# Chitra Sharma vs Union Of India on 9 August, 2018

## Equivalent citations: AIRONLINE 2018 SC 1215, AIRONLINE 2018 SC 86

## Author: D Y Chandrachud

## Bench: D Y Chandrachud, A M Khanwilkar, Dipak Misra

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 744 OF 2017

CHITRA SHARMA AND ORS ..Petitioners

VERSUS

UNION OF INDIA AND ORS ..Respondents

WITH

WRIT PETITION (CIVIL) NO 782 OF 2017

WITH

WRIT PETITION (CIVIL) NO 783 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) NO 24001 OF 2017

WITH

WRIT PETITION (CIVIL) NO 803 OF 2017

WITH

WRIT PETITION (CIVIL) NO 805 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) NO 24002 OF 2017
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WITH

WRIT PETITION (CIVIL) NO 950 OF 2017

WITH

WRIT PETITION (CIVIL) NO 860 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) NO 36396 OF 2017

WITH

SPECIAL LEAVE PETITION (CIVIL) D NO 33267 OF 2017

AND

WITH

WRIT PETITION (CIVIL) NO 511 OF 2018

JUDGMENT

Dr D Y CHANDRACHUD, J 1 Permission to file the Special Leave Petitions is granted. 2 These proceedings have been initiated under Article 32 of the Constitution for protecting the interests of home buyers in projects floated by Jaypee Infratech Limited1. JIL is a special purpose vehicle created by its holding company, Jaiprakash Associates Limited2.

JIL JAL 3 IDBI Bank Limited instituted a petition under Section 7 of the Insolvency and Bankruptcy Code 20163 against JIL4 before the National Company Law Tribunal5 at its Bench at Allahabad. The bank sought the initiation of a Corporate Insolvency Resolution Process6 against JIL. JIL filed its objections opposing admission of the petition. However, according to the petitioners, JIL withdrew its objections and furnished its consent for a resolution plan under the provisions of the IBC. IDBI Bank claimed that JIL had committed a default of Rs. 526.11 crores in the repayment of its dues. On

9 August 2017, NCLT initiated the CIRP in respect of JIL. An order of moratorium was issued under Section 14 by which the institution of suits and the continuation of pending proceedings, including execution proceedings was prohibited. An Interim Resolution Professional7 was appointed under the provisions of the IBC. On 14 August 2017, JIL, in pursuance of the order of NCLT called for submissions of claims by creditors:

> financial creditors in Form-C, operational creditors in Form -B, workmen and employees in Form -E and other creditors in Form -F. On 16 August 2017, the Insolvency and Bankruptcy Board of India made an amendment to its regulations and Regulation 9(a) was inserted to include claims by other creditors. On 18 August 2017, the Board released a press note clarifying that home buyers could fill in Form -F as they could not be treated at par with financial and operational creditors.
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> IBC CP (IB) 77/ALB/2017) NCLT CIRP IRP

4 These proceedings were instituted for the following reliefs:

> (i) A declaration that Sections 6,7,10,14 and 53 of the Code are ultra vires in so far as only financial or operational creditors are recognized, disregarding other stakeholders such as the home buyers;
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> (ii) The order dated 9 August 2017 of the NCLT be set aside;
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> (iii) The Union of India be directed to notify under Section 14(3) that the provisions for moratorium contained under Section 14(1)(a) shall not apply to consumers and that the home buyers be allowed to exercise the rights available to them under the Consumer Protection Act 1986 and the Real Estate (Regulation and Development) Act 2016;
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> (iv) A forensic audit of JIL and JAL be conducted for the period from 2009 to 2017; and
>
> (v) A direction be issued to the Union of India to protect the interests of home buyers in the larger public interest.

5 As the above narration indicates, the grievance with which this Court was moved under Article 32 was that the CIRP ignores the interests of vital stakeholders in building projects, chief among whom are individuals who have invested their wealth in pursuit of the human desire to own a home. The IBC, in the submission of the petitioners, recognized only three categories or classes namely (i) corporate debtors; (ii) financial creditors and (iii) operational creditors. Not being protected by the IBC, the petitioners contended that the rights conferred upon them by special enactments including the Consumer Protection Act 1986 and by RERA could not be divested. Suspension of the right to seek redressal before an adjudicatory forum under Section 14(1)(a) would, it was asserted, leave the home buyers without a remedy. Section 238 of the IBC gives it an overriding effect over other laws

in existence.

6 The petition before this Court has grown in size to incorporate as many as 646 persons who claim to be home buyers. Arrayed before the Court as respondents to these proceedings, besides JIL, JAL and the Union of India are statutory authorities (including the Reserve Bank of India), banks and welfare associations representing home buyers. A large number of intervention applications have been filed.

7 The home buyers invested in residential projects ("high-tech" townships as they were described) proposed by JIL and JAL in the National Capital Region. The townships were to be ready for possession within thirty to thirty-six months of the booking by a prospective buyer. Relying on the representations of the developers, individual purchasers invested in the residential projects. A large number of them have obtained loans from financial institutions. As a result of the delay in handing over possession, numerous flat buyers filed consumer complaints before the State and National Consumer Disputes Redressal Commissions. In June 2017, RBI is stated to have published a list of the top 12 defaulters in the country including JIL which was declared to be in default of an amount approximately of Rs. 8,000 crores to its lenders. 8 This Court was moved in the exercise of its jurisdiction under Article 32 to protect the interests of home buyers, who had been left in the lurch. When the petition was instituted, they had no locus in the CIRP. Liquidation would leave the home buyers to face an uncertain future. The disposal of assets would, it is apprehended, deprive them of their right to own a home. Faced with a situation of human distress, occasioned by the failure of the developers to meet their contractual obligations and a legal regime as it then stood under the IBC which provided no solace to home buyers, this Court issued notice on 4 September 2017 in a batch of writ petitions. Proceedings before the NCLT at Allahabad were directed to remain stayed until further orders. The Court further directed that a copy of the proceedings be served on the office of the learned Attorney General for India. Applications for impleadment and intervention were allowed.

9 On 11 September 2017, IDBI Bank Limited file an application for vacating the ad-interim order dated 4 September 2017. The Attorney General submitted before this Court that the order of stay would result in a consequence which was unintended: control of JIL would be restored to the erstwhile management. Such a consequence would affect the rights of creditors and of the consumers as well. In the meantime, as a result of the ad-interim stay, the IRP had handed over records to JIL. Counsel for the home buyers contended that if the order of stay was being modified to enable the IRP to take back control, it was necessary to have their representative on the Committee of Creditors8. The regime of the Act did not at that stage include any representation for the home buyers on the CoC. 10 Accordingly, on 11 September 2017, this Court modified its earlier order dated 4 September 2017 in the following terms:

a) The IRP shall forthwith take over the Management of JIL.

The IRP shall formulate and submit an Interim Resolution Plan within 45 days before this Court. The Interim Resolution Plan shall make all necessary provisions to protect the interests of the home buyers;

b) Mr.Shekhar Naphade, learned senior counsel along with Ms.Shubhangi Tuli, Advocate-on-Record, shall participate in the meetings of the Committee of Creditors under Section 21 of the Insolvency and Bankruptcy Code, 2016 to espouse the cause of the home buyers and protect their interests;

c) The Managing Director and the Directors of JIL and JAL shall not leave India without the prior permission of this Court;

d) JAL which is not a party to the insolvency proceedings, shall deposit a sum of Rs.2,000 crores(Rupees two thousand crores) before this Court on or before 27.10.2017. For the said purpose, if any assets or property of JAL have to be sold, that should be done after obtaining prior approval of this Court. Any person who was a Director or Managing Director of JIL or JAL on the date of the institution of the insolvency proceedings against JIL as well as the present Directors/Managing Director shall also not leave the country without prior permission of this Court. The foregoing restraint shall not apply to nominee Directors of lending institutions (IDBI/ICICI/SBI);

e) All suits and proceeding instituted against JIL shall in terms of Section 14(1)(a) remain stayed as we have directed the IRP to remain in Management. Be it clarified that we have passed this order keeping in view the provisions of the Act and also the interest of the home buyers." 11 The above interim directions indicate that three significant aspects were the foundation of the order:

> CoC First, following the discipline of the IBC, the IRP was permitted to take over management of JIL and to proceed to formulate an interim resolution plan within a stipulated period;
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> Second, the IRP was directed to ensure that necessary provisions were made to protect the interests of home buyers. To facilitate the views of the home buyers being placed before the CoC this Court nominated a senior counsel practicing before this Court to participate in those meetings under Section 21 of the IBC;
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> Third, JAL as the holding company of JIL was directed to deposit a sum of Rs 2,000 crores on or before 27 October 2017.
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> In formulating these directions, the Court initiated steps to protect the interests of the home buyers. At that stage, it must be noted, the CoC as constituted under Section 21 of the IBC did not include a representative of the home buyers. Nor were the home buyers regarded as financial creditors under the IBC. The mechanism evolved by the Court was intended to provide a workable arrangement under the then prevailing regime so that the interests of the home buyers would not be ignored.

12 By an order dated 23 October 2017 leave was granted to the IRP to file an action plan and an information memorandum in a sealed cover before this Court. 13 JAL moved an application before this Court for vacating the direction for deposit of Rs 2,000 crores or for a modification that would enable JAL to transfer its rights under a concession agreement in respect of the Yamuna Expressway

(between NOIDA and Agra. This request was seriously opposed by the Attorney General as well as by counsel appearing on behalf of IDBI Bank and the Yamuna Expressway Industrial Development Authority. Counsel for the IRP drew the attention of the Court to the fact that the rights under the concession agreement belong to JIL which was subject to proceedings under the IBC as a result of which such a request for alienation could not be permitted. By its order dated 25 October 2017, this Court declined to modify the direction for deposit of an amount of Rs 2,000 crores. However, time to do so was extended until 5 November 2017. 14 On 30 November 2017 this Court directed that the home buyers may approach the amicus curiae9 appointed in the case. The amicus curiae was to open a web portal on which details of the home buyers would be uploaded. All directors were required to remain present in this Court on the next date to disclose their personal assets on affidavit. The directors were present before this Court on 22 November 2017 when a statement was made on behalf of JAL of its readiness to deposit a sum of Rs 275 crores. By its order dated 22 November 2017 this Court permitted JAL to deposit a demand draft of Rs 275 crores during the course of the day and directed that a further sum of Rs 150 crores be deposited by 13 December 2017 and of Rs 125 crores by 31 December 2017. A restraint was imposed on the Mr Pawanshree Agrawal alienation of the properties and assets of the directors and their families. The earlier direction for the deposit of Rs 2,000 crores was maintained. In pursuance of the order dated 22 November 2017 an amount of Rs 150 crores was deposited, as noticed in the order dated 15 December 2017.

15 On 10 January 2018 RBI moved an Interlocutory Application before this Court seeking leave to move the NCLT against JAL under the provisions of the IBC. While observing that the application filed by the RBI would be considered at a later stage, this Court issued directions to JAL to file details of its housing projects on affidavit. The amicus curiae was permitted to open a separate web portal reflecting the details of the home buyers of JAL.

16 When the proceedings were listed before this Court on 21 March 2018, JAL stated through its counsel that an amount of Rs 550 crores had been deposited with the Registry. Counsel for JAL stated that only 8% of the home buyers are interested in seeking a refund while others have expressed the desire to seek possession of their flats. The Court indicated in its order that presently it was concerned with those home buyers who sought a refund while the grievances of those who wished to have possession of their flats would be considered at a subsequent stage. Since the order for the deposit of Rs 2,000 crores had not been complied with despite the end of the deadline under the previous directions, the Court issued further directions. As agreed by the Managing Director of JAL, an instalment of Rs 100 crores was to be deposited by 15 April 2018 while a second instalment in the like amount was directed to be deposited by 10 May 2018. The amicus curiae informed the Court that information gathered from the web portal indicated that an amount of Rs 1300 crores was required to be refunded by way of principal alone to the home buyers who were seeking refunds. The amicus curiae was requested to submit a project-wise chart to the Court, indicating the number of persons and the stage of completion. One of the grievances of the home buyers was that the developer was making demands towards monthly instalments despite being unable to complete construction. Consequently, a direction was issued restraining the developer from raising demands towards outstanding or future instalments in respect of those flat buyers who had expressed a desire to obtain refunds. By the order of this Court, the IRP was permitted to finalise the resolution plan. However, the plan would, this Court directed, be implemented only with its leave. The NCLT was

permitted to decide the proceedings subject to the directions which were issued.

17 On 16 April 2018, the Court was apprised of the fact that JAL had deposited the first instalment of Rs 100 crores. We may note at this stage, that JAL had submitted before the Court that it should be permitted to participate as one of the intending bidders in the resolution plan which was being formulated by the IRP. Dealing with the submission, this Court allowed JAL to submit a representation to the competent authority, though with the clarification that the Court had not expressed any opinion on that issue. This Court also directed that if the amount as directed was not deposited within the time specified, steps would be taken to attach the personal properties of the directors.

18 On 16 May 2018, the Court was apprised of the fact that an amount of Rs 750 crores was deposited by JAL. A further direction was issued for the deposit of Rs 1000 crores by 15 June 2018 subject to which, a stay was granted of further proceedings only in so far as the liquidation is concerned. 19 We may note at this stage that both in its earlier order dated 21 March 2018 as well as in the subsequent order dated 16 May 2018, this Court had recorded the request of the home buyers for a pro-rata disbursement of the amount which was deposited by JAL. No direction for disbursement has been issued and the request was deferred for being considered.

20 On 13 July 2018, certain proposals were made by JAL before this Court for permission to alienate specific assets to secure compliance with the interim directions of this Court for deposit of Rs 2,000 crores. This proposal was seriously opposed by counsel for the petitioners and home buyers, besides the financial institutions. Observing that the Court was not inclined to entertain the proposals mooted by the JAL, the proceedings were directed to be listed on 16 July 2018 “exclusively for the purpose of considering the issue of the rights of the home buyers and the capability of JAL and JIL to construct the projects.” 21 Section 12(1) of the IBC envisages that the CIRP has to be completed within a period of 180 days from the date of admission of the application. However, a window is provided to the resolution professional to seek an extension of a further period of 90 days upon a resolution from the CoC. The extension can be provided only once.

22 In the case of JIL, the period for completing the CIRP was to end on 6 February 2018. Based on the approval of the CoC an extension of 90 days was sought and granted by the NCLT by an order dated 12 February 2018. The extended period was to end on 12 May 2018. During the course of the process, the IRP invited expressions of interest in pursuance of which ten applicants including JAL submitted resolution plans. The IRP had made it clear while inviting applications for Expressions of Interest that the resolution plan to be submitted by the applicants must protect the interests of home buyers and provide for expeditious completion of the work of construction. The bid submitted by JAL was found to be ineligible in view of the bar contained in Section 29 A of the IBC and was not opened. Of the resolution plans submitted by nine resolution applicants, five were found not to be compliant with the IBC and were not not presented to the CoC for consideration. After initial negotiations, a discussion took place with four resolution applicants, these being:

(a) JSW Infrastructure Limited & IBC Knowledge Park Ltd. (JSW-IBC);

(b) Adani Infrastructure and Developers Pvt. Ltd. (Adani);

(c) Lakshdeep investments & Finance Pvt. Ltd.

along with Sh.Sudhir Valia and relatives (Lakshdeep); and

(d) Cube Highways and Infrastructure Pte. Ltd., Kotak Investment Advisors Ltd and I Squared Asia Advisors Pte Ltd (Cube-Kotak-I Squared).

Subsequently JSW was found to be ineligible under Section 29A. Hence, the resolution plans of the remaining three applicants were taken up for consideration. Counsel for the IRP has drawn the attention of the Court to the fact that none of the remaining three applicants proposed to bring in any funds for refund of the amounts paid by the home buyers to JIL. At a meeting held on 9 April 2018, the CoC decided to shortlist the resolution plan of Lakshdeep for negotiation. Lakshdeep submitted a resolution plan on 1 May 2018 and a meeting of the CoC was scheduled on 7 May 2018 to consider it under Section 30(4). In the meantime, in pursuance of the liberty granted by this Court on 16 April 2018, JAL submitted a representation on 6 May 2018. The CoC considered the resolution plan of Lakshdeep and the representation of JAL. JAL was permitted to present its plan before the CoC. The resolution plan submitted by JAL was rejected as a result of the statutory bar contained in Section 29A and since it failed to convince the CoC of its ability to tie up funds for construction. The CoC resolved to put the resolution plan of Lakshdeep for voting on 8 May 2018. However, when the plan was taken up, only 6 % of the votes cast were in favour of Lakshdeep, as against a three-fourth majority which was then needed under Section 30 (4) (the present requirement is of two- thirds, following the amendment to the IBC which has taken effect from 6 June 2018). Accordingly, the IRP informed the NCLT that no resolution plan was approved by the CoC within a period of 270 days which came to an end on 12 May 2018.

23 The total financial debt due to the financial creditors on the date of the commencement of corporate insolvency (9 August 2017) stood at Rs 9,984.70 crores.

24 Section 33(1) of the IBC postulates that liquidation follows upon the rejection of a resolution plan:

> “33. Initiation of liquidation.
>
> (1) Where the Adjudicating Authority, -
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> (a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or
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> (b) rejects the resolution plan under section 31 for the non-

compliance of the requirements specified therein, it shall -

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered. " In terms of the provisions of Section 33(1), where the resolution plan has been rejected under Section 31, the NCLT is required to pass an order for the liquidation of the corporate debtor.

25 During the course of the hearing, there has been a unanimity of opinion that the liquidation of JIL will not subserve the interests of the home buyers. The home buyers have made valuable investments by contributing hard earned monies in the hope of obtaining a roof over their heads. A home for the family is a basic human yearning. In diverse contexts it has been held by this Court to be a part of the right to life, as a fundamental constitutional guarantee10. All the counsel for the home buyers have earnestly appealed to the Court to exercise its jurisdiction to ensure complete justice to the home buyers instead of leaving them to the mercy of a liquidation process. The Court appreciates the substance in that plea, understanding at the same time, the need to abide by the discipline of the law.

26 Now, it is in this background that it would be necessary for the Court to understand and evaluate the provisions of the IBC which have a bearing on the issue at hand. The IBC is intended to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner to achieve a maximisation of the value of the assets of such persons and to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders. The enactment of the IBC has created a paradigm shift in the regulatory framework and processes governing corporate insolvency. The IBC reflects a fundamental change in the basic premise of a "debtor in possession" to a "creditor in possession". The resolution process is market driven. Resolution professionals are appointed or replaced by the CoC to conduct the entire process within 180 days, which can be extended for a further period of 90 days. A moratorium would operate during the process. Failure of the resolution process leads to See M/s.Shantistar Builders v Narayan Khimalal Totame (1990) 1 SCC 520 liquidation. Primacy is given in the process to commercial decisions. The success of the process is contingent upon the competence of the IRP and the CoC. The responsibilities entrusted to the IRP include managing the affairs of the corporate debtor, engaging experts or professionals, constituting a CoC, preparation of an information memorandum, determination of the liquidation value and enterprise value, inviting expressions of interest, permitting resolution applicants to submit plans which would be placed before the CoC where the applicant is found to be eligible (Sections 17, 18, 20, 23, 25, 26, 29 and 30). The CoC comprises of all financial creditors and authorised representatives of certain categories of persons and classes of creditors under Section 21(6) and Section 21(6A)(b). The CoC is responsible for approving crucial decisions and actions of the IRP, while managing the affairs of the corporate debtor under Section 28. The resolution plan approved by 66 % of the voting share in the CoC is submitted by the IRP to the NCLT for its approval. When the NCLT is satisfied that the plan

approved by the CoC meets the requirement of Section 30(2) it will approve the plan, which will be binding on all stakeholders (Sections 21, 22, 24, 25,27, 28 and 30).

Protecting Home Buyers:

27 The IBC, as it was originally enacted, did not contain an adequate recognition of the interests of home buyers in real estate projects. Home buyers are vital stake holders. The process of corporate insolvency resolution directly impacts upon their rights and interests. Yet the IBC, as initially crafted, did not protect them. The concerns of the home buyers have been sought to be assuaged by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which came into force on 6 June 2018. As a result of the Ordinance, home buyers are brought within the purview of financial creditors under the IBC. The expressions "secured creditor" and "security interest" are defined in Section 3(30) and (31) thus:

> "(30) "secured creditor" means a creditor in favour of whom security interest is created;
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> (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person;

Provided that security interest shall not include a performance guarantee;" The expression 'financial creditor' is defined in Section 5(7) thus:

> "(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred" The expression 'financial debt' is defined in Section 5(8) thus:
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> (8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes– ...
>
> (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

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

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);" As a result of the amendment brought about in the definition of 'financial debt',

amounts raised from allottees under real estate projects are deemed to be amounts "having a commercial effect of a borrowing". Hence outstandings to allottees in real estate projects are statutorily regarded as financial debts. Such allottees are brought within the purview of the definition of 'financial creditors'. 28 Section 7 of the IBC creates a statutory right in favour of financial creditors to initiate the corporate resolution process. Section 7 reads thus:

> "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.

(2) The financial creditor shall make an application under sub- section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish –

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b)the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board. (4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that –

(a) a default has occurred and the application under sub- section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub- section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

(7) The Adjudicating Authority shall communicate-

(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;

(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be." Being financial creditors under the IBC, allottees in real estate projects necessarily constitute a part of the CoC. Section 21 contains provisions for the constitution of the CoC. In so far as is material, Section 21 is extracted below:

"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.

... (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.

... (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 subsection (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. ... (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).” Financial creditors are entitled to a voting share proportionate to the extent of the financial debt owed. Regulation 16A contains provisions for the selection of an authorised representative to represent financial creditors in the class. Regulation 16A is in the following terms:

> “16A. Authorised representative.
>
> (1) The interim resolution professional shall select the insolvency professional, who is the choice of the highest number of financial creditors in the class in Form CA received under sub-regulation (1) of regulation 12, to act as the authorised representative of the creditors of the respective class:
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> Provided that the choice for an insolvency professional to act as authorised representative in Form CA received under sub- regulation (2) of regulation 12 shall not be considered. (2) The interim resolution professional shall apply to the Adjudicating Authority for appointment of the authorised representatives selected under sub-regulation (1) within two days of the verification of claims received under sub-regulation (1) of regulation 12.

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

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

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

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

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

(8) The authorised representative of creditors in a class shall be entitled to receive fee for every meeting of the committee attended by him in the following manner, namely: -

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

(9) The authorised representative shall circulate the agenda to creditors in a class and announce the voting window at least twenty-four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours." (emphasis supplied) The voting share of a creditor in a class is proportional to the financial debt together with interest at 8 per cent per annum.

On 13 July 2018, a circular has been issued by the Insolvency and Bankruptcy Board of India to facilitate the process of appointing an authorised representative for classes of creditors governed by Section 21 (6A) (b) of the IBC. In so far as is material, the circular states thus:

"2. Section 21 (6A) (b) of the Code read with regulation 16A of the Regulations provide for a simplified mechanism of representation of financial creditors through

authorised representatives, as detailed in Para 1 above, and are, therefore, matters of procedure. It is necessary that an ongoing corporate insolvency resolution process, where creditors belonging to a class are otherwise not represented in the CoC, uses this simplified mechanism, irrespective of the stage of the process. The resolution professional, who exercises the powers and performs the duties as vested or conferred on the interim resolution professional under section 23(2) of the Code, shall facilitate representation through authorised representative(s).

3. It is, accordingly, clarified that wherever the approval of resolution plan under regulation 39 (3) of the Regulations is at least 15 days away, the resolution professional shall expeditiously obtain, by electronic means, the choice of the insolvency professional from creditors in a class to act as the authorised representative of the class and proceed further in the manner as specified in regulation 16 A of the Regulations." The case of JAL:

29 Mr FS Nariman, learned senior counsel appearing on behalf of JAL tendered a note of submissions before this Court seeking to explain the perspective of the developers. JAL is stated to be a public listed company with 5.57 lakh individual shareholders and fifteen directors (including eight independent directors and two nominee directors of lenders). In 2003, JAL was allotted rights for the construction of an expressway from NOIDA to Agra. A concession agreement was entered into with the Yamuna Expressway Industrial Development Authority. A special purpose vehicle, JIL was set up. Finance was obtained from a consortium of banks – IDBI Bank being the lead bank – against a partial mortgage of lands acquired in the NOIDA-Agra sector and a pledge of 51% of the shareholding held by JAL. A housing plan was envisaged for the construction of real estate projects in two locations of the land acquired: 1,162 acres in Wish Town, NOIDA and 1,355 acres in Mirzapur. JAL has stated that it has still to provide possession to 21,532 home buyers. According to JAL:

"7. Till date:

(i) Construction of 106 Towers (out of remaining 228 towers)- consisting of 11,336 units/flats is 50% to 90% complete, and

(ii) Construction of 50 Towers consisting of 6,500 units is between 25% to 50% complete, and

(iii) Construction of 72 Towers is less than 25% complete.

On the basis of the above the expectation and undertaking is to accommodate approximately 500 home buyers out of the remaining 21,532 home buyers every single month starting July 2018." JAL has sought to assure that it would double the strength of existing workers for the construction of its projects. JAL has also stated that it would deposit post-dated cheques of Rs 600 crores with the Registry of this Court. However, this is subject to the condition that the Court should allow it to dispose of "identified cement assets" including its cement plan at Rewa in Madhya Pradesh. In order

to enable it to do so, JAL has sought a direction to the NCLT at Allahabad to decide the application filed before it for sanctioning a scheme of arrangement, propounded pursuant to a master restructuring agreement signed and accepted by the 32 creditors. JAL seeks to continue the stay of liquidation proceedings against its deposit of post-dated cheques of Rs 600 crores. JAL also seeks a stay on the direction of this Court allowing the IRP to remain in management.

30 Having carefully considered the proposal submitted on behalf of JAL by Mr FS Nariman, learned senior counsel we are not inclined to accept it. As we shall explain, accepting the proposal submitted on behalf of JAL would cause serious prejudice to the discipline of the IBC and would set at naught the salutary provisions of the statute. In order to enable the Court to explain the position, a reference is necessary to the provisions of Section 29 A of the IBC which reads as follows:

> 29A. Persons not eligible to be resolution applicant. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person— (a) is an undischarged insolvent;
>
> (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
>
> (c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:
>
> Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:
>
> Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.
>
> Explanation I- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and 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, prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;]

(d) has been convicted for any offence punishable with imprisonment –

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment :

Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor

and remains unpaid in full or part];

(i) 5[is] subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation 6[I]. — For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and 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, prior to the insolvency commencement date;

Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017

made under the Foreign Exchange Management Act, 1999 (42 of1999);

(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government."

31 Parliament has introduced Section 29 A into the IBC with a specific purpose. The provisions of Section 29 A are intended to ensure that among others, persons responsible for insolvency of the corporate debtor do not participate in the resolution process. The Statement of Objects and Reasons appended to the Insolvency and Bankruptcy Code (Amendment) Bill 2017, which was ultimately enacted as Act 8 of 2018, states thus:

"2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible." (emphasis supplied) Parliament was evidently concerned over the fact that persons whose misconduct has contributed to defaults on the part of bidder companies misuse the absence of a bar on their participation in the resolution process to gain an entry. Parliament was of the view that to allow such persons to participate in the resolution process would undermine the salutary object and purpose of the Act. It was in this background that Section 29 A has now specified a list of persons who are not eligible to be resolution applicants.

32 Clauses (c) and (g) of Section 29 A would operate as a bar to the promoters of JAL/JIL participating in the resolution process. Under clause (c), a person who at the time of the submission of the resolution plan has an account which has been classified a Non-Performing Asset under the guidelines of the RBI or of a financial regulator is subject to a bar on participation for a stipulated period. Under clause (g), a person who has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been

made by the adjudicating authority under the IBC is prohibited from participating. The Court must bear in mind that Section 29 A has been enacted in the larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a back-door entry to erstwhile managements in the CIRP. Section 30 of the IBC, as amended, also clarifies that a resolution plan of a person who is ineligible under Section 29 A will not be considered by the CoC :

> "30. Submission of resolution plan.
>
> ... (4) The committee of creditors may approve a resolution plan by a vote of not less than 4[sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:
>
> Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:
>
> Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A: Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that subsection]:
>
> Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018."

33 Mr Anand Grover appearing on behalf of the home buyers has opposed the proposal submitted by JAL/JIL on the following grounds:

> (i)) Loans given to JAL have been classified as Non Performing Assets which renders JAL ineligible as a resolution applicant/new promoter under Section 29A(b) of the IBC;
>
> (ii) In addition to Section 29A (b), JAL is also disqualified under Section 29A
>
> (g) of IBC. Section 29A(g) provides that a person who is engaged in a fraudulent transaction should not be allowed to bid for another company as such a person may

again engage in fraudulent transactions. In May 2018, the NCLT Allahabad set aside a fraudulent transaction involving a mortgage of around 750 acres of JIL's land in favour of the lenders of JAL. This mortgage was without any consideration and the land of 750 acres may be worth INR 5,000 crores. The matter is now before the NCLAT, which has specifically framed an issue in this regard;

(iii) The RBI is already before this Court seeking initiation of insolvency proceedings against JAL. JAL's proposal, although presented under the garb of protecting the interest of homebuyers, is aimed at the twin benefits of avoiding insolvency of JAL and regaining control of JIL, thereby defeating RBI's application for insolvency proceedings of JAL as well as Section 29A of IBC;

(iv) The reasons pleaded by JAL/JIL to excuse their failure to complete the housing projects such as the stay order granted by the National Green Tribunal have been rejected by orders of the National Consumer Disputes Redressal Commission as there was no stay. One such order was passed by the NCDRC on 2 May 2016, in Developers Township Property Owners Welfare Society v.

Jaiprakash Associates Limited (Consumer Case No. 1479 OF 2015);

(v) The contention of JAL that they faced impediments on account of the purported stay imposed by the NGT is patently incorrect as the stay by the NGT was only on handing over possession without an occupation certificate, which had no bearing on the construction. Moreover, JAL carried out construction during that period as is evidenced inter alia by the fact that they raised demands for construction linked payments during this period;

(vi) During the pendency of the CIRP from 9 August 2017, construction work was done under the aegis of the IRP under whom JAL was a mere contractor;

(vii) The claim by JAL that flats have been delivered is a fractured claim as flats have been delivered in incomplete stages and are not in accordance with the allotment letters. The flooring is not complete, doors and windows are missing, no objection certificates have not been obtained from the Fire Department and the offer of possession is being made without the occupation certificate;

viii) JAL does not have the capacity to deliver the flats and 22,000 homebuyers are suffering due to delays of more than four years in completion of various projects of JAL and JIL;

(ix) Under the contracts, JAL and JIL are jointly and severally liable to deliver the flats. If JAL was serious about delivering the flats, the present situation would not have arisen. Further, JAL would have avoided the insolvency process of JIL and would not have cast the home buyers to the uncertainties of insolvency;

(x) There are serious doubts about the credentials of JAL which has diverted funds from JIL towards its other businesses. The applicant associations had appointed ASA Financial Services to conduct an

audit of JIL's financials and the audit report demonstrates that JAL may have diverted more than INR 10,000 crore from JIL;

(xi) JAL is undergoing a serious financial crisis. This is clear from the following facts:

> (a) JAL has not yet honoured the order of this Court asking it to deposit Rs 2,000 crore for protection of the interest of the home buyers. JAL has paid only Rs 750 crores out of Rs 2,000 crores, after the expiry of almost 10 months from 11 September 2017 which was the date of the initial order of this Court;

(b) JAL has failed to pay even the latest instalment of Rs 1,000 crores by 15 June 2018 in accordance with the order of this Court dated 16 May 2018;

(c) JAL is a defaulter of more than 30 banks to the extent of around Rs 30,000 crores. JAL has also defaulted on fixed deposits, foreign currency convertible bonds and payments to Noida Authority;

(d) Even in the latest proposal, the proposal to deposit Rs 600 crores is spread over time indicating that JAL has no resources; and

(e) The proposal of doubling the strength of workers from 4,000 to 8,000 would only mean doubling the strength from 17 workers per tower to 35 workers per tower (228 towers to be built by 8,000 workers). This would amount to 2 workers in each floor of 4 flats (21,532 flats in 228 towers by 8,000 workers). At this rate, completion of flats may take several years. 34 Similar submissions have been urged on behalf of the home buyers by other learned counsel.

35 The bar under Section 29A would preclude JAL/JIL from being allowed to participate in the resolution process. Moreover, the facts which have been drawn to the attention of the Court leave no manner of doubt that JAL/JIL lack the financial capacity and resources to complete the unfinished projects. To allow them to participate in the process of resolution will render the provisions of the Act nugatory. This cannot be permitted by the Court. 36 But it has been submitted on behalf of JAL/JIL by Mr F.S. Nariman, learned senior counsel that with the expiry of the time lines prescribed in the IBC for the CIRP, the only option that would now remain is to liquidate the corporate debtor. Mr Nariman submitted that liquidation is not in the interest of the home buyers. In that event, in his submission, the only way out would be to obviate the consequence of liquidation by envisaging an arrangement outside the provisions of the IBC and not under it. It has been submitted that an ongoing project which has provided over 11,200 homes to home buyers in 79 towers should not, as far as possible, be stopped midway since that would affect the interests of the remaining 21,532 buyers who await possession. Their rights, it has been urged, are recognised and preserved under the Real Estate (Regulation and Development) Act 2016. Mr Nariman submitted that unless a group of independent professionals, to be appointed by this Court, comes to a conclusion that it is not financially viable at all for JIL/JAL to complete the remaining work in a time bound manner, their role as developers should not be discounted. Hence it has been submitted that an independent committee of experts should be constituted by this Court to evaluate the financial capability of JAL/JIL to continue executing the ongoing projects. In this background it has

also been submitted that following the opening of the web portal under the directions of the Court, only 8% of the home buyers have opted for refunds while 92% have chosen not to claim refunds thereby implying a confidence in the ability of JIL/JAL to complete the project. JIL, it has been submitted, has assets valued at Rs 17,116 crores by bank valuers to whom they were submitted as security and even the distress value is Rs 14,548 crores. Mr Nariman submitted that among the two sets of financial creditors of JIL and JAL:

> (i) the creditors of JIL are headed by IDBI Bank apart from which there are 12 other banks in the consortium;
>
> (ii) the financial creditors of JAL await formal orders of the NCLT to the scheme of arrangement which has been agreed to by all its 32 creditors under a Master Restructuring Arrangement.

37 We may note at this stage that counsel appearing on behalf of the home buyers have uniformly opposed the proposal of JIL/JAL. The home buyers have urged before this Court that they have no confidence in the ability of either JIL or JAL to complete the outstanding projects. The home buyers have urged that they have been left in the lurch by the developers who have miserably failed to fulfil their contractual obligation by allotting flats on time. 38 On behalf of the IRP, Mr Parag Tripathi, learned senior counsel submitted that essentially, the Court has two options before it. The first option would be to revive the process of corporate insolvency by extending the time period of 270 days specified in the IBC in order to enable fresh consideration to be made of the prospect for a resolution which would now have take into account the interests of the home buyers under the amended IBC. The second option would, it was urged, be for this Court, in the exercise of its jurisdiction under Article 142 to appoint a Committee under its directions and supervision. The Committee would explore the possibility of a resolution which would obviate the need for the liquidation of the corporate debtor. The second option which has been proposed by learned senior counsel for the IRP forms the basis of the additional submissions tendered by Mr Nariman. As we have noted, Mr Nariman urged that on the expiry of the time lines prescribed in the IBC for the completion of the resolution process the only available alternative is to proceed outside the provisions of the IBC.

39 In considering the rival submissions, several important facets of the case need to be underscored. First and foremost, the CIRP was initiated on 9 August 2017, following the order of the NCLT admitting the proceedings. The period of 180 days for concluding the CIRP come to an end on 6 February 2018 and the extended period ended on 12 May 2018. When the CIRP was initiated and until the period of 270 days concluded, the home buyers did not have the status of financial creditors under the provisions of the IBC. They had no statutory voting rights in the CoC. Under the interim directions of this Court, a workable arrangement was sought to be put into place by appointing a representative of the home buyers on the CoC to facilitate their interests being duly borne in mind. But the point to be noted is that in the absence of a statutory recognition of the position of the home buyers as financial creditors, the law did not allow for real and substantive entitlements to them in the CoC. These statutory entitlements have been brought in by the Ordinance in order to recognise the vital interests of the home buyers in a real estate project and to

allow them a statutory status in the insolvency resolution process. Unfortunately by the time that the Ordinance came into being on 6 June 2018, the period of 270 days had expired; the resolution plan of Lakshdeep was rejected and the IRP informed NCLT that no resolution plan had been approved within the extended period of 270 days on 12 May 2018. Having regard to the material change which has been brought about by the amendment of the IBC by the Ordinance and the fact that this Court has been in seisin of the proceedings to ensure that the home buyers are protected, we are of the view that it is but appropriate and to do complete justice to secure the interests of all concerned that the CIRP should be revived and CoC reconstituted as per the amended provisions to include the home buyers. Tn the facts of the present case, recourse to the power under Article 142 would be warranted to render complete justice. Parliament has undoubtedly provided a period of 180 days and an extended period of 90 days to complete the process. But in the present case a peculiar situation has arisen as a result of which the status of the home buyers which had not been recognised prior to 6 June 2018 has now been expressly recognised as a result of the amending Ordinance. Learned counsel for the IRP submitted that in the CoC which will be reconstituted under the amended IBC, the home buyers would have a substantial voting power so as to be able to effectively protect their interests. Moreover, this Court should follow the discipline of the IBC which has been enacted by Parliament specifically to streamline the resolution of corporate insolvencies. Matters involving corporate insolvencies require expert determination. The legislature has made specific provisions which are conceived in public interest and to facilitate good corporate governance. The Court should not take upon itself the burden of supervising the intricacies of the resolution process. Accepting the suggestion of Mr Nariman (and one of the two options proposed by Mr Tripathi) of the Court appointing a Committee to supervise the resolution process outside the IBC will involve the Court in an insuperable burden of evaluating intricate matters of financial expertise on which Parliament has legislated to create specific mechanisms. We are emphatically of the view that it would not be appropriate for the Court to appoint a Committee to oversee the CIRP and assume the task of supervising the work of the Committee. We must particularly be careful not to supplant the mechanisms which have been laid down in the IBC by substituting them with a mechanism under judicial directions. Such a course of action would in our view not be consistent with the need to ensure complete justice under Article 142, under the regime of law. Hence, the power under Article 142 should be utilised at the present stage for the limited purpose of recommencing the resolution process afresh from the stage of appointment of IRP by the order dated 9 August 2017 and resultantly renew the period which has been prescribed for the completion of the resolution process. We have furnished above, the reasons for doing so. Chief amongst them is the fact that in the present case the period of 270 days expired before the Ordinance conferring a statutory status on home buyers as financial creditors came into existence. In the circumstances, it would be necessary to revive the period prescribed by the statute by another 180 days commencing from the date of this order. During this period, the IRP shall follow the provisions of the IBC afresh in all respects. A new CoC should be constituted in accordance with the amended provisions of the IBC to enforce the statutory status of the allottees as financial creditors. We also clarify that apart from the three bidders whose bids were found to be eligible by the IRP, it would be open to the IRP to invite fresh bids to facilitate a wider field of choice before the CoC. In that process, the offers made by the intervenors in this proceedings can also be considered by CoC anew. We are not inclined to evaluate the merits of the bids submitted by the bidders who were left in the fray, two of whom have intervened. All bids must follow the discipline of the IBC. We have, however, not

accepted the submission to allow JIL or JAL and the erstwhile promoters to participate in the process. Their participation is expressly prohibited by Section 29 A and we decline to make any exception which would breach a salutary and express provision made in the IBC.

40 As we have stated earlier, an amount of Rs 750 crores is lying in deposit before this Court pursuant to the interim directions, on which interest has accrued. The home buyers have earnestly sought the issuance of interim directions to facilitate a pro-rata disbursement of this amount to those of the home buyers who seek a refund. We are keenly conscious of the fact that the claim of the home buyers who seek a refund of monies deserves to be considered with empathy. Yet, having given our anxious consideration to the plea and on the balance, we are not inclined to accede to it for more than one reason. Firstly, during the pendency of the CIRP, it would as a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. For the present, we leave open the question as to whether the home buyers are unsecured creditors (as was urged by Mr.Tripathi) or secured creditors (as was urged by counsel appearing for them). Directing disbursement of the amount of Rs 750 crores to the home buyers who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors. Once we have taken recourse to the discipline of the IBC, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process. Secondly, the figures which have been made available presently, following the opening of the web portal by the amicus curiae, indicate that 8% of the home buyers have sought a refund of their monies while 92% would evidently prefer possession of the homes which they have purchased. We cannot be unmindful of the interests of 92% of the home buyers many of whom would also have obtained loans to secure a home. They would have a legitimate grievance if the corpus of Rs 750 crores (together with accrued interest) is distributed to the home buyers who seek a refund. The purpose of the process envisaged by the IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of the IBC. Thirdly during the course of the hearing, the Court has been apprised of the concerns of the secured creditors, chief among them being the IDBI bank limited. In its submissions before this Court, IDBI bank has emphasised that one of the major reasons for the enactment of the IBC was to protect the interest of lenders. The debt owing to the banks and financial institutions has been secured by the assets of JIL, to protect their interests. This debt originates in the public deposits of the banks and financial institutions, who are answerable to their stakeholders. Fourthly, the RBI has moved this Court for permission to initiate an insolvency resolution process. Parliament enacted the Banking Regulation (Amendment) Act 2017 by introducing Section 35 AA and Section 35 AB into the Banking Regulation Act 1949. The amendment empowers the Central government to authorise RBI to issue directions to any banking company to initiate an insolvency resolution process in respect of a default as understood under the IBC. Such an order was issued by the Central government on 5 May 2017. The RBI constituted an Internal Advisory Committee (IAC) consisting primarily of its independent directors. The IAC took up for consideration accounts which were classified either partly or wholly non-performing from amongst the top 500 exposures in the banking system as on 31 March 2017. As a first step, the IAC recommended all such non-performing asset accounts with fund and non-fund based outstandings exceeding Rs 5,000 crores. The IAC has initially taken up

twelve accounts involving total exposure of Rs1,79,769 crores. JIL was one of the twelve accounts in respect of which directions have been issued to banks for initiating insolvency resolution. Subsequently, the IAC recommended that in respect of those accounts where 60% or more had been classified as NPAs as on 30 June 2017, banks may be directed to implement a viable resolution plan within six months failing which the accounts may be directed for a reference under the IBC by 31 December 2017. JAL was one such entity. No viable resolution plan could be found as a result of which it is also required to be referred for CIRP. RBI has carried out this exercise as a matter of economic policy in its capacity as the prime banking institution in the country, entrusted with a supervisory role, and the power to issue binding directions. The position of the RBI as an expert regulatory body particularly in matters of economic and financial policy has been reiterated in several decisions of this Court: [R.K.Garg v Union of India11, Peerless General Finance and Investment Co.Ltd. v RBI12, TN Generation and Distribution Corpn. Ltd. v CSEPDI-Trishe Consortium13"].

41 JAL was classified under the SMA – II category (demands overdue for more than 60 days) by banks as early as on 3 October 2014 and as an NPA since 31 March 2015. We agree with the submission of the RBI that any further delay in resolution would adversely impact a viable resolution being found for JAL and JIL. The facts which have emerged before the Court from the application filed by the RBI clearly indicate the financial distress of JAL and JIL. The apprehensions of the home-buyers in regard to their financial incapacity is borne out by RBI, as a responsible institution has urged before the Court. The IBC has been enacted in the form of a comprehensive bankruptcy law and with a specific legislative intent. With the amendment brought about by the Ordinance promulgated in June 2018, the interests of the home buyers have been sought to be safeguarded. Accordingly, we accede to the request made on behalf of the RBI to allow it to follow the recommendations of the IAC to initiate a CIRP against JAL under the IBC.

42 We, accordingly, issue the following directions:

> (i) In exercise of the power vested in this Court under Article 142 of the Constitution, we direct that the initial period of 180 days for the (1981) 4 SCC 675 at para 19 (1992) 2 SCC 343 at para 31 (2017) 4 SCC 318 at para 36 conclusion of the CIRP in respect of JIL shall commence from the date of this order. If it becomes necessary to apply for a further extension of 90 days, we permit the NCLT to pass appropriate orders in accordance with the provisions of the IBC;
>
> (ii) We direct that a CoC shall be constituted afresh in accordance with the provisions of the Insolvency and Bankruptcy (Amendment) Ordinance, 2018, more particularly the amended definition of the expression "financial creditors";
>
> (iii) We permit the IRP to invite fresh expressions of interest for the submission of resolution plans by applicants, in addition to the three short-listed bidders whose bids or, as the case may be, revised bids may also be considered;

(iv) JIL/JAL and their promoters shall be ineligible to participate in the CIRP by virtue of the provisions of Section 29A;

(v) RBI is allowed, in terms of its application to this Court to direct the banks to initiate corporate insolvency resolution proceedings against JAL under the IBC;

(vi) The amount of Rs 750 crores which has been deposited in this Court by JAL/JIL shall together with the interest accrued thereon be transferred to the NCLT and continue to remain invested and shall abide by such directions as may be issued by the NCLT.

43 We see no reason to keep these proceedings pending before the Court any further. The proceedings shall stand disposed of. However, we grant liberty to all concerned parties to adopt appropriate proceedings in accordance with law, should it become necessary to do so in future. Applications, if any, pending are also disposed of.

.....CJI [DIPAK MISRA] .....J [A M KHANWILKAR] .....J [Dr D Y CHANDRACHUD] New Delhi;

August 09, 2018