations by the Code. The adjudicating authority is required by the letter of the law and indeed we may say so, in accordance with the spirit to ascertain within 14 days of the receipt of the application if there is any default from the records of information utility or on the basis of other evidence made available by the financial creditor under sub-section (3) [In Pioneer (supra), the period has been understood as directory]. `Information utility' has been defined in Section 3(21), as a person who is registered with the Board as information utility under Section 210. The word 'Board' has been defined in Section 3(1) to be the 'Insolvency and Bankruptcy Board of India' which is established under sub-Section (1) of Section 188.

64. Section 7(6) declares that the CIRP shall commence from the date of admission of the application under sub-section (5).

65. Section 8 read with Section 9 deal with application for initiation of the CIRP by an operational creditor. Section 10 deals with an application by the corporate applicant. The word Corporate applicant is defined to refer to the corporate debtor and other entities associated with it. More about it at a later stage. It is thereafter that law giver has in Section 11 proscribed applications which should otherwise be maintainable. This is a provision in which we will devote more time later on in this judgement. Section 12 places the time limit. Section 12 has a marginal note which is to the following effect:

> "12. Time-limit for completion of insolvency resolution process.-
>
> (1) Subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. (2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent. of the voting shares.
>
> (3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once. Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019."

66. Coming to sub-Section 2, the CIRP is to be completed within 180 days from the date of admission of the application to initiate the process. As far as an application by a financial creditor is concerned, the date of admission is the date of the order admitting the application. Under sub-Section (2) however if the Committee of creditors by a vote of 66 per cent of the voting share instructs the RP to extend the period of CIRP beyond 180 days, the RP is bound to file an application. The adjudicating authority on receipt of the application can extend the period of 180 days for a maximum period of 90 days. Such extension can be granted only once. With effect from 16.8.2019, two provisos have been inserted. The provisos were added in fact as noted in paragraph-74 of the Essar Steel(supra)to overcome what was laid down in (2019) 2 SCC 1 decided by this Court 04.10.2018. In the latter decision in Arcellormittal(supra), this Court purported to hold that the time taken in legal proceedings must be excluded. Under the first proviso, the CIRP has to be mandatorily completed within a period of 330 days from the insolvency commencement date. This period of 330 days is to include any extension granted under sub-Section (3) by the Adjudicating Authority and also the time taken in legal proceedings in relation to the resolution process of the corporate debtor. However, in Committee Creditors of Essar Steel (supra), this Court struck down the word 'mandatorily' as being manifestly arbitrary and in violation of Article 19 (1)(g) and proceeded to hold as follows:

"...The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate 10-12- 2020 (Page 69 of 85) debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings

is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general Rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation."

67. At this juncture, it must be noted that under the first proviso inserted by the amendment dated 16.08.2019, reference to the period of 330 days is made with regard to the insolvency commencement date. The insolvency commencement date has been defined in Section 5(12). Section 5(12) reads as follows:

"5(12) "insolvency commencement date"

means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be." There was a proviso but it stands omitted by Act 1/2020 (with effect from 28/12/2019).

68. In this regard, it is to be noticed that the scheme appears to be that the name of the RP to act as the IRP is to be indicated in the application. While admitting the application under Section 7(5), the adjudicating authority is to appoint the proposed resolution professional. In fact, Section 16(2) of the Code contemplates such appointment. We may refer to Section 12A which was inserted with effect from 6.6.2018. Section 12A reads as follows:

"12A. Withdrawal of application admitted under section 7, 9 or 10. – The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified."

69. The above provision dealing with withdrawal of application after admission may be contrasted with Rule (8) which apparently deals with withdrawal before admission.

70. Section 16 of the Code, however, indicates that the adjudicating authority shall appoint an interim resolution professional within 14 days from the insolvency commencement date. We have already noted the definition of the words 'insolvency commencement date' as the date of admission. Section 13 contemplates steps to be taken upon admission under Section 7, inter alia.

1. A moratorium contemplated under Section 14 is to be declared.

2. A Public announcement of the initiation of the CIRP and inviting claims against the corporate debtor is to be made.

3. The appointment of the IRP- the appointment is to be done in the manner as provided in Section 16. The announcement is to be made immediately after the appointment of resolution professional.

71. Section 14 deals with moratorium.

"14. Moratorium. - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b)transferring, encumbering, alienating or disposing off by the corporate debtor 1 Ins. by Act No. 26 of 2019, sec. 4 (w.e.f. 16-8-2019). 2 Ins. by Act No. 26 of 2018, sec. 9 (w.e.f. 6- 6-2018). 20 any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); (d)the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution

professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and

preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

> Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be."

72. It will be noticed that while Section 6 read with Section 7 contemplates that a financial creditor may move the application individually, he may also move the application jointly with other financial creditors. Even if a single financial creditor was to be the applicant, after the appointment of the interim resolution professional, the applicant ceases to be in seisin of the lis. The provisions of Section 17 is to be noticed. It reads as follows:

> "17. Management of affairs of corporate debtor by interim resolution professional. - (1) From the date of appointment of the interim resolution professional, -
>
> (a) the management of the affairs of the corporate debtor shall vest in the interim resolution professional;
>
> (b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;
>
> (c) the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the

corporate debtor as may be required by the interim resolution professional;

(d) the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

(2) The interim resolution professional vested with the management of the corporate debtor, shall-

(a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;

(b)take such actions, in the manner and subject to such restrictions, as may be specified by the Board;

(c) have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;

(d)have the authority to access the books of accounts, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and

(e) 2 [be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor."

73. Section 17 contemplates that the management of the affairs of the corporate debtor will vest with the IRP. This takes effect from the date of the appointment of the interim resolution professional. Furthermore, the powers of the Board of Directors who are partners of the corporate debtors shall stand suspended.

74. Virtually, the entire control of the management including all the acts and authority indicated in sub- section 2 is to be carried out by interim resolution professional and authority exercised by him. Section 18 details the duties of the IRP. It reads as follows:

"18. Duties of interim resolution professional. – The interim resolution professional shall perform the following duties, namely: -

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority:

(g) to perform such other duties as may be specified by the Board.

Explanation. – For the purposes of this 1 section, the term “assets” shall not include the following, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

75. It will be noticed that amongst his duties, is the duty to constitute a Committee of Creditors. The constitution of the committee of creditors and the method of voting and the extent of the same are found detailed inter alia in Section 21. Since much may turn on the said provision we refer to the same:

"21. Committee of creditors. – (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors. (2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub- section (6) or sub-section (6A) or sub- section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed], prior to the insolvency commencement date.

(3) Subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them. (4) Where any person is a financial creditor as well as an operational creditor –

(a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor. (5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer. (6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may-

(a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) represent himself in the committee of creditors to the extent of his voting share;

(c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(6A) 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.

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

(i) under clauses (a) and (c) of sub-

section (6A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

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

(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6A). (8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent. of voting share of the financial creditors:

> Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified. (9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process. (10) The resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition." Section 22 (1) and (2) read as follows:
>
> "22. Appointment of resolution professional. –
>
> (1) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
>
> (2) The committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional." Section 23 reads as follows:
>
> "23. Resolution professional to conduct corporate insolvency resolution process.– (1) Subject to section 27, the resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period:
>
> Provided that the resolution professional shall continue to manage the operations of the corporate debtor after the expiry of the corporate insolvency resolution process period, until an order approving the resolution plan under sub-section (1) of section 31 or appointing a liquidator under section 34 is passed by the Adjudicating Authority.

(2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

(3) In case of any appointment of a resolution professional under sub- sections (4) of section 22, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional."

76. Section 24 deals with the meeting of committee of creditors. Now that resolution professional has been appointed, as contemplated under Section 22, Section 24(2) declares that all the meetings of the committee of creditors shall be convened by resolution professional. Section 25 speaks about the duties of the resolution professional. Section 25(2),(h) and (i) read as follows:

> "25(2) (h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.
>
> (i) present all resolution plans at the meetings of the committee of creditors."

77. Section 25A, which was inserted with effect from 06.06.2018 will be separately dealt with. No doubt, Section 27 contemplates that a committee of creditors may at any time during the CIRP replace the resolution professional as provided in the section. Section 28, no doubt, constrains the resolution professional in regard to the matters provided therein. The approval of the committee of creditors is required in such matters. It includes making any change in the management of corporate debtor and its subsidiary (Section 28(j)). Section 30 contemplates that resolution applicant may submit a resolution plan. The 'resolution applicant' has been defined in sub-section 25 of Section 5 which reads as follows:

> "5(25) "resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section
>
> 25." The resolution plan has been defined in Section 5 (26). The same reads as under:
>
> "5(26) "resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.
>
> Explanation.- For removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger."
>
> 78. The resolution professional has to examine each resolution plan received by him on the basis of the invitation made by the resolution professional under Section 25(h) and ascertain whether the plan is in conformity with the various criteria mentioned in Section 30(2) of the Code. The matter is thereafter put up by the resolution professional before the committee of creditors. All resolution plans which conform with the conditions in sub-section (2) of Section 30 are, in fact, to be placed before the committee of creditors. The committee of creditors may approve the resolution plan after considering its feasibility and viability, the manner of distribution

> proposed, which may take into account the hurdles, priority amongst creditors as laid down in sub-

section(1) of Section 53 including the priority and the value of security interest of secured creditors and such other requirements as may be specified by the Board. There are other details with which we are not concerned in Section 30. Section 31 requires approval of the resolution plan by the adjudicating authority. It reads inter-alia as follows:

> "31. Approval of resolution plan. – (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:
>
> Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation." The scope of these provisions have been dealt with in the decision of this Court in Essar Steel India Limited vs. Satish Kumar Gupta and Ors. and (2019) 2 SCC 1 among other decisions authored by one of us (Justice R.F. Nariman).
>
> 79. Sub-section (2) of Section 31 enables the adjudicating authority to reject the resolution plan.

Section 31 (3) contemplates that after the approval of the resolution plan that the moratorium order passed by the adjudicating authority under Section 14 shall cease to have effect. Section 32A will be separately dealt with.

80. Section 33, which is in Chapter III in Part II, compels announcing the death knell of the corporate debtor. That is if, before the expiry of insolvency resolution process period or the maximum period permitted which is CIRP under Section 12, inter alia, a resolution plan is not received or though received is rejected by the adjudicating authority, then under Section 33, order is to be passed. The curtains are wrung down on the insolvency resolution process. The corporate debtor goes into liquidation. The adjudicating authority is bound to pass an order requiring corporate debtor to be liquidated as provided in chapter III Part II. Section 33(2) contemplates that before the confirmation of the resolution plan if the committee of creditors so approved by not less than 66% of the voting decide to liquidate the corporate debtor, the adjudicating authority is to pass the liquidation order. Section 33(5) may be noticed at this stage:

> "33 (5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:
>
> Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.
>
> An explanation has been added to Section 33(2)of the Code.
>
> "Explanation - For the purpose of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after constitution under sub-section (1) of Section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum." THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 AND ITS SCHEME (HEREINAFTER REFERRED TO AS 'RERA', FOR SHORT).

81. The Real Estate Regulation and Development Bill was introduced in the Rajya Sabha in 2013. Noticing the fact that though the Consumer Protection Act, 1986 is available as a Forum in the real estate market for the buyers, the recourse is only curative and is not adequate to address all the concerns of the buyers and promoters in the said sector, it was felt that there should be a central legislation in the interest of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. The Bill was passed by both the Houses of Parliament and received the assent of the President of India on the 25.03.2016. By 01.05.2017, the provisions of the Act came into force, even though, certain Sections have come into force earlier on 01.05.2016.

82. We may advert to the following definition clauses. Section 2(b) defines 'advertisement', as follows:

> "2(b) "advertisement" means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such plot, building or apartment or to make advances or deposits for such purposes;"

83. Section 2(c) defines 'agreement for sale', as follows:

> "2(c) "agreement for sale" means an agreement entered into between the promoter and the allottee;"

84. Section 2(d), which is at the centerstage of the controversy, defines the word 'allottee', which reads as follows:

> "2(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;"

85. As can be seen, the word 'allottee' includes, plot, apartment or building. The words 'apartment' and 'building' are defined. Section 2(e) defines the word 'apartment' and it reads as follows:

> "2(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 on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified;"

86. Section 2(j) defines the word 'building' and it reads as follows:

> "2(j) "building" includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;" Section 2(s) defines 'development' and it reads as follows:

> "2(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 redevelopment; " 'Development works' is defined in Section 2(t) and it reads as follows:

> "2(t) "development works" means the external development works and internal development works on immovable property;" The word 'promoter' is defined in 2(zk) and it reads as follows:

> "2(zk) "promoter" means,—
>
> (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of— (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-

operative housing finance society and a primary co-

operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder;" Section 2(zn) defines 'real estate project', it reads as follows:

"2(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;"

87. Section 3 prohibits any promoter from advertising, marketing, etc. or even inviting persons to purchase any plot, apartment or building in any real estate project or part of it without there being registration. Sub-Section (2), however, exempts certain projects from the requirement of

registration and it reads as follows:

"3(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." Section 7 contemplates revocation of registration. It is relevant to note Section 7(1), which reads as follows:

> "7(1) The Authority may, on receipt of a complaint or suomotu 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." We may also further notice Section 7(3). It read as follows:

> "7(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." We may further bear in mind Section 8 and it reads as follows:
>
> "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."

88. Section 11 deals with the functions and duties of a promoter and is of considerable importance, and it reads as follows:

> "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."

89. Section 14 declares that the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications, as approved by the Competent Authorities.

90. Sub-Section (2) of Section 14, reads as follows:

"14. (2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the 16 apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two- thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only."

91. A similar Explanation, as found in Section 14, regarding what the word allottee means for the purpose of section 15 is found in Section 15. Section 15 deals with obligations of promoter in the case of transfer of a real estate project to a third party and Section 15(1) reads as follow:

"15. Obligations of promoter in case of transfer of a real estate project to a third party.—(1) The promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party without obtaining prior written consent from two-third allottees, except the promoter, and without the prior written approval of the Authority: Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter. ..." Section 17 (1) of the RERA, reads as follows:

"17. Transfer of title.—(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate"

92. Section 18 deals with the right of the allottee to obtain the amount given by the allottee and even compensation. It reads as follows:

"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." Finally, Section 19 deals with the rights and obligations of an allottee and it reads as follows:

"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 (l) 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 for 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."

93. The Act contemplates setting-up of a Real Estate Regulatory Authority, a Central Advisory Council and the Real Estate Appellate Tribunal. Offences and penalties are provided for to give teeth to the Act.

Section 71 gives the power of adjudication of compensation. Section 72 provides for the factors to be taken into consideration for adjudging the quantum of compensation or interest under Section 71. Section 79 enacts a bar of jurisdiction of the civil court in regard to any matter in which the Authority, the Adjudicating Officer or the Appellate Tribunal is empowered by the Act to determine. An injunction cannot be issued by any court or other Authority in respect of any action taken or to

be taken in pursuance of the power conferred by or under the Act under the RERA.

94. Section 85 deals with the power to make regulations. Section 85(2) reads as follows inter alia:

> "85(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely — xxx xxx xxx xxx
>
> (c) such other information and documents required under clause (f) of sub-section (1) of section 11;
>
> (d) display of sanctioned plans, layout plans along with specifications, approved by the competent authority, for display under clause (a) of sub-

section (3) of section 11;

(e) preparation and maintenance of other details under sub-section (6) of section 11;

Section 88 of RERA, read as follows:

> "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." It is also important to notice, at once, Section 89 and it reads as follows:
>
> "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."

95. The only Act, which is repealed is the Maharashtra Housing (Regulation and Development) Act, 2012.

96. A perusal of Section 88 reveals, on the one hand, that the provisions of the RERA, are in addition to and not in derogation of the provisions of any other law for the time being in force. At the same time, Section 89 provides that the RERA will prevail over any other inconsistent law. The result is that while all cognate laws, which are not inconsistent with RERA will continue to operate within their own sphere, the provisions, which are, however, inconsistent with RERA, will not survive after RERA has come into force.

97. In this regard, we may notice, the Delhi Apartment Ownership Act, 1986. Section 2 deals with the application of the Act and it reads as follows:

> "2. Application — The provisions of this Act shall apply to every apartment in a multi-storeyed building which was constructed mainly for residential or commercial

or such other purposes as may be prescribed, by—

(a) any group housing co-operative society; or

(b) any other person or authority, before or after the commencement of this Act and on a free hold land, or a lease hold land, if the lease for such land is for a period of thirty years or more:

Provided that, where a building constructed, whether before or after the commencement of this Act, on any land contains only two or three apartments, the owner of such building may, by a declaration duly executed and registered under the provisions of the Registration Act, 1908 (16 of 1908), indicate his intention to make the provisions of this Act applicable to such building, and on such declaration being made, such owner shall execute and register a Deed of Apartment in accordance with the provisions of this Act, as if such owner were the promoter in relation to such building."

98. Section 3(b) defines the word 'allottee' as follows:

"3(b) "allottee", in relation to an apartment, means the person to whom such apartment has been allotted, sold or otherwise transferred by the promoter;"

99. Section 3(c) defines apartment and it reads as follows:

"3(c) "apartment" means a part of any property, intended for any type of independent use, including one or more rooms or enclosed spaces located on one or more floors or any part or parts thereof, in a multi-storeyed building to be used for residence or office or for the practice of any profession, or for the carrying on of any occupation, trade or business or for such other type of independent use as may be prescribed, and with a direct exit to a public street, road or highway, or to a common area leading to such street, road or highway, and includes any garage or room (whether or not adjacent to the multi-storeyed building in which such apartment is located) provided by the promoter for use by the 4 owner of such apartment for parking any vehicle or, as the case may be, for the residence of any domestic aide employed in such apartment;"

100. Section 3(e) defines 'apartment owner' and it reads as follows:

"3(d) "apartment number" means the number, letter or combination thereof, designating an apartment;

101. Section 3(f) defines 'association of apartment owners' as follows:

"3(e) "apartment owner" means the person or persons owning an apartment and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment;

102. Section 4, 4(1), (2) and (3), read as follows:

"4. Ownership of apartments.—(1) Every person to whom any apartment is allotted, sold or otherwise transferred by the promoter, on or after the commencement of this Act, shall, save as otherwise provided in section 6, and subject to the other provisions of this Act, be entitled to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him.

(2) Every person to whom any apartment was allotted, sold or otherwise transferred by the promoter before the commencement of this Act shall, save as otherwise provided under section 6 and subject to the other provisions of this Act, be entitled, on and from such commencement, to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him.

(3) Every person who becomes entitled to the exclusive ownership and possession of an apartment under sub-section (1) or sub-section (2) shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the Deed of Apartment and such percentage shall be computed by taking, as a basis, the value of the apartment in relation to the value of the property.

xxx xxx xxx"

103. Section 5 provides that subject to the provisions of Section 6, the apartment owner may transfer his apartment and his right is heritable.

104. Section 14 provides for registration for the deed of apartment, which is to be executed under Section 13.

105. Section 15 declares that there shall be an association of apartment owners in relation to the apartment and property pertaining thereto and for the management of common areas and facilities. Model byelaws are to be framed by the Administrator and the Association of Apartment Owners can make departure from the model byelaws only with the prior approval of the Administrator.

106. There are similar laws made in the States which relate to the right of the apartment owners. We will revert back to the specific questions which have been raised by the petitioners.

THE CONTENTIONS

107. The contention which is raised is that under the impugned provisos inserted in Section 7(1) of the Code, an application by an allottee, can be made only if there are hundred allottees or a number representing one-tenth of the total number of allottees, whichever is less, with a further rider that the allottees must be part of the same real estate project. It is contended that the word 'allottee' is to be understood in the sense in which the word has been defined in the RERA. If that is so, it is contended that the impugned amendment would be inflicted with the vice of vagueness and it is arbitrary.

108. What is to be meaning of the word 'allottees'? The following questions are posed:

> i. Is the total number of the allottees, to be calculated qua the Units promised?
>
> Or ii. Is it to be based on the number of units constructed or is it to be the number of units allotted or units where the agreement to sell is entered into?

109. There is an information asymmetry. There is no published data available of status of allotted units. No builder shares the information. It is impossible for the buyers to obtain the information. Ten per cent of allotted units, even it is assumed to be qua letter of allotment, is a dynamic figure and keeps changing. A buyer may calculate ten per cent of the hundred units allotted by morning and it may become 110 by night rendering the filing impossible.

110. Further, it is complained that it is not clear as to whether in determining allottees, in a real estate project, whether it is a tower? the entire colonization? Or a SPV? Ten per cent of a real estate allottees could mean ten per cent of the allotted units or ten per cent of the total legal persons, who have bought into the project, particularly, in cases of multiple ownership of the same property. The provision, in fact, renders group members prone to corruption by cash settlement by the builder. The coram will be disrupted, if one or two members are bought of or even legally settled. This will necessitate fresh filing. FINDINGS

111. We have referred to the definition of the word allottee and real estate project and Section 3 of the Act which requires prior registration. We have also referred to the definition of real estate project. In all these definition clauses, the words 'as the case may be' is found after the words plot, apartment or building. Thus, the Act is meant to regulate the dealings in plots, apartments and buildings. A real estate project, in other words, as defined, is the development of a building or apartments or the development of land into plots or apartments. The development is contemplated as being towards selling apartments, plots or buildings. It would also necessarily include common areas. The expression 'apartment', as defined in RERA, is a very comprehensive one. It takes in, blocks, chamber, dwelling unit, flat, office, showroom, shop, godown, premises, suite, tenement, unit or by any other name and which is a separate and self-contained part of any immovable property. It includes any 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. It may be used or intended to be used for any residential or commercial use such as residence, office, shop, showroom or godown or for carrying on any business, occupation, profession, trade or any other type of use, which his ancillary.

112. 'Building' has been defined as including any structure or erection or part of any structure and intended to be used for residential or commercial purposes, inter alia. Thus, an allotment under RERA can be in relation to a plot, an apartment or a building. In other words, a project, would be in relation to plots, apartments or buildings. It could also be for a composite one for plots and apartments or for plots and buildings. We have noticed the expansive definition of the word apartment and flats are comprehended within the definition of the word apartment. We have also noticed in this regard, the definition of the word apartment, in the Delhi Apartment Ownership Act, 1986. We have also seen that under the Delhi Apartment Ownership Act, allottee has been defined in relation to an apartment to mean the person to whom such apartment has been allotted, sold or otherwise transferred by the promoter.

113. For appreciating the meaning of the word 'allottee', for the purpose of the Code, undoubtedly, it is necessary to travel to Section 2(d) and 2(zn)of RERA for the reason that in Section 5(8)(f) of the Code, the following Explanation was inserted by Act 26 of 2018 w.e.f. 06.06.2018. This provision has been upheld by this Court in Pioneer (supra).

"5(8)(f) xxx xxx xxx 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;"

114. Real estate project may relate to plots, apartments, or buildings or plots/apartments and plots/buildings. As far as the expression 'allottee' is concerned, since the Code in the Explanation to Section 5(8)(f), incorporates the definition of the word 'allottee' in RERA, for the purpose of the provisos in question, we must necessarily seek light only from the expression 'allottee' defined in Section 2(d) of RERA.

115. If we breakdown Section 2(d), it yields the following component parts:

> i. An allottee may be an allottee of a plot or an apartment or a building. A real estate project may relate to plots or apartments or buildings;
>
> or plots/buildings or plots/apartments.
>
> ii. An allottee, in the case of an apartment, which expression includes flats, among other structures, would include the following categories of persons. It would include a person to whom the apartment is allotted. It would also include a person to whom the apartment is sold, whether as freehold or leasehold.

iii. Thirdly, it would include a person to whom the promoter has transferred the apartment, otherwise than by way of a sale;

iv. Lastly, it would include persons who have acquired the allotment through sale, transfer or otherwise, with the caveat that it will not include a person to whom the apartment is given on rent. Whatever we have mentioned about apartments, is equally true qua allotment of plots or buildings.

A MISCELLANY OF CONTENTIONS REGARDING ALLOTTEES

116. The definition of the word 'promoter' in RERA may be noticed in this regard. It includes a person who constructs or causes to be constructed an independent building or apartments or convert an existing building or a part thereof into apartments for the purpose of selling or some of the apartments to other persons. In regard to such a person, it is clear that there is no allotment of any plot as such. It may be another matter that the contract may contemplate the assignment of the undivided interest in the land upon which the construction is made to the allottee but the allottee is the allottee of the building or the apartment as defined in the Act. Coming to clause (ii) of Section 2(zk) defining 'promoter', it contemplates a developer who develops land into a project. The promoter in such a case may also put up construction on any of the plots for the purpose of sale either with or without structures thereon. Therefore, this category of promoter and therefore real estate project would be a hybrid project which involves the development of the land into plots sale of plots aloneafter development or sale of the plot with the construction thereon. Coming to clause (iii) of the definition of 'promoter' it includes any public body or development authority in respect of allottees of building or apartments constructed by such authority or body on lands owned by them or placed at their disposal by the Government. There may be such promoters who are development authorities or public bodies, if they own plots or have plots at their disposal by the Government which is then, allotted. The allotment must be for the purpose of selling. The plots and the apartments must be intended for sale. In regard to Apex Level Co- operative Housing Society or Primary Co-operative Housing Society, they are treated as promoters in regard to apartments or buildings for its purpose or in respect of allottees, apartments or buildings. This necessarily mean that in regard to such societies the allottees could be the members or non-members. Clause V also includes person who acts as builder, colonizer, contractor, developer, estate developer or any other name or claiming to be the Power of Attorney of the holder of the land on which the building, apartment constructed or the plot developed for sale. This must be further understood in the light of the definition of the real estate project in Section 2 (zn). It defines as meaning the various activities. It consists of the following:

1. Development of the building

2. A building which consists of apartments

3. Converting an existing building or a part thereof into apartment

4. The development of land into plots or apartments as the case may be.

117. The aforesaid activities must be for the purpose of sale of all or some of the apartments, plot or building along with the common areas and other work and rights. The task of ascertaining who will be an allottee as also the question as to what will be the total number of allottees and therefore what would constitute one-tenth of total number of allottees must depend upon the nature of the real estate project in question. It will depend on what is offered by the promoter under the project. It may be real estate project which seeks to develop a building and sale of the building. It may be a project for the construction of apartments with the agreements to convey the undivided interest of land also. It may be a project which envisages converting an existing building or a part into an apartment. It may be a project for merely development of land into plots and sale of the plotted land as such. It may be also that the same person may also develop either apartments or building to be sold. In this regard we may remember the explanation in Section 2(zk) (vi)defining the word 'promoter'. The said section reads as under:

> "(zk) "promoter" means,—
>
> (i) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) xxx xxx xxx
>
> (iv) xxx xxx xxx
>
> (v) xxx xxx xxx
>
> (vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder;"

118. Therefore, a conspectus of the provisions would show that having regard to the legislative intention the term 'allottees' as defined in Section 2(d) must be understood undoubtedly on its own terms predominantly. But at the same time the other provisions which form part of the Act and therefore the scheme must also be borne in mind. The Argument that the definition of 'allottee' suffers from over inclusiveness and under inclusiveness needs to be considered. Under inclusiveness and over inclusiveness are aspects of the guarantee under Article 14. Equals must be treated equally. Unequals must not be treated equally. What constitutes reasonable classification must depend upon the facts of each case, the context provided by the statute, the existence of intelligible differentia which has led to the grouping of the persons or things as a class and the leaving out of those who do not share the intelligible differentia. No doubt it must bear rational nexus to the objects sought to be

achieved.

119. Coming to the definition of the word 'allottee' it appears to be split up into three categories broadly, they are- plot, apartment and buildings. In the context of the impugned proviso, it must be remembered that if an applicant is able to garner a magical figure of 100 allottees, then he can present the application under Section 7 of the Code. This is for the reason that the further requirement of one-tenth of total number of allottees is meant to apply in a situation only if one-tenth of the total number of allottees is less than

100. This is for the reason that the word 'whichever' has been used. No doubt in the context of one-tenth of the allottees, the greater the number of total number of allottees, the greater will be the number of one-tenth. In other words, if the total number of allottees is less, then, one-tenth of the total number will be less, and if in such circumstances, it is lesser than hundred, such number of allottees can make application under Section 7 under the impugned provisos. Therefore, in calculating the total number of allottees in one sense is a double-edged sword as the more is the numerator, the more will be the resultant figure required under the proviso.

120. Be that as it may, as we have noticed the question must be decided with reference to real nature of the real estate project in which the applicant is an allottee. If it is in the case of an apartment, then necessarily all persons to whom allotment had been made would be treated as allottees for calculating the figure mentioned in the impugned proviso. The word 'allotment' does mean allotment in the sense of documented booking as is mentioned in Section 11(1)(b) in regard to apartment or plot with which we are largely concerned. Such detail regarding the quarterly up-to-date list of the number and the types of apartments are to be uploaded as provided in Section 11. It is this information incidentally, which is the reservoir of data which the legislature intends that the allottees can use even though it is not necessarily confined to them. The allottee would also include a person who acquires the allotment either through sale, transfer or otherwise. The transferee of the allotment is contemplated. There can be no difficulty in including such assignee of the allotment as also the allottee for the purpose of complying with the threshold requirement under the impugned proviso. Thus, all allottees and all assignees of allotment would qualify both to be considered for the purpose of calculating the total number of allottees but confined to the particular real estate project and therefore for arriving at the figure of 100 allottees or one-tenth of the allottees as the case may be. Then, there is a third category, which is introduced by the expression 'sold' (whether as 'leasehold' or 'freehold' or otherwise transferred by the Promoter). Here a question may arise, if the word 'sold' is applied to the expression 'plot', then undoubtedly the transferee would be an allottee. If the sale is to the allottee in a real estate project which is a hybrid project consisting of development of land into plots and also development of buildings as is contemplated under Section 2(zk) then the transferee of the plot undoubtedly would be an allottee. He may have a complaint regarding the default by the promoter in the matter of development of the plot under hybrid project. As far as sale whether 'freehold' or 'leasehold' of an apartment or a building is concerned, once an apartment or building is sold, it presupposes that the construction of the building or the apartment is complete ordinarily. No doubt, he may also have complaints against the promoter which may be addressed under the RERA. For the purpose of the proviso in question, going by the definition, undoubtedly, such transferee of an apartment or building, is to be treated as an allottee. Let us take

an example. A Promoter constructs several apartments. An apartment is defined so as to include 'flat'. It can be residential or commercial. Assume that the Promoter has constructed and completed construction, five out of the fifteen floors (which constitutes the project), on the basis of the occupation certificate, as different from the completion certificate, as the latter certificate is given only on the completion of the project. He assigns and transfers the apartment to those allottees to whom he allotted the apartment when he has completed the construction. Such transferees would be allottees under the RERA. The question, however, may arise from the point of view of the impugned proviso as to what is the common feature between such an allottee to whom the constructed apartment is already handed over after sale and the allottee of the remaining floors where there is no construction or only construction which is pronouncedly lagging behind the schedule. The question may arise whether banding together such allottees under the definition clause make out the case of over inclusive classification. Are unequals being treated equally?

121. A mere charge of either under inclusiveness or over inclusiveness which is not difficult to make hardly suffices to persuade the court to strike down a law. There is a wide latitude allowed in the legislature in these matters. The examination cannot be extended to find out whether there is mathematical precision or wooden equality established. The working of the statute may produce further issues, all of it may not be fully perceived as which may not be wholly foreseen by the law giver. The freedom to experiment must be conceded to the legislature, particularly, in economic laws. If problems emerge in the working of law and which require legislative intervention, the court cannot be oblivious to the power of the legislative to respond by stepping in with necessary amendment. There is nothing like a perfect law and as with all human institutions there are bound to be imperfections. What is significant is however for the court ruling on constitutionality, the law must present a clear departure from constitutional limits.

122. In the example of an apartment which is sold where the project is not complete, we bear in mind the following features:

> In such cases if there is insolvency, the project would remain incomplete. Common areas/common facilities would not become available. The feature which attract a buyer is the whole project which is completed. The apartment owner may very well refuse to accept delivery as he may insist upon the completion of the project with all its promised facilities. Section 17 of RERA contemplates the transfer of title to the common areas to the association of allottees. Obviously, such a thing would not be possible ordinarily unless the construction is complete. In other words, unlike an allottee of a different project under the same promoter the different allottees as contained in the definition of the word 'allottee' would have room for common complaints. A realistic and pragmatic approach is not to be eschewed or abandoned. Thus, we cannot see merit in the contention.

123. We have noticed Section 11 (1) (b) of RERA. It contemplates details of booking qua apartments and plots. This is sufficient to reject the argument that it could be based on a total number of the units promised. What is required is allotment and not promised flats as per a brochure. It is also not the total constructed units. This is as what is relevant under the impugned provisos read with

Section 5(8)(f) explanation and section 2 (d) of RERA read with Section 11(1)(b) and the rules made thereunder is the 'booking' of apartments or plots. What is allotted or booked may be more than what is constructed if there is a mismatch at any given point of time. It is the number of units allotted. Now, the allotment and the agreement to sell are not irreconcilable with each other and may signify the same.

124. The further contention that 10 percent is dynamic and what is 1/10 in the morning may fall short by night if more allotment is made, is untenable in law. The provisions of the Companies Act, 1913 (Section 153-C), Section 399 of the Companies Act, 1956 and Section 244 of the Companies Act, 2013 contain similar provisions. The mere difficulties in given cases, to comply with a law can hardly furnish a ground to strike it down. As to what would constitute the real estate project, it must depend on the terms & conditions and scope of a particular real estate project in which allottees are a part of. These are factual matters to be considered in the facts of each case.

THE PROBLEM OF DEFAULT AND LIMITATION

125. It is urged on behalf of the petitioners that the provisos requiring support of one hundred persons or one-tenth of the allottees, whichever is lower, is unworkable and arbitrary having regard to the provisions of the Code. There can only be one default in a complaint, it is contended. When the required number of allottees may have to be drawn from allottees who may have entered into agreements with the builder on different dates, the date of default would be different. This would adversely impinge on the absolute right which otherwise exist with an allottee to make an application under Section 7 of the Code.

126. Per contra, the learned Additional Solicitor General would draw attention to Explanation to Section 7(1). She would further contend that as long as there is a default which need not be qua the applicant or applicants, an application would be maintainable and there is no merit in this contention.

127. In this context, it is necessary to recapture Section 4 of the Code. It reads as follows:

> "4. (1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees:
>
> Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees." The amount is now fixed at Rs.1 crore.

128. It is thereafter that Section 6 declares that where any corporate debtor commits default, a financial creditor, an operational creditor or a corporate debtor may itself initiate CIRP in the manner provided in Chapter 2.

129. Section 7 continues to declare that a financial creditor either by itself or jointly by other creditors or any other central government notified person, file an application before the

Adjudicating Authority, when a default has occurred. It is thereafter that the following Explanation is present, no doubt, after the impugned provisions, after the amendment:

"7. (1) xxx xxx xxx Explanation.—For the purposes of this sub- section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor."

130. The Explanation makes it clear that a financial debt, which is owed to any other financial creditor of the corporate debtor would suffice to make an application on the basis that the default has occurred. Default has been defined in Section 3(12) of the Code as follows:

> "3(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be;"

131. Interpreting these provisions and the Rules as well, this Court in Innoventive (supra), held as follows:

> "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." (Emphasis supplied)

132. It is true that Section 238A (inserted with effect from 06.06.2018) of the Code provides that the provisions of the Limitation Act shall be applicable as far as may be to the proceedings or appeals before the Adjudicating Authority and the NCLAT, as the case may be, inter alia. Interpreting this provision, inter alia, this Court in B.K. Educational Services Private Limited (supra), has held that Article 137 in Schedule I of the Limitation Act, 1963, will apply in regard to an application under Sections 7 and 9 of the Code. This Court held, inter alia, as follows:

> "42. It is thus clear that since the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application."

133. In fact, the Court, in the said case, in the course of its judgment, gives an example of a debt which is due since 1990 and which has become barred but which is sought to be revived through the medium of Section 7 of the Code which law came into being in 2016. It is to avoid such situations that this Court noted that even if Section 238A was inserted after the original enactment, the Limitation Act, 1963, would, indeed apply, right from the inception of the Code. It is to be noticed that this Court has applied Article 137, and also, at the same time, countenanced the applicability of Section 5 of the Limitation Act, providing for condonation of delay in appropriate cases.

134. It is, therefore, clear that the requirement of the Code in regard to an application by a financial creditor does not mandate that the financial debt is owed to the applicant in terms of the Explanation. This is for the reason that apparently that the CIRP and which, if unsuccessful, is followed by the liquidation procedure is in all a proceeding, in rem. The Law Giver has envisaged in the Code, an action, merely for setting in motion the process initially. The litmus test on the anvil of which, the Adjudicating Authority will scrutinize the matter, is only the existence of the default, as defined in Section 4 of the Code. As on date, the amount of default is pegged at Rs.1 crore. Present a financial debt which has not been paid, the doors are thrown open for the processes under the Code to flow in and overwhelm the corporate debtor. The further barrier is limitation, no doubt, as noticed in B.K. Educational Services Private Limited v. Parag Gupta & Associates50. As with anything in life, not only will imperfections stand out and mathematical nicety be flouted, a law may end up seemingly trampling upon the interests of a few or even many. Since, the Code undoubtedly bears the brand of an economic measure upon its face, and in true spirit, being one of the most significant and dynamic economic experiments indulged in by the Law Giver, not by becoming servile to Parliament, but by way of time hallowed deference to the sovereign body experimenting in such matters, this Court will lean heavily in favour of such a law. The complaint of the petitioners that an increase in the required strength of applicants, will create legal knots which do not admit of solution, do not appeal to us and we intend lay bare how the law can indeed be worked, even with

the extra burden which is cast on the persons covered by the provisos.

135. It is indisputable that in order to successfully move an application under Section 7 that there must be 50 (2019) 11 SCC 633 a default which must be in a sum of Rs.1 crore. It is equally clear that the amount of Rs.1 crore need not be owed by the corporate debtor in favour of the applicant. It must be noted that the Explanation existed even prior to the provisos being inserted. It is open to a financial creditor, to move an application in the company of another financial creditor or more than one other financial creditor. In fact, a perusal of the Rules, which we have already extracted, would indicate that irrespective of the number of applicants the Court Fee would remain Rs. 25,000/-. This answers the alleged vagueness about court fees where the provisos are given effect to. Thus, dehors the impugned provisos in terms of the Explanation in sub-Section 7(1), a financial debt need not be owed to the applicant and as joint application by more than one applicant was and is contemplated, the resultant position would be that any number of applicants, without any amount being due to them, could move an application under Section 7, provided that they are financial creditors and there is a default in a sum of Rs.1 crore even if the said amount is owed to none of the applicants but to any another financial creditor. This position has not undergone any change even with the insertion of the provisos. In other words, even though the provisos require that in the case of a real estate project, being conducted by a corporate debtor, an application can be filed by either one hundred allottees or allottees constituting one-tenth of the allottees, whichever is less, if they are able to establish a default in regard to a financial creditor and it is not necessary that there must be default qua any of the applicants. We have taken an extreme example to illustrate how the Code can possibly be worked.

136. In practice, it may be unlikely, however, that persons would come together as applicants under the Code, if they are real estate allottees, particularly knowing what the admission of application under Section 7 entails, and the destiny of an application which has reached the stage of compulsory winding up under Section 33. However, taking a more likely example, viz., of the corporate debtor operating in the real estate sector and an allottee moving an application upon there being amounts due to him, prior to the amendment, undoubtedly, a single allottee could set the ball in motion and all he had to satisfy is default to him or any other financial creditor. The change that is brought about is only that apart from establishing the factum of default, he must present the application endorsed by the requisite number introduced by the proviso. Since, default can be qua any of the applicants, and even a person, who is not an applicant, and the action is, one which is understood to be in rem, in that, the procedures, under the Code, would bind the entire set of stakeholders, including the whole of the allottees, we can see no merit in the contention of the petitioner based on the theory of default, rendering the provisions unworkable and arbitrary.

137. In this regard, it is necessary to notice Form 1, in which, an application is to be maintained under Section 7 of the Code read with Rule 4 of the Rules. In the said Form, in Part IV, there are two columns. The first column is total amount of debt granted, dates of disbursement. Under the second column in Part IV, the applicant must show the amount claimed to be in default and the date on which the default occurred (the applicant is required to attach the workings for computation of the amount and days of default in tabular form). Part V deals with particulars of the financial debt (documents, records and evidence of default). The applicant is called upon to attach copy of record

of default with information utility, if any. The applicant may attach list of any other document to prove the existence of the default, as can be seen from clause 8 of Part V.

138. In this regard, question may arise as to how the application would have to be filled-up, if there are hundred allottees in a given case to comply with the requirement of the proviso. In the very first place, we must notice that as far as the workability of this provision in such a situation is looked at, it cannot be called into question, having regard to one aspect in particular. Even before the amendment, and what is more also, after the amendment, a joint application is permissible (though not mandated) in respect of all classes of financial creditors. This means, even in the case of any application filed by more than one applicant, if the requirements of the Code are otherwise fulfilled, there can be cases where the applicants can file a single application by giving the details which we have adverted to. Secondly, we must bear in mind again, that the application is contemplated to be an application in rem. One or more financial creditors activises the Code with reference to the threshold figure of Rs.1 crore, being in default. The Authority is alerted. He verifies this aspect, finding that the debt is established under Section 7(5), and further that it is not barred by limitation or if he invokes the power under Section 5 of the Limitation Act, to condone the delay [as contemplated in B.K. Educational Services Private Limited (supra)], the curtains are raised for the Code to be applied since the default in the sum may be owed to any financial creditor. It suffices that the said sum can be claimed as a sum in default in terms of the Explanation in Section 7(1). Undoubtedly, the record of default, as contemplated in the Code, which need not be the record of default with the information utility alone, has to be furnished. If the default is qua all the applicants, then also, as long as the statutory requirements regarding the amount, and it not being barred, are fulfilled, it will be open to the applicants to plead the same. Undoubtedly, if the debt, in a sum of Rs.1 crore, happens to be set up, which is barred, then, unless Section 5 of the Limitation Act is successfully invoked, the applicants would risk rejection of the application, which cannot be stated to be unfair as it is in accordance with law. What we are indicating is that in view of the special provision, contained in the Explanation to Section 7(1), the arguments appear to be farfetched. We must bear in mind that when we reasonably contemplate, a state of insolvency, while in law, the corporate debtor, being in default to a single financial creditor in a sum of Rs. 1 crore, is sufficient, it is highly unlikely that the corporate debtor would not be similarly financially in dire straits towards the other creditors (allottees). Another aspect, which is raised, is that in the example of a hundred allottees, if they have agreements, under which, the date of default is different, how is the application to be drafted and processed? What, if the debt is barred qua some of the applicants, whereas, it is not so in regard to the other applicants. Taking a cue from the Explanation to Section 7(1), all that would be required is, to plead the default, no doubt, in the sum of Rs. 1 crore, which is not barred as the cause of action. In other words, if a law contemplates that the default in a sum of Rs.1 crore can be towards any financial creditor, even if he is not an applicant, the fact that the debt is barred as against some of the financial creditors, who are applicants, whereas, the application by some others, or even one who have moved jointly, fulfill the requirement of default, both in terms of the sum and it not being barred, the application would still lie. ALLOTTEES TO BE FROM SAME REAL ESTATE PROJECT: IS IT UNCONSTITUTIONAL?

139. We have referred to the definition of the word ‘allotee’ in Section 2(d) of the RERA. In regard to a real estate project, all persons, who are treated as allottees, as per the definition of allottee would

be entitled to be treated as allottees, for the purpose of Section 5(8)(f) (Explanation) and also, for the purpose of the impugned provisos. All that is required is that the allottees must relate to same real estate project. In other words, if a Promoter has a different real estate project, be it in relation to apartments, in the case an application under Section7, those would not be reckoned in computing one-tenth as well as the total allotments.

140. The rationale behind, confining allottees to the same real estate project, is to promote the object of the Code. Once the threshold requirement can pass muster when tested in the anvil of a challenge based on Articles 14, 19 and 21, then, there is both logic and reason behind the legislative value judgment that the allottees, who must join the application under the impugned provisos, must be related to the same real estate project. The connection with the same real estate project is crucial to the determination of the critical mass, which Legislature has in mind, as a part of its scheme, to streamline the working of the Code. If it is to embrace the total number of allottees of all projects, which a Promoter of a real estate project, may be having, in one sense, it will make the task of the applicant himself, more cumbersome. It becomes a sword, which will cut both ways. This is for the reason that the complaints, relating to different projects, may be different. With regard to one project of a Promoter of real estate project, maybe, in the advanced stage, the allottees in a particular project, may not have much of a complaint. The complaint, in relation to yet another project, may be more serious. If the complaint in respect of the latter, attracts the attention of a critical mass of allottees, and the proposed applicant is part of that project in the said project, then, it may be easier for the allottees to fulfil the statutory mantra in the impugned provisos, with the junction of likeminded souls. If, on the other hand, the requirement was to make a search for allottees of different projects, as would be the case, if the entirety of the allottees, under different projects, were to be reckoned, the task would have been much more cumbersome. The requirement of the allottees, being drawn from the same project, stands to reason and also does not suffer from any constitutional blemish, as pointed out.

THE POINT OF TIME TO COMPLY WITH THE THRESHHOLD REQUIREMENTS

141. The question, then arises, as to the alleged lack of clarity about the point of time, at which the requirements of the impugned provisos, are to be met. Is it sufficient, if the required number of allottees join together and file an application under Section 7 and fulfil the requirements, at the time of presentation? Or, is it necessary that the application must conform the numerical strength, under the new proviso, even after filing of the application, and till the date, the application is admitted under Section 7(5)? There can be no doubt that the requirement of a threshold under the impugned proviso, in Section 7(1), must be fulfilled as on the date of the filing of the application. In this regard, we find support from an early judgment of this Court, which was rendered under Section 153-C of the Companies Act, 1913. Section 153-C is the predecessor to Sections 397 and 398 read with Section 399 of the Companies Act, 1956. Its most recent avatar is contained in Sections 241 and 242 of the Companies Act, 2013 read with Section 244. In fact, Section 399 (3) of the Companies Act, 1956, read as follows:

> “399(3) Where any members of a company are entitled to make an application in virtue of sub-section (1), any one or more of them having obtained the consent in

writing of the rest, may make the application on behalf and for the benefit of all of them."

142. In the decision of this Court in Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao and others51, the provision in question, viz., Section 153-C of Companies Act, 1913 dealt with the power of the Court to Act, when the Company acts in a prejudicial manner or oppresses any part of its members. It, inter alia, provided that no application could be made by any member, in the case of a company having a share capital unless the member has obtained consent, in writing, of not less than one hundred in number of the members 51 AIR 1956 SC 213 of the company or not less than one-tenth in number of the members, whichever is less. There was also an alternate requirement, to which, resort could be made in regard to company, not having share capital. There was another mode of fulfilling the threshold requirement. In the facts of the said case, the number of the members of the company were 603. Sixty-five members consented to the application. The problem, however, arose as it was contended that 13 of the members who had consented, had, subsequent to the presentation of the application, withdrawn their consent. This Court went on to hold as follows:

"5 xxx xxx xxx We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the right of the applicant to proceed with the application or the jurisdiction of the court to dispose of it on its own merits."

143. In the matter of presentation of an application under Section 7, if the threshold requirement, under the impugned provisos, stands fulfilled, the requirement of the law must be treated as fulfilled.

The contention, relating to the ambiguity and consequent unworkability and the resultant arbitrariness, is clearly untenable and does not appeal to us. If an allottee is able to, in other words, satisfy the requirements, as on the date of the presentation, the requirement of the impugned law is fulfilled.

HOLDINGS BY FAMILY MEMBERS ETC. AND JOINT HOLDINGS OF A UNIT; SINGLE ALLOTTEE?

144. One of the contentions, which is raised is that in Section 399 (2) of the Companies Act, 1956, it was provided that in applying the threshold test of requisite number of members, to join in an application under Sections 397 and 398, where any share or shares are held by two or more persons, they shall be counted only as one member. Section 244 of the Companies Act, 2013, corresponds to Section 399 of the Companies Act, 1956. The Explanation in Section 241(1) contains an identical

provision as in Section 399(2). It is, however, pointed out by the petitioners that in the matter of an allotment, being made to more than one person, of an apartment or other real estate property, it is not laid down as to how the matter is to be dealt with. It is vague. It is arbitrary. It is true that in the impugned proviso, introduced in Section 7(1), there is no indication as to how the number of allottees are to be reckoned in the case of more than one person. It will be of interest to note that in Section 14 of the RERA, the Promoter is forbidden from making any additions and alterations in the sanctioned plans, layout plans and specifications, the nature of the fixtures, fittings and amenities, which are agreed to be undertaken, without the consent of that person. Of course, minor additions or alterations, in circumstances provided in the proviso, can be carried out.

145. Thereafter, Section 14(2)(ii) contemplates that any other alterations in the sanctioned plans, layout plans and specifications or the common area within the project, cannot be carried out except with the previous written consent of at least two-thirds of the allottees, other than the Promoter, who had agreed to take the apartments in such building. In this context, there is an Explanation. The Explanation purports to declare that if an allottee has taken more than one apartment or plot in his name or in the name of his family, it will be treated as a single allotment. In the case of persons, such as companies or firms or association of individuals, bookings in its name or in the name of associated entities or related enterprises, are to be treated as a single allotment.

146. Similarly, Section 15 of RERA interdicts transfer or assignment of his majority rights and liabilities to a third party, without obtaining the prior written consent of two-thirds of the allottees and also without the prior written approval of the Authority. A similar Explanation, as is found in Section 14, which we have already described, is to be found in Section 15. Such an Explanation is, however, not found in the definition of 'allottee' in Section 2(d) of RERA. The object of the Explanation, both in Sections 14 and 15, is apparent. It is to avoid defeating the object, which would occur, if members of the same family, monopolises a project or associated and related concerns of a company, firm or association, corner the allotments. It is also possible that they may be hand-in-glove with the Promoter, which would result in defeating the rights of the other allottees, as the figure of two- thirds, would cease to represent the interest of the actual two-third majority, which is intended by the Legislature, be it in a matter or alterations or additions in the sanctioned plans or layout plans, etc., or in the matter of the Promoter getting out of the project in regard to his majority rights, by transfer or assignment. These Explanations are intended to hold the Promoter responsible to the sanctioned plans as also to prevent the Promoter from wriggling out of his majority rights, without a real majority, as would be represented by two-thirds of the separate allottees, agreeing to the same. We cannot read the Explanations in Sections 14 and 15 into the definition of 'allotee' in Section 2(d), as, in Sections 14 and 15, a perusal of Explanations, makes it clear that they are enacted for the purpose of Sections 14 and 15, respectively. We would have to take the definition of the 'allottee' from Section 2(d), as it is. Therefore, it does not matter whether a person has one or more allotments in his name or in the name of his family members. As long as there are independent allotments made to him or his family members, all of them would qualify as separate allottees and they would count both in the calculation of the total allotments, as also in reckoning the figure of hundred allottees or one-tenth of the allottees, whichever is less.

147. As far as the situation projected about, there being no clarity regarding whether, if there is a joint allotment of an apartment to more than one person, is it to be taken as only one allottee or as many allottees as there are joint allottees, it would appear to us, on a proper understanding of the definition of the word 'allottee' in Section 2(d) and the object, for which the requirement of hundred allottees or one-tenth has been put, and also, not being oblivious to Section 399(2) of the Companies Act, 1956, as also the Explanation in Section 244(1) of the Companies Act, 2013, in the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment can only be treated as a single allotment. This for the reason that the object of the Statute, admittedly, is to ensure that there is a critical mass of persons (allottees), who agree that the time is ripe to invoke the Code and to submit to the inexorable processes under the Code, with all its attendant perils. The object of maintaining speed in the CIRP and also the balancing of interest of all the stakeholders, would be promoted by the view that as in the case of the Companies Acts, 1956 and 2013, that for the purpose of complying with the impugned provisos in Section 7(1), while the allottee can be of any of the categories, fulfilling the description of an allottee in Section 2(d) of RERA, as interpreted earlier by us joint allottees of a single apartment, will be treated as only one allottee. Any other view can lead to clear abuse and defeating of the object of the Code. If, for instance, a single apartment is taken in the name of hundred persons, a single allottee, who in turn comprise of relatives or family members or friends, can move an application, even though the position ante would be restored, which means that only the allottee qua one apartment, plot or building, is before the Authority and it would not really represent a critical mass of the allottees in the real estate project concerned. Therefore, we have no hesitation in rejecting the contentions of the petitioner on having made the said interpretation.

THE POWER OF WAIVER, BEING DENIED, UNLIKE THE COMPANIES ACTS

148. There is another argument, which is pressed before us as one, which distinguishes the impugned provisions from those contained in the Companies Act. Section 399(4) of the Companies Act, 1956, read as follows:

> "399.(4) The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the Tribunal under section 397 or 398, notwithstanding that the requirements of clause (a) or clause
>
> (b), as the case may be, of sub-section (1) are not fulfilled."

149. It is, therefore, contended that the said provision rendered the threshold requirement in Section 399(1), a fair one. This is for the reason that where it was found just and equitable by the Central Government, it could authorize any member or members to apply under Section 397 or Section 398, even though the numerical strength of members, as required in Section 399(1), did not come forward to present the application.

150. We are called upon to pronounce on the constitutionality of the law. Having regard to the salutary object and the distinguishing features, which clearly distinguish the allottees and also the

creditors falling in the first proviso from the other creditors, both financial and operational, we see no merit in the contention. It is another matter that we may entertain the belief that it would have been more wise on the part of the Legislature to have incorporated a safety valve to provide for situations where without complying with threshold requirement, a single allottee could move the application. In this regard, we should also bear in mind the scope of an application under Sections 397 and 398.

151. The Central Government, having regard to the scheme of Companies Act, is intricately interconnected with the management of the companies. It had powers of investigation into the affairs of the companies under Section 235 and Section 237. The purport of Sections 397 and 398 include the conduct of the affairs of the company in any manner prejudicial to the public interest or also, no doubt, prejudicial to member or members. In such circumstances, clothing the Central Government with the power to waive the requirement and permitting the application to be presented by even a single member, is in sync with the scheme of the Companies Act. The role of the Central Government is different under the Code. In fact, the Central Government does not have any role, as such under the Code. It acts only through the designated Authorities under the Code. The Code is about insolvency resolution and on failure liquidation. The scheme of the Code is unique and its objects are vividly different from that of the Companies Act. Consequently, if the Legislature felt that threshold requirement representing a critical mass of allottees, alone would satisfy the requirement of a valid institution of an application under Section 7, it cannot be dubbed as either discriminatory or arbitrary.

A LOOK AT ORDER I RULE 8 OF THE CODE OF CIVIL PROCEDURE, 1908 (THE CPC) AND SECTION 12 OF THE CONSUMER PROTECTION ACT, 1986 and the contentions based on the same.

152. The argument of the petitioners is that under Order I Rule 8 of the CPC, where there are numerous persons having the same interest in one suit, one or more such persons can, with the permission of the court, sue or be sued or may defend such suit on behalf of or for the benefit of all persons so interested, at the instance of a single person with whom numerous persons share the same interest. The court, after giving permission, is to give notice of the institution of the suit as provided. Thereupon, any person, on whose behalf or for whose benefit the suit is instituted or defended, can apply to the court, to be made a party. Finally, Sub-Rule (6) of Order I Rule 8 declares that the Decree passed in the suit under Order I Rule 8, shall be binding on all persons, on whose behalf or for whose benefit, the suit is instituted or defended, as the case may be. The Explanation in Order I Rule 8 of CPC, reads as follows:

> "Explanation.— For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be."

153. This provision is sought to be contrasted with the provisos inserted by the impugned amendment. It was sought to be contended that the procedure contemplated in Order I Rule 8, on

the one hand, countenances the setting in motion of a civil suit by a single person, no doubt with the permission of the Court and after a Notice is given, as provided therein, any of the persons, who have the same interest, can come forward and seek to be made a party. By the device, embedded in Order I Rule 8, the interest of all the persons, who are having the same interests, is best safeguarded. Should he wish to oppose the applicant, he is free to do so. Should he wish to, on the other hand, support the Plaintiff, it is equally open to him to adopt such a course. At the end of the proceedings, when the Decree is passed, it shall be binding on all the persons, for whose benefit or on whose behalf, the suit is laid even by a single person. On the other hand, for reasons, which are entirely arbitrary, it is pointed out that a most cumbersome and unachievable threshold requirement is thrust upon a class of the financial creditors alone, by requiring that should an allottee wish to invoke Section 7 of the Code, he should muster the support of at least 99 other allottees or one-tenth of the total number of allottees, whichever is lower. Again, it is emphasized that matters are made worse by insisting that the allottees must be drawn from the same project. It is, similarly, submitted that the Consumer Protection Act also has embraced the principle of Order I Rule 8 of the CPC, as can be seen from Section 12 of the Consumer Protection Act. The definition of the word 'complainant', in Section 2(b)(iv) of the Consumer Protection Act, 1986, includes one or more consumer, where there are numerous persons having the same interest. Section 12 provides for the manner in which a complaint is to be made. Section 12(1)(c) reads as follows:

> "12(1)(c). One or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested; or

154. The last provision, in a string of provisions, which provide the scheme in regard to an action modelled on Order 1 Rule 8 of the CPC, is found in Section 13(6) of the Consumer Protection Act, 1986. It reads as follows:

> "13(6) Where the complainant is a consumer referred to in sub-clause (iv) of clause (b) of sub-section (1) of section 2, the provisions of rule 8 of Order I of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Forum thereon."

155. Thus, the procedure, under Order I Rule 8, is squarely made applicable to the proceedings under the Consumer Protection Act, in a situation, where, there are more than one consumer, having the same interest. It is true that the words "same interest", has been understood in the light of the Explanation under Order 1 Rule 8 of the CPC and therefore, it is not necessary that all the numerous persons, within the meaning of the Consumer Protection Act or in a civil suit, need establish that they have the same cause of action. What is essential is that they have the same interest. Interpreting the words "same interest", it is still further true that this Court, in Chairman, Tamil Nadu Housing Board v. T. N. Ganapathy52, has held that what is required is only community of interest. This was a case where a suit was filed by allottees of plots of 52 (1990) 1 SCC 608 low-income groups against the appellant-Housing Board seeking injunction from demanding and collecting any additional price and the suit was held maintainable under Order I Rule 8, even

though separate demand notices were issued to each allottees.

156. In appreciating this argument, it is important to not be oblivious to the scheme of the Code and to distinguish it from a civil suit laid invoking order I Rule 8 or the consumer complaint presented by one consumer, sharing the same interest with numerous others, again invoking Order I Rule 8. It is true that once Order I Rule 8 is made applicable, a single plaintiff or a consumer, in a civil suit or a consumer complaint respectively, can set the ball rolling. All the persons, having the same interest, are free to join in the proceedings. Irrespective of whether they join or not, a Decree or order, which is pronounced, will bind all the persons having the same interest. The procedure, under Order I Rule 8, if it had been made applicable in regard to an application by the allottee of a real estate project, would indeed have made it very easy for a single allottee to invoke Section 7 of the Code and it would also have countenanced the participation of the other allottees, should they wished to be made parties upon the publication of the Notice contemplated in Order I Rule 8(2).

157. So far so good. Now, we will examine the other side of the story and that is the object of the Code and the scheme of the Code. Under the Code, once an application is moved and is admitted under Section 7, the stage is set for resolving the insolvency. The Resolution of the Insolvency may be attained by replacing the existing management. The Law Giver has contemplated last mile funding. It has, however, fixed a time limit, as contemplated in Section 12 of the Code, no doubt as explained by this Court. Once, the application is admitted under Section 7(5), initially, the Interim Resolution Profession (IRP) would supplant the very management by virtue of the suspension of the powers of the management, as contemplated in the Code. The IRP may or may not continue as the Resolution Professional (RP) but a RP is, undoubtedly, to be appointed under the scheme of the Code. The management passes into the hands of the RP. Thereafter, depending upon the receipt of the Resolution Plan and its acceptability to the Committee of Creditors and finally the approval by the Adjudicating Authority of the Resolution Plan, which is approved by the Committee of Creditors, depends the Resolution of the Insolvency. All of this is to be completed within a period of 330 days again subject to the limit not being 'mandatory' as explained by this Court in Essar Steel(supra). Should this not happen, the Adjudicating Authority is obliged, under Section 33, to pass an Order for winding up of the Corporate Debtor. Section 53 provides for the priority in the matter of payment of the amounts which are collected by way of liquidation value. The allottees would rank as unsecured creditors. The inevitable conclusion is that unlike in an ordinary civil suit or in a consumer complaint, the drastic consequences, as the inexorable liquidation of the corporate debtor, contemplated under the Code, is the inevitable consequence, of the application reaching the stage of Section 33 of the Code. Liquidation could take place even earlier under Section 33(4). As to whether the procedure contemplated in Order I Rule 8 is suitable, more appropriate and even more fair, is a matter, entirely in the realm of legislative choice and policy. Having regard to the scheme of the Code, which we have detailed above, there cannot be scintilla of doubt that what the petitioners are seeking to persuade us to hold, is to make a foray into the forbidden territory of legislative value judgment. This is all the more so, when the dangers lurking behind full play to Order I Rule 8 being given appear to be fairly clear. We have, therefore, no hesitation in rejecting this contention, which no doubt, at first blush, may appear attractive. We only need add that invalidating a law made by a competent Legislature, on the basis of what the Court may be induced to conclude, as a better arrangement or a more wise and even fairer system, is constitutionally impermissible. If, the

impugned provisions are otherwise not infirm, they must pass muster.

158. Are the Amendments violative of the `Pioneer Judgment' in Pioneer Urban Land and Infrastructure Ltd. and another v. Union of India and others53, certain amendments to the Code were challenged. The challenged provisions included the Explanation added to Section 5(8)(f).

159. The challenge was made in a batch of Writ Petitions filed by a group of Real Estate Developers. This Court was invited to adjudicate upon the constitutionality on a wide range of grounds. It is important to cull out the findings rendered by the Court in the said decision as much reliance has been placed by the Petitioners on the decision:

> i. The Code is a Legislation which deals with economic matters and, therefore, the Legislature must be given free play in the joints;
>
> ii. The legislative judgment in economic choices must be given a certain degree of deference by the Courts;
>
> iii. The amendment by which the explanation was inserted in Section 5(8) was clarificatory in nature and allottees/home buyers were included 53 (2019) 8 SCC 416 in the main provision, i.e., Section 5(8)(f) from the inception of the Code;

iv. The amending Act did not infringe Articles 14, 19(1)(g) read with Article 19(6) or 300A of the Constitution of India;

v. RERA and the Code must be held to co-exist, and in the event of a clash, RERA must give way to the Code. The Code and RERA operate in completely different spheres.

vi. Paragragraph-30 of the judgment in Pioneer Urban Land and Infrastructure Ltd.(supra) reads as follows:

> "30. 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 (P) Ltd. v. Kotak Mahindra Bank Ltd. [Swaraj Infrastructure (P) Ltd. v. Kotak Mahindra Bank Ltd., (2019) 3 SCC 620 : (2019) 2 SCC (Civ) 136] has held that the Debts 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 paras 21 and 22 therein).” [para 30] vii. It is apposite to advert to paragraph-41 in the nature of the contentions raised in this case.

To quote:

> “41. It is also important to remember that the Code is not meant to be a debt recovery mechanism (see para 28 of Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]). 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 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 [Ram Krishna Dalmia v. S.R. Tendolkar, 1959 SCR 279 :

AIR 1958 SC 538] , V.C. Shukla [V.C. Shukla v. State (Delhi Admn.), 1980 Supp SCC 249 : 1980 SCC (Cri) 849] , Shri Ambica Mills Ltd. [State of Gujarat v. Shri Ambica Mills Ltd., (1974) 4 SCC 656 : 1974 SCC (L&S) 381] , Venkateshwara Theatre [Venkateshwara Theatre v. State of A.P., (1993) 3 SCC 677] and Mardia Chemicals [Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311].” [para 41] viii. On the possibility of the Code being misused by a single allottee, we may notice the following:

“51. 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." ix. This Court also held that the erstwhile Management is free to offer a resolution plan in the event of an Application under Section 7, being admitted in favour of an allottee, subject, no doubt, to Section 29 (A) of the Code, which may be accepted.

160. It is clear that impugned provisos do not set at nought the ruling of this Court in Pioneer (supra). In a challenge by real estate developers upholding the provisions in the manner done including the explanation in Section 5 (8)(f) and allaying the apprehension about abuse by individual allotees cannot detract from the law giver amending the very law on its understanding of the working of the Code at the instance of certain groups of applicants and impact it produces on the economy and the frustration of the sublime goals of the law.

INFORMATION ASYMMETRY

161. The contention on behalf of the petitioner's both in regard to the debenture holders and security holders as also the allottees is that the provisos are unworkable. This is for the reason that information relating to allottees in respect of real estate projects and the debenture holders and security holders in regard to the first proviso is not available. In regard to shareholders with respect to Section 399 of the Companies Act, 1956 and section 244 of the Companies Act 2013, it is pointed out that the threshold requirements can be fulfilled having regard to the documented information regarding the shareholding available in law. This is not the position it is pointed out in regard to the categories covered by provisos one and two. This renders the provisions manifestly arbitrary.

162. Per contra, the stand of the union is as follows. As far as allottees in a real estate project is concerned, there is information available under the provisions of Real Estate Regulation Act. Firstly, it is pointed out that the said act contemplates an association of allottees. The association plays an important role. The promoter has to take a lead in the formation of the Association. The allottees are also obliged to take interest in the formation of the Association. Once the association is formed, the law giver contemplates naturally that information relating to allotment would become available. The provisions of the Act, which we have referred to earlier, are emphasised. Secondly, it is pointed out that under Section 11 of the Act as also the rules the promoter is bound to open a webpage and post information relating to allotments. This is to be updated. Therefore, there is no merit in the contention. Similar submissions are made in regard to debenture holders and security holders. It is submitted that information is available in terms of section 88 of the Companies Act, 2013. It is open to any of the security holders or debenture holders to inspect the registers and ascertain about security holders and debenture holders.

163. As far as allottees are concerned in regard to apartments and plots, Section 11(1)(b) of the RERA makes it mandatory for the promoter to make available information regarding the bookings. We have conflated bookings with allotments. We cannot proceed on the basis of the contention of the petitioners that the impugned provisos are unworkable and arbitrary on the basis that the court

must take notice of the 'reality' which is that the promoters do not make available information as required of them. The burden it is well settled to prove all facts to successfully challenge the statute is always on the petitioner. There cannot be a priori reasoning, and there is no burden on the state. If there is defiance of the law by promoters, the allottees are not helpless. They can always seek proper redress in the appropriate forum. No doubt, we also would observe that it becomes the duty of all the authorities to ensure that the promoters will stringently abide by their duties under the act. Section 11(1)(b) of the RERA speaks about information being made available regarding bookings which can be understood as the 'allotments'. The word 'allottee' as defined in Section 2(d) also takes in a person who subsequently acquires the allotment through sale, transfer or otherwise. In Section 11(1)(b) there is reference to bookings. If the information is to be limited to the original booking then the information about assignment just mentioned may not be made available. In this regard we may notice the Haryana Real Estate Regulatory Authority, Gurugram (Quarterly Progress Report) Regulations 2018. Regulation 4 provides inter alia that the promoter shall upload on the webpage which he has to create for the project within 15 days from the expiry of each quarter, namely, the list of number and types of apartments/plots booked. Our attention has also been drawn to the format for Quarterly Progress Report to be submitted under Haryana Regulations. A perusal of the report would show that the promoter is obliged to submit the names of the allottees. Obviously, if there is change in the allotment the changed name should be reflected in the Report. This must undoubtedly be ensured by the authorities stringently. We also find merit in the contention of the Union that the Association of allottees has to be formed under the mandate of the law it is expected to play an important role. Information will certainly be forthcoming in regard to allotments upon the allottees becoming members of the Association as required. We cannot ignore the role of the association in the matter of becoming the transferee of the common areas, being clothed with the right of first refusal within the meaning of section 7 of the Act and also the right to complain otherwise under the Act. This aspect of the association of allottees is not a matter of mere trifle. The allottees cannot truly possess and enjoy their properties be it an apartment or building without their having right of common areas. The promoter is bound under Section 17 to transfer title to the common areas to the association. Section 19(9) of RERA makes it a duty on the part of the allottee to participate towards the formation of the association or cooperative society or the federation of the same. The possession of the common areas is also to be handed over to the association of the allottees. The law giver has therefore created a mechanism, namely, the association of allottees through which the allottees are expected to gather information about the status of the allotments including the names and addresses of the allottees. We cannot proceed on the basis in a case which involves a challenge to a statute that the information to be gathered under the statute will not be available on the basis that the statute will not be worked as contemplated by the law giver. Hence, we reject the contentions of the allottees.

164. In regard to the debenture holders and security holders also we would see no merit in the contentions. There is a statutory mechanism, which is comprised in the provisions of the Companies act 2013, namely Section (88). Section 88 (1) reads as follows:

> "88. Register of members, etc (1) Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely:—

(a) register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;

(b) register of debenture-holders; and

(c) register of any other security holders.

165. Violation of Section 88 (1) is made punishable under Section 88 (3).

166. There is no case established that the version of the Union about availability of information contained in the registers which can be perused is not correct. Again, the burden is on the petitioners and they have not discharged their burden.

THE FIRST AND SECOND PROVISOS CLASSIFICATION DOWN MEMORY LANE: ARTICLE 14 AND REASONABLE CLASSIFICATION

167. Both sides have placed reliance on a large number of decisions in relation to reasonable classification under Article 14 of the Constitution. Even in the first decade of the Republic, this Court has, in a large number of cases, settled the principles in regard to what constitutes hostile discrimination and what is reasonable classification. Since, we would be in the region of platitude, if we were to chronicle the principles laid down in each of those cases, we think it suffices to refer to some of the decisions of this Court alone.

168. In Ameerunnissa Begum (supra), which involved the challenge to law made by the Nizam as Raj Pramukh of the former State of Hyderabad, we need notice the following:

> "11. The nature and scope of the guarantee that is implied in the equal protection clause of the Constitution have been explained and discussed in more than one decision of this court and do not require repetition. It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particulars objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable arbitrary; that it does not rest on any rational basis having regard to the objects which the legislature has in view."

169. In Nagpur Improvement Trust (supra), the petitioner before the High Court alleged discriminatory proceedings for acquiring his land under the Improvement Trust Act instead of the Land Acquisition Act. This Court while dismissing the appeal and affirming the view of the High Court that there was hostile discrimination proceeded to lay down as follows:

"26. It is now well-settled that the State can make a reasonable classification for the purpose of legislation. It is equally well-settled that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question.

In this connection it must be borne in mind that the object itself should be lawful. The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

xxx xxx xxx xxx

28. It would not be disputed that different principles of compensation cannot be formulated for lands acquired on the basis that the owner is old or young, healthy or ill, tall or short, or whether the owner has inherited the property or built it with his own efforts, or whether the owner is politician or an advocate. Why is this sort of classification not sustainable? Because the object being to compulsorily acquire for a public purpose, the object is equally achieved whether the land belongs to one type of owner or another type.

29. Can classification be made on the basis of the public purpose for the purpose of compensation for which land is acquired? In other words can the Legislature lay down different principles of compensation for lands acquired say for a hospital or a school or a Government building? Can the Legislature say that for a hospital land will be acquired at 50% of the market value, for a school at 60% of the value and for a Government building at 70% of the market value? All three objects are public purposes and as far as the owner is concerned it does not matter to him whether it is one public purpose or the other. Article 14 confers an individual right and in order to justify a classification there should be something which justifies a different treatment to this individual right. It seems to us that ordinarily a classification based on the public purpose is not permissible under Article 14 for the purpose of determining compensation. The position is different when the owner of the land himself is the recipient of benefits from an improvement scheme, and the benefit to him is taken into consideration in fixing compensation. Can classification be made on the basis of the authority acquiring the land? In other words can different principles of compensation be laid if the land is acquired for or by an Improvement Trust or Municipal Corporation or the Government? It seems to us that the answer is in the negative because as far as the owner is concerned it does not matter to him whether the land is acquired by one authority or the other."

170. It is also correct that this decision has come to be relied upon by this Court recently in Union of India vs. Tarsem Singh54.

171. What is emphasized before us by the petitioners is the principle that the object itself cannot be discriminate. It is pointed out that the object in the case of impugned provisos between different sections of financial creditors is such discrimination. Further the corporate debtors are discriminated again in that builders are accorded special treatment qua other corporate debtors.

172. In Triloki Nath Khosa(supra), this Court was called upon to pronounce on subordinate legislation which according to writ petitioners denied them the guarantee of Article 14. This Court held, inter-alia, as follows:

> "18. This submission is erroneous in its formulation of a legal proposition governing onus of proof and it is unjustified in the charge that the record discloses no evidence to show the necessity of the new Rule. There is always a presumption in favour of the constitutionality of an enactment and the 54 (2019) 9 SCC 304 burden upon him who attacks it to show that there has been a clear transgression of the constitutional principles. [Ram Krishan Dalmia v. Justice S. R. Tendolkar AIR 1958 SC 538: 1959 SCR 279, 297(b):
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> 1959 SCJ 147] A rule cannot be struck down as discriminatory on any a priori reasoning. "That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the Rules offend Act. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration." The burden thus is on the respondents to set out facts necessary to sustain the plea of discrimination and to adduce "cogent and convincing evidence" to prove those facts for "there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification". [State of U. P. v. Kartar SinghAIR 1964 SC 1135 : (1964) 6 SCR 679, 687 : (1964) 2 SCJ 666.] In G.D. Kelkar v. Chief Controller of Imports and Exports [AIR 1967 SC 839 : (1967) 2 SCR 29, 34 : (1967) 2 SCJ 182] Subba Rao, C.J., speaking for the Court has cited three other decisions of the Court in support of the proposition that "unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show by pleading the necessary material before the Court that the said classification is unreasonable and violative of Article 16 of the Constitution".

19.Thus, it is no part of the appellants' burden to justify the classification or to establish its constitutionality.

Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis.

31.Classification, however, is fraught with the danger that it may produce artificial inequalities and therefore, the right to classify is hedged in with salient restraints; or else, the guarantee of equality will be submerged in class legislation masquerading as laws meant to govern well marked classes characterized by different and distinct attainments. Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the

group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

32. Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification, for were such an inquiry permisible it would be open to the Courts to substitute their own judgment for that of the legislature or the Rule-making authority on the need to classify or the desirability of achieving a particular object." (Emphasis supplied)

173. Justice Krishna Iyer in his concurring judgement laid down inter-alia as follows:

> "Mini-classifications based on micro- distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality."

174. The case in Murthy Match Works (supra), involved a challenge to the levy of Excise duty on match box directed against medium sized manufacturers and it was impugned as being discriminatory. This Court's conclusions are apposite and are as follows:

> "There can be hostile discrimination while maintaining façade of equality.
>
> 13. Right at the threshold we must warn ourselves of the limitations of judicial power in this jurisdiction. Mr Justice Stone of the Supreme Court of the United States has delineated these limitations in United States v. Butler [(1936) 297 US 1: Tresolini and Shapiro: American Constitutional Law, 3rd Edn.] thus:
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> "The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint for the removal of unwise laws from the statute books appeal lies not to the Courts but to the ballot and to the processes of democratic Government."
>
> 14. In short, unconstitutionality and not unwisdom of a legislation is the narrow area of judicial review. In the present case unconstitutionality is alleged as springing from lugging together two dissimilar categories of match manufacturers into one compartment for like treatment.
>
> 15. Certain principles which bear upon classification may be mentioned here. It is true that a State may classify persons and objects for the purpose of legislation and pass laws for the purpose of obtaining revenue or other objects.

> Every differentiation is not a discrimination. But classification can be sustained only it is founded on pertinent and real differences as distinguished from irrelevant and artificial ones. The constitutional standard by which the sufficiency of the differentia which form a valid basis for classification may be measured, has been repeatedly stated by the Courts. If it rests on a difference which bears a fair and just relation to the object for which it is proposed, it is constitutional. To put it differently, the means must have nexus with the ends.

Even so, a large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the Court will be reluctant and perhaps ill-equipped to investigate. In this imperfect world perfection even in grouping is an ambition hardly ever accomplished. In this context, we have to remember the relationship between the legislative and judicial departments of Government in the determination of the validity of classification. Of course, in the last analysis Courts possess the power to pronounce on the constitutionality of the acts of the other branches whether a classification is based upon substantial differences or is arbitrary, fanciful and consequently illegal. At the same time, the question of classification is primarily for legislative judgment and ordinarily does not become a judicial question. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the Judicature cannot rush in where even the Legislature warily treads. All these operational restraints on judicial power must weigh more emphatically where the subject is taxation.

18. Another proposition which is equally settled is that merely because there is room for classification it does not follow that legislation without classification is always unconstitutional. The Court cannot strike down a law because it has not made the classification which commends to the Court as proper. Nor can the legislative power be said to have been unconstitutionally exercised because within the class a sub-classification was reasonable but has not been made." (Emphasis supplied)

175. In State of Gujarat and Another v. Shree Ambica Mills Ltd.55, this Court has laid down certain principles relating to under inclusive and over inclusive classification. This is, no doubt, apart from holding that a law which contravenes fundamental rights of the citizens may continue to be valid as regards non-citizens. As regards classification and the vice of under inclusive and over inclusive classification we may notice the following statement of the law:

> "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 (1974) 4 SCC 656 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 some day bring about his downfall employed such a classification.

58. The piecemeal approach to a general problem permitted by under- inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt.

Administrative expedients must be forged and tested. Legislators, recognising these factors, may wish to proceed cautiously, and courts must allow them to do so. [See Joseph Tussman and Jacobusten Brook The Equal Protection of the Law, 37 California Rev 341]

62. In short, the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think (see Tigner v. Texas). [310 US 141]

64. Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc. The prominence given to the equal protection clause in many modern opinions and decisions in America all show that the Court feels less constrained to give judicial deference to legislative judgment in the field of human and civil rights than in that of economic regulation and that it is making a vigorous use of the equal protection clause to strike down legislative action in the area of fundamental human rights. [See “Developments Equal Protection”, 32 Harv, Law Rev 1065, 1127]

65. The question whether, under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depend upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasising the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities.

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]." (Emphasis supplied)

176. In the decision of this Court in In Re The Special Courts Bill, 197856, a bench of seven learned judges of this Court laid down certain propositions. We need only allude to those propositions which are apposite for deciding the fate of these cases before us:

> "(1) The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part, which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favouritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances.
>
> (2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and 56 (1979) 1 SCC 380 classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same. (5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.

xxx xxx xxx (11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality.

(12) Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

(13) A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination."

177. In Ajoy Kumar Banerjee and ors. v. Union of India and ors.57, this Court, inter-alia, held, while dealing with the challenge to a scheme, as amended by employees of Insurance Companies, on the grounds that it violated the fundamental rights of Article 14, 19 (1)g and 31 of the Constitution. This Court held inter-alia as follows:

> "Whether the same results or better results could have been achieved and better basis of differentiation evolved is within the domain of legislature and must be left to the wisdom of the legislature."

178. In the Constitution Bench decision of this Court in Subramanian Swami vs. Director, CBI and ors. the issue was the constitutional validity of Section 6A of the Delhi Special Police Establishment Act, 1946. Section 6A declared that the CBI shall not conduct any inquiry or investigation into any offence alleged to 57(1984) 3 SCC 127 (2014) 8 SCC 682 have been committed under the Prevention of Corruption Act 1988 except with the previous approval of the Central Government where the allegation was in relation to employees of the Central government of the level of Joint Secretary and above and also officers appointed by the Central Government in public sector corporations controlled by the Central Government. It is dealing with this challenge that this Court went on to hold after refering to the earlier case law including the judgment of this Court in the Special Courts case (supra) that it is well settled that the Courts do not substitute their views as to what the policy is. It held as follows:

> "49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is." (Emphasised)

179. It was found that the classification made in Section 6A on the basis of status in Central Government service is not permissible under Article 14 of the Constitution. The Court posed the question as to whether there is sound differentiation between corrupt public servant based on their status. As noted, the provision was found to be unconstitutional.

180. In the context of the argument that a sub-class cannot be created within a class, the following decisions of this Court were relied upon by the Union to contend that it depends on the availability or absence of a rational basis.

181. In 1960 1 SCR 39 / AIR 1959 SC 1124, the petitioners challenged the constitutionality of the Sugar Export Promotion Act, 1958 apart from certain orders passed thereunder. The contention taken by the petitioners was that since the declared object of the Act was to earn foreign exchange, compelling only sugar manufacturers which manufactured by vacuum pan process to export sugar was discriminatory. They also pointed out that manufactures of commodities other than sugar were not compelled to export in the same manner and there was further discrimination. It was while repelling this contention that the Court laid down as follows:

> "21. In our opinion, this argument is without substance. The power of Parliament to make laws in relation to foreign exchange is manifest. Entry No. 36 of the Union List specifically confers jurisdiction on Parliament to legislate in relation to foreign exchange. That Entry, if interpreted widely, would embrace within itself not only laws relating to the control of foreign exchange but also to its acquisition to better the economic stability of the country. The need for foreign exchange to finance the various development schemes was, very properly, not disputed. It is, thus, plain that the object of the Act is in the public interest. If we are to exist as a progressive nation, it is very necessary that we carve out a place for ourselves in the International market. The beginning has to be made, and many a time, it is at a great loss. That the Central Government has selected the sugar industry for an export programme does not mean that it cannot make a classification of the commodities, bearing in mind which commodity will have an easy market abroad for the purpose of earning foreign exchange. During the Suez crisis, sugar was exported in large quantities from this country, and earned 12.4 crores as foreign exchange. There is nothing on the record to show that export of other commodities was not also undertaken, though it was pointed out in arguments that manganese ore was also exported in a similar manner to earn foreign exchange. It is quite obvious that the Central Government cannot order the export of all and sundry manufactured commodities from the country, without being assured of a market in foreign countries. Necessarily, the Government can only embark upon an export policy in relation to those products, for which there is an easy and readily available market abroad. For this reason also, sugar produced by the vacuum pan process may have been selected, because such sugar is perhaps in demand abroad and not sugar produced by any other process. It must be realised that goods manufactured in our country have to stand heavy competition from goods produced abroad, and even this export can only be made at great sacrifice, and is made only to earn foreign exchange, which would not, otherwise, be available.

182. In 1976 2 SCC 310, this Court was dealing with the challenge to the judgment of the High Court by which it had upheld the challenge by the respondent to a rule which granted power to the appellant State to grant further exemption to the members of scheduled castes and scheduled tribes to pass the departmental test necessary for being considered for promotion. The learned ASG drew support from the following statement in the judgement by Justice K.K. Mathew:

"83. A classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law. In other words, the classification must be founded on some reasonable

ground which distinguishes persons who are grouped together and the ground of distinction must have rational relation to the object sought to be achieved by the rule or even the rules in question. It is a mistake to assume a priori that there can be no classification within a class, say, the lower division clerks. If there are intelligible differentia which separates a group within that class from the rest and that differentia have nexus with the object of classification, I see no objection to a further classification within the class. It is no doubt a paradox that though in one sense classification brings about inequality, it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons. In this view, I have no doubt that the principle laid down in All India Station Masters and Assistant Station Masters Association v. General Manager, Central Railway [(1960) 2 SCR 311 :

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AIR     1960    SC    384.]      ; S.G.
            Jaisinghani v. Union                of
            India and State of J&K. v. Triloki
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Nath Khosa [(1974) 1 SCR 771 : (1974) 1 SCC 19 : 1974 SCC (L&S) 49.] has no application here."

183. In Indira Sawney v. Union of India59, this Court held, "This merely sees goes to show that even among backward classes, there can be sub-classification on a reasonable basis."

184. In State of West Bengal and ors. v. Rash Bihari Sarkar and ors.60, exemption was granted under Bengal Amusements Act, 1922 as amended in 1981 from Entertainment Tax for theatre groups which were bonafide and which performed not for monetary gain which tax exemption was not given to theatre groups which performed for monetary gains. Both were theatre groups. Noticing however, the distinction between the theatre groups, this Court went on to hold as follows:

"4. Equality means equality in similar circumstances between same class of persons for same purpose and objective. It cannot operate amongst unequals. Only likes can be treated alike. But even amongst likes the legislature or executive may classify on distinction which are real. A classification amongst groups 59 1992 Supp 3 SCC 217 60 (1993) 1 SCC 479 performing shows for monetary gains and cultural activities cannot be said to be arbitrary. May be that both the groups carry out the legislative objective of promoting social and educational activities and, therefore, they are likes but the distinction between the two on monetary gains and otherwise is real and intelligible. So long the classification is reasonable it cannot be struck down as arbitrary.

Likes can be treated differently for good and valid reasons. The State in treating the group performing theatrical shows for advancement of social and educational purpose, differently, on basis of profit-

making from those formed exclusively for cultural activities cannot be said to have acted in violation of Article

14."

185. In State of Kerala v. Aravind Ramakant Modawdakar and ors.61, reduction in taxes was given to inter-state stage carriage operators which benefit was not extended to intra-state stage carriage operators. The Court though noted, that both the inter-state operators and intra-state operators were, in a generic sense, state carriage operators, there was a distinction between the 1999 7 SCC 400 two. It is apposite to refer to what this Court laid down in para 10 of the judgement.

"10.The validity of Section 22 of the Act has not been questioned which section empowers the State in public interest to grant exemptions in such a manner as it deems fit to a class of people. Once we hold that the contract carriages covered by intra- State permits and inter-State permits can form two distinct and separate classes within the larger class of contract carriages, we find it difficult to hold that this classification is either unreasonable or it lacks a nexus to the object or is violative of Article

14."

186. In Sansar Chand Atri v. State of Punjab and another62, relied upon by the petitioners, for contending that Article 14 frowns upon creation of a sub-class within a class, the case turned on its facts. What is significant, however, is the reasoning. The question, in short, was whether the appellant was an ex-serviceman or not, on the basis of the provisions of the Punjab Recruitment of Ex-Servicemen Rules, 1982, 62 (2002) 4 SCC 154 as amended by Notification dated 22.09.1992. The contention of the respondent was that since the appellant was discharged from the army on his own request, he could not be treated as an ex-serviceman. After considering the Rules, as amended and on the facts, it was held as follows:

> "8. ...If the contention raised on behalf of the Service Commission and the State Government that since the appellant has been discharged from the army at his own request, he cannot be treated as an ex- serviceman, is accepted then it will create a class within a class without rational basis and, therefore, becomes arbitrary and discriminatory. It will also defeat the purpose for which the provision for reservation has been made."
>
> 187. We have already adverted to the decision of this Court in relation to the taboo, which is alleged by the petitioners against creating a class within a class.
>
> 188. We are of the view that the principles, which governed the legitimacy of the sub-class within a class, is based, essentially, on the very principles, which are discernible in regard to reasonable classification under Article 14. It is clear that the law does not interdict the creation of a class within a class absolutely. Should there be a rational basis for creating a sub-class within a class, then, it is not impermissible. This is the inevitable result of an analysis of the judgments relied upon by the petitioner themselves, viz., Sansar Chand Atri v. State of Punjab and another (supra). The decisions, which have been relied upon by the Union and which we have adverted to, clearly indicate that a class within a sub-class, is indeed not antithetical to the guarantee of equality under Article 14.

189. Now, let us apply the principles, which are indisputable to the facts before us. Allottees are, indeed, financial creditors. They do possess certain characteristics, however, which appear to have appealed to the Legislature as setting them apart from the generality of financial creditors. These features, which set them apart, have been clearly indicated in the stand of the Union. They are:

i. Numerosity;

ii. Heterogeneity;

iii. The individuality in decision making.

190. Section 21(6A) and Section 25A, constitutionality of which has been upheld by this Court in Pioneer (supra), would go to show that the debenture holders and security holders would be covered by 21(6A)(a). As far as the allottees of a real estate project are concerned, they would be governed by 21(6A)(b). Both these categories, have a common feature. The distinguishing hallmark which separates them from the generality of the financial creditor is numerosity. In fact this aspect has been noticed by this Court in Swiss Robbins (supra)(para 49). By the sheer numbers of these creditors, they have come in for special treatment under Section 21(6A). Another feature, which is to be noticed in this regard in heterogeneity.

Lastly, there is also the aspect of individualized decision-making. Authorized representatives are contemplated in regard to these categories of financial creditors under Section 21(6A). The manner in which these authorized representatives are to vote is also provided in Section 25A. There is another aspect also to be noticed. Section 7 always contemplated the possibility of a joint application. The impugned amendments incorporating the provisos 1 and 2 only builds upon the edifice erected already by way of Section 21(6A) and 25A based on the experience of the Legislature as also the Report of the Expert Body. This certainly is a highly important input which persuades us further that the classification in regard to these classes of financial creditors does not represent forbidden classification.

191. Section 25A of Code, reads as follows:

"25A. Rights and duties of authorised representative 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.
>
> (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).] (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.]"

192. We will expatiate on these aspects. In the case of the allottees of a real estate project, it is the approach of the Legislature that in a real estate project there would be large number of allottees. There can be hundreds or even thousands of allottees in a project. If a single allottee, as a financial creditor, is allowed to move an application under Section 7, the interests of all the other allottees may be put in peril. This is for the reason that as stakeholders in the real estate project, having invested money and time and looking forward to obtaining possession of the flat or apartment and faced with the same state of affairs as the allottee, who moves the application under Section 7 of the Code, the other allottees may have a different take of the whole scenario. Some of them may approach the Authority under the RERA. Others may, instead, resort to the Fora under the Consumer Protection Act, though, the remedy of a civil suit is, no doubt, not ruled out. Ordinarily, the allottee would have the remedies available under RERA or the Consumer Protection Act, as the more effective option. In such circumstances, if the Legislature, taking into consideration, the sheer numbers of a group of creditors, viz., the allottees of real estate projects, finds this to be an intelligible differentia, which distinguishes the allottees from the other financial creditors, who are

not found to possess the characteristics of numerosity, then, it is not for this Court to sit in judgment over the wisdom of such a measure.

193. The enquiry, we realize, must not end with finding that there is an intelligible differentia, to be found in the numerosity, heterogeneity and individuality in decision-making of the allottees. The law further requires that the differentia must have bear a rational nexus with the object of the law.

194. The object of the law is clear. A radical departure was contemplated from the erstwhile regime, which was essentially contained in The Sick Industrial Companies (Special Provisions) Act, 1985, and which manifested a deep malaise, which impacted the economy itself. To put it shortly, the procedures involved under the Act, simply meant procrastination in matters, where speed and dynamic decisions were the crying need of the hour. The value of the assets of the Company in distress, was wasted away both by the inexorable and swift passage of time and tardy rate at which the forums responded to the problem of financial distress. The Code was an imperative need for the nation to try and catch up with the rest of the world, be it in the matter of ease of doing business, elevating the rate of recovery of loans, maximization of the assets of ailing concerns and also, the balancing the interests of all stakeholders. The Code purports to achieve the object of maximization of the assets of corporate bodies, inter alia, which have slipped into insolvency. Present a default, which, no doubt, is not barred by time (subject to the power of the Authority under Section 5 of the Limitation Act), the Insolvency Resolution Process can be triggered. It falls into two stages. In the first stage or the calm period, every attempt is contemplated to rescue the corporate debtor from falling into liquidation. No doubt the moratorium under section 14 is inevitable. The most significant feature of the Code is the seemingly inexorable time limit, which is fixed under Section 12. On the application being admitted under Section 7(5), an Interim Resolution Professional makes his appearance. In him, vests the powers to manage the affairs of the corporate debtor. He may be replaced by a Resolution Professional or he may be appointed as a Resolution Professional. The most striking feature of the Code is the constitution of the Committee of Creditors and the role, which it plays. In short, the show is run by the Resolution Professional, subject to the control of the Committee of Creditors. The Resolution of Insolvency is essentially sought through the instrument of a Resolution Plan to be submitted by a Resolution Applicant. Various restrictions are cast, in regard to a Resolution Applicant, through the device of Section 29A of the Code. A Resolution Plan is intended to resuscitate an ailing corporate debtor and keep it going as a going concern. The importance of rescuing ailing businesses in the form of infusing new life in such concerns, cannot be understated. Its significance lies in various directions. There would be various categories of creditors, of which, the legislative choice appears to show some degree of preference for the financial creditors, particularly in the form of banks and financial institutions. One of the chief goals of the Code is to prevent the loss of the value of capital. If the recovery of the loan is effected at the earliest, it translates into the availability of the recovered capital for being lent to other entrepreneurs, and this is an aspect, which goes to the root of the matter. With every passing hour, not unnaturally, depreciation will claim its victim in the form of diminution of value of the assets. Should insolvency pass into the stage of liquidation, the loss is not only of the concerned businesses, but it also would represent a loss for the Nation. This is, undoubtedly, apart from the impairment of the interests of all stakeholders. The stakeholders would include the financial creditors and the operational creditors, as well. Employees of the failed business, would take a direct hit. Therefore, the Code

accords the highest importance to speed in the matter of undergoing the process of insolvency.

195. Section 12 contemplates, in short, a maximum period of 330 days from the date of the insolvency commencement date, which we have already explained. Though, the word 'mandatorily' has been struck down by this Court in the decision in Committee of Creditors of Essar Steel India Limited(supra), this Court has only balanced the interest of all concerned, by permitting an enlargement of the time, only in those cases, where the delay occurs not on account of the fault of the players concerned and it is based on the principle actus curiae nemiem gravabit, which means that the act of Court shall prejudice no man. This Court has not undermined the timeline fixed by the Legislature and, in fact, it has underlined the importance of conforming to the time limit. Speed, indeed, continues to be of the essence of the Code.

196. The speed, with which the processes can be conducted and completed, is based on the volume of the litigation. The Adjudicating Authorities and the Appellate Bodies, viz., N.C.L.A.T., are authorities under other enactments, as well. They are hard-pressed for time. The matters, which are covered by the Code, may present convoluted facts. The issues may bristle with complications, both in points of law and also facts. If, out of a large body of financial creditors belonging to a sub-group, as for instance allottees of a real estate project, were to be given the freedom to activise the Code, then, the possibility of multiple individual actions, is a spectre, which the Legislature, must be presumed to be aware of. In other words, the Legislature became alive to the peril of entire object of the Code, being derailed by permitting the individual players crowding the docket of the Authorities under the Code, and resultantly, reviving the very state of affairs, which compelled the Legislature to script a new dawn in this area of law. Instead, having regard to the numerosity, the Legislature has thought it fit to adopt a balanced approach by not taking the allottee out of the fold of the financial creditors altogether. The allottee continues to be a financial creditor. All that is envisaged is the legislative value judgment that a critical mass is indispensable for allottees to be present before the Code, can be activised. The purport of the critical mass of applicants would ensure that a reasonable number of persons similarly circumstanced, form the view that despite the remedies available under the RERA or the Consumer Protection Act or a civil suit, the invoking of the Code is the only way out, in a particular case. As held by this Court, in Pioneer (supra), after having analyzed, what awaits an allottee, moving an application under Section 7 of the Code, as contrasted with what he could get under RERA or what we note under the Consumer Protection Act and finding that the Code would be ordinarily activised by an allottee, when he feels that the solution lies in the remedy provided under the Code, viz., replacing the management of the real estate project with a new management, this Court took notice of the fact that should Insolvency Resolution reach a stage of liquidation, being unsecured creditors, the allottees would not even get the amount, which he has invested. In fact, after insertion of the explanation to section 33 (2) at any time after a committee of creditors is constituted such an eventuality is possible. In short, numerosity of the allottees of a real estate project, necessitated, in the view of the Legislature, as gleaned from the provisions, to condition an absolute right, which does have a clear rational nexus with the object sought to be achieved. We have noticed, one of the objects is the balancing of the interests of all stakeholders. By imposing a threshold limit of either hundred allottees or if the number of allottees going by the criteria of one-tenth of the allottees is, even less than hundred, then, the said number of allottees must agree to invoke the Code. This is again, based on the intelligible differentia of heterogeneity. By

heterogeneity, is meant, differences between a seemingly homogenous group. All allottees of a real estate project form a class. All of them have stakes in the prompt and effective completion of the real estate project. We must proceed on the basis that what the allottee would legitimately look forward is the completion of the project and the handing over of the possession of the flat or apartment in due time. The achievement of this object, which must be attributed reasonably to each and every allottee, as his goal, may be possible in the views of different allottees differently. As noted, there is a plurality of remedies, which the law provides. More importantly, the outcome of activising the Code, is almost like an uncertain wager. The outcome of invoking the Code by individual allottees would be apart from clogging the dockets of the Adjudicating Authorities with even more voluminous files leading to greater delay, that at the instance of such individual allottees, what would be perceived as an avoidable calamity, is perpetuated. In other words, while a vast majority of allottees may see reason in either giving time and reposing faith in existing management of real estate project or successfully invoking the other remedies available to them, an individual allottee, out of the heterogenous group, would throw the spanner in the works and bring the entire real estate project itself to a possible doom. Under the newly added Explanation to Section 33(2), at any time, after the constitution of the Committee of Creditors, there can be liquidation.

197. The third distinguishing feature, which has been projected by the Union, is the difference in individuality in decision-making process, attributed to the allottees. This means that unlike a bank or a financial institution, where the decision-making process is more institutionalized, an individual allottee, left free to file an application under Section 7, would exhibit a high-level of subjectivity. As the learned ASG points out, and which is also part of the argument, based on both, numerosity and heterogeneity, what Parliament has instated upon is, the presence of the commendable value of exhibiting concern for the other allottees, who may think completely differently about the wisdom of invoking the Code. Here again, this distinguishing feature, which becomes an intelligible differentia, in the view of the Legislature, and which cannot be shown to be demonstrably a mere pretense, it bears a rational nexus with the objects of the Code, which we have already delineated. To recapitulate, the individual allottee, with a high-level of subjectivity in decision-making, may take a plunge at invoking the Code, without having a more global view of the consequences, which will follow. Any such attempt would only be dubbed as frivolous. This attempt by individual allottees would have the following consequences:

i. It would crowd an already heavy docket;

ii. It would consequently slow down the processes under the Code, even with respect to matters, which may be more genuine and require greater and more timely attention;

iii. It will defeat the object of the balancing the interests of all stakeholders. We must indicate that the aspect about delaying of the processes, when allottees are pulling at each other, having conflicting views about the appropriateness of the Code being invoked, is the clear prospect of allottees coming into collision in the Fora by way of opposing the application, would be an undeniable reality. This is despite the fact that it could always be argued by the individual allottee that what the law mandates in

> Section 4, is only the proving of the fact of default in a sum of Rs.1 crore, as thing stand. It is also the argument of the petitioners that since what is relevant for the other financial creditors, is proving the default of Rs.1 crore, the insistence on a threshold for allottees alone, makes it discriminatory. Allottees being financial creditors, must be assumed to know what is in their best interest. What is given through one hand, cannot be taken away by another, is another allied submission. It is also contended that there is no empirical evidence of there being misused, after the judgment of this Court in Pioneer (supra), upholding the rights of the allottees, including debunking the argument that a lone ranger will end up abusing the system;

198. This aspect, in fact, is countered by the learned ASG, by reeling out facts. Between 2016, when the Code was enacted and June, 2018, there were 241 applications by the allottees. In the aftermath of the amendment, i.e., from 06.06.2018, there was a sudden spurt of applications by allottees (2201 cases in a short span of about eighteen months). This is again sought to be contrasted by a mere 130 applications, which came to be filed from 29.12.2019, over a period of eight months till August, 2020. There is also the case for the Union that an Expert Body, viz., the Committee has recommended for the threshold. This recommendation was born out of experience of the pitfalls, which follow, allowing a completely free hand to individual allottees to move the application. We are not impressed by reference to the discordant notes struck, both by reason of the nature of jurisdiction we exercise as also the merit we see otherwise in the rationale behind the law.

199. We see considerable merit in the stand of the Union. This is not a case where there is no intelligible differentia. The law under scrutiny is an economic measure. As laid down by this Court, in dealing with the challenge on the anvil of Article 14, the Court will not adopt a doctrinaire approach. Representatives of the people are expected to operate on democratic principles. The presumption is that they are conscious of every fact, which would go to sustain the constitutionality of the law. A law cannot operate in a vacuum. In the concrete world, when the law is put into motion in practical experiences, bottlenecks that would flow from its application, are best envisaged by the Law Givers. Solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law. It is no part of a court's function to probe into what it considers to be more wise or a better way to deal with a problem. In economic matters, the wider latitude given to the Law Giver is based on sound principle and tested logic over time. In fact, though there is no rigid separation of powers in India, as it obtains in the United States, there is broadly separation of powers, which in fact, has been recognized as a basic feature of the Constitution (see His Holiness Kesavananda Bharti Sripadagalvaru v. State of Kerala and another63). In any case, the Court errs 63 (1973) 4 SCC 225 in the judicial veto of legislation, in a manner of speaking, it is usurping the power, which is earmarked to another organ of the State, viz., the Legislature. The large number of validating acts would produce undeniable proof of the same.

ALLOTTEES VS. OPERATIONAL CREDITORS

200. One of the contentions raised by petitioners is as regards the hostile discrimination between petitioner (allottees) and operational creditors. The advantages which, financial creditor have over operational creditors is referred to.

201. In regard to the advantages, which the financial creditors enjoyed over operational creditors, which constituted also differences between them, the following are highlighted, apart from the difference in procedure, by which, the operational creditor could stand ousted, if the corporate debtor could set up a plausible dispute:

> i. Firstly, it is pointed out that the financial creditor is on the Committee of Creditors and manages the affairs of the debtor with the Resolution Professional; The operational creditors have no such power.
>
> ii. Financial creditors decide who is to be the Resolution Professional;
>
> iii. The financial creditors approve or disapprove the resolution plan.
>
> iv. Almost, all, major decisions require the sanction of financial creditors.
>
> v. Financial debts enjoy priority over third party, operational claims under Section 53 in liquidation. It is despite all this, post the impugned amendment, a large number of financial creditors covered by the provisos are required to initiate a proceeding. It is palpably arbitrary.
>
> The financial creditor in the category of the allottees are now worse off.

202. As far as the argument relating to violation of Article 14 qua operational creditor is concerned, we are of the view that there is no merit in the same. Quite apart from the fact that under the code they are dealt with under different provisions and a different procedure is entailed thereunder, even the decisions of this Court relied on by the allottees have treated the financial creditor differently from the operational creditor.

203. In Innoventive Industries Limited v. ICICI Bank and another64, this Court elaborately analysed the scheme of the Code and the distinction between the financial creditors and the operational creditors. This Court noticed that in the case of application, under Section 8, by an operational creditor, the corporate debtor within ten days of the notice, issued under Section 8 can bring to the notice of the operational creditor, the existence of the dispute or a record of a proceeding in a court or before an Arbitrator. This exercise, successfully carried out by the corporate debtor, will enable it to get out of the purview of the Code. In case of a financial creditor, if the debt is due, that it is payable unless it is interdicted by some law or it has not become due, the default, contemplated under the Code, has occurred and the 64 (2018) 1 SCC 407 application, filed by the financial creditor, must be admitted and the matter proceeded with.

204. In Swiss Ribbons (supra) the classification in controversy was between operational and financial creditor. Apart from dealing with the policy behind the Code and the reasons which led to it, this Court inter alia held 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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> 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.

50. According to us, 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. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in the United Kingdom and in this country. Apart from the above, 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 creditors can be many as opposed to financial creditors, who lend finance for the set-up or working of business. 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 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.

51. Most importantly, 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 reorganisation 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 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.

xxx xxx xxx xxx

119. It will be seen that the reason for differentiating between financial debts, which are secured, and operational debts, which are unsecured, is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Insolvency Code. We have already seen that repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted. For these reasons, the challenge to Section 53 of the Code must also fail."

205. It must be remembered that the principles laid down came to be made in the context of challenge to the provisions of the Code pointing out violation of Article 14 insofar as the

classification between operational creditor and financial creditor was alleged to be contrary to Article 14.

206. In Pioneer (supra) the case and the decision is closer to the facts before us. The challenge was to the amendments to the Code including the explanation added to Section 5(8) to the Code. As we have noted the explanation purports to clarify that any loan raised from an allottee under the real estate project is to be deemed to be an amount having commercial effect of borrowing. Apart from the said provision, there were other provisions also called in question. This Court proceeded to find inter alia as follows:

> The amendment by way of insertion of explanation in 5(8)(f) was only clarificatory of the existing law. The allottees of flats and apartments were subsumed within the provisions of Section 5(8)(f). In other words, an allottee was a financial creditor. After a conspectus of the provisions the Code and the RERA, this Court also held that the RERA and the Code co-exist and in the event of the confrontation, the Code will hold sway. RERA was thus found to be not a special statute which will override the general statute namely the Code. Dealing with the challenge to the amendment to the Code on the ground that there is violation of Article 14 on the basis that the equals are being treated unequally and unequals are being treated equally this Court found it unacceptable. This Court found the amendment to be an economic measure. This Court also pointed out the perils associated with an allottee pursuing remedy under the Code in paragraph 41 and thereafter went on to hold as follows:
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> "42. 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 the 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.

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utilities under the Code, makes it easy for homebuyers/allottees to approach 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.

43. Shri Shyam Divan relying upon Nagpur Improvement Trust v. Vithal Rao [Nagpur Improvement Trust v. Vithal Rao, (1973) 1 SCC 500] SCC para 26 and Subramanian swamy v. CBI [Subramanian Swamy v. CBI, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 :

(2014) 3 SCC (L&S) 36] SCC paras 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, homebuyers/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 are within the larger class of financial creditors, there being no infraction of Article 14 on this score."

207. Thus, we notice the following aspects:

> In Swiss Robbins (supra) on the basis of the challenge involved to the legislation, this Court noted that a financial creditor can trigger the Code either by itself or jointly with other financial creditors when a default occurs. The procedure in regard to operational creditors is however different. At the stage prior to admission of the application, it is open to the corporate debtor to show that the debt is disputed in which event the application stands rejected. In paragraph-49, this Court took the view that the debenture holder and the persons with home loans may be numerous and therefore have been statutorily dealt with by the changes made in the Code. But as a general rule it was found that financial creditors which involved banks and financial institutions will be certainly smaller than the operational creditors. Further it was held that most financial creditors particularly Banks and financial institutions are secured creditors whereas most operational creditors are unsecured.
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> In para 50 of Swiss Ribbon this Court distinguished between secured and unsecured creditors and noted that a divide existed from the earliest of the Companies Acts both in U.K. and in India.

> Financial creditors generally lend on a term loan or for working capital. Operational creditors are creditors on account of supply of goods and services. The sums involved in the financial contracts are generally large sums in contrast with amounts involved in operational credit which are generally less. Repayment schedules are different. Other distinctions are noticed between the two. It is further found that even more importantly financial creditors are involved with the assessing of viability of the corporate debtor from the very beginning. This enables the financial creditor to indulge in restructuring of the loan. Preserving the corporate debtor as a going concern while securing the highest recovery for all creditors is the objective of the Code.
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> Financial creditors were therefore clearly different from operational creditors. There is obviously an intelligible differentia between the two which has the direct relation with the object to the object which is to be achieved by the Code.
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> This Court further noticed in the context of challenge to Section 53 of the Code which deals with the manner of distribution of assets of corporate debtor in liquidation proceedings, that there is difference in relative importance between financial debt which are secured and operational debts which are unsecured. The distinction was found in the relative importance of two types of debts when it comes to the objects sought to be achieved. This Court was of the view when repayment takes place in regard to financial creditors it leads to fresh infusion of capital into the economy which results in the money being available to be lent to other businessmen.

208. In Swiss Ribbons (supra), dealing with the challenge to the provisions based on Article 14 of the Constitution of India, this Court adopted the following reasoning. Financial creditors were essentially identified as being banks and other financial institutions. Banks and financial institutions, are generally secured creditors. The procedure adopted by these institutions, right from the time the loan is applied for, and it being processed, the largeness of the sums involved, the method of repayment, the re- arrangement of the repayment of the loan, the study conducted, in fact, before the loan is given the control, which the banks and the financial institutions retain over the debtor, and finally, the importance of the repayment to such institutions, for the economic stability and progress of the country, by way of the recovered amounts being infused a fresh capital for other entrepreneurs, was contrasted with the operational debtors, who were, in the first place, unsecured creditors, generally. Operational creditors are creditors to whom the corporate debtor owes money for having availed goods and services. The features which mark out the banks and financial institution were found in applicable to the operational creditors.

209. Coming to Pioneer (supra), this Court has recognized that allottees under a real estate project are unsecured creditors (See paragraph-61, wherein it is so found). Equally, it is noted in paragraph-43 as follows:

> "43. for example, fixed deposit holders, though financial creditors, would be like real estate allottees in that they are unsecured creditors."

210. It is further found that financial contracts in the case of these individuals, (allottees) need not involve large sums of money [See paragraph-43 of Pioneer (supra)].

211. It could be urged, therefore, that the real foundation on the basis of which, this Court justified the difference in procedure under Section 7 on the one hand and Sections 8 and 9 on the other hand between financial creditors and operational creditors, is that after conflating financial creditors with banks and financial institutions and noting them to be secured creditors, lending large sums of money, both of which features are not present in the case of an allottees under a real estate project as allottees remain unsecured creditors and also their contract need not involve large sums of money, they should, therefore, fall to be treated at least like the operational creditors with whom they bear the greater resemblance. What is complained of is before the impugned amendments, allottees being treated as part of the larger group of financial creditors, could invoke the provisions of Section 7 singly and without having to garner the support of any fellow traveller. The operational debtor could also, likewise, file such an application without having to search around for kindred souls. After the amendment, however, the advantageous position which was occupied by the allottee as a financial creditor, has been extinguished and the allottee is worse off than even an operational creditor. This is for the reason that a single operational creditor could all by himself, activise the Code whereas the allottee is left far behind. This amounts to treating the allottee with discrimination.

212. While it may be true that the allottee is not a secured creditor and he is not in the position of a bank or the financial institution, the contentions of the petitioners that there is hostile discrimination forbidden Article 14 is untenable. There cannot be any doubt that intrinsically a financial creditor and an operational creditor are distinct. An operational creditor is one to whom money is due on account of goods or services supplied to the debtor. The financial creditor on the other hand, is so described, on account of there being the element of borrowing. This distinction is indisputable. The other distinctions are articulated with clarity in paragraph-42 of the judgment of this Court in Pioneer (supra) which we have already adverted to. As noticed by this Court, what is unique to the real estate developer vis-a-vis operational debts is that the developer is the debtor as an allottee funds his own apartment by paying amounts in advance. On the other hand, in case of operational debt, the person who has supplied the goods and services, becomes the creditor and the corporate debtor is one who has availed such services. Another distinction noticed is that an operational creditor has no interest or stake in the corporate debtor. The allottee is, on the other hand, vitally concerned with the financial health of the corporate debtor. Should financial ruin occur, the real estate project will come to a nought. Should such an event take place also, the allottee would not be in a position to either claim or get compensation or even refund with interest. Thirdly, as again noticed by this Court, there is no consideration for the time value of money in the operational debt. This is not so in the case of an allottee. The non-availability of documentary evidence in respect of operational debts as against information available under the RERA qua real estate developers is yet another feature which was noticed in Pioneer (supra) dealing with the differences between an operational debtor and an allottee.

213. The operational debtor, is concerned with the payment of the amount due to it for the goods and services supplied. When an allottee invests money in a real estate project, his primary and

principal concern is that the project is completed and he gets possession of the apartment or the flat. The problem really arises as there are many stakeholders whose interests are affected. It cannot be in dispute that under the law, an allottee can seek remedies under the RERA. An allottee can also seek remedies under the Consumer Protection Act or even file a suit. No doubt, Section 71 of the RERA permits a person who has filed a complaint in respect of matters governed by Sections 12, 14, 18 and 19 of RERA to withdraw the complaint and file the same before the Adjudicating Officer under RERA. There are large number of cases where allottee seek refuge either under the RERA or under the Consumer Protection Act. An action under the Code by way of an application under Section 7 is an action in rem. The recovery of the amounts paid is not what is primarily contemplated under the Code. In paragraph-41 of judgment of this Court in Pioneer (supra), this Court has painted the rather dismal but realistic picture of the fruits of litigation launched under Section 7 by an allottee of a real estate project. This Court has gone on to hold that only such allottee who has completely lost faith in management would come under Section 7 in hope that some other developer will take over and complete the project. At the same time, this Court noticed that such an adventure would be in the teeth of an impending peril, that should things do not go as planned, corporate demise follows and the allottee would stand reduced to receiving whatever little may remain and found on the basis that he is a mere unsecured creditor in the order of priority prescribed under Section 53 of the Code. This Court has painted a more rosy picture for an allottee approaching under the RERA, as there is a great likelihood, it is noted that the project could be completed or the full amount of refund together with penalty is awarded. Thus, the vires of the impugned provisions must be judged without turning a blind eye to the distinction between the wisdom and the legislative value judgment behind the Statute being immune from judicial scrutiny on the one hand and a hostile discrimination falling foul of the mandate of equality under Article 14, being fatal to the Statute. In this case, while it may be true that the allottees are unsecured creditors and in that regard, they are similar to the operational creditors and it also may be true that many contracts under real estate projects, may not involve large sums as the subject matter of advances by banks and other financial institutions, the similarity between the two ends there. What is of greater importance is the distinctions which we have already noted and the most vital point which sets them apart, in the matter of pronouncing on the vires of the provisos under Section 7 is the numerosity of the allottees, and what is more not being homogeneous in what they want in a particular situation, since the law has indeed endowed the allottees with different remedies, having different implications, be it under the Consumer Protection Act or under RERA. If the Legislature felt that having regard to the consequences of an application under the Code, when such a large group of persons, pull at each other, an additional threshold be erected for exercising the right under Section 7, certainly, it cannot suffer a constitutional veto at the hands of Court exercising judicial review of legislation. In fact, this Court in Pioneer was invited to hold that the allottees were more like operational creditors than financial creditors and many aspects were pointed out and this Court after referring to the differences pointed out to it in a tabular form in [para 48], rejected the contentions. The rejection is supported with reference to the findings in Swiss Robbin (supra) which is alluded to in para 32 of Pioneer (supra).

214. It is to be noted also that it is not a case where the right of the allottee is completely taken away. All that has happened is a half-way house is built between extreme positions, viz., denying the right altogether to the allottee to move the application under Section 7 of the Code and giving an

unbridled license to a single person to hold the real estate project and all the stakeholders thereunder hostage to a proceeding under the Code which must certainly pass inexorably within a stipulated period of time should circumstances exists under Section 33 into corporate death with the unavoidable consequence of all allottees and not merely the applicant under Section 7 being visited with payment out of the liquidation value, the amounts which are only due to the unsecured creditor. It must be remembered that, the point of distinction, between a financial creditor in this case, the allottees of a real estate project and the operational creditors, as contained in Section 7 on the one hand and Sections 8 and 9 are preserved. In other words, the operational creditor still has to cross the threshold of not being shut off from the application not being processed in the teeth of the defense allowed to the corporate debtor in regard to an operational creditor. All that has happened is the Legislature in its wisdom has found that the greater good lies in conditioning an absolute right which existed in favour of an allottee by requirements which would ensure some certain element of consensus among the allottees. It must be remembered that the requirement is a mere one- tenth of the allottees. This is a number which goes to policy and lies exclusively within the wisdom of the Legislature. Hence, we have no hesitation in repelling the contentions in this regard.

DEBENTURE HOLDERS/SECURITY HOLDERS: THE CHALLENGE TO THE FIRST IMPUGNED PROVISO

215. Shri Rana Mukherjee, learned senior counsel in W.P.(C) No.579 of 2020 would submit that the first proviso appears to be clearly the result of a mistake. It is contended that the target of the legislature was the problem created by individual allottees invoking section 7 of IBC. As far as his clients are concerned, they are debenture holders and other security holders to whom debt is owed by the corporate debtor. There is no rational basis for imposing a threshold requirement upon the security holders. Reference is made to the mention of 'class'.

216. Learned counsel would commend to us the principle of absurdity. It is pointed out that the principle of absurdity should guide this Court to read down the first proviso to not apply it in regard to security holders and debenture holders. In this regard our attention has been drawn to the decision of this court in Vasant Ganpat Padave (D) by L.Rs. and Ors. v. Anant Mahadev Sawant (D) through L.Rs. and Ors.65. It is further brought to the notice of the court that the provision suffers from manifest arbitrariness. Counsel relies upon the judgement of this Court in Shayara Bano v. Union of India and others66 decision which witnessed the striking down of the law relating to triple talak. Per contra, it is the stand of the Union that Section 21(6A)(a) and (b) read with Section 25A of the Code contemplated certain classes of financial creditors as falling in a separate class by themselves.

217. It is the stand of the Union that in regard to certain classes of creditors, financial creditors, 65(2019) 12 SCALE 579 66(2017) 9 SCC 1 i.e., having regard to the large numbers, they were to be treated differently. It is accordingly that with the insertion of sub-section (6A) in section 21 with clause

(a) dealing with security holders including debenture holders which would cover the petitioners that an authorised representative was to be appointed to be on the committee of creditors.

218. Section 25A provides for the rights and liabilities of the authorised representatives who include the authorised representatives of debenture holders, security holders and finally the allottees. As far as allottees are concerned, it is the stand of the Union that they would fall under Section 21 (6A)(b) whereas the security holders including debenture holders to whom the corporate debtor owes money would fall under section 21 (6A)(a). In regard to both these categories, in other words, the feature which stands out is the large number of the creditors as also the large number of allottees. No doubt, in the case of allottees there are other distinguishing features as well. The interplay of the Consumer Protection Act, the provisions of the Real Estate Regulation Act, the balancing of the interests of the allottees in the sense of the optimal securing of the stake of the allottees in the continuance of the real estate project itself would only strengthen the classification further in regard to allottees. However, that is not to say that in regard to the debentures and security holders they can individually be permitted to set in motion CIRP. In regard to the question of availability of information with respect to similarly placed debenture holders or security holders, the contention of the Union is that under section 88 of the Companies Act information is generated regarding debenture holders and security holders. Anyone can inspect the records of the company and glean information with which application can be moved under the first proviso to Section 7(1). In regard to them also it is the case of the Union that the principle of heterogeneity applies. Equally, it is the case of the Union that the individual creditor in the said class would make a highly individualised and subjective decision in regard to whether an application under Section 7 must be moved and this is sought to be contrasted with the institutional decision-making which would come into play in regard to banks and other financial institutions.

219. We are of the view that the first proviso is invulnerable. As pointed out by the learned Additional Solicitor General with the insertion of sub-section 6A in section 21 as also Section 25A, the intention of the legislature is to treat the financial creditors differently. They are marked by unique features in terms of numerosity and heterogeneity is clear. Section 21 (6A) (a)reads as follows:

> "(6A) 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) xxx xxx xxx
> (c) xxx xxx xxx

Section 25A provides as follows:

> " 25A. Rights and duties of authorised representative 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 intructions:

> 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. (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).”

220. These provisions were unsuccessfully challenged before this Court as evident from the decision in the Pioneer (supra). As pointed out on behalf of the Union, in the said case the challenge was mounted by the promoters of real estate projects. These provisions have been accepted by creditors like the petitioners covered by sub-section 6A. The impact of the insertion of sub-section 3A in Section 25A is to be noticed. As already seen section 25A, inter alia, deals with the exercise of rights and the liabilities of authorised representative of creditors like debenture holders and allottees. After the insertion of sub-section 3A in section 25A, the majority of the creditors of a class is permitted to call the shots. It’s view, in other words, will hold sway. This is subject to the Code otherwise. The legislative understanding is clear that in regard to such creditors bearing the hallmark of large numbers they are required to be treated differently. If they are not treated differently it would spell chaos and the objects of the Code would not be fulfilled. It is an extension of this basic principle which has led to the insertion of the impugned proviso. Insisting on a threshold in regard to these categories of creditors would lead to the halt to indiscriminate litigation which would result in an uncontrollable docket explosion as far as the authorities which work the Code are concerned. The debtor who is apparently stressed is relieved of the last straw on the

camel's back, as it were, by halting individual creditors whose views are not shared even by a reasonable number of its peers rushing in with applications. Again, as in the case of the allottees, this is not a situation where while treating them as financial creditors they are totally deprived of the right to apply under Section 7 as part of the legislative scheme. The legislative policy reflects an attempt at shielding the corporate debtor from what it considers would be either for frivolous or avoidable applications. What we mean by avoidable applications is a decision which would not be taken by similarly placed creditors keeping in mind the consequences that would ensue not only in regard to persons falling in the same category but also the generality of creditors and other stakeholders. All that the amendment is likely to ensure is that the filing of the application is preceded by a consensus at least by a minuscule percentage of similarly placed creditors that the time has come for undertaking a legal odyssey which is beset with perils for the applicants themselves apart from others. As far as the percentage of applicants contemplated under the proviso it is clear that it cannot be dubbed as an arbitrary or capricious figure. The legislature is not wanting in similar requirements under other laws. The provisions of the Companies Act, 2013 and its predecessors contained similar provisions. Allowing what is described as 'lone Ranger' applications beset with extremely serious ramifications which are at cross purposes with the objects of the code. This is apart from it in particular spelling avoidable doom for the interest of the creditors falling in the same categories. The object of speed in deciding CIRP proceedings would also be achieved by applying the threshold to debenture holders and security holders. The dividing line between wisdom or policy of the legislature and limitation placed by the Constitution must not be overlooked.

221. The contention based on the applicability of the Absurdity Doctrine on the Principle that the result which, `all mankind without speculation would unite in rejecting' can have no application to the provision. The Code and object of the Code and the unique features which set apart the creditors involved in this case from the generality of the creditors, the challenge being to an economic measure and the consequential latitude that is owed to the legislature renders the Principle of Absurdity wholly inapposite.

222. There is no scope also having regard to their identification in paragraph-49 of Pioneer (supra) with reference to their numerosity. They cannot be heard to complain about their inclusion within the terms of the 1st proviso. Also Section 21(6A)(a) read with Section 25(A) puts the matter beyond the pale of doubt.

223. There is no basis for the petitioners to draw any support from the decision of this Court in 2019(12) SCALE.579. The facts in the said case presented a clear situation which invited the application of the Principle.

THE CHALLENGE TO EXPLANATION-II TO SECTION 11 OF THE CODE.

224. The Petitioner, in Writ Petition No. 267 of 2020, challenges the aforesaid Explanation.

225. As already noticed, the Amendment Act, 2020 received the assent of the President of India on 13.03.2020 and it is deemed to have come into force on the 28.12.2019 (be it remembered that the Ordinance, inserting the same Explanation, had been brought into force on 28.12.2019).

226. The case of the Petitioner, in brief, is as follows:

> Respondent No.3 is a subsidiary company of the Petitioner. Respondent No. 2 is also a corporate body. There were certain transactions between Respondent Nos.2 and 3. Alleging default by Respondent No.3, Respondent No.2 had filed an Application under Section 9 (the application to be filed by an operational creditor) against Respondent No.3. Respondent No.2 had filed the application under Section 9 of the Code on 24.08.2018. It is the further case of the Petitioner that Respondent No.2, on the other hand, was itself undergoing a CIRP and the CIRP Application had been admitted against the Second Respondent on 12.09.2017. It is pointed out that the Respondent No.3 has taken a contention that Respondent No.2 was disentitled to file an application under Section 11(a) of the Code as Respondent No.2 was itself facing a CIRP. It is further contended that during the pendency of the proceeding against the second Respondent, the Adjudicating Authority has passed an Order on 19.11.2018 to liquidate Respondent No.2 under Section 34 of the Code. This development invites the wrath of Section 11(d) as well. However, the Adjudicating Authority had, on 24.08.2019, erroneously admitted the Application filed by Respondent No.2 under the Code. An Appeal was carried by the Petitioner against the same, which is pending. It is while so, that the Ordinance came to be promulgated on 28.12.2019 adding Explanation-II to Section 11 vis-à-vis followed by passing of the impugned, amending Act on similar lines.

227. The contention of the Petitioner can be summed-up as follows:

> An Explanation cannot modify the main provision to which it is an Explanation.
>
> Section 11(a) and Section 11(b) unequivocally bar a Corporate Debtor from filing a CIRP Application qua another Corporate Debtor under Section 7 and Section 9 of the Code. Support is sought to be drawn from the exposition of the law qua an explanation laid down in S. Sundaram Pillai and others v. R. Pattabiraman and others67 and Sonia 67(1985) 1 SCC 591 Bhatia v. State of U.P. and others68. It is complained that the label of an Explanation has been used to substantially amend, which is an arbitrary and irrational exercise of power.

228. It was pointed out that the word 'includes' in Explanation-I to Section 11 would indicate that an Application for CIRP is barred not only against itself but also against any other Corporate Debtor when the applicant-Corporate Debtor is found placed in circumstances expressed in Section 11. It is further contended that the impugned Amendment, effectively repeals Sections 11(a) and 11(d). If the purport of the Explanation, which is impugned, is that the intention of the law was to only bar an Application for CIRP by a Corporate Debtor against itself, then, it will be unworkable and practically impossible. Explanation-II is manifestly arbitrary. Support is sought to be drawn from Shayara Bano (supra). It was further contended that the amendment cannot be used retrospectively and take away the vested right. In fact, it is contended 68(1981) 2 SCC 585 that a clarificatory amendment is prospective but Explanation II is in reality a substantive provision. Attempt is made to lay store by

the Judgment of this Court in Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi-I69, wherein this Court was dealing with Section 271 of the Income-Tax Act, 1961, in which, an Explanation was added. The Section in question, was a penal provision.

229. It was further contended that the law has been settled by National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) that a Corporate Debtor, covered by Section 11(a) and 11(d), cannot file application for CIPR against another Corporate Debtor. The impugned amendment cannot be used retrospectively in cases instituted before 28.12.2019, which is the day on which the impugned amendment came into force. It is submitted that the amendment is violative of Article 14 and the relevant law. 69(2007) 9 SCC 665

230. Respondent No.2, in its submissions, contends as follows:

> Respondent No. 3 owes Respondent No.2, more than a sum of Rs. 26 crores, which is 20 per cent of the liquidation value of Respondent No.2. It is further contended that the notes on clause explains the purpose of the provision. The amendment is defended as reasonable and not arbitrary. It is pointed out that it will be contrary to the object of the Code if the debt due to the Corporate Debtor cannot be secured. The duties of the Resolution Professional under the Code to protect and preserve the assets of the Corporate Debtor are pointed out. An order of the Appellate Adjudicating Authority in support of Respondent No.2 is also pointed out. Explanation-
>
> II, it is pointed out, only clarifies what was always the correct position.

231. Learned Additional Solicitor General, appearing on behalf of the Union of India would also support the amendment. Reference is made to the Report dated February, 2020 of the Insolvency Law Committee, which, inter alia, reads as follows:

> "6. ELIGIBILITY OF A CORPORATE DEBTOR TO INITIATE CIRP AGAINST OTHER PERSONS 6.1. Under Section 11(a) and (d) of the Code, corporate debtors "undergoing a corporate insolvency resolution process" and "in respect of whom a liquidation order has been made" are not permitted to file an application to initiate CIRP. It was brought to the Committee that this has created confusion over whether a corporate debtor which is undergoing CIRP or liquidation process, may file an application to initiate CIRP against other corporate persons who are its debtors.
>
> 6.2. The Committee noted that different Adjudicating Authorities had taken different approaches regarding the right of a resolution professional to initiate CIRP against other corporate debtors. On the one hand, the right of the resolution professional to initiate CIRP against other corporate debtors was upheld by relying on the statutory duty of the resolution professional to recover outstanding dues of the corporate debtor under Section 25(2)(b). On the other hand, the resolution professional had been prevented from doing so, on the basis of a literal interpretation of Section 11(a).

> While the Appellate Authority had dismissed the appeals filed against some of these orders without endorsing either of these approaches, in Abhay N. Manudhane v Gupta Coal India Pvt. Ltd., it had taken the latter approach and denied the liquidator the right to file an application to initiate CIRP against other corporate debtors (in the context of Section 11(d)).
>
> 6.3. However, according to the Notes on Clauses to Section 11, the section was enacted to prevent "repeated recourse to the corporate insolvency resolution process in order to delay repayment of debts due or to keep assets out of the reach of creditors" and to "ensure finality of the liquidation order" by preventing a corporate debtor to initiate CIRP after a liquidation order is passed.

Thus, it is clear that Section 11 aims at preventing a corporate debtor from abusing the statutory process under Chapter II of Part II of the Code by repeatedly initiating CIRP against itself or by initiating CIRP even after a liquidation order is passed against it. The Committee discussed that if Section 11 were instead, interpreted to prevent the resolution professional or the liquidator of a corporate debtor from initiating CIRP against other defaulting entities, it would cause serious detriment to the ability of a corporate debtor to recover its dues from its debtors." ANALYSIS

232. Before we address the argument with regard to the provisions of the Code, it is necessary to cull-out the principles applicable in regard to the function of an Explanation. A bench of three learned Judges, in an off-quoted judgment in S. Sundaram Pillai (supra) came to elaborately examine the scope of an Explanation. Incidentally, the Court had to deal with an Explanation which was appended to a proviso and, therefore, its judgment also deals with the principles applicable in regard to a proviso. On a conspectus of various decisions, this Court made a survey of the earlier case law. We may refer to paragraphs-49, 50, 52 and, finally, its conclusions in paragraph-53 as follows:

> "49. The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. CTO [(1961) 1 SCR 902 : AIR 1961 SC 315 : (1960) 11 STC 764] a Constitution Bench decision, Hidayatullah, J. speaking for the Court, observed thus:
>
> "Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain clause (1)(fl) of the Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."
>
> 50. In Bihta Cooperative Development Cane Marketing Union Ltd. v. Bank of Bihar [(1967) 1 SCR 848 : AIR 1967 SC 389 : 37 Com Cas 98] this Court observed thus:
>
> "The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section."

> 52. In Dattatraya Govind Mahajan v. State of Maharashtra [(1977) 2 SCR 790 : (1977) 2 SCC 548 : AIR 1977 SC 915] Bhagwati, J.

observed thus: (SCC p. 563, para 9) "It is true that the orthodox function of an Explanation is to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it.... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations."

53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is— "(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

233. It is important to actually understand the scope of an Explanation. We have already noticed the summary of the conclusions of this Court in S. Sundaram Pillai (supra) at paragraph-53. It may give the impression that an Explanation, in those circumstances, does not widen the boundaries of the main provision to which it is an Explanation. However, it is apposite that we hearken back to what this Court said on an earlier occasion. In a judgment rendered by four learned Judges in Hiralal Rattanlal and Ors. v. State of U.P. and another70 this Court had, while considering the scope 70 (1973) 1 SCC 216, of an Explanation in a Taxing Statute, viz., the United Provinces Sales Tax Act, 1948, had this to say:

> "22. It was next urged that on a true construction of Explanation II to Section 3-D, no charge can be said to have been created on the purchases of split or processed pulses. It was firstly contended that an Explanation cannot extend the scope of the main section, it can only explain that section. In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the

other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intention is not clear. Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so-called proviso has substantially altered the main section. In CIT v. Bipinchandra Maganlal & Co. Ltd., Bombay [AIR 1961 SC 1040 : (1961) 2 SCR 493 : (1961) 41 ITR 290] this Court held that by the fiction in Section 10(2)(vii) second proviso read with Section 2(6-C) of the Indian Income Tax Act, 1922 what is really not income is, for the purpose of computation of assessable income, made taxable income.

25. On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c). But from what has been said in the case, it is clear that if on a true reading of an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation. In all these matters the courts have to find out the true intention of the Legislature." (Emphasis supplied)

234. Even though, in a later decision in S. Sundaram Pillai (supra), this Court had adverted to this Judgment when it came to culling out the propositions, the aspect about an Explanation, widening the scope of a provision, has not been expressly spelt out. It must be remembered that the Legislature speaks through the medium of the words it uses. The nomenclature, it gives to the device, cannot control the express language, which it employs. If, in effect, in a particular case, an Explanation does widen the terms of the main provision, it would become the duty of the Court to give effect to the will of the Legislature.

235. In fact, with respect to the decision in S. Sundaram Pillai (supra), it may be necessary to dissect the provisions which fell for consideration. The Court, in the said case, was dealing with the law relating to restrictions on eviction of the tenant prevailing in Tamil Nadu. The substantive provision conferred a right on the landlord to evict a tenant, should he wilfully fail to pay the rent. There was a proviso, however, which empowered the Court to grant time to the tenant subject to the limit of 30 days, should it be found that the non-payment of the rent was not wilful. It was to this proviso that an Explanation was added. The Explanation, in turn, provided that if the landlord gave a notice to the tenant to pay the rent and rent remained unpaid for a period of two months, it would be construed as a case of wilful default. The arguments, which were addressed before this Court, included the contention that even if a notice was given within the meaning of the Explanation, it would not control the duty of the Court to find out whether there was wilful default. It was, while the Court dealt with these arguments, inter alia, that the Court proceeded to lay down two propositions. Firstly, in a case where no notice was given by the landlord, within the meaning of the Explanation, it was for the Court to find out, on the facts and

> circumstances, as to whether there was wilful default. The second proposition, which was laid down was, even if a notice was given under the Explanation and there was default in payment, it would be treated as a case of wilful default unless the tenant was able to establish that he was prevented from making payment on account of circumstances which prevented him from doing so. We may also notice a still later judgment of this Court in Sonia Bhatia (supra). In the said case, the question fell for consideration under the law relating to land reforms. Sub-Section (6) of Section 5 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 provided that the transfer made by a person, after a certain date, was to be ignored. There was a proviso, which, however, excepted certain transfers. One of the conditions to be met before a case could fall within the proviso was that the transfer must have been made for valuable consideration. To the said proviso, there was again an Explanation I followed by Explanation II.

It reads as follows:

> "Explanation I.—For the purposes of this sub-section, the expression "transfer of land made after the twenty- fourth day of January, 1971", includes—
>
> (a) a declaration of a person as a co-

tenure-holder made after the twenty- fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-

fourth day of January, 1971;

(b) any admission, acknowledgement, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.

Explanation II: The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefits."

236. The transfer in the said case was a gift which attracted the wrath of the main provision which meant that the transfer had to be ignored, and the land, which was the subject matter of the gift, had to be included in the ceiling account of the donor. This Court appreciated the scope of the legislation to be just that and rejected the argument based on the terms of the Explanation and held as follows:

> "24. In Bihta Co-operative Development Cane Marketing Union Ltd. v. Bank of Bihar [AIR 1967 SC 389 : (1967) 1 SCR 848 : 37 Com Cas 98] this Court was called upon to consider the Explanation to Section 48(1) of the Bihar and Orissa Cooperative Societies Act, 1935.

Therein this Court observed:

> "The question then arises whether the first Explanation to the section widens the scope of sub-section (1) of Section 48 so as to include claims by registered societies, against non-members even if the same are not covered by clause (c)."

237. We have made a brief survey of some of the case law by way of expounding the true province of an Explanation.

238. Coming to the facts of the instant case, it is necessary to analyse the limbs of Section 11. Sections 7, 9 and 10, read with Section 5, provide for the procedure to be adopted by the Adjudicating Authority in dealing with applications for initiating CIRP by the financial creditor, operational creditor and corporate debtor. It is after that Section 11 makes its appearance in the Code. It purports to declare that an application for initiating CIRP cannot be made by categories expressly detailed in Section 11. Section 11(a) vetoes an application by a corporate debtor, which is itself undergoing a CIRP. An argument sought to be addressed by the petitioner is that the purport of the said provision is that it prohibits not only a corporate debtor, which is undergoing a CIRP, from initiating a CIRP against itself, which, but for the fact, it is undergoing a CIRP, would be maintainable under Section 10 of the Code, but it also proscribes an application by a corporate debtor for initiating a CIRP against another corporate debtor. It appears to be clear to us, and this will be corroborated by the further provisions as well, that the real intention of the Legislature was that the prohibition was only against the corporate debtor, which is already faced with the CIRP filed by either a financial creditor or operational creditor, jumping into the fray with an application under Section 10. This appears to be clear from the reports which have been placed before us.

239. Coming to Section 11(b), it again disables a corporate debtor which has completed CIRP twelve months preceding the date of the making of the application from invoking the Code. It may be demystified as follows:

> On the strength of the application made under Sections 7, 9 or 10, CIRP is initiated and it is completed at a certain point of time. This Section is aimed at preventing a further application not eternally but for a period of twelve months after the expiry of the insolvency resolution process.
>
> Quite apart from the fact that even the petitioners do not lay store by Section 11(b) and their case is premised on Section 11(a) and 11(d), the importance of Section 11(b) is that it sheds light regarding the intention of the Legislature to be that the corporate debtor cannot initiate CIRP against itself under any of the limbs of Section 11, in the circumstances detailed therein. Section 11(c) again disentitles corporate debtor, apart from a financial creditor who has violated any terms of a resolution plan, which was approved twelve months before the making of the application.
>
> In other words, after the Adjudicating Authority approves a resolution plan under Section 31 of the Code, should a corporate debtor, inter alia, transgress upon any of the terms of the resolution plan and it still ventures to again approach the Adjudicating Authority with an application under Section 10 and attempt to restart

the process all over again within a period of twelve months from the date of approval, this is declared impermissible under Section 11(c).

240. Finally, coming to Section 11(d), it disentitles the making of an application to initiate CIRP by a corporate debtor in respect of whom a liquidation order has been made. We have already noticed the scheme of the Code. The Legislature intends to have a two-stages approach to the problem of insolvency as regards the corporate debtor. On the basis of an application by the eligible person, a CIRP is initiated. If it is admitted, a Committee of Creditors is constituted before the curtains are wrung down on the insolvency resolution process by the inexorable passage of time, which is fixed under Section 12. If a resolution plan finds approval at the hands of the Committee of Creditors and also the Adjudicating Authority, liquidation is staved off. Should there be no resolution plan within the time limit or the resolution plan is not approved, the curtains rise for the process of liquidation process to be played out in terms of the Code. The first act of the drama consists of the order of liquidation to be passed under Section 33 of the Code. It is this order which is referred to in Section 11(d). There is also an order of liquidation permissible earlier, under Section 33(4). No doubt after the introduction of the explanation to Section 33(2), an order of liquidation may be passed in terms thereof. Once, this order is passed, the Legislature intended that a corporate debtor, in regard to whom the CIRP was initiated and which has culminated in the order of liquidation being passed after no resolution of the insolvency took place, cannot again initiate a fresh CIRP, putting under the carpet, as it were, a whole process in the recent past. In fact, to use the words “recent past” may not be correct for unlike Section 11(b) and 11(c), in a case, where there is an order for liquidation under Section 33, then, an application under Section 10, would not be maintainable. The person disentitled under Section 11(d) would be the corporate debtor and the disentitlement is qua itself.

241. Now, let us turn to the first Explanation. The Explanation declares that for the purpose of Section 11, a corporate debtor includes a corporate applicant in respect of such corporate debtor. There is an argument raised on behalf of the petitioners which surrounds the word “included”. The contention appears to be that before the insertion of Explanation II, which is challenged before us, under Section 11, not only was an application for initiating CIRP by a corporate debtor against itself prohibited in the circumstances referred to in Section 11 but it also contemplated that the CIRP could not be filed by the corporate debtor in circumstances covered by Section 11 against another corporate debtor. Otherwise, there was no meaning in using the word “includes”. In order to appreciate this argument, it is necessary to set out the definition of the word “corporate applicant” in the Code.

“6(5) “corporate applicant” means--

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor;

or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor;

or

(d) a person who has the control and supervision over the financial affairs of the corporate debtor;"

242. It is to be noticed that under Section 10 of the Code, a corporate debtor can file an application for CIRP, when there is a default by itself. The persons, who can make application under section 10, are those who are alluded to as in the definition of the word "corporate applicant". In other words, an application by the corporate debtor for initiating a CIRP, when there is a default by the corporate debtor, can be made not only by the corporate debtor but also any of the other three categories falling in clauses (b), (c) and

(d) of the provision which defines the word "corporate applicant". It is to ensure that there was clarity regarding the question as to whether, while in Section 11, there is a prohibition against the corporate debtor in various circumstances and it is disabled from moving an application under Section 10 against itself, there is no reference to the other persons who are covered by the definition of the word "corporate applicant". It is hence that Explanation I was inserted. In other words, it was to ensure that in the circumstances contemplated in Section 11, an application under Section 10 could not be made by any of the categories of persons mentioned in the definition of the word "corporate applicant".

243. Now, let us consider finally the impugned Explanation. The impugned Explanation came to be inserted by the impugned amendment. Apparently, interpreting Section 11, there appears to have been some cleavage of opinion. This is apparent from the case set up on behalf of the petitioners and the case set up on behalf of the Union of India. The intention of the Legislature was always to target the corporate debtor only insofar as it purported to prohibit application by the corporate debtor against itself, to prevent abuse of the provisions of the Code. It could never had been the intention of the Legislature to create an obstacle in the path of the corporate debtor, in any of the circumstances contained in Section 11, from maximizing its assets by trying to recover the liabilities due to it from others. Not only does it go against the basic common sense view but it would frustrate the very object of the Code, if a corporate debtor is prevented from invoking the provisions of the Code either by itself or through his resolution professional, who at later stage, may, don the mantle of its liquidator. The provisions of the impugned Explanation, thus, clearly amount to a clarificatory amendment. A clarificatory amendment, it is not even in dispute, is retrospective in nature. The Explanation merely makes the intention of the Legislature clear beyond the pale of doubt. The argument of the petitioners that the amendment came into force only on 28.12.2019 and, therefore, in respect to applications filed under Sections 7, 9 or 10, it will not have any bearing, cannot be accepted. The Explanation, in the facts of these cases, is clearly clarificatory in nature and it will certainly apply to all pending applications also.

244. We may notice that these are petitions filed under Article 32 of the Constitution of India, essentially, complaining of violation of Fundamental Right under Article 14 of the Constitution insofar as the challenge to the Explanation is concerned, a strained effort is made to describe this

amendment as manifestly arbitrary. To build up this argument, an attempt is made to contend that an Explanation cannot widen the provisions or whittle down its scope. We are afraid, that this venture of attempting to persuade us to hold that an Explanation would be trespassing the limits of its province, should it widen the scope of the main provisions, itself has no legs to stand on, as explained earlier. We are unable to understand how it could be described as being arbitrary for the Legislature to clarify its intention through the device of an Explanation. The further attempt to persuade us to overturn the provision on the score that the Explanation attempts to achieve the result of a repeal of Sections 11(a) and 11(d), is totally meritless. We are clear in our mind that on a proper understanding of Sections 11(a) and 11(d), it does nothing of the kind. Sections 11(a) and 11(d) remain intact in the manner we have propounded.

245. We must record our understanding of the efforts of the petitioner in the light of the application which is pending and the appeal also which is preferred by the petitioner in NCLAT. We are really concerned and can be called upon only to pronounce on the vires of the Statute on the score that it is unconstitutional on any ground known to law. The only ground which is urged before us is the violation of Article 14. This ground does not merit acceptance. The challenge is repelled.

IS SECTION 32A UNCONSTITUTIONAL?

246. Section 32A is challenged by allottees in Writ Petition No.75 of 2020. The petitioners in Writ Petition No.27 of 2020 and Writ Petition No. 579 of 2020, who are creditors (money lenders) also challenge Section 32A.

247. The petitioners contend that immunity granted to the corporate debtors and its assets acquired from the proceeds of crimes and any criminal liability arising from the offences of the erstwhile management for the offences committed prior to initiation of CIRP and approval of the resolution plan by the adjudicating authority further jeopardizes the interest of the allottees/creditors. It will cause huge losses which is sought to be prevented under the provisions of the Prevention of Money Laundering Act, 2002.

248. Section 32A is arbitrary, ultra vires and violative of Article 300A and Articles 14, 19 and 21.

249. The stand of the Union, on the other hand, is as follows:

> Section 32A provides immunity to the corporate debtor and its property when there is approval of the resolution plan resulting in the change of management of control of corporate debtor. This is subject to the successful resolution applicant being not involved in the commission of the offence. Statutory basis has now given under Section 32A to the law laid down by this Court in the decision of Committee of Creditors of Essar Steel(supra). This Court took the view therein that successful resolution applicant cannot be faced with undecided claim after its resolution plan has been accepted. The object is to ensure that a successful resolution applicant starts of on a fresh slate. The relevant extracts of the Statement of Objects and Reasons relied upon by the Union of India are as follows:

"STATEMENT OF OBJECTS AND REASONS xxx

2. A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation, to prevent potential abuse of the Code by certain classes of financial creditors, to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions, and in order to fill the critical gaps in the corporate insolvency 69 framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016.

3.The Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019, inter alia, provides for the following, namely:— xxx

(vii) to insert a new section 32A so as to provide that the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease under certain circumstances."

250. Reliance is also placed on the report of the Insolvency Law Committee. Relevant extracts which have been relied on are as follows:

"PREFACE v. Liability of corporate debtor for offences committed prior to initiation of CIRP- in order to address the issue of liability that fall upon the resolution applicant for offences committed prior to commencement of CIRP, it has been recommended that a new section should be inserted which provides that when the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or 70 otherwise. The newly inserted section as mentioned above shall also include protection of property from enforcement action when taken by successful resolution applicant. Also, it was recommended that cooperation and assistance to authorities investigating the offences committed prior to commencement of CIRP shall be continued by any person who is required to provide such assistance under the applicable law.

xxx Chapter 1: Recommendations regarding the Corporate Insolvency Resolution Process xxx

17. LIABILITY OF CORPORATE DEBTOR FOR OFFENCES COMMITTED PRIOR TO INITIATION OF CIRP* 17.1. Section 17 of the Code provides that on

commencement of the CIRP, the powers of management of the corporate debtor vest with the interim resolution professional. Further, the powers of the Board of Directors or partners of the corporate debtor stand suspended, and are to be exercised by the interim resolution professional. Thereafter, Section 29A, read with Section 35(1)(f), places restrictions on related parties of the corporate debtor from proposing a resolution plan and purchasing the property of the corporate debtor in the CIRP and liquidation process, respectively. Thus, in most cases, the provisions of the Code effectuate a change in control of the corporate debtor that results in a clean break of the corporate debtor from its erstwhile management. However, the legal form of the corporate debtor continues in the CIRP, and may be preserved in the resolution plan. Additionally, while the property of the corporate debtor may also change hands upon resolution or liquidation, such property also continues to exist, either as property of the corporate debtor, or in the hands of the purchaser.

17.2. However, even after commencement of CIRP or after its successful resolution or liquidation, the corporate debtor, along with its property, would be susceptible to investigations or proceedings related to criminal offences committed by it prior to the commencement of a CIRP, leading to the imposition of certain liabilities and restrictions on the corporate debtor and its 71 properties even after they were lawfully acquired by a resolution applicant or a successful bidder, respectively.

Liability where a Resolution Plan has been Approved 17.3. It was brought to the Committee that this had created apprehension amongst potential resolution applicants, who did not want to take on the liability for any offences committed prior to commencement of CIRP. In one case, JSW Steel had specifically sought certain reliefs and concessions, within an annexure to the resolution plan it had submitted for approval of the Adjudicating Authority. Without relief from imposition of the such liability, the Committee noted that in the long run, potential resolution applicants could be disincentivised from proposing a resolution plan. The Committee was also concerned that resolution plans could be priced lower on an average, even where the corporate debtor did not commit any offence and was not subject to investigation, due to adverse selection by resolution applicants who might be apprehensive that they might be held liable for offences that they have not been able to detect due to information asymmetry. Thus, the threat of liability falling on bona fide persons who acquire the legal entity, could substantially lower the chances of its successful takeover by potential resolution applicants.

17.4. This could have substantially hampered the Code's goal of value maximisation, and lowered recoveries to creditors, including financial institutions who take recourse to the Code for resolution of the NPAs on their balance sheet. At the same time, the Committee was also conscious that authorities are duty bound to penalize the commission of any offence, especially in cases involving substantial public interest. Thus, two competing concerns need to be balanced. 17.5. The Committee noted that the proceedings under the Code, which are designed to ensure maximization of value, generally require transfer of the corporate debtor to bona fide persons. In fact, Section 29A casts a wide net that disallows any undesirable person, related party or defaulting entity from acquiring a corporate debtor. Further, the Code provides for an open process, in which transfers either require

approval of the Adjudicating Authority, or can be challenged before it. Thus, the CIRP typically culminates in a change of control to 72 resolution applicants who are unrelated to the old management of the corporate debtor and step in to resolve the insolvency of the corporate debtor following the approval of a resolution plan by the Adjudicating Authority.

17.6. Given this, the Committee felt that a distinction must be drawn between the corporate debtor which may have committed offences under the control of its previous management, prior to the CIRP, and the corporate debtor that is resolved, and taken over by an unconnected resolution applicant. While the corporate debtor's actions prior to the commencement of the CIRP must be investigated and penalised, the liability must be affixed only upon those who were responsible for the corporate debtor's actions in this period. However, the new management of the corporate debtor, which has nothing to do with such past offences, should not be penalised for the actions of the erstwhile management of the corporate debtor, unless they themselves were involved in the commission of the offence, or were related parties, promoters or other persons in management and control of the corporate debtor at the time of or any time following the commission of the offence, and could acquire the corporate debtor, notwithstanding the prohibition under Section 29A.

17.7. Thus, the Committee agreed that a new Section should be inserted to provide that where the corporate debtor is successfully resolved, it should not be held liable for any offence committed prior to the commencement of the CIRP, unless the successful resolution applicant was also involved in the commission of the offence, or was a related party, promoter or other person in management and control of the corporate debtor at the time of or any time following the commission of the offence. 17.8. Notwithstanding this, those persons who were responsible to the corporate debtor for the conduct of its business at the time of the commission of such offence, should continue to be liable for such an offence, vicariously or otherwise, regardless of the fact that the corporate debtor's liability has ceased. Actions against the Property of the Corporate Debtor 17.9. The Committee also noted that in furtherance of a criminal investigation and prosecution, the property of a company, which continues to exist after the resolution or liquidation of a corporate debtor, may have been liable to be attached, seized or confiscated. For instance, the property of a corporate debtor may have been at risk of attachment, seizure or confiscation where there was any suspicion that such property was derived out of proceeds of crime in an offence of money laundering. It was felt that taking actions against such property, after it is acquired by a resolution applicant, or a bidder in liquidation, could be contrary to the interest of value maximisation of the corporate debtor's assets, by substantially reducing the chances of finding a willing resolution applicant or bidder in liquidation, or lowering the price of bids, as discussed above. 17.10. Thus, the Committee agreed that the property of a corporate debtor, when taken over by a successful resolution applicant, or when sold to a bona fide bidder in liquidation under the Code, should be protected from such enforcement action, and the new Section discussed in paragraph 17.7 should provide for the same. Here too, the Committee agreed that the protection given to the corporate debtor's assets should in no way prevent the relevant investigating authorities from taking action against the property of persons in the erstwhile management of the corporate debtor, that may have been involved in the commission of such criminal offence.

17.11. By way of abundant caution, the Committee also recognised and agreed that in all such cases where the resolution plan is approved, or where the assets of the corporate debtor are sold under liquidation, such approved resolution plan or liquidation sale of the assets of the corporate debtor's assets would have to result in a change in control of the corporate debtor to a person who was not a related party of the corporate debtor at the time of commission of the offence, and was not involved in the commission of such criminal offence along with the corporate debtor.

Cooperation in Investigation 17.12. While the Committee felt that the corporate debtor and bona fide purchasers of the corporate debtor or its property should not be held liable for offences committed prior to the commencement of insolvency, the Committee agreed that the corporate debtor and any person who may be required to provide assistance under the applicable law should continue to provide assistance and cooperation to the authorities investigating an offence committed prior to the commencement of the CIRP. Consequently, the Committee recommended the new Section should provide for such continued cooperation and assistance." The Additional Solicitor General also places reliance on the Sixth Report of the Standing Committee of Lok Sabha made in March, 2020. The relevant portion according to the learned ASG are as follows:

> " 3.8 "The stakeholders on the above clause furnished the following suggestion:-
>
> "Though the Bill gives immunity to the corporate debtor (company as a legal entity) from prior offences, the individuals responsible for committing such offences on behalf of the debtor will still be held liable. The question is whether the debtor should be absolved of all kinds of prior offences with such a blanket immunity." 3.9 The Secretary, Ministry of Corporate Affairs during the sitting held on 15th January, 2020 remarked:-
>
> "If the bidder, who is coming and participating under the court supervised competitive process, does not get security and is not indemnified, there may be a problem." 3.10 Further, the Ministry furnished the following comment on the above suggestion:
>
> "...this provision would only apply where the CIRP culminates in a change in control to a 75 completely unconnected resolution applicant. As such, a resolution applicant has nothing to do with the commission of any pre-CIRP offence whatsoever, and the corporate debtor is now fundamentally not the same entity as the one that committed the crime." 3.11 The Committee are in agreement with the intent of this amendment to safeguard the position of the Resolution Applicant(s) by ring-fencing them from prosecution and liabilities under offences committed by erstwhile promoters etc. The Committee understand the need for treating the company or the Corporate Debtor as a cleansed entity for cases which result in change in the management or control of the corporate debtor to a person who was not a promotor or in the management control of the corporate debtor or related party of such person, or to a person against whom there are material evidence and pending complaint or report by the investigating authority filed in relation to the criminal offence. The Committee agree that this

> provision is essential to provide the Resolution Applicant(s) a fair chance to revive the unit which otherwise would directly go into liquidation, which may not be as beneficial to the economy.

The Committee believe that this ring- fencing is essential to achieve revival or resolution without imposing additional liabilities on the Resolution Applicant, arising from malafide acts of the previous promoter or management."

251. Apart from the fact that it is intended to give a clean break to the successful resolution applicant, it is pointed out that it is hedged in with ample safeguards to avoid any exploitation. The same are as follows:

> "106. Section 32A was inserted to give a clean break to successful resolution applicants from the erstwhile management by shielding them and immunizing them from prosecution and liabilities for offences that may have been committed prior to the commencement of the CIRP. Further, ample safeguards have been incorporated in the said provision to prevent any exploitation, namely:
>
> i. The immunity is attracted only when a resolution plan is approved by the Adjudicating Authority under section 31 and the resolution plan results in the change in management or control of the corporate debtor.
>
> ii. The immunity is granted only to the corporate debtor and its property, where such property is covered under the resolution plan approved by the Adjudicating Authority under section 31, from any liability or prosecution with regard to offences committed prior to the commencement of the corporate insolvency resolution process.
>
> iii. Any person who was a promoter or in the management or control of the corporate debtor or a related party or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business and who was directly or indirectly involved in the commission of such offence shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased.
>
> iv. Section 32A does not bar an action against the property of any person other than the corporate debtor against whom such an action may be taken under such law as may be applicable.
>
> v. Notwithstanding the immunity given under Section 32A, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."

252. Section 32A has been divided into three parts consisting of sub-Sections (1) to (3). Under sub-Section (1), notwithstanding anything contained, either in the Code or in any other law, liability of a corporate debtor, for an offence committed prior to the commencement of the CIRP, shall cease. Further, the corporate debtor shall not be liable to be prosecuted for such an offence. Both, these immunities are subject to the following conditions:

> i. A Resolution Plan, in regard to the corporate debtor, must be approved by the Adjudicating Authority under Section 31 of the Code;
>
> ii. The Resolution Plan, so approved, must result in the change in the management or control of the corporate debtor;
>
> iii. The change in the management or control, under the approved Resolution Plan, must not be in favour of a person, who was a promoter, or in the management and control of the corporate debtor, or in favour of a related party of the corporate debtor;
>
> iv. The change in the management or control of the corporate debtor must not be in favour of a person, with regard to whom the relevant Investigating Authority has material which leads it to entertain the reason to believe that he had abetted or conspired for the commission of the offence and has submitted or filed a Report before the relevant Authority or the Court. This last limb may require a little more demystification.
>
> The person, who comes to acquire the management and control of the corporate person, must not be a person who has abetted or conspired for the commission of the offence committed by the corporate debtor prior to the commencement of the CIRP. Therefore, abetting or conspiracy by the person, who acquires management and control of the corporate debtor, under a Resolution Plan, which is approved under Section 31 of the Code and the filing of the report, would remove the protective umbrella or immunity erected by Section 32A in regard to an offence committed by the corporate debtor before the commencement of the CIRP. To make it even more clear, if either of the conditions, namely abetting or conspiring followed by the report, which have been mentioned as aforesaid, are present, then, the liability of the corporate debtor, for an offence committed prior to the commencement of the CIRP, will remain unaffected.;

253. The first proviso in sub-Section (1) declares that if there is approval of a Resolution Plan under Section 31 and a prosecution has been instituted during the CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-Section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved Resolution plan, there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the

offence, then, the prosecution, if it is instituted after the commencement of the CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second proviso to sub-Section (1), however, the designated partner in respect of the liability partnership or the Officer in default, as defined under Section 2(60) of the Companies Act, 2013, or every person, who was, in any manner, in- charge or responsible to the corporate debtor for the conduct of its business, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. This is despite the extinguishment of the criminal liability of the corporate debtor under sub-Section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or indirectly involved in the commission of such offence, in terms of the Report submitted and Report filed by the Investigating Authority, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. Thus, the combined reading of the various limbs of sub-Section (1) would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of the CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the criminal liability will continue to haunt the persons, who were in in-charge of the assets of the corporate debtor, or who were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.

254. Coming to sub-Section (2) of Section 32A, it declares a bar against taking any action against property of the corporate debtor. This bar also contemplates the connection between the offence committed by the corporate debtor before the commencement of the CIRP and the property of the corporate debtor. This bar is conditional to the property being covered under the Resolution Plan. The further requirement is that a Resolution Plan must be approved by the Adjudicating Authority and, finally, the approved plan, must result in a change in control of the corporate debtor not to a person, who is already identified and described in sub-Section (1). In other words, the requirements for invoking the bar against proceeding against the property of the corporate debtor in relation to an offence committed before the commencement of the CIRP, are as follows:

> (i) There must be Resolution Plan, which is approved by the Adjudication Authority under Section 31 of the Code;
>
> (ii) The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not – (a) a promoter; (b) in the management or control of the corporate debtor or (c) a related party of the corporate debtor; (d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint. If all these aforesaid conditions are fulfilled then the Law Giver has provided that no action can be taken against the property of the corporate debtor in connection with the offence;

The Explanation to sub-Section (2) has clarified that the words “an action against the property of the corporate debtor in relation to an offence”, would include the attachment, seizure, retention or confiscation of such property under the law applicable to the corporate debtor. Since the word

"include" is used under sub-clause (i) of the Explanation, the word "action" against the property of the corporate debtor is intended to have the widest possible amplitude. There is a clear nexus with the object of the Code. The other part of the clarification, under the Explanation, is found in the second sub-clause of the Explanation

(ii). Under the second limb of the Explanation, the Law Giver has clearly articulated the point that as far as the property of any person, other than the corporate debtor or any person who had acquired the property of the corporate debtor through the CIRP or liquidation process under the Code and who otherwise fulfil the requirement under Section 32A, action can be taken against the property of such other person. Thus, reading sub-Section (1) and sub- Section(2) together, two results emerge – (i) subject to the requirements embedded in sub- Section (1), the liability of the corporate, debtor for the offence committed under the CIRP, will cease; (ii) The property of the corporate debtor is protected from any legal action again subject to the safeguards, which we have indicated. The bar against action against the property, is available, not only to the corporate debtor but also to any person who acquires property of the corporate debtor under the CIRP or the liquidation process. The bar against action against the property of the corporate debtor is also available in the case of a person subject to the same limitation as prescribed in sub-Section (1) and also in sub- Section (2), if he has purchased the property of the corporate debtor in the proceedings for the liquidation of the corporate debtor.

255. The last segment of Section 32A makes it obligatory on the part of the corporate debtor or any person, to whom immunity is provided under Section 32A, to provide all assistance to the Investigating Officer qua any offence committed prior to the commencement of the CIRP.

256. The contentions of the petitioners appear to be that this provision is constitutionally anathema as it confers an undeserved immunity for the property which would be acquired with the proceeds of a crime. The provisions of the Prevention of Money-Laundering Act, 2002 (for short, the PMLA) are pressed before us. It is contended that the prohibition against proceeding against the property, affects the interest of stakeholders like the petitioners who may be allottees or other creditors. In short, it appears to be their contention that the provisions cannot stand the scrutiny of the Court when tested on the anvil of Article 14 of the Constitution of India. The provision is projected as being manifestly arbitrary. To screen valuable properties from being proceeded against, result in the gravest prejudice to the home buyers and other creditors. The stand of the Union of India is clear. The provision is born out of experience. The Code was enacted in the year 2016. In the course of its working, the experience it has produced, is that, resolution applicants are reticent in putting up a Resolution Plan, and even if it is forthcoming, it is not fair to the interest of the corporate debtor and the other stake holders.

257. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property,

it hardly furnishes a ground for this this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the Interim Resolution Professional and thereafter into the hands of the Resolution Professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.

258. It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor. The corporate debtor and its property in the context of the scheme of the code constitute a distinct subject matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgement of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximisation of the value of the assets which again is to be achieved at the earliest point of time cannot become the subject of judicial veto on the ground of violation of Article 14. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgement and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some it cannot unless it strikingly ill squares with some constitutional mandate suffer invalidation.

259. There is no basis at all to impugn the Section on the ground that it violates Articles 19, 21 or 300A. VESTED RIGHT; RETROSPECTIVITY; THE 3rd PROVISO IN SECTION 7

260. We will recapitulate the third proviso, at this juncture.

“7(1)	xxx	xxx	xxx
Explanation		xxx	xxx

xxx xxx xxx xxx

Provided also that where an

application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2020, such application shall be modified to comply with the requirements of the first or second proviso within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission."

261. A perusal of the same, makes it clear that the third proviso is a one-time affair. It is intended only to deal with those applications, under Section 7, which were filed prior to 28.12.2019, when, by way of the impugned Ordinance, initially, the threshold requirements came to be introduced by the first and the second impugned provisos. In other words, the legislative intention was to ensure that no application under Section 7 could be filed after 28.12.2019, except upon complying with the requirements in the first and second provisos. The Legislature did not stop there. It has clearly intended that the threshold requirement it imposed, will apply to all those applications, which were filed, prior to 28.12.2019 as well, subject to the exception that the applications, so filed, had not been admitted, under Section 7(5). In other words, the Legislature intended that in every application, filed under Section 7, by the creditors covered by the first proviso and by the allottees governed by the second proviso, should also be embraced by the newly imposed threshold requirement for which, it was intended, should be complied within 30 days from the date of the Ordinance. However, this restriction was not to apply to those applications which stood admitted as on the date of the Ordinance. It is also clear that the consequence of failure to comply with the threshold requirement, in regard to applications, which have been filed earlier, was that they would stand withdrawn.

262. In this regard, several contentions are raised. It is pointed out by the learned Counsel for the petitioners, apart from the plea of discrimination, which is alleged against the first and second provisos, that the third proviso, makes a clear incursion into a vested right. The impugned third proviso is afflicted with the vice of manifest arbitrariness. It is contended that the petitioners, who had moved an application under the erstwhile regime, were legally entitled to make such an application, whether it is by a single allottee or jointly. This was a substantive right. Availing such substantive right, under a Statute, when the application stood instituted, they had the right to continue with the proceeding unimpaired and unhindered by the new threshold requirement, which cannot be made applicable in their cases. It is contended that when there is a repeal of a Statute, the existing rights are saved. In this case, there was an existing right with the petitioners to institute the application under Section 7 and, therefore, this right cannot be imperilled by enacting the amendment. It is pointed out that the statutory time limit to decide an application, was fourteen days. This Court, in Pioneer (supra), also stressed the importance of disposing matters, within the period, even though, it may have laid down that the period is not inflexibly mandatory and that it is directory. In the case of the petitioners, the applications were pending for more than a year. Classifying the applications under the same head, is arbitrary and irrational. The petitioners have spent substantial sums towards court fee, legal and other expenses, in addition to considerable time.

There is no provision to ameliorate their losses. Withdrawals and fresh filing would derail the insolvency process. Our attention is draw to the judgment of this Court in Hitendra Vishnu Thakur and others v. State of Maharashtra and others71, wherein this Court laid down that Statute, which affects substantive right, is presumed to be prospective, unless made retrospective expressly or by necessary intendment. Every litigant has a vested right in substantive matters but no such right exists in procedural law. The law relating to right of action and right of appeal, even though remedial, is substantive in nature. A procedural Statute should not, generally speaking, be applied retrospectively, where the result would be to create new disabilities or obligations or to impose new duties in respect of accomplished transactions. Reliance is placed similarly on the judgment of this Court in Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co. and another72. The period of 30 days is far too short and that too, under an amendment, which is itself impossible to comply with. In this regard, also judgment of this Court in B.K. Educational Services Private Ltd. v. Parag Gupta and Associates73, is 71 (1994) 4 SCC 602 72 (2001) 8 SCC 397 73 (2019) 11 SCC 633/ 2018 1 IBJ (JP) 649 SC referred to. The proviso cannot be applied retrospectively. The proviso is penal, arbitrary, unjust and unfair. Reliance is placed on In Re:

> Pulborough Parish School Board Election, Bourke v.
>
> Nutt74.
>
> 263. Per contra, the stand of the respondents in this regard, is as follows:
>
> The third proviso does not affect any rights of the creditors in question. By merely filing an application under Section 7, no absolute right is created. In this regard, reliance is placed on judgments of this Court in (2004) 1 SCC 663, (2019) 2 SCC 1, (2019) 4 SCC 17, (2015) 3 SCC 206, (2019) SCCONLINE SC 1478. It is further contended that the mere right to take advantage of a statue is not a vested right. And in this regard out attention is drawn to following Judgments – (1961) Vol. 2 All Eng. 721, (1980) 1 SCC 149; Lalji Raja and Sons (supra), (1985) 1 SCC 436. The impugned third proviso is intended to protect the collective

74 (1894) 1 QB 725 interest of others in a class of creditors. Before admission of an application, there is no vested right. Therefore, it does not have retrospective application, in a manner that impairs vested right. This requirement would ensure that there is no needless multiplicity and no single allottee would be able to achieve admission and its consequences without having a certain minimum number of compatriots on board. Even vested right can be taken away by the Legislature [(1957 SCR 488].

264. The first question, which we would have to answer, is whether the right under the unamended Section 7 was a vested right of the financial creditors or allottees covered by the provisos 1 and 2, respectively. This brings us squarely to the question as to what constitutes a vested right. Learned ASG contends that there is no vested right till the application is admitted. It is also contended that the right was only one to take advantage of a Statute. In Salmond on Jurisprudence, the following characteristics have been found indispensable to constitute a right:

> "41. The characteristics of a legal right Every legal right has the five following characteristics: -
>
> (1) It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.
>
> (2) It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of the duty, or as the person of incidence.
>
> (3) It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.
>
> (4) The act or omission relates to some thing (in the widest sense of that word), which may be termed the object or subject-matter of the right. (5) Every legal right has a title, that is to say, certain facts or event by reason of which the right has become vested in its owner."

265. Legal rights are, in a wider sense, of four distinct kinds. They are rights, liberties, powers and immunities. Duty is the correlative of a right, while, no rights correspond to liberties. Liabilities have a nexus with the power exercised by another person, with regard to whom, the liability exists in another party. When somebody has an immunity against another, it disables the latter, and thus, it constitutes a disability for him. Salmond notes further that the term right is often used in the wide sense to include liberty by which it is meant to have one left free to do as he pleases.

266. We may notice the following discussion relating to powers and liabilities:

> "2. Powers and liabilities. Yet another class of legal rights consists of those which are termed powers. Examples of such are the following: the right to make a will, or to alienate property; the power of sale vested in a mortgagee; a landlord's right of re-entry; the right to marry one's deceased wife's sister; the power to sue and to prosecute; the right to rescind a contract for fraud; a power of appointment; a power of appointment; the right of issuing execution on a judgment; the various powers vested in judges and other officials for the due fulfilment of their functions. All these are legal rights-they are legally recognized interests-they are advantages conferred by the law-but they are rights of a different species from the two classes which we have already considered. ..... My right to make a will corresponds to no duty in any one else. A mortgagee's power of sale is not the correlative of any duty imposed upon the mortgagor;
>
> xxx xxx xxx xxx A power may be defined as ability conferred upon a person by law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons. ..." (Emphasis supplied)

267. It may be asked whether a right of action is a right or a power. Is there a duty with anyone in the case of a right to an action? We need not probe this further as a power is also a right in the wider sense. The right to sue and right to appeal has been so recognized as we will notice.

268. As far as the distinct kind of legal rights are concerned, in the classification made by Salmond75 which counts nine distinct legal classifications of legal rights, we notice the following discussion of classification between vested and contingent rights. To quote:

> "Vested and contingent rights. A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right. A right is contingent when some but not all of the vestive facts, as they are termed, have occurred. A grant of land to A in fee simple will 75 See "Salmond on Jurisprudence, 12th Edition, P J Fitzgerald" give A a vested right of ownership. A grant to A for life and then to B in fee simple if he survives A, gives B a contingent right. It is contingent because some of the vestive facts have not yet taken place, and indeed may neve do so: B may not survive A. if he does, his formerly contingent right now becomes vested. A contingent right then is a right that is incomplete.

A contingent right is different, however from a mere hope of spes. If A leaves B a legacy in his will, B has no right to this during A's lifetime. He has no more than a hope that he will obtain a legacy; he certainly does not have an incomplete right, since it is open to A at any time to alter his will."

269. In Garikapati Veeraya (supra), the suit was filed on 22.04.1949. The High Court decreed the suit in an appeal by the plaintiff on 04.03.1955. The petitioner before this Court contended that since the valuation of the suit was more than Rs. 10,000, in terms of the clause 39 of the Letters Patent, 1865, an appeal was maintainable before the Supreme Court. No doubt this involved the argument that the appeal in fact lay to the Federal Court as all appeals would lie to the Federal Court in view of the abolition of the Privy Council in 1949. Since, the Federal Court was replaced by Supreme Court, the appeal lay before this Court.

270. After consideration of the case law we notice the following principles which have been laid down by this Court.

"23(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually

exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

(Emphasis supplied)

271. It is clear that the institution of a suit leads to the inference that the right of appeal is preserved. There is a vested right of appeal. The vested right of appeal accrues to the litigant and exists from the day of the institution of the lis (suit). Therefore, while the remedy of an appeal may be provided under the statute that right becomes a vested right only from the point of time that the suit is filed either by the appellant or the opposite party. All of this undoubtedly is subject to a subsequent enactment not interfering with the right of an appeal.

272. In Lalji Raja and Sons v. Hansraj Nathuram76, this court inter alia held as follows:

> "16. That a provision to preserve the right accrued under a repealed Act "was not intended to preserve the abstract rights conferred by the repealed Act.... It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute see" — Lord Atkin's observations 76 (1971) 1 SCC 721 in Hamilton Cell v. White. [(1922) 2 KB 422] The mere right, existing at the date of spealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause — see Abbot v. Minister for Lands [(1895) AC 425] and G. Ogden Industries Pvt. Ltd. v. Lucas. [(1969) 1 All ER 121]"

273. It is apposite to notice the context in which the said observations were made. There was an ex parte decree passed by a Court in West-Bengal in 1949. It was transferred to a Court (Morena) in Old Madhya Bharat State. The Execution Petition was dismissed on the ground that it was an ex parte Decree by a foreign court. This Court noted that Sections 38 and 39 of the Code of Civil Procedure did not apply on the day in question, and therefore, the transfer orders was without jurisdiction. On 1st April, 1951 the CPC was extended to former state of Madhya Bharat. The decree holders sought a fresh transfer of the decree to the very same court as earlier namely Morena which had become part of State of Madhya Pradesh to which CPC applied. The High Court upheld the contention of the judgment debtor that the decree could not be executed as being of the foreign court. This Court reversed the High Court judgment. The argument which was raised, was based on Section 20 of the Code of Civil Procedure (Amendment) Act, 1951, by which the Code was extended to Madhya Bharat. There was a repeal of the law that prevailed in the State when the amendment to the CPC in 1951 was made applicable. There was, however, also a proviso which saved rights privileges, obligations and liabilities acquired, accrued or incurred. The contention therefore of the judgment debtor was that the judgment debtor's right to resist was preserved under the saving clause. It was found by this Court that the provisions of CPC enforced in Madhya Bharat did not

confer the right claimed by the judgment debtor. All that happened as a result of the extension of the Code to the whole of India in 1951, was that the decrees which could have been executed in the British India could now be executed in the whole of India. It is, therefore, in the context of a repeal and as to whether right to take advantage of the repealed law constituted a right accrued under the usual saving clause that the observations made in paragraph 16 are to be understood.

274. This Court made reference to a few decisions (paragraph-16) including Abbott and Minister of Lands77. We think, it is appropriate that we advert to the issues which were involved in the said cases.

275. In Abbott (supra), the Privy Council had to deal with the following factual matrix, in short:

> The appellant effected a conditional purchase under Section 22 of the Crown Lands Alienation Act, 1861, adjoining the land which he had acquired in fee simple. He made certain applications, seeking to make further additional conditional purchases of certain adjoining lands as also seeking a lease.
>
> The questions which arose for the opinion of the court were three in number. Firstly, the question arose whether the conditional purchase which the appellant had made, constituted him the holder of an original conditional purchase, under Section 42 77 (1895) AC 425 of the Act of 1884. Still further, the question fell for decision as to whether Section 22 of the Crown Lands Act of 1884 reserved the right for the appellant the right to purchase additional conditional purchases of adjoining crown lands, which were allowed to the full area of 648 acres allowed by the repealed Act. Thirdly, the question arose, as to whether supposing him to be entitled to the additional conditional purchase, was he entitled to the conditional lease which he had applied for? Section 22 of the 1861 Act was repealed and in the later Act, there was no corresponding provision to Section 22 but there was a saving proviso which enabled the appellant, according to him, to make an additional conditional purchase, as if Section 22 remained in force. The saving clause saved all the accrued rights and liabilities. Noticing the change in the condition of residence, which had been earlier imposed, being done away with, the Court went on to hold as follows:
>
> “It has been very common in the case of repealing statues to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of them, the result would be very far-reaching.
>
> It may be, as Windeyer J.
>
> observes, that the power to take advantage of an enactment may without impropriety be termed a “right”. But the question is whether it is a “right accrued” within the meaning of the enactment which has to be construed.

> Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words "obligations incurred or imposed". They think that the mere right (assuming it to be properly so called existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment."

276. In Hamilton Gell v. White78, upon a quit notice given by the landlord, the tenant sought to avail the benefit of Section 11 of the Agricultural Holdings Act, 1914 by successfully complying with one out of the two 78(1922) 2 K.B. 422 conditions for seeking the compensation. Before the tenant could comply with the further condition, which was that he should move the action within two months, after quitting the holding, Section 11 was repealed. He subsequently made his claim within three months, as limited by the repealed Section. The matter went to an Arbitrator. The Arbitrator stated a special case. He raised two questions. Firstly, whether the tenant was entitled to claim compensation under the repealing Act of 1920 and, secondly, whether he could claim under the repealed Act notwithstanding the repeal. The first question was answered against the tenant, with which, the Court of Appeal agreed. As regards the second question, the Court was of the view that the tenant was entitled to succeed. The following is the reasoning, in short:

"SCRUTTON L.J. ... But it is not suggested by the appellant that his right to compensation was acquired by his giving notice of intention to claim it, what gave him the right was the fact of the landlord having given a notice to quit in view of a sale. The conditions imposed by s. 11 were conditions, not of the acquisition of the right, but of its enforcement. Sect. 38 says that repeal of an Act shall not (c) "affect any right ....

acquired .... under any enactment so repealed," or (e) "affect any investigation, legal proceeding, or remedy in respect of any such right." As soon as the tenant had given notice of his intention to claim compensation under s. 11 he was entitled to have that claim investigated by an arbitrator. In the course of that arbitration he would no doubt have to prove that that right in fact existed, that is to say that the notice to quit was given in view of a sale, and he would also have to prove the measure of his loss. But he was entitled to have that investigation, which had been begun, continue, for s. 38 expressly provides that the investigation shall not be affected by the repeal. I should like to add that the arbitrator would be well advised to make his award complete. If he had continued his investigation and said:

> If it is found that the tenant had a right I assess the compensation at so much under the Act of 1908 and so much under the Act of 1920 we should have been able to give our final judgment." (Emphasis supplied)

277. The decision thus turned on the point of time at which the right arose.

278. Atkin LJ., as he then was, agreed that the Appeal should be allowed and went on to hold as follows:

> "ATKIN L.J. .... It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right," which would "accrue" when he has quitted his holding, to receive compensation. ..."

279. In Odgen Industries Pty. Ltd. v. Haider Doreen Lucas79,the following facts in a case which originated in Australia may be noticed. An employee of the appellant died on 7th July, 1965. His death was materially contributed by injuries, which, in turn, arose out of and in the course of his employment with the appellants. The employee was hospitalized in March, 1965 for treatment and he again came to be hospitalized in 19th June, 1965 and, thereafter, he died on 79 3 WLR 75 / (1969) (1) All England Reports 121 07.07.1965. He left behind him the respondent, his widow and two children under the age of 16, who were wholly dependent on the employee's earnings. The amount of compensation for the dependents would have been calculated under the Workers Compensation Act, 1958. The Act, however, was amended by the Workers Compensation (Amendment) Act, 1965. The Amendment Act, came into force for 01.07.1965. The Amendment Act increased the benefits payable to the dependents. The High Court of Australia dismissed the appeal of the employer and affirmed the award of the Workman's compensation board paying the increased compensation under the Amending Act. The Privy Council was called upon to decide two questions. Firstly, the question was whether, as the Amendment Act came into operation after the original injury to the employee, his dependents were entitled to the increased rates prescribed by the amending Act. Secondly, did the deceased, after the 30.06.1965, suffer a further injury or aggravation, which gave him new title for the purpose of the Amendment Act. The Court, went on to hold as inter-alia follows:

> "Under the Act of 1958 the widow did not have to prove that she was in fact dependent upon the earnings of her husband though under the Amendment Act she has to do so. Nevertheless, it is quite clear as a matter of law that no single person can say under either Act the moment before the death "I shall be a dependant at the death if I so long live." First, it must be established that the death was caused or contributed to by the accident, secondly that the widow will be the deceased's widow at the date of death and not dead or married to some other man, and the children must show that they are under sixteen. None of these things can be ascertained (let alone proved) until after the moment of death of the worker.
>
> In their Lordships' opinion in section 7 (2)(c) the rights, privileges and obligations acquired or accrued on the one side and the liabilities incurred on the other side referred to in that paragraph are mutual and correlative.

... The object and intent of the Interpretation Act is to preserve rights and privileges acquired or accrued on the one side and the corresponding obligation or liability incurred by the person bound

to observe or perform those rights or privileges on the other side; so that when a subsequent Act repeals or amends those rights, privileges and liabilities for the future that would not affect the pre-existing mutual rights and liabilities of the parties. .... But in the view that their Lordships take there is for the purposes of the Interpretation Act no right in the dependants and no correlative liability upon the worker's employers until the moment of death. Therefore apart altogether from authority their Lordships are of opinion that the Acts Interpretation Act has no application and the rights of the dependants and the corresponding liability of the employer must be tested and ascertained at the date of the death; at that time there was an obligation upon the employer under and by virtue of the Act of 1958 as amended by the Amendment Act to compensate the dependants in accordance with its provisions. That was the ground of decision of the majority of the High Court in their very careful judgments with which their Lordships agree. ..." (Emphasis supplied)

280. It will be, at once, noticed that the saving clause in the repealing Act, was not the basis for the judgment rendered in favour of the employee. The compensation was ordered based on the law prevalent at the time of death.

281. Now, it is necessary to refer to the judgment of this Court in Isha Valimohamed v. Haji Gulam Mohamad & Haji Dada Trust80. The facts in the said case are to be noticed in some detail for it may have bearing on the questions to be answered by us. The Respondent landlord (1974) 2 SCC 484 purported to terminate the tenancy in relation to a building by a notice dated 12.02.1964 on the ground inter alia of subletting. It must be noticed that at the time the subletting took place the building was covered by Saurashtra Rent Control Act, 1951. The said Act provided that the landlord shall be entitled to recover possession in the case of subletting by the tenant. It is while this Act was in force that the tenant sublet the premises. However, the Saurashtra Act came to be repealed by the Bombay Rents, Hotels and Lodging Houses Rates Control Act, 1947 on 31.12.1963. Section 51 of the Bombay Act, inter alia, contained the saving clause that the repeal would not affect any right, privilege, obligation, liability accrued or incurred under any law so repealed. The notice, terminating tenancy was issued on 12.02.1964 after the repeal of the 'Saurashtra Act'. The High court took the view that the landlord had an accrued right under saving clause of the Bombay Act. The suit was brought after the repeal.

282. This Court adopted the following reasoning:

> If the notice under the Transfer of Property was necessary to determine the tenancy on the ground of subletting, then the High Court would not be correct that the respondent landlord had an accrued right before issue of notice. Thereafter, the Court went on to consider 'Hamilton' (supra) and 'Abbott' (supra) inter alia.

Thereafter, the Court went on to consider the argument as to whether the landlord had a privilege under the saving clause.

Thereafter, what is relevant is that this Court went on to find that the High Court was not right in proceeding on the basis of that notice was necessary under Transfer of Property Act to terminate on the ground that the appellant had sublet the premises.

283. It is apposite to notice the reasoning in paragraph-16:

> "16. Under the Transfer of Property Act, mere sub-letting, by a tenant, unless the contract of tenancy so provides, is no ground for terminating the tenancy. Under that Act a landlord cannot terminate a tenancy on the ground that the tenant had sub-let the premises unless the contract of tenancy prohibits him from doing so. The respondent-landlord therefore could not have issued a notice under any of the provisions of the Transfer of Property Act to determine the tenancy, as the contract of tenancy did not prohibit sub-letting by the tenant. To put it, differently, under the Transfer of Property Act, it is only if the contract of tenancy prohibits sub-letting by tenant that a landlord can forfeit the tenancy on the ground that the tenant has sub-let the premises and recover possession of the same after issuing a notice. Section 111 of the Transfer of Property Act provides that a lease may be determined by forfeiture if the tenant commits breach of any of the conditions of the contract of tenancy which entails a forfeiture of the tenancy. If sub-letting is not prohibited under the contract of tenancy, sub-letting would not be a breach of any condition in the contract of tenancy which would enable the land- lord to forfeit the tenancy on that score by issuing a notice. If that be so, there was no question of the respondent landlord terminating the tenancy under the Transfer of Property Act on the ground that the tenant had sub-let the premises. It is only under Section 13(1)(e) of the Saurashtra Act that a landlord was entitled to recover possession of the property on the basis that the tenant had sub-let the premises; and, that is because, Section 15 of that Act unconditionally prohibited a tenant from sub-letting.

The Saurashtra Act nowhere insists that the landlord should issue a notice and terminate the tenancy before instituting a suit for recovery of possession under Section 13(1)(e) on the ground that the tenant had sub-let the premises. The position, therefore, was that the landlord was entitled to recover possession of the premises under Section 13(1) of the Saurashtra Act on the ground that the tenant sublet the premises. It would follow that a right accrued to the landlord to recover possession under Section 13(1) of the Saurashtra Act when the tenant sub-let the premises during the currency of that Act and the right survived the repeal of that Act under proviso (2) to Section 51 of the Bombay Act and, therefore, the suit for recovery of possession of the premises under Section 13(1) read with clause (e) of the Saurashtra Act after the repeal of that Act on the basis of the sub-letting during the currency of the Saurashtra Act was maintainable. In this view, we think that the judgment of the High Court must be upheld and we do so."

284. Thus, what is relevant, this Court went on to find under the Saurashtra Act, there was no requirement of any notice to terminate the tenancy. It was found that the landlord was entitled to recover the possession under the said Act, if there was subletting. In other words, the Court went on to hold that a right accrued to the landlord under the Saurashtra Act upon the appellant subletting the premises. It was during the pendency of the Saurashtra Act. This right survived the repeal of the Saurashtra Act and thus the suit under the Saurashtra Act was maintainable.

285. Apparently, the Court drew support from the principle in Hamilton (supra). We have already noticed the facts of Hamilton (supra). The question in short would appear to be as to when the right comes into existence? If, the right comes into existence then the remedy can be pursued by the party entitled.

286. This again would necessarily depend upon the terms of the repealing enactments as also the terms of the saving clause. In the absence of a saving clause, no doubt a party can also fall back on the Section 6 of the General Clauses Act, 1897. This is again subject to what is held about the scope of a saving clause in (1989) 2 SCC 557 as will be noticed later on.

287. What is further significant to be noticed is that the decision involved a case where, though styled as a suit, the proceeding under the Saurashtra Act was a proceeding under a Statute and the right was one created by the statute and what gave the right to the landlord was an act of subletting. The said right was what was not wiped out by the repeal. As already noticed the suit itself was filed after the repeal. The discussion on the distinction between a privilege and an accrued right in the said decision has been relied upon recently in a judgement by one of us (Justice R.F. Nariman) in Bombay Stock Exchange v. V.S. Kandalgaonkar81.

288. In New India Assurance Co. Ltd. v. Shanti Misra82, the husband of the first respondent died as a result of a motor accident. The suit could be brought under Article 82 of the Limitation Act 1963 within two years of the accident. On 18.03.1867, the Government of Uttar Pradesh constituted the claim Tribunal under Section 110 of the Motor Vehicle Act. The application of the respondents before the Tribunal was objected to by the appellant insurer. While deciding in favour of the 81(2015) 2 SCC 1 82(1975) 2 SCC 840 respondents and holding that the application was maintainable before the Tribunal, this court, inter- alia, held as follows:

> "... If action, before Civil Court was alive where no suit had been filed "In such cases the vested right of action was not meant to be extinguished. The remedy of either application under Section 110A or a civil suit must be available; surely not both."

289. Thereafter, it was held, inter-alia, as follows:

> "5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when

the accident occurred. To that extent there was no difficulty in giving the answer in a simple way." (Emphasis supplied)

290. We may also notice that in regard to the question as to whether a new law of Limitation could extinguish vested right of action, it was held, inter-alia, as follows:

"7. (2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish a vested right of action by providing for a shorter period of limitation." It is important to notice paragraph-9:

"9. In Gopeshwar Pal v. Jiban Chandra Chandra [ILR 51 Cal 1125] Jenkins, C.J. delivering the judgment on behalf of the majority of the Full Bench said at p. 1141:

"Here the plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the amending Act. It is not (in our opinion) even a fair reading of Section 184 and the third Schedule of the Bengal Tenancy Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed." The majority of the Full Bench of the Madras High Court in Rajah Sahib Meharban-i-Doston Sri Raja Row V.K.M. Surya Row Bahadur, Sirdar, Rajahmundry Sircar and Rajah of Pittapur v. G. Venkata Subba Row [ILR 34 Mad 645] has taken the same view following the Full Bench decision in Gopeshwar Pal case at p. 650. Amendment of the law of limitation could not destroy the plaintiff's right of action which was in existence when the Act came into force. We are conscious of the distinction which was sought to be made in the application of these principles. It was said that the right could not be destroyed but recourse to suit would be available under the old law of limitation. We, however, think that giving retrospective effect to the change of law in relation to the forum, in the context of the object of the change, is imperative. That being so the principles aforesaid for overcoming the bar of limitation will be applicable."

291. This judgment has been followed in Vinod Gurudas Raikar v. National Insurance Co. Ltd. & ors83 and also in Union of India v. Harnam Singh84 and recently also by this Court in B.K. Educational Services (supra).

292. In V. Dhanapal Chettiar v. Yesodai Ammal85, a Bench of seven learned Judges while taking the view that a notice to quit under section 106 of the TP Act 1882 was not necessary for an Eviction Petition under any of the State Rent Acts observed in

regard to Isha Valimohamed (supra) that the view taken in the said case that the landlord could not have issued notice to determine the tenancy on the ground of subletting under any of the provisions of Transfer of Property Act was not correct as a notice issued under Section 111 (h) does not require any ground to be made out for termination of the tenancy. It was further held that the view taken in Isha Valimohamed (supra), in this regard, would be taken only under Section 111 (g).

(1991) 4 SCC 333 (1993) 2 SCC 162 85(1979) 4 SCC 214

293. In D. C. Bhatia v. Union of India86, the Delhi Rent Control Act came to be amended with effect from 01.12.1988, by which amendment, the Act was not to apply to any premises, the monthly rent of which exceeded Rs.3500/-. Dealing with the tenants' contention that he had a vested right this Court took the view that if the tenant is sought to be evicted before the amendment, they could have taken advantage of the provisions of the Act to resist such eviction. But this was nothing more than the right to take advantage of the law and the tenant had statutory protection only as long as the law remains in force. We may only notice paragraph-53. It read as under:

"53. The provisions of a repealed statute cannot be relied upon after it has been repealed. But, what has been acquired under the Repealed Act cannot be disturbed. But, if any new or further step is needed to be taken under the Act, that cannot be taken even after the Act is repealed." (Emphasis supplied) 86 (1995) 1 SCC 104

294. In Mst. Bibi Sayeeda & Ors. v. State of Bihar and Others87, the Court was to dealing with the meaning of the word `Bazar' in the Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950). In the course, of the said judgement the Court went on to hold that the right of the proprietor of a State to hold a `Mela' on its own land is a right in the estate being appurtenant to the ownership of his land. In the context, of property rights undoubtedly the Court went on to make the following observations:

"17. The word 'vested' is defined in Black's Law Dictionary (6th Edn.) at p. 1563 as:

"Vested; fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent." Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights.

(1996) 9 SCC 516/AIR 1996 SC 1936 In Webster's Comprehensive Dictionary, (International Edn.) at p. 1397 'vested' is defined as:

"[L]aw held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interests."

> 295. Though this is a case which dealt with vested right qua property there is indeed authority for the proposition that the concept of vested right is not confined to a property right. In this regard we may profitably refer to the special bench of judgement of High Court of Calcutta reported in Gopeshur Pal v.

Jiban Chandra Chandra and others88, referred to by this Court in AIR 1976 SC 237 (supra) when it was, inter alia, held:

> 3."On the contrary, the essential conditions of the two cases are so distinct that in our opinion it cannot be said that the earlier decision is, in relation to the circumstances of this case, affected by the judgment of the Privy Council. It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still, the intention to take AIR 1914 Calcutta 806 away a vested right without compensation or any saving, is not to be imputed to the Legislature, unless it be expressed in unequivocal terms [cf. The Commissioner of Public Works v. Logan [L.R. 1903 A.C. 355.]].

That this view is not limited to those cases where rights of property in the limited sense are involved, is shown by the Colonial Sugar Refining Co. v. Irving [L.R. 1905 A.C. 369.], where it was held that an Act ought not to be so construed as to deprive a suitor of an appeal in a pending action, which belonged to him as of right at the date of the passing of the Act. Equally is a right of suit a vested right, and in Jackson v. Woolley [8 Ell. and Bl. 784 (1859).], the Court of Exchequer Chamber declined, in the absence of something putting the matter beyond doubt, to put on an Act a construction that would deprive any person of a right of action vested in him at the time of the passing of the Act.

4.William, J. said: "It would require words of no ordinary strength in the statute to induce us to say that it takes away such a vested right."

296. In M.S. Shivananda v. Karnataka SRTC89, under an ordinance, employees of the erstwhile State Carriage Operators were to be absorbed by State Road Transport corporation subject to certain conditions. The ratio 89 (1980) 1 SCC 149 was provided. The ordinance was replaced by an Act. The ratio, however, stood altered. This affected the chances of absorption of the workers. This led to writ petitions. The question which fell to be decided with reference to the effect of repeal and what constituted a right. The court held inter-alia as follows:

> "15. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right. In Director of Public Works v. Ho Po Sang [(1961) 2 All ER 721, 731 (PC)] Lord Morris speaking for the Privy Council, observed:

"It may be, therefore, that under some repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should be or should not be given. On a repeal, the former is preserved by the Interpretation Act. The latter is not."(emphasis supplied) It must be mentioned that the object of Section 31(2)(i) is to preserve only the things done and action taken under the repealed Ordinance, and not the rights and privileges acquired and accrued on the one side, and the corresponding obligation or liability incurred on the other side, so that if no right acquired under the repealed Ordinance was preserved, there is no question of any liability being enforced.

16. Further, it is significant to notice that the saving clause that we are considering in Section 31(2)(i) of the Act, saved things done while the Ordinance was in force; it does not purport to preserve a right acquired under the repealed Ordinance. It is unlike the usual saving clauses which preserve unaffected by the repeal, not only things done under the repealed enactment but also the rights acquired thereunder. It is also clear that even Section 6 of the General clauses Act, the applicability of which is excluded, is not intended to preserve the abstract rights conferred by the repealed Ordinance. It only applies to specific rights given to an individual upon the happening of one or other of the events specified in the statute."

297. In Kanaya Ram (supra) the predecessor in interest of the appellants had applied for purchase of the tenancy right under the Punjab Security of Land Tenures Act 1953. During the pendency of the proceedings before the Assistant Collector, certain persons were impleaded as respondents on the basis that they were the legal heirs of the landlord. Thereafter, their names were struck off as unnecessary. On the same day, the application of the predecessor in interest of the appellants was allowed. Thereafter, there was certain oral sales by the original land owner. The contention which apparently was taken by the legal heirs of landlord upon his death was that the original landlord died during the pendency of the proceedings, and there was change in the status of the land owners against whom the application under Section 18(1) of the Act was made as on that date as his legal heirs became small land owners. The Financial Commissioner before whom the matter reached, however, was of the view that the application made by the appellants predecessor being competent on the date it was filed, the rights of the parties had to be adjudicated on that basis. The learned Single Judge of the High Court took the view, however, that the changed situation brought about by the death of the big land owner had to be taken into account in determining the right of the tenant.

Respondents 3 to 14 who were the legal heirs of the landlord instituted a suit against the transferees from the landlord on the basis that they were mere benmaidars of the land owner and no title passed to them as the alleged sales were not effected by registered instruments under section 54 which had

been extended by the Government of Punjab with effect from 1st April 1955 to the State. The suit came to be decreed. They sought impleadment before the High Court on the ground that the Collector had in determining the surplus area of the land of the land owners held that the sales in favour of respondents 1 and 2 were benami. The Collector found that on the death of the original land owners, respondents 3 to 14 became small land owners. The Division Bench took the view that no oral sale could be made, and therefore, the transfers made in favour of respondents 1 and 2 did not pass any title. This Court, apart from noticing the fact that as the special leave had been refused against the main judgment the appeal was no longer tenable it, held that the original land owner was not impleaded by the predecessor in interest of the appellants in his application even though respondents 3 to 14 were impleaded and they were subsequently deleted on appellant's objection that they were not necessary parties. This Court went on to distinguish the judgment in Rameshwar and Others v. Jot Ram and Another90 as it was a case where the tenants after making the requisite application had made the necessary deposit of the first instalment of the purchase price. It was in such circumstances noted that the tenants had acquired a vested right to purchase the land and the case had gone beyond the stage of mere application under section 18(1). This Court noted that the observation of the Court that the rights of the parties are determined "by the facts as they exist on the date of the action" must be held in the context in which they were made. What is relevant is the following statement is the judgment in Kanaya Ram (supra):

> "10. .....In the present case, Harditta Ram, the predecessor-in-title of the appellants, when he made the application for purchase under Section 18(1) of the Act, had a mere "hope or expectation of, or liberty to apply for, acquiring a right" and not a "right acquired or accrued" under Section 18(1). It has been held

90 (1976) 1 SCC 194 ever since the leading case of Abbott v. Minister for Lands [1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC)] [1895 AC 425 : 64 LJPC 167 : 72 LT 402 (PC)] that a mere right to take advantage of the provisions of an Act is not an accrued right. Abbott case [1895 AC 425: 64 LJPC 167 : 72 LT 402 (PC)] has been followed by this Court in a number of decisions. In such a situation, the Court is bound to take into consideration the subsequent events and mould the relief accordingly. The decision in Rameshwar case [(1976) 1 SCC 194 : AIR 1976 SC 49 : (1976) 1 SCR 847] clearly turned on the legal fiction contained in Section 18 (4)

(b) of the Act and the death of the large landholder Teja during the pendency of the appeal before the Financial Commissioner on which inheritance opened and his legal heirs became small landholders, could not impair the vested rights acquired by the tenants by virtue of the order passed by the Prescribed Authority and the deposit by them of the first instalment of the purchase price as required under Section 18 (4)(a)." (Emphasis supplied)

298. While on the ambit of the saving clause we may notice Bansidhar v. State of Rajasthan91 while dealing with the fact of saving clause in a repealing statute the court held as follows:

> (1989) 2 SCC 557 "28. A saving provision in a repealing statute is not exhaustive of the rights and obligations so saved or the rights that survive the repeal. It is observed by this Court in IT Commissioner v. Shah Sadiq & Sons [(1987) 3 SCC 516 : 1987 SCC

> (Tax) 270 : AIR 1987 SC 1217, 1221] : (SCC p. 524, para 15) "... In other words whatever rights are expressly saved by the 'savings' provision stand saved. But, that does not mean that rights which are not saved by the 'savings' provision are extinguished or stand ipso facto terminated by the mere fact that a new statute repealing the old statute is enacted. Rights which have accrued are saved unless they are taken away expressly. This is the principle behind Section 6(c), General Clauses Act, 1897...." We agree with the High Court that the scheme of the 1973 Act does not manifest an intention contrary to, and inconsistent with, the saving of the repealed provisions of Section 5(6-A) and Chapter III-B of "1955 Act" so far as pending cases are concerned and that the rights accrued and liabilities incurred under the old law are not effaced. Appellant's contention (a) is, in our opinion, insubstantial.

Re Contention (b)"

299. Petitioners also rely on the judgment of this Court Hitendra Vishnu Thakur (supra) and Ambalal Sarabhai Enterprises Ltd. (supra).

300. In Hitendra Vishnu Thakur (supra), the case arose under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA Act). Section 20(4) of TADA Act, made Section 167 of the CrPC applicable with certain modifications. Clause (b) provided for a longer period, as the period for which remand could be ordered. By an amendment, w.e.f. 22.05.1993, the period was reduced. Thereafter, however, another clause, viz., clause (bb) was added, which contained a proviso. The proviso mandated that if it was not possible to complete the investigation within a period of 180 days on the Report of the Public Prosecutor, indicating the progress of the investigation and the specific reasons for detention beyond 180 days, the designated court should extend the period upto one year. It was in the context of this provision that this Court, after noting that the amendment was retrospective and apply to pending cases, in which, the investigation was not complete on the date of the Amending Act and the challan had not been filed in the Court, the Court culled-out the following principles:

"26. xxx xxx xxx xxx

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

301. Thereafter, the Court also went on to hold, however, that both the amendment clauses (b) and (bb) would apply retrospectively to all pending cases. Thus, it was found that the Amending Act was retrospective and both the clauses would apply to cases which were pending investigation on the date when the amendment came into force and where challan had not been filed till then.

302. In Ambalal Sarabhai Enterprises Ltd. (supra), by an amendment to the Delhi Rent Control Act, while a petition for eviction by the respondent landlord was pending on the ground of subletting, exclusion of the jurisdiction of the Rent Controller with respect of tenancies fetching monthly rent exceeding Rs.3,500/- was brought into force. The question arose, inter alia, as to whether the ground of illegal subletting was a vested right. It also fell for decision as to whether there was merit in the contention of the appellant tenant that after the amendment, the civil court alone had jurisdiction. It was the contention of the tenant that he had no vested right and the amendment was not retrospective in operation, and therefore, the civil court alone would have jurisdiction. The landlord contended that in view of Section 6 of the General Clauses Act, 1897, the pending proceedings before the Rent Controller should at any rate continue even if his contention based on vested right was repelled. This Court went on to hold that the tenant had no vested right by relying on the judgment of this court in Mohinder Kumar and others v. State of Haryana and another92 and also in D. C. Bhatia and others v. Union of India and another93 (the latter of which decisions is relied upon by the respondent-Union for the proposition that a right to take advantage of an enactment, would not create a vested right). Thereafter, this Court went on to hold that the landlord also did not have a vested right for seeking on the ground of eviction under Section 14 of the Delhi Rent Control Act. It was found that Section 14 was only a protective right for a tenant and the various clauses which constituted a proviso to the protection from eviction by a landlord could not be construed as a vested right in favour of the landlord. Having so held, this Court went on to consider the effect of a repeal 92 (1985) 4 SCC 221 93 (1995) 1 SCC 104 of Section 6 of the General Clauses Act. Therein, this Court went on to hold that the respondent-landlord had a right to continue the proceedings before the Rent Control Board under Section 6 of the General Clauses Act. It would be an accrued right in terms of Section 6. We need only notice paragraphs-26, 35 and 36 of Ambalal Sarabhai Enterprises Ltd.(supra):

> "26. As a general rule, in view of Section 6, the repeal of a statute, which is not retrospective in operation, does not prima facie affect the pending proceedings which may be continued as if the repealed enactment were still in force. In other words, such repeal does not affect the pending cases which would continue to be concluded as if the enactment has not been repealed. In fact when a lis commences, all rights and obligations of the parties get crystallised on that date. The mandate of Section 6

> of the General Clauses Act is simply to leave the pending proceedings unaffected which commenced under the unrepealed provisions unless contrary intention is expressed. We find clause
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> (c) of Section 6, refers the words "any right, privilege, obligation ... acquired or accrued" under the repealed statute would not be affected by the repealing statute. We may hasten to clarify here, mere existence of a right not being "acquired" or "accrued" on the date of the repeal would not get protection of Section 6 of the General Clauses Act.
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> xxx xxx xxx xxx
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> 35. In cases where Section 6 is not applicable, the courts have to scrutinise and find whether a person under a repealed statute had any vested right. In case he had, then pending proceedings would be saved. However, in cases where Section 6 is applicable, it is not merely a vested right but all those covered under various clauses from (a) to (e) of Section 6. We have already clarified that right and privilege under it is limited to that which is "acquired" and "accrued". In such cases pending proceedings is to be continued as if the statute has not been repealed.

36. In view of the aforesaid legal principle emerging, we come to the conclusion that since proceeding for the eviction of the tenant was pending when the repealing Act came into operation, Section 6 of the General Clauses Act would be applicable in the present case, as it is the landlord's accrued right in terms of Section 6. Clause (c) of Section 6 refers to "any right" which may not be limited as a vested right but is limited to be an accrued right. The words "any right accrued" in Section 6(c) are wide enough to include the landlord's right to evict a tenant in case proceeding was pending when repeal came in. Thus a pending proceeding before the Rent Controller for the eviction of a tenant on the date when the repealing Act came into force would not be affected by the repealing statute and will be continued and concluded in accordance with the law as existed under the repealed statute."

303. In Howrah Municipal Corporation and Others v. Ganges Rope Co. Ltd. and Others94 the first respondent company had applied for sanction for construction of its complex of seven floors. By order dated 23.12.1993 the High Court directed sanction to be accorded for the plan up to the 4th floor provided other requirements are complied with. It was also observed that the company would be at liberty to seek further sanction if it was permissible. Sanction was given and construction completed as regards the four floors. Relying on the High Court order, sanction was sought for the remaining floors. The High Court passed an order expressing the expectation that the order would be passed within a period of four weeks relying upon (2004) 1 SCC 663 the earlier order. There was correspondence between the parties. While the matter was so pending, the building rules were amended restricting the height of buildings, inter alia. The height being restricted, the application for sanction of additional three floors was rejected. The High Court took the view that the unamended rules and regulations on the date of submission of the application seeking sanction for further construction would govern the matter. This Court on a conspectus of the rules found that the

rules did not contemplate `deemed sanction' or `deemed refusal', and therefore, without express sanction there could not be construction. The contention however, was that the order of the High court fixing a period to decide its pending application be treated as creating vested right in favour of the respondent. This court held as follows:

> "37. The argument advanced on the basis of so-called creation of vested right for obtaining sanction on the basis of the Building Rules (unamended) as they were on the date of submission of the application and the order of the High Court fixing a period for decision of the same, is misconceived. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right" [see K.J. Aiyer's Judicial Dictionary (A Complete Law Lexicon), 13th Edn.]. The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to "ownership or possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction. In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfilment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such "vested right" or "settled expectation" is being sought to be enforced. The "vested right" or "settled expectation" has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."

304. In Arcelormittal India Private Limited v. Satish Kumar Gupta & Others95, a judgment rendered by one of us (R.F. Nariman, J.), this Court dealt with the very Code with which we are concerned. It concerned the scope of Section 29A of the Code declaring ineligibility of certain categories of persons to be resolution applicants. In this context, this Court inter alia, while dealing with the scope of the Code as also the principle of piercing of corporate veil, and after an exhaustive survey of the Code and reiterating the principle that it is settled law that a statute is designed to be workable, a question was posed whether a resolution plan being turned down under (2019) 2 SCC 1

Section 30(2) could be challenged. Answering this question, the Court held as follows:

> "79. Given the timeline referred to above, and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the adjudicating authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.
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> 82. Take the next stage under Section
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> 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time-

limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the adjudicating authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place.

305. In Swiss Ribbons (supra), while dealing with constitutional validity of Section 29A of the Code declaring certain persons not to be eligible as resolution applicants, after referring to the decision in Arcelormittal India Private Ltd. (supra), this Court held as follows:

> "97. It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing [see State Bank's Staff Union (Madras Circle) v. Union of India [State Bank's Staff Union (Madras Circle) v. Union of India, (2005) 7 SCC 584 : 2005 SCC (L&S) 994] (at para 21)].
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> In ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] , this Court has observed that a resolution applicant has no vested right for consideration or approval of its resolution plan as follows: (SCC p. 87, para 82) "82. Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is

not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time-

limits specified where no other resolution plan is available with him.

It is clear that at this stage again no application before the adjudicating authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place."

98. This being the case, it is clear that no vested right is taken away by application of Section 29-A. However, Shri Viswanathan pointed out the judgments in Ritesh Agarwal v. SEBI [Ritesh Agarwal v. SEBI, (2008) 8 SCC 205] (at para 25), K.S. Paripoornan v. State of Kerala [K.S. Paripoornan v. State of Kerala, (1994) 5 SCC 593] (at paras 60-

66), Darshan Singh v. Ram Pal Singh [Darshan Singh v. Ram Pal Singh, 1992 Supp (1) SCC 191] (at para

35), Pyare Lal Sharma v. Jammu & Kashmir Industries Ltd. [Pyare Lal Sharma v. Jammu & Kashmir Industries Ltd., (1989) 3 SCC 448 : 1989 SCC (L&S) 484] (at para 21), P.D. Aggarwal v. State of U.P. [P.D. Aggarwal v. State of U.P., (1987) 3 SCC 622 : 1987 SCC (L&S) 310] (at para 18), and Govind Das v. CIT [Govind Das v. CIT, (1976) 1 SCC 906 : 1976 SCC (Tax) 133] (at paras 6 and 11), to argue that if a section operates on an antecedent set of facts, but affects a vested right, it can be held to be retrospective, and unless the legislature clearly intends such retrospectivity, the section should not be construed as such. Each of these judgments deals with different situations in which penal and other enactments interfere with vested rights, as a result of which, they were held to be prospective in nature.

However, in our judgment in ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1], we have already held that resolution applicants have no vested right to be considered as such in the resolution process. Shri Mukul Rohatgi, however, argued that this judgment is distinguishable as no question of constitutional validity arose in this case, and no issue as to the vested right of a promoter fell for consideration. We are of the view that the observations made in ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] directly arose on the facts of the case in order to oust the Ruias as promoters from the pale of consideration of their resolution plan, in which context, this Court held that they had no vested right to be considered as resolution applicants. Accordingly, we follow the aforesaid judgment. Since a resolution applicant who applies under Section 29-A(c) has no vested right to apply for being considered as a resolution applicant, this point is of no avail."

306. We may observe that the decisions of this Court in Arcelormittal India Pvt. Ltd. (supra) and Swiss Robbins (supra) are inappropriate to the context of the cases before us. We may also notice the decision of the Court of Appeal in West vs. Gwynne96. The plaintiff in the said case who was the landlord of the property wrote to the defendant, his tenant for his consent for (1910) WLR 976 the

proposed underlease. The defendant insisted however on receiving for himself one half of the surplus rental as a condition for the consent. The suit filed by the plaintiff was for a declaration that the defendant could not impose such a condition and that he could give the underlease without any further consent of the defendant. In the year 1892 (after the lease), section 3 of the Conveyancing Act 1892 was enacted. The question which arose was whether it would apply to existing leases as well as and was of general application or it should be confined to leases after the commencement of the Act. The said section provided that in all leases containing a covenant against assigning or under letting without license or consent such covenant should unless the lease contain an express provision to the contrary be deemed subject to the proviso that no fine shall be payable for or in respect of such license or consent. The court took the view that the words of the section was clear. In fact, we may profitably notice the words of Joyce, J. whose judgment was the subject matter of the appeal "the section with which we have to deal with in this case is quite plain to everyone but a lawyer". The court of appeal took the view that the provision was a general enactment based on ground of public policy, Cozens Hardy M.R. while agreeing with the general proposition that a statute is presumed not to have retrospective operation unless a contrary intention appears by express words or by necessary implication held as follows:

> "Retrospective operation is an inaccurate term. Almost every statute affects right which would have been existed but for the statute.
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> 307. Buckley, L.J. went on to hold as follows:
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> "...To my mind the word "retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law."
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> 308. Reliance has been placed on the judgment of this court in B.K. Educational Services Private Limited v.

Parag Gupta and Associates97 which was rendered by one of us (R.F. Nariman, J.). By an amendment to the Code with effect from 6.6.2018 Section 238A was inserted by which the Limitation Act, 1963, was made applicable to the proceedings and appeals before the authorities including the appellate tribunal. The question which fell for decision was whether the Limitation Act 1963 would also apply in respect of application under Section 7 inter alia on and from the commencement of the Code on 1.12.2016 till the date of the amendment that is 6.6.2018. In answering this question, this court went on to hold that the CIRP can only be initiated either by a financial or operational creditor in relation to debts which have not become time barred. In the course of its judgment, this Court referred to the earlier judgment of this Court including the recent

judgment of this Court in M.P. Steel Corporation v.

(2019)11 SCC 633 Commissioner of Central Excise98. In the said decision, this Court has relied upon the earlier judgment reported in Smt. Shanti Misra (supra) wherein it was laid down inter alia as follows:

> "(2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally, the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by providing for a shorter period of limitation."
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> 309. This Court also held that the application filed in 2016 or 2017 cannot suddenly revive a debt which is no longer due as it is time barred. Apparently, the petitioners are seeking to lay store by the principle that a new law cannot extinguish a vested right of action even if it be pertaining to the period of limitation.
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> 310. A right of appeal is a vested right, as noticed.

However, it becomes vested not because the right is (2015) 7 SCC 58 created under the Statute alone. It becomes vested, as noticed by this Court in Garikapati Veeraya (supra), from the date of institution of the suit. What about a right to sue? In the case of a right to file a civil suit, equally there is a vested right to file a suit but the question would be as to when does it arise. From the line of argument pursued on behalf of the Union that in the case of the right to take advantage of an existing Statute, there is no accrued right, which means also that there is no vested right, should we proceed on the basis that the concept of a vested right qua a civil suit, can be recognized only after the civil suit is filed, at a time when there is no law, ousting or barring a civil suit and a law is passed, during the pendency of a civil suit, which again does not expressly bar the suits, which had already been filed? Since we are in the regions of vested rights, and every right must have a title to the right, and since every civil suit is based on a cause of action, could it not be said that the right to sue becomes vested from the point of time when the cause of action arises? Since, for every civil suit, there is a period of limitation prescribed, could it not be said that since a period of limitation has been prescribed for instituting a suit, the right to sue becomes vested from the first day when the period of limitation starts to run?

311. Order VII Rule 11 of the Code of Civil Procedure contemplates rejection of a plaint, if it does not disclose a cause of action. The cause of action in a suit, will consist of the facts, which, if not traversed by the defendant, will entitle the plaintiff to a Decree. The Schedule to the Limitation Act, 1963, consisting of three columns. The third column, provides for the time, from which, the period begins to run for different suits. Article 19 provides for money payable for money lent. The period of three years, prescribed as period of limitation, begins to run from the point of time, when the loan is made. This means that, at any point of time, after the loan is made, but within three years, ordinarily, a civil suit is to be filed. In the example, we have given, if a suit is filed towards the end of

the three-year period, would it be said that the right to sue was not available from the first day, when the period of limitation began to run? We will take another example. Article 73 provides for a period of one year for a suit for compensation for false imprisonment. The time, from which the period begins to run, is when the imprisonment ends. Can it not be said that the prisoner, upon his incarceration coming to an end, is clothed with a vested right to sue? We would think, that he is given a right, which is vested in him, when the imprisonment ends. In fact, it is the illegal imprisonment which is really creates the vested right but the period of limitation begins on sound policy only after his release. Article 113 of the Limitation Act, provides for suits for which there is no period provided in the schedule. The period of 03 years provided begins to run when the right to sue accrues. If the right to sue 'accrued' within the meaning of Article 113, can it still be said, that for the purpose of deciding, the effect of a law purporting to impact the right, there is no vested right or accrued right till the suit is filed? We will give another example and that is Article 30, which gives a right to sue on the bond subject to a condition. The period of limitation is three years. The time begins to run when the condition is broken. The right to sue clearly could be said to arise, immediately upon the condition being broken. We may, in this context also, notice that one of the five characteristics for a legal right to exist, is that every legal right has a title. It is further stated, in Salmond on Jurisprudence that every legal right has a title, which are apparently the facts or events by reason of which the right has become vested in its owner. Now, it must be noticed also, at this stage that the Limitation Act, in fact, contemplates the time, within which the suit must be brought, beginning necessarily on the supposition, that at least, on the very first day of the period of time, from which a plaintiff can sue, the right is already vested in him. This would reinforce us in our view that a vested right to sue could be said to accrue, and it would always precede the institution of the suit. At any rate, it could be said to exist from the very first day, on which the time begins to run, under the Limitation Act. Thus, a vested right to sue could be tested with reference not to the date on which the suit is filed as would be the case where a question arises, whether a right of appeal exists.

312. However, we must consider whether a right of suit is conferred by a statute. In this regard, we may notice the decision of this Court in Mardia Chemicals Ltd. and others v. Union of India and others99. Therein the validity of certain provisions of the SARFAESI Act 2002, was questioned. Of relevance to us, in these cases is the discussion of this Court relating to the vires of Section 17(2). The said provision contemplated a pre-deposit of 75 per cent of the amount by the applicant under Section 17 before the Tribunal. This Court found the condition of pre-deposit arbitrary and unreasonable. In this context, this court also noted the distinction between a civil suit and an appeal and it was found that an application maintained under section 17 was in the nature of a suit, it is apposite that we notice the following:

> 99 (2004) 4 SCC 311 "59.We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings.

It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily

available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court in Ganga Bai v. Vijay Kumar [(1974) 2 SCC 393] where in respect of original and appellate proceedings a distinction has been drawn as follows:

> (SCC p. 397, para 15) "There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."
>
> 60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive, more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of a one-sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the authority concerned. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.
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> xxx xxx xxx xxx
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> 64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet,
>
> (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the

amount claimed by no means would be a meagre amount, and

(vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-

section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution." (Emphasis supplied)

313. Thus, a right to sue is not created by the statute. It is an inherent right unless is barred by some law. Therefore, the principle that a right to take advantage of a statute not being an accrued right may not apply. We may also use this occasion to repel the argument based on Mardia Chemicals (supra) that the application under Section 7 is akin to a civil suit. The context of the application under Section 17 of SARFAESI Act is completely different from that of the code. The application under Section 17 of the SARFAESI was found to be in lieu of a suit. The allottee has other remedies unlike the applicant under Section 17. All the assets of the debtor are taken over. The situation cannot be compared. No doubt, the argument of the learned ASG is based on the right under Section 7 of the Code being a mere right to take advantage of a statute. In Abbott (supra), in the context of a saving enactment, the Court observed that a mere right assuming it to exist in the members of the public or any class, then, to take advantage of an enactment, without any act done by the individual, towards availing himself of that right, could not be treated as an accrued right under the enactment. Therefore, the stand appears to be that the right under Section 7 is a mere right to take advantage of an enactment. It is the further case of the Union, apparently that, only upon an application being filed and what is more, it is admitted under Section 7(5), that a vested right would accrue.

314. We do not think that the principles which have been laid down, may apply in the case of a vested right of action. We take the view that a plaintiff has a vested right, depending on whether there is a cause of action and a period of limitation, which has begun to run, which necessarily involves, the existence of a vested right. In the case of an application under Section 7 of the Code, we may notice that it is a valuable right, no doubt, statutory in nature. It cannot be the law that a Statute cannot create vested rights. Should the ingredients which the Legislature contemplate exist in favour of a person as an action in law, it can also be described as a vested right. The application, under Section 7, is an application, which attracts the period of limitation, which has already been noticed. It commences from the time when the right to sue accrues. In every case, where the period of limitation began to run, in respect of debt prior to the Code coming into being, the right to sue would have arisen earlier. In this regard we may refer to Isha Valimohamed (supra).

315. In regard to the effect of this finding on the challenge to the first and the second provisos in Section 7, we must immediately observe that the impugned first and second provisos have only prospective operation. We have already found that the provisos first and second are valid. They can survive, even if the third proviso is struck down. The third proviso is on the other hand dependant on the first and second provisos and cannot survive their invalidation. The vested right cannot exist merely by reason of Section 7. It must depend upon the vestitive facts which would create the right

in conjunction with Section 7. We need not probe the matter further in those cases where only the first and second provisos can be questioned. This is so in two writ petitions, W.P. No. 228 of 2020 and W.P. No. 850 of 2020, where, though there are no applications filed under Section 7 before the amendment, the third proviso is also challenged, which cannot be countenanced.

316. There is, in our view, a right which is vested in the cases where, the petitioners have filed application, fulfilling the requirements under unamended Section 7 of the Code. The very act of filing the application, even satisfies the apparent test propounded by the Additional Solicitor General, that the right under Section 7 is only one to take advantage of the statute and unless advantage is actually availed it does not create an accrued right. When applications were filed under the unamended provisions of Section 7, at any rate it would transform into a vested right. The vested right is to proceed with the action till its logical and legal conclusion. We are unable to accept the stand of the learned ASG, that a vested right to emerge still require an order under Section 7(5) of the Code. It is no doubt a stage, when the authority finds there is default and takes the matter forward including appointing to begin with the IRP and ordering a moratorium. In this regard, it is to be noted that in the scheme of the Code, what takes place before admission, is that the applicant tries to establish the debt and default. This is akin to the stage of a trial in a suit. No doubt, this happens only if the application is free from defects. But this is a far cry from saying that a vested right of action did not inhere even on the version of the ASG upon the act of the creditor invoking the Code.

317. In P.D. Aggrawal & others v. State of U.P and others.100, the Court was dealing with a challenge to statutory rules, inter alia, by which temporary Assistant Engineers who were working continuously since the date of their appointment in the cadre of Assistant Engineer were deprived of their services from the date of substantial appointment to the temporary post for the purpose of seniority. This Court in the context of rules and the impact it had held as follows:

> "18. It has been held by this Court in E.P. Royappa v. State of Tamil Nadu [AIR 1974 SC 555, 583 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165] , Maneka (1987) 3 SCC 622 Gandhi v. Union of India [AIR 1978 SC 597, 624 : (1978) 1 SCC 248] that there should not be arbitrariness in State action and the State action must ensure fairness and equality of treatment. It is open to judicial review whether any rule or provision of any Act has violated the principles of equality and non-

arbitrariness and thereby invaded the rights of citizens guaranteed under Articles 14 and 16 of the Constitution...." It was also after noting the facts stated as follows:

> "..Thus the 1969 and 1971 amendments in effect take away from the officers appointed to the temporary posts in the cadre through Public Service Commission i.e. after selection by Public Service Commission, the substantive character of their appointment. These amendments are not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from March 1, 1962 even to existing officers recruited against temporary vacancies through Public Service Commission. As has been stated hereinbefore that the Government has

> power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

318. We may notice two aspects. Firstly, it was a challenge to a statutory rule. The Court went on to observe that it could be the overturned if it is arbitrary. We have already taken note that in regard to the challenge to a law made by the legislature under Article 14 that what is required is that a law must be manifestly arbitrary. The said concept has been explained in Shayara Bano (supra) (paragraph-101).

319. In Darshan Singh v. Ram Pal Singh and Ors.101, the appellants challenged certain alienations as being contrary to custom under the State law of the year 1920. The matter was at the appellate stage in suits filed by the appellants.

320. In 1973, the law was amended. On the basis of same, the High Court dismissed the suit on the basis of that, after the amending Act came into force there could not be a challenge to the transfer. The contentions of the appellants was that the amending Act 101 1992(Suppl)1 SCC 191 could not be read as retrospective. The original enactment permitted challenging the transfer on the ground that the transfer was contrary to custom. It was this right which was sought to be subjected to certain conditions.

321. We may notice that this case did not involve a challenge to the amendment. In the course of the judgement, the Court took the view what was taken away was the basic right to `contest', the transfer irrespective of whether it was in a suit or appeal. The Court concluded that by the amending Act the custom was done away with.

322. In K.S. Paripoornan v. State of Kerala102, the Constitution Bench had to consider whether Section 23 (I-A) and introduced by the amending Act 1984 was retrospective. In the majority judgement by S. C. Agrawal, J., we notice the following:

> "64. A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is 102 (1994) 5 SCC 593 declaratory in nature inasmuch as while a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. A statute is regarded retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. By virtue of the presumption against retrospective applicability of laws dealing with substantive rights transactions are neither invalidated by reason of their failure to comply with formal requirements subsequently imposed, nor open to attack under powers of

avoidance subsequently conferred. They are also not rendered valid by subsequent relaxations of the law, whether relating to form or to substance. Similarly, provisions in which a contrary intention does not appear neither impose new liabilities in respect of events taking place before their commencement, nor relieve persons from liabilities then existing, and the view that existing obligations were not intended to be affected has been taken in varying degrees even of provisions expressly prohibiting proceedings. (See:

Halsbury's Laws of England, 4th Edn. Vol. 44, paras 921, 922, 925 and 926)." (Emphasis supplied)

323. In State Bank's Staff Union (Madras Circle) v. Union of India and others103, an award was passed by the Industrial Tribunal, which was impugned before the High Court. When the matter was so pending, the State Bank of India Act came to be amended. The contention of the appellants was that the amendment was intended to nullify the decision of the High Court, which was repelled. The Court also considered the power of the sovereign Legislature to make retrospective legislation. The Court held as follows:

"21. Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes the power to give it retrospective effect. Craies on Statute Law (7th Edn.) at p. 387 defines retrospective statutes in the following words:

"A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." 103 AIR 2005 SC 3446 / (2005) 7 SCC 584

22.Judicial Dictionary (13th Edn.) by K.J. Aiyar, Butterworth, p. 857, states that the word "retrospective" when used with reference to an enactment may mean

(i) affecting an existing contract; or

(ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "retrospective or retroactive law" as one which takes away or impairs vested or accrued rights acquired under existing laws. A retroactive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

23. In Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edn., 2005) the expressions "retroactive" and "retrospective" have been defined as follows at p. 4124, Vol. 4:

"Retroactive. — Acting backward; affecting what is past.

(Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. — Also termed retrospective. (Black's Law Dictionary, 7th Edn., 1999) ‘ “Retroactivity” is a term often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called “true retroactivity”, consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as “quasi-retroactivity”, occurs when a new rule of law is applied to an act or transaction in the process of completion.... The foundation of these concepts is the distinction between completed and pending transactions....’ T.C. Hartley, Foundations of European Community Law, p. 129 (1981).

Retrospective. — Looking back; contemplating what is past.

Having operation from a past time. ‘Retrospective’ is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisite for its action is drawn from a time antecedent to its passing.” (Vol. 44, Halsbury's Laws of England, 4th Edn., p. 570, para

921.) xxx xxx xxx xxx

25. In Harvard Law Review, Vol. 73, p. 692 it was observed that:

“It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called ‘small repairs’. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus the interest in the retroactive curing of such a defect in the administration of the Government outweighs the individual's interest in benefiting from the defect.”

26. The above passage was quoted with approval by the Constitution Bench of this Court in the case of Asstt. Commr. of Urban Land Tax v. Buckingham and Carnatic Co. Ltd. [(1969) 2 SCC 55] In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not, various factors have to be considered. It was observed in the case of Stott v. Stott Realty Co. [284 NW 635] as noted in Words and Phrases, Permanent Edn., Vol. 37-A, p. 2250 that:

> "The constitutional prohibition of the passage of 'retroactive laws' refers only to retroactive laws that injuriously affect some substantial or vested right, and does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on account of defects in the law or its omission to provide the relief necessary to secure such right."
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> 27.Craies on Statute Law (7th Edn.) at p. 396 observes that:
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> "If a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right." (Emphasis supplied)

324. The Court also repelled the argument that vested rights cannot be taken away by the Legislature by way of retrospective legislation. In paragraph-35, the Court held as follows:

> "31. Learned counsel for the appellant submitted that vested rights cannot be taken away by the legislature by way of retrospective legislation. The plea is without substance. Whenever any amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case the exercise by the legislature by introducing a new provision or deleting an existing provision with retrospective effect per se does not amount to violation of Article 14 of the Constitution. The legislature can change, as observed by this Court in Cauvery Water Disputes Tribunal, Re [1993 Supp (1) SCC 96 (2)] the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers." (Emphasis supplied) SECTION 6 OF GENERAL CLAUSES ACT, 1897

325. In this regard, no support can be drawn from Section 6 of the General Clauses Act, 1897. Section 6 makes it clear that the rights or privileges which may be asserted are subject to the law not being couched contrary to such rights/privileges. In this case it is precisely because the 3rd proviso covers the applications filed prior to the amendment which had not been admitted, that the petitioners have challenged the provision.

READING DOWN

326. Further, the appeal to invoke the principle of reading down the proviso is untenable. In his judgment for the majority Sawant, J. in Delhi Transport Corpn. v. D.T.C. Mazdoor Congress104 held as follows:

> "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 104 (1991) Suppl.(1) SCC 600 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."

327. Now, the terms of the proviso are clear. It does not admit of more than one interpretation at least in terms of the matter covered by it. The only area left is the impact of the withdrawal which is to happen.

328. We may also notice the judgment of this Court in Vijay v. State of Maharashtra105. The appellant was elected as a member of the Panchayat in 2000 and elected as the Sarpanch. He was further elected as Councillor of the Zila Parishad. An amendment was made with effect from 8.8.2003. Under the marginal note Disqualifications, Section 14, inter alia, disentitled a person from continuing as a Panchayat Member if he was elected a Councillor of the Zila Parishad. This Court found that it was a disqualifying law intended to have retrospective effect. We may notice para 12 which reads as follows:

> "12. The appellant was elected in terms of the provisions of a statute. The right to be elected was created by a statute and, thus, can be taken away by a statute. It is now well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the (2006) 6 SCC 289 statute may be held to be retrospective in nature. The appellant does not and cannot question the competence of the legislature in this behalf." The case did not involve a challenge to the law.

What is significant is the statement that the right created by a Statute, can be taken away by a statute.

329. We find that qua the financial creditors covered by the third proviso, having invoked, at any rate unamended Section 7, they had a vested right.

330. They had undoubtedly a vested right to have their actions carried to its logical and legal end. No doubt, the question of admission of the application arises under Section 7(5) of the Code. It is open to the Adjudication Authority to reject the application but that does not mean that the applicants had no vested right of action. The possibility of a plaint being rejected under Order VII Rule 11 or an appeal being dismissed under Order XLI Rule 11 without notice being issued to the respondent or the fact that the suit can be dismissed at later stages, cannot detract from the right of the plaintiff or the appellant, being a substantive right. The same principle should suffice to reject the contention, based on admission under Section 7(5) alone, giving rise to the vested right in regard to an applicant under Section 7 of the Code.

331. A vested right is not limited to property rights. A right of action should conditions otherwise exist, can also be a vested right. Such a right can be created by a Statute and even on a repeal of such a Statute, should conditions otherwise exist, giving a right under the repealed Statute, the right would remain an accrued right [See Isha Valimohamed (supra)].

332. No doubt, there may not be a vested right as regard mere procedure and while limitation, ordinarily, belongs to the domain of procedure, should new law shorten the existing period of limitation, such a law would not operate in regard to the right of action which is vested [See Shanti Misra (supra)]. A party may not have a vested right of Forum as distinct from the vested right of action [See Shanti Misra (supra)].

333. Every sovereign Legislature is clothed with competence to make retrospective laws. It is open to the Legislature, while making retrospective law, to take away vested rights. If a vested right can be taken away by a retrospective law, there can be no reason why the Legislature cannot modify the vested rights [See State Bank's Staff Union (Madras Circle) (supra)].

334. In an action, where the law is not challenged, the Court would ordinarily proceed as follows. It will presume that a law, which affects substantive rights, are meant to have prospective operation only. In the same way, as regards procedural laws or the laws relating to a mere matter of procedure or of Forum, they carry retrospective impact.

335. A Statute is not retrospective merely because it affects existing rights. This is, however, in regard to the future operation of law qua the existing rights. If the existing right is modified or take away and it is to have operation only from the date of new law, it would obviously have only prospective operation and it would not be a retrospective law.

336. Declaratory, clarificatory or curative Statutes are allowed to hold sway in the past. The very nature of the said laws involve the aspect of public interest which requires sovereign Legislature to

remove defects, clarify aspects which create doubt. The declaratory law again has the effect of the legislative intention being made clear. It may not be apposite in the case of these Statutes to paint them with the taint of retrospectivity.

337. What then is retrospectivity? It is ordinarily the new law being applied to cases or facts, which came into existence prior to the enacting of the law. A retrospective law, in other words, either supplants an existing law or creates a new one and the Legislature contemplates that the new law would apply in respect of a completed transaction. It may amount to reopening, in other words, what is accomplished under the earlier law, if there was one, or creating a new law, which applies to a past transaction.

338. "A Statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under any existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already passed". [See Craies on State Law, 7th Edition, Page- 387].

339. In Halsbury's Laws of England, 4th Edition, Page- 570, paragraph-921, it is, inter alia, stated as follows - "In general, however, court regarded as retrospective, any Statute, which operates on cases or facts, coming into existence, before its commencement, in the sense that it affects even if for the future only, the character or consequences of transactions, previously entered into or of other past conduct".

340. When a Statute made by the sovereign Legislature is found to have retrospective operation and the challenge is made under Article 14 of the Constitution,

(i) the Court must consider whether the law, in its retrospectivity, manifests forbidden classification.

(ii) Whether the law, in its retrospectivity, produces manifests arbitrariness, (iii) if a law is alleged to be violative of Article 19(1)(g), firstly, the Court, in an action by a citizen, would, in the first place, find whether the right claimed, falls, within the ambit of Article 19(1)(g). The Court will further enquire as to whether such a law is made, inter alia, by way of placing reasonable restrictions by looking into the public interest. In the case of law, which is found to be not unfair, it would also not fall foul of Article

21.

341. Where the law is challenged on the ground that it is violative of Fundamental Rights under Article 14, necessarily the Court must enquire whether it is a capricious, irrational, disproportionate, excessive and, finally, without any determining principle. [see Shayara Bano case (supra)] The right of a citizen, or for that matter, any person under Article 14, is a right which is personal to him.

342. The golden thread which runs through the grounds making up the Doctrine of Manifest arbitrariness Injustice, undoubtedly, consists of total absence of public interest, of which the sovereign Legislature as the supreme law giver, is the undoubted custodian. Though made in the

context of the power of the Court in England, in regard to taking into consideration the concept of fairness, while deciding upon the issue of retrospectivity, we would think the following passage in the Principles of Statutory Interpretation by Justice G.P. Singh, made relying upon the Judgment of the House of Lords in L'Office Cherifien Des Phosphates and another And Yamashita-Shinnihon Steamship Co. Ltd.106, would furnish a safe and fairly comprehensive guide, even in the matter of determining the constitutionality of a retrospective law. Hence, we refer to the same and would approve of the same.

"... It was observed that the question of fairness will have to be answered in respect of a particular statute by taking into account various factors viz., value of the rights which the statute affects; extent to which that value is diminished or extinguished by the suggested retrospective effect of the statute; unfairness of adversely affecting the rights; clarity of the language used by Parliament and the circumstances in which the legislation was created. "All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statue with the suggested degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say." (Emphasis supplied)

343. Having laid down the principles, we shall now apply the same to the facts of the present cases before us. 106 (1994) 1 AllER 20 As far as the nature of the right in question is concerned, which would include the value of the rights, it is a right of action. The right of action is, undoubtedly, a vested right. The role of the applicant essentially fades out after the admission of the application is made under Section 7(5). The scheme of the Code has been unraveled by us. The right, which is given, is a right in rem. It is not a mere personal right, in the sense that it is right in rem. The applicant is not even required to plead the default qua him as the default to any financial creditor, in the requisite sum, provided it is not barred under Article 137, suffices. The consequences of the application would be that it may land the applicant and also all the stakeholders, in liquidation of the corporate debtor.

344. As far as, the manner, in which, the value of the right is affected or if we may use the word 'impaired', it is another most significant aspect, to be borne in mind. The manner, in which, a particular Statute carrying retrospective effect, will impair, the rights will depend on the facts of each case. We have, for instance, noticed the clear unfairness, which, the Rule in question carried qua a set of employees in regard to their vested right, in P.D. Aggrawal (supra). The vested right, in fact, consisted of the right to have certain period reckoned for the purpose of seniority. As far as the clarity of the language used, there does not appear to be any ambiguity, and what Parliament intended is, completely free from doubt. The only area where any ambiguity can be said to exist – is the effect of the application being treated as withdrawn. The further aspect, which is to be borne in mind, is the circumstances in which the legislation is created. It is here that the mischief rule and the aspect of public interest looms large. At the end of the day, the tussle is between the individual right versus the public interest. Now, public interest is a concept, which is capable of embracing, within its scope, the interest of different sections of the public. This would include the sections of the public to which the applicant himself belongs. Public interest would, undoubtedly, also encompass, the economy of the country, which can be understood in terms of all the objects, for which the Code was enacted. They would include the speed with which the Code is worked. It would include, also,

safeguarding the interests of all the stakeholders. This may necessarily include the corporate debtor as a stakeholder, being protected from applications, which are perceived as frivolous or not representing a critical mass.

345. We have noticed the statistics which has been made available by the Union. On the eve of the ordinance on the 27.12.2019, it would appear that 2201 applications, came to be moved, during a period of nearly eighteen months as in comparison to 253 applications during the preceding period representing a nearly 10-fold increase.

346. Now, the third proviso, thus, indeed, does not say that as on the date of filing of the applications, the law was what is contained in the first and the second provisos. In that sense, it could be said that it was not retrospective. We have found that when invoking the unamended Section 7 applications stood moved, they evinced creation of vested rights to continue with the proceeding. The applications were, no doubt, at the stage, prior to the admission under Section 7(5). It is at this stage that through the device of the third proviso, the Parliament has applied the principle of first and second proviso of threshold requirement, in respect of pending applications, which is made to appear as it would have operation in the future. Now here we must address an argument of the 3rd proviso going to mere procedure. The financial creditors covered by the 3rd proviso were clothed with a statutory right under Section 7. This right was available to be exercised by an individual creditor, by himself or jointly with others. The imposition of a threshold requirement being a mandatory and irreducible minimum even, if it is to be achieved as and after the date of the amendment, constitutes an intrusion into the substantive right of action vested in the individual creditor. The action of the creditor was not a completed transaction. As regards his conduct in the past, viz., moving under Section 7, it is incomplete but the action was commenced. But the law (the 3rd proviso) impairs the past action qua the future. We would find as follows. Imposing the threshold requirement under the 3rd proviso, is not a mere matter of procedure. It impairs vested rights. It has conditioned the right instead, in the manner provided in the first and the second proviso. We have already upheld the first and second proviso, which, in fact, operates only in the future. In that sense, the Legislature has purported to equate persons who had not filed applications with persons like the petitioners who had filed the applications under the unamended law.

347. At this point, we must notice one argument, which is that, the Law Giver has discriminated between applicants under Section 7, which were pending at different stages. We may notice, in this regard, however, that all the applicants share the common characteristic of being applicants in applications which were not admitted. In fact, most of the applications would appear to have been filed in the year 2019. Enquiring further into the different stages in these applications, would go against the principle that the Court does not look to mathematical nicety or perfection in the law. The Court also bears in mind, the principle that the law is an economic measure. CLARITY REGARDING 'WITHDRAWAL' UNDER THE THIRD PROVISO

348. One of the aspects to be considered is the clarity of a retrospective law. The requirement of compliance with the threshold numerical requirements under the first and second proviso is an integral and inseparable part of the third proviso. Let us have a look at the consequences that follow

if the numerical strength cannot be cobbled up by the applicant. The proviso declares that in such an eventuality the application will be treated as withdrawn before admission. Rule 8, as noticed by us, provides for power with the Tribunal to allow withdrawal before admission. Does it mean that an applicant can file a fresh application after gathering together the requisite numbers? What is the impact of withdrawal under provisions under the general law? What is the impact of the law relating to the Limitation Act in respect of the application which has been withdrawn?

349. In the context of a Civil suit, Order XXIII deals with withdrawal and adjustment of suit. Order XXIII (1)(4b) prohibits a fresh suit in respect of the same subject matter (cause of action), if a suit is withdrawn without permission of the Court under Order XXIII(1)(3).

350. In the facts of the case before us the third proviso does not indicate as to whether a fresh application after complying with the requirement of the ingredients of the first and second proviso is maintainable. It does not also indicate what would be the position even if such application is maintainable by the same applicant, with regard to the periods spent in the context of ruling of this Court that the Limitation Act applies and the relevant Article is Article 137 and therefore, any application filed beyond the period of three years from the date of the default is barred.

351. The other way of looking at these issues is that Order XXIII(1) applies only in the case of a civil suit. In regard to the application under Article 137 which is what an application under Section 7 of the Code is, it could it be said that Order XXIII(1) is inapplicable. Secondly, could it not be said that it is not a case of a voluntary withdrawal by the applicant and the withdrawal of the application is declared by the Legislature, and therefore, Order XXIII(1) would not apply.

352. Section 14 of the Limitation Act, 1963 reads as follows:

> "14.Exclusion of time of proceeding bona fide in court without jurisdiction. — (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.— For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

353. A perusal of 14(1) shows that it is intended to exclude time in regard to a civil suit. Section 14(2) covers cases relating to the applications for which period of limitation is fixed. It contemplates that if such applicant comes to Court late with a time barred application but is able to show that he has been prosecuting with due diligence another civil proceeding, for the same relief, the period, when he was so prosecuting the other proceeding, can be excluded where the proceeding was prosecuted in good faith in a Court which from defect of jurisdiction or other cause of like nature is unable to entertain it. It will be noticed that sub-Section (3) of Section 14 deals only with the case falling under sub section (1). In other words, it relates to civil suits. It enables a plaintiff in a subsequent suit to exclude the period which was consumed in prosecuting an earlier civil suit which latter suit stood withdrawn with permission granted by the Court. Therefore, in regard to applications, including applications under Article 137, it appears, the Law Giver has not contemplated expressly excluding the time spent in pursuing another proceeding which stood withdrawn.

354. In regard to power of withdrawal as already noticed Rule 8 of the Insolvency and Bankruptcy (Application of Adjudicating Authority Rule), 2016 reads as follows:

> "Rule (8) withdrawal of application the adjudicating authority may permit withdrawal of the application may not Rule 4,6,7 as the case may be on a request made by the applicant before its admission."

355. The application made under Rule 4 is the application under Section 7 by the financial creditor. However, rule 8 is silent as to any similar prohibition as is contained in Order XXIII(1)4(b). Unless the principle of Order XXIII Rule 1 which is based on public policy, is applied, a fresh application, compliant with the first two provisos in Section 7, may not be barred. In this regard, since under the Explanation in Section 7(1), default occurs when default qua any financial creditor is made out, the cause of action can become different, in which case, even the principle of Order XXIII Rule 1, may not apply.

356. In this regard, since withdrawal is ordained by the third proviso, it would not be a withdrawal under Rule 8 on request. Secondly, even for the principle based on public policy to apply to a withdrawal under Rule 8, there must be a request and withdrawal. We do not pronounce on the effect of the same, viz., withdrawal on request. Suffice it to conclude and hold that the withdrawal under the third proviso would not bar a fresh application by the same party after complying with the provision of the first or second proviso as the case may be on the same default.

357. As far as Limitation is concerned, however, on the terms of Section 14, since 14(1) read with 14(3), contemplates withdrawal of a suit with permission under Order XXIII Rule 1(4)(b) to enable exclusion of the period spent in a suit which is withdrawn and Section 14(2) is what applies to applications including one under, Article 137, the period spent in the application when it is withdrawn under the 3rd proviso cannot be excluded under Section 14 (3) of the Limitation Act. However, it may be open to point out that application is not being entertained within the meaning of Section 14(2) on account of the law that mandates its withdrawal on account of the non-compliance of conditions for maintaining the application it would be. However, we need not pronounce on it, as we feel that having regard to the Explanation in Section 7, it will always be open to the applicant to set up a different default to any financial creditor and move afresh. This unique feature of the Code is highly relevant in determining the validity of the Amendment. The application under Section 7 is not meant to be a recovery mechanism. The Code, as is clear from its title, deals with insolvency resolution, to begin with. If there is insolvency, the application, with reference to any of the large number of creditors, suffices.

358. Thus, withdrawal under the third proviso would not be bar a fresh application even on the same cause of action. It can, at any rate, be condoned under Section 5 of the Limitation Act. It is here we would also exercise our power under Article 142 to direct that if fresh applications are filed by the petitioners after complying with the first and second proviso, then on applications being filed under Section 5, of the Limitation Act, in regard to the period of pendency of applications, the authority shall condone the delay. As far as the period after the withdrawal under the proviso, in view of the power again under Section 5 of the Limitation Act, certainly we see no reason as to why the periods spent cannot be explained in terms of B.K. Educational Services (P) Ltd. (supra). In the above manner, we would interpret the implications of withdrawal.

359. We would consider the aspect of public interest, which can be gathered from the conditions obtaining, when the impugned amendment was made. Under the existing law, Section 7 of the Code permitted filing of applications by single applicants. It has been realised by the Legislature that there is dire need to condition the absolute right in respect of certain classes of financial creditors. We have already upheld the classification enacted in the first and the second provisos. From the standpoint of public interest, every application maintained by a single applicant, is perceived as a veritable threat to the fulfilment of the objectives of the Code. The continuance of the applications could not, therefore, be in public interest. It is, as if, the Legislature intended to apply its brakes in the form of asking the applicants to obtain the consensus of a minimum number of similar stakeholders, before the applications could be further processed.

360. Let us consider the impugned proviso with a different wording. What, if the proviso provided for a longer period of time to comply with the requirement under the first and second provisos.? In such a scenario, once the numerical strength, contained in the first and second provisos, in regard to the persons covered by the same, has been found to be valid by us, the blemish that would remain is, no doubt, the Legislature is interfering with the vested right, in the manner done under the provisos read together. That a vested right can be the subject matter of retrospective law, cannot be doubted. Since, the law made, under the Constitution, must pass muster, under Articles 14, 19, 21 and 300A of the Constitution, the issue really boils down to, whether or not, it is manifestly arbitrary. The

further question would arise, under Article 19, as to whether, the law would amount to a reasonable restriction of the Right under Article 19(1)(g). The Doctrine of Fairness, indeed, has been present in the mind of the courts, whenever a law, described as retrospective, comes up for interpretation with or without a challenge to the law. In the context of a challenge, on the ground of manifest arbitrariness, the test to be applied has been articulated as to whether it is capricious, irrational, does not disclose any principle, betrays absence of proportionality or whether it is excessive. We must also not lose sight of the fact that the law in question is an economic measure. This is a case where the Law Giver has not left anything to speculation or doubt. We have already indicated about the effect of the proviso mandating the compulsory withdrawal of the application. We are of the view that this is a case, where the law, in question, is retrospective, in that, contrary to the requirement in the law, at the time, when the application was filed, a new requirement is placed, even though, it is sought to be done by superimposing this condition, not at the time, when the application was filed, which really is the relevant time to determine the question of maintainability of the application, with reference to what the law provided in regard to who can move the application but at the stage of the new law.

361. However, we cannot also lose sight of the fact that the Legislature has power to impair and take away vested rights. The limitation that flows, however, is from both Article 14 and 19 read with Article 21. It flows from the Doctrine that the action of the State must be fair and reasonable. The question, as to validity of the retrospective law, is a matter to be judged on a consideration of the facts, the period of time, over which the retrospective law operates, the impact of the law on the vested rights, the public interest, the nature of the right, which is the subject matter of the law and the terms of the law.

362. The nature of the right involved in this case, is the right of the financial creditors to move an application under Section 7. Though, Section 7 confers a right upon the financial creditor to file the application, the proceedings are one in rem. We have already dealt with the scope of the Code and the consequences it can produce on the stakeholders and also the real estate project. The Legislature was faced with the situation, where it felt that the requirement, as to maintainability of the application under Section 7, must, in regard to pending applications, be modified in the manner done. There is a determining principle, namely, the perception from experience about how the entire object of the Code would stand jeopardised if applications already filed could go on even when a fair and reasonable number of kindred souls are not available to support it. Once there is a principle, it cannot be capricious, excessive or disproportionate unless we find the time given under the proviso is manifestly arbitrary. A vested right under a statute can be taken away by a retrospective law. A right given under a statute can be taken away by another statute. We cannot ignore the fact that there was considerable public interest behind such a law. The sheer numbers, in which applications proliferated, combined with the results it could produce, cannot be brushed aside as an irrational or capricious aspect to have been guided by in making the law. Being an economic measure, the wider latitude available to the Law Giver, cannot be lost sight of.

363. The issue, which, however remains, is the period of 30 days made available. Is it reasonable to expect that a single applicant could, under the aegis of the laws' collect information, and furthermore, gather the support of fellow travellers, also inclined to support the applicant, as

required? The third proviso does not provide for the applicant applying before the Tribunal and seeking extension of the period. It could be also argued that by granting such extensions, no harm is caused to the stakeholders, insofar as, all this is done before the admission of the application, with which alone, the consequences, including the appointment of the Interim Resolution Professional and the passing of an Order of Moratorium, would arise. But here again we would be foraying into areas of legislative value judgement and be proceeding on the basis of what would be a fairer law.

364. We have to take the law, therefore, as it is and deal with it on the touchstone of, whether the law is manifestly arbitrary. We have already, no doubt, found that by virtue of the statutory mechanism, there appears to be an information grid available under the law. Undoubtedly, we would have felt more reassured, if the period had been longer than it is. The law came as a bolt from the blue as it were.

365. As regards the compelled withdrawal under the third proviso of the pending applications is concerned, we hold as follows. Once the Legislature intended that the pending applications must be made compliant with the threshold requirement, consequences for not doing so had to be provided. Otherwise, it would have created complete uncertainty and the applicant would have been dealt with in a manifestly arbitrary manner. Providing for the consequence of withdrawal before admission, which we have explained, does not have the consequence of preventing the fresh filing, even in regard to the same default, after complying, no doubt, with the requirement of the first or the second proviso, cannot be dubbed as arbitrary. No doubt, there is lack of clarity in this regard in the provision but on an understanding of the law, as we have expounded, the provision was capable of being understood in the manner done.

366. In regard to the first and the second provisos, they have only prospective operation. The creditors covered by these provisos, are not subjected to any time limit (except, no doubt, the bar under Article 137 of the Limitation Act), in the matter of garnering the requisite support. However, prescribing a time limit in regard to pending applications, cannot be, per se, described as arbitrary, as otherwise, it would be an endless and uncertain procedure. The applications would remain part of the docket and also become a Damocles Sword overhanging the debtor and the other stakeholders with deleterious consequences also qua the objects of the Code.

367. Finally, the actual time provided. Is it manifestly unfair? Would not six weeks, two months or even more lengthier periods, be more fair? Undoubtedly, it would be, from the point of view of the applicants. Another way to approach the problem is, was it impossible for the creditor/creditors to seek information, get into touch with the other creditors and persuade them to join him/them. As far as court fees is concerned, there is no extra liability as the amount remains the same, viz., Rs.25,000/-, irrespective of the number of applicants. If the condition in the third proviso was impossible to comply with, then, it would also be manifestly arbitrary. As far as availability of information is concerned, be it the mechanism of an Association of Allottees contemplated under the RERA or the requirement under the said Act to post details of the allotment, at least, in law, the Legislature was not making a capricious command. So also, is the case with the creditors covered by the first proviso, having regard to the clear requirement of Section 88 of the Companies Act, 2013. There are registers, which can be perused and information gathered.

368. Another aspect of the matter is, if there is insolvency and it affects creditors, ordinarily, self-interest would guide them into following the best course available to them. We have also seen the presence of plural remedies. No doubt, calculation of one-tenth in a case, may, undoubtedly, require the quantification of total number of creditors. This would be necessary, no doubt, only if hundred creditors cannot be found to support the application.

369. We have noted the consequences of the deemed withdrawal, the nature of the right, the Explanation to Section 7, the objects of the Code, the factual matrix reflecting a ten-fold increase in the applications, the pressure on the dockets of the bodies, which are charged with the imperative duty to deal with matters with the highest speed, the impact on similar stakeholders in the category and the sheer largeness of the class of creditors. The period could have been more fair to the petitioners by being longer but that is where we must bear in mind, the limits of our jurisdiction. Where would the Court draw the line? We find it difficult to hold that within the time limit of 30 days it is impossible to comply with the requirements.

370. We have dealt with the aspect relating to the impact of the statutory withdrawal of the application. Secondly, we must also bear in mind that the Code was enacted in the year 2016. The period of the retrospective operation, would appear to be, spread over for a period of two years and for the most part, it relates to a period of one year. We have already found that the withdrawal under the third proviso, will not stand in the way of the applicant, invoking the same default and filing the application and even the principle of Order XXIII Rule 1 of the CPC will not apply and will not bar such application. As far as limitation is concerned, we have explained as to what is to be the impact. The nature of the vested right and the impact of the law, the public interest, the sublime objects, which would be fulfilled, would, in the facts of this case, constrain us from interfering, even though, this Court may have a different view about the period of time, which is allowed to the applicant.

371. Lastly, there remains a question of court fees. As far as court fees is concerned, it is true that in the circumstances of the case, there is compelled withdrawal of the applications. The other side of the picture is, even, according to the petitioners, the applications engaged the Adjudicating Authority and time was spent on the applications. In the circumstances of these cases, we would resort to our power under Article 142 of the Constitution to order as follows. We would direct that in case applications are moved by the applicants, who are petitioner before us, in regard to the very same corporate debtor, in the same real estate project, as far as allottees are concerned, the applicants shall be exempted from the requirement of paying court fee. This would obviously be a one-time affair. We, however, further make it clear that exemption from paying court fee, in the case of joint applicants, will be limited only to once, to a single application in future, in relation to the same subject matter, as per the application. To make it clear, in a case where there are more than one applicants in the pending application in respect of real estate project, if they combine in future application, they would stand exempted. Secondly, in case, any of the applicants, if they were to move jointly with the requisite number under the second proviso, the exemption will be limited only to once. Meaning thereby, if exemption has been availed of by any one out of the joint applicants, in conjunction with others, then, the other joint applicants cannot claim exemption. If there are any applicants, falling under the first proviso, and who are among the petitioners, in regard to the same corporate debtor, they would also be entitled to the exemption from payment of the court fee.

RELIEF

372. We uphold the impugned amendments. However, this is subject to the following directions, which we issue under Article 142 of the Constitution of India:

> i. If any of the petitioners move applications in respect of the same default, as alleged in their applications, within a period of two months from today, also compliant with either the first or the second proviso under Section 7(1), as the case may be, then, they will be exempted from the requirement of payment of court fees, in the manner, which we have detailed in the paragraph just herein before.
>
> ii. Secondly, we direct that if applications are moved under Section 7 by the petitioners, within a period of two months from today, in compliance with either of the provisos, as the case may be, and the application would be barred under Article 137 of the Limitation Act, on the default alleged in the applications, which were already filed, if the petitioner file applications under Section 5 of the Limitation Act, 1963, the period of time spent before the Adjudicating Authority, the Adjudicating Authority shall allow the applications and the period of delay shall be condoned in regard to the period, during which, the earlier applications filed by them, which is the subject matter of the third proviso, was pending before the Adjudicating Authority.
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> iii. We make it clear that the time limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay caused by the applications pending before the Adjudicating Authority. In other words, it is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under Section 5 of the Limitation Act, in regard to the period, during which, the applications were pending before the Adjudicating Authority, which were filed under the unamended Section 7, as also thereafter.

373. The Writ Petitions and the Transferred Case will stand dismissed subject to the aforesaid directions and the observations contained in the Judgment, and we only make it clear that the benefits of the directions, under Article 142, will be available also to the petitioners in the Transferred Case.

374. The intervention application (I.A.No.67473 of 2020 in WP (C)No.26 of 2020) is filed by allottees who have filed application under Section 7 on 20.9.2019. I.A. No.32863 of 2020 in WP(C) No.53 of 2020 is filed by the allottee for impleadment. He has filed application under Section 7 of the Code on 19.12.2019. I.A. No.32869 of 2020 WP(C) No.53 of 2020 is filed by the allottees who have filed the same for impleadment. They have filed application under Section 7 on 17.9.2019. I.A.No. 15425 of 2018 in WP (C)No.26 of 2020 is filed by a corporate debtor for impleadment. All the above IAs are disposed of in terms of the judgment as aforesaid. We however make it clear that the directions we have issued under Article 142 regarding court fees and about condonation of delay will apply to the applicants who are allottees.

.....J. (ROHINTON FALI NARIMAN) .....J. (NAVIN SINHA) .....J. (K.M. JOSEPH) NEW DELHI, DATED;JANUARY 19,2021