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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGIANAL CIVIL JURISDICTION

WRIT PETITION NO. 2737 OF 2017
(WRIT PETITION LODGING NO. 2010 OF 2017)

Neelkamal Realtors Suburban Pvt. Ltd. and anr. .. Petitioners

Vs.

1. Union of India and ors. .. Respondents

WRIT PETITION NO. 2711 OF 2017
(WRIT PETITION LODGING NO. 1965 OF 2017)

Real Gem Buildtech Private Limited and anr. .. Petitioners

Vs.

1. Union of India and ors. .. Respondents

WRIT PETITION NO. 2255 OF 2017
(Transferred from Nagpur)

Nirmal Ujwal Credit Co-operative Society
Limited, Nagpur .. Petitioner

Vs.

1. The Union of India through its Secretary, Urban Housing and Poverty Alleviation Department, New Delhi and ors. .. Respondents

WITH
WRIT PETITION NO. 2708 OF 2017
(WRIT PETITION LODGING NO. 2034 OF 2017)

M/s. Mudassar Builders and Developers .. Petitioner

Vs.

1. Union of India and ors. .. Respondents

WITH
WRIT PETITION NO. 2727 OF 2017
(WRIT PETITION LODGING NO. 1967 OF 2017)

D. B. Realty Limited and anr. .. Petitioners

Vs.

1. Union of India and ors. .. Respondents

WITH
WRIT PETITION NO. 2256 OF 2017
(Transferred from Nagpur)

1. Swapnil Promoters and Developers Private Limited and ors. .. Petitioners

Vs.

1. The Union of India through its Secretary, Urban Housing and Poverty Alleviation Department, New Delhi and ors. .. Respondents

WITH
WRIT PETITION NO. 2730 OF 2017
(WRIT PETITION LODING NO. 2011 OF 2017)

MIG (Bandra) Realtors and Builders Pvt. Ltd. .. Petitioner

Vs.

1. Union of India and ors. .. Respondents

WITH
CHAMBER SUMMONS NO. 224 OF 2017
IN
WRIT PETITION NO. 2711 OF 2017

Forum for People's Collective Efforts (F.P.C.E.) .. Applicant

IN THE MATTER BETWEEN

Real Gem Buildtech Private Limited and anr. .. Petitioners

Vs.

1. Union of India and ors. .. Respondents

WITH
CHAMBER SUMMONS NO. 223 OF 2017
IN
WRIT PETITION NO. 2727 OF 2017

Hamid Khan .. Applicant

IN THE MATTER BETWEE

D. B. Realty Limited and anr. .. Petitioners

Vs.

1. Union of India and ors. .. Respondents

AND
CHAMBER SUMMONS LODGING NO. 306 OF 2017
IN
WRIT PETITION NO. 2727 OF 2017

Mohammed Husian Umatia and ors. .. Applicants

IN THE MATTER BETWEE

D. B. Realty Limited and anr. .. Petitioners

Vs.

1. Union of India and ors. .. Respondents

Mr. Aspi Chinoy, Senior Counsel a/w. Mohd. Himayutullah, Ms. Rujuta Patil and Ms. Niyathi Kalra i/b. Negandhi Shah & Himayatullah, for the petitioners in WP/2737/2017 (WPL/2010/17).

Dr. Veerendra Tulzapurkar, Senior Counsel a/w. Nikhil Sakhardande & Suraj Iyer i/b. Ganesh and Co. for the petitioner in WP/2708/2017 (WPL/2034/17).

Mr. Girish Godbole,Senior Counsel a/w. Ms. Rujata Patil & Ms. Niyathi Kalra i/b. Negandhi Shah & Himayatullah for the petitioners in WP/2727/2017 (WPL/1967/17).

Mr. S.U. Kamdar, Senior Counsel a/w. Chirag Kamdar, Dhawal Mehta, Ms. Swapnil Khatri, Krishna Moorthy, Abir Patel, K. Vasania & Ms. Aditi Khanna i/b. Wadia Ghandy & Co. for the petitioners in WP/2711/2017 (WPL/1965/17).

Mr. Prakash Randive a/w. Ashwini Kathane, for the petitioners in WP/2255/2017.

Mr. Nikhil Sakhardande a/w. Pralhad Paranjpe i/b. A.A. Naik, for the petitioner in WP/2256/2017.

Ms. Rujuta Patil and Ms. Niyathi Kalra i/b. Negandhi Shah & Himayatullah for the petitioner in WP/2730/2017 (WPL/2011/17).

Mr. Siraz Rustomjee, Senior Counsel a/w. Trushar Bhavsar, Ranbir Singh, Mr. Jarin Doshi i/b. Malvi Ranchoddas & Co. for applicant/intervener in CHS/224/2017.

Mr. Tanveer Nizam a/w. Mrs. Mariam Nizam i/b. Altaf Khan for the applicant/interveners in CHS/223/2017.

Mr. Anil C. Singh, Additional Solicitor General a/w. Amogh Singh, Kapil Moye, Vijay Killedar, Vaibhav Sugdare, Aditya Thakkar, D.P. Singh, Ms. Indrayani Deshmukh, Ms. Geetika Gandhi, V.T. Kalyan, Sandesh Patil and Nagendra Goel, Ms. Tamanna Naik, for respondent No.1 – Union of India in all Petitions.

Mr. Ashutosh Kumbhakoni, Advocate General a/w. Ms. G.R. Shastri, Addl. Govt. Pleader a/w Shardul Singh & Akshay Shinde, for the State in all Petitions.

Mr. Ashutosh Kumbhakoni, Advocate General a/w. Shardul Singh i/by Mrs. Sushma Singh for respondent no.3 in WP/2727/17 (WPL/1967/17) & WP/2737/17 (WPL/2010/17).

Mr. Ashutosh Kumbhakoni, Advocate General i/by Mr. Amit Borkar for respondent no.3 in WP/2730/17 (WPL/2011/17) and WP/2708/17 (WPL/2034/17).

Mr. Ashutosh Kumbhakoni, Advocate General i/by Mr. Akshay Shinde for respondent no.3 in WP/2711/17 (WPL/1965/17).

Mr. Darius Khambata, Senior Counsel appointed as A*micus Curiae* with Ms. Naira Jejeebhoy and Pheroze Mehta.

None for applicants in Chamber Summons (L) No. 306 of 2017.

CORAM : NARESH H. PATIL &
R. G. KETKAR, JJ.

RESERVED ON : NOVEMBER 14, 2017

PRONOUNCED ON : DECEMBER 06, 2017

JUDGMENT [Per Naresh H. Patil, J.] :

1. Rule. Rule made returnable forthwith. Heard finally.

2. The Apex Court by an order dated 4th September, 2017, in Transfer Petition (Civil) Nos. 1448 – 1456 of 2017, passed following order:-

> " For the present we feel that it would be appropriate to direct the High Court of Judicature at Bombay to take up the matters i.e. W.P. (L) Nos. 1967, 2010, 2011, 2023, 1965, 2034, 4419, 4692 and 19157 of 2017 along with other connected matters, if any, pending in the High Court, together.
>
> We request the Chief Justice of the High Court of Bombay to assign the cases to a particular Bench for expeditious decisions of the matters. Let matters be decided with two months.
>
> Consequently the Transfer Petitions are disposed of."

3. In this batch of Writ Petitions, petitioners had challenged legality and constitutional validity of certain provisions of the Real Estate (Regulation and Development) Act, 2016 (for short " the **RERA**") as being violative of the provisions of Articles 14, 19(1)(g), 20 and 300-A of the Constitution of India. The petitioners prayed for a declaration that the first proviso to Section 3 (1), Section 3 (2)(a) & (c), Explanation to Section 3, Sections 4(2)(c) & 4(2) (d) (e) (f) (g) (k), Sections 4 (2) (l) (C) and 4 (2) (l) (D), Sections 5(1)(b), 5 (3) and the first proviso to Section 6 of the RERA are unconstitutional, illegal, ultra vires, without jurisdiction and without authority of law. The petitioners have also challenged validity of provisions of Sections 4, 5, 7, 8, 11 (h), 14 (3), 15, 16, 18, 22, proviso to Section 27(1)(a), Section 40, proviso to Section 43(5), proviso to Section 50(1)(a), Sections 53(1) & 53(3), 46, 59, 60, 61, 63, 64 and Section 82 of the RERA and Rules 3 (f), 4, 5, 6, 7, 8, 18, 19, 20, 21 of the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 (for short "**the Maharashtra Rules of 2017**").

4. During the course of hearing, the learned counsel appearing for the petitioners restricted their challenge to first proviso to Section 3(1), Section 3(2)(a), explanation to Section 3, Section 4(2)(l)(C), Section 4(2)(l)(D), Section 5(3), first proviso to Section 6, Sections 7, 8, 18, 38, 40, 46(1)(b), 59, 60, 61, 63, 64 of RERA and have advanced their submissions. We have dealt with the submissions of the learned counsel accordingly. Though in Writ Petition Nos.2711 and 2256 of 2017 validity of certain Rules of the Maharashtra Rules of 2017 was challenged but during the course of arguments none of the learned counsel advanced submissions regarding challenge to the Rules. Therefore, We would not deal with the challenge to the Rules framed under the RERA by the State of Maharashtra.

5. The RERA was enacted by the Parliament as Act 16 of 2016 in the year 2016. Some of the provisions of the RERA came into force on a date prescribed by the Central Government under the notification published in the official gazette. Different dates were appointed for different provisions of the RERA. By Notification No. S.O. 1544 (E), dated 26-4-2016, the Central Government appointed 1st day of May 2016 as a date on

which some of provisions of the RERA came into force, namely, Sections 2, 20 to 39, 41 to 58, 17 to 78 and 81 to 92. By Notification No. S. O. 1216, dated 19-4-2017 some more provisions of the RERA came into force, namely, Sections 3 to 19, 40, 59 to 70 and 79, 80 w.e.f. 1st May, 2017.

6. The statement of objects and reasons of the RERA, in paras 1, 2 and 3, reads as under:-

> **Statement of Objects and Reasons.** - The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.
>
> 2. In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and

Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.

3. The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run."

7. It would be advantageous to refer to some of the provisions under the definition clause of RERA under Section 2 :-

"**2. Definitions.** - In this Act, unless the context otherwise requires -

(za) "**interest**" means the rates of interest payable by the promoter or the allottee, as the case may be;

Explanation.- For the purpose of this clause -

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

(zh) "**planning area**" means a planning area or a development area or a local planning area or a regional development plan area, by whatever name called, or any other area specified as such by the appropriate Government or any competent authority and includes any area designated by the appropriate Government or the competent authority to be a planning area for future planned development, under the law relating to Town and Country Planning for the time being in force and as revised from time to time;

(zi) "**prescribed**" means prescribed by rules made under this Act;

(zj) "**project**" means the real estate project as defined in clause (zn);

(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 persons, 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;

(zn) "**real estate project**" means the development of a building or a building consisting or 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;

8. It is necessary to refer to some of the provisions of the RERA :

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

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

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

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

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

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

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

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

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

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

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

(a) ……..

to

(k) ……..

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

(A) …....

(B) ….....

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

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

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

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

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

Explanation. - For the purpose of this clause, the term scheduled bank means a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);

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

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

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

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

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

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

Section 6. Extension of registration.- The registration granted under section 5 may be extended by the Authority on an application made by the promoter due to *force majeure*, in such form and on payment of such fee as may be prescribed:

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

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

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

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

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

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

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

Explanation. - For the purposes of this clause, the term "unfair practice means" a practice which, for the

purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:-

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

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

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

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

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

(d) the promoter indulges in any fraudulent practices.

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

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

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

(a) shall debar the promoter from accessing its website in relation to that project and specify his name in the list of defaulters and display his photograph on its website and also inform the other Real Estate Regulatory Authority in other States and Union territories about such revocation or registration;

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

(c) shall direct the bank holding the project bank account, specified under sub-clause (D) of clause (1) of sub-section (2) of section 4, to freeze the account, and thereafter take such further necessary actions, including consequent de-freezing of the said account, towards facilitating the remaining development works in accordance with the provisions of section 8;

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

Section 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.

Section 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, 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 he claim for compensation under this sub-section 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.

Section 22. Qualifications of Chairperson and Members of Authority.- The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department dealing with Housing and the Law Secretary, in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of the Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration:

Provided that a person who is, or has been, in the service of the State Government shall not be appointed as a Chairperson unless such person has held the post of Additional Secretary to the Central Government or any equivalent post in the Central Government or State Government.

Provided further that a person who is, or has been, in the service of the State Government shall not be appointed as a

member unless such person has held the post of Secretary to the State Government or any equivalent post in the State Government or Central Government.

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

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.

(3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.

(4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal:

Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal Functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:

Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at-least thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee inlcuding interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

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

Section 45. Composition of Appellate Tribunal.- The Appellate Tribunal shall consist of a Chairperson and not less

than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member, to be appointed by the appropriate Government, -

Explanation.- For the purposes of this Chapter,-

(i) "**Judicial Member**" means a Member of the Appellate Tribunal appointed as such under clause (b) of sub-section (1) of section 46;

(ii) "**Technical or Administrative Member**" means a Member of the Appellate Tribunal appointed as such under clause (c) of sub-section (1) of section 46.

Section 46. Qualifications for appointment of Chairperson and Members.- (1) A person shall not be qualified for appointment as the Chairperson or a Member of the Appellate Tribunal unless, he, -

(a) in the case of Chairperson, is or has been a Judge of a High Court; and

(b) in the case of a Judicial Member he has held a judicial office in the territory of India for at-least fifteen years or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post, or

has been an advocate for at-least twenty years with experience in dealing with real estate matters; and

(c) in the case of Technical or Administrative Member, he is a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at-least twenty years in the field or who has held the post in the Central Government, or a State Government equivalent to the post of Additional Secretary to the Government of India or an equivalent post in the Central Government or an equivalent post in the State Government.

(2) The Chairperson of the Appellate Tribunal shall be appointed by the appropriate Government in consultation with the Chief Justice of High Court or his nominee.

(3) The judicial Members and Technical or Administrative Members of the Appellate Tribunal shall be appointed by the appropriate Government on the recommendations of a Section Committee consisting of the Chief Justice of the High Court or his nominee, the Secretary of the Department handling Housing and the Law Secretary and in such manner as may be prescribed.

9. It is informed that various States had framed Rules in exercise of powers conferred under Section 84 of the RERA. The State of Maharashtra too framed Rules, namely, Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017, which were notified on 20-4-2017.

10. In exercise of powers conferred under sub-section (1) and clause (i) of sub-section (2) of section 85 of the RERA, the Maharashtra Real Estate Regulatory Authority, with the approval of the State Government, made Regulations, namely, Maharashtra Real Estate Regulatory Authority (General) Regulations, 2017, which were notified on 24-4-2017.

The learned counsel appearing for the Union informed that many States had framed Rules and Regulations in exercise of powers conferred under RERA.

11. By an Act of Parliament, a Regulatory Authority was established for the regulation and promotion of the real estate sector to ensure sale of

plot, apartment, building or sale of real estate project, in an efficient and transparent manner. The Act aims at protecting interest of consumers in the real estate sector by establishing an adjudicating mechanism for speedy redressal of disputes. The Act establishes an Appellate Tribunal to hear appeals arising out of decisions, directions or orders of the Real Estate Regulatory Authority.

12. We would deal with the specific challenges made to the validity of the provisions of the RERA.

SUBMISSIONS ON BEHALF OF THE PETITIONERS IN WRIT PETITON NO. 2737 OF 2017 (WPL/2010/2017):

13. The learned Senior Counsel Mr. Aspi Chinoy appeared for the petitioners - Neelkamal Realtors Suburban Pvt. Ltd. and anr. The learned counsel referred to various provisions of the RERA. The learned counsel has taken a strong objection on regulating the transactions of ongoing projects and compelling promoters of such projects to get the project registered under RERA from the date of notification of the provisions of Sections 3 to 19 i.e. from 1-5-2017. Under the RERA, "**the ongoing project**" has been defined under Section 3 as the project where

development is going on and for which completion certificate has not been issued. It was submitted that it would be illegal, unreasonable, arbitrary and unconstitutional to compel the promoters of the ongoing projects to register their projects under RERA by applying provisions of RERA retrospectively. The learned counsel submits that if the application of RERA is not considered to be retrospective then it is certainly retro-active in nature when it comes to making certain provisions of RERA applicable to the ongoing projects. Even while making the application of certain provisions of RERA retro-active in nature, the RERA fails to take into account the past agreements entered into between the promoters and the allottees and the rights and liabilities arising and flowing from such agreements. The provisions which affect the transactions entered into by the promoter in respect of ongoing projects are contrary to enactments like the Contract Act and the Transfer of Property Act. There is no transparency in respect of the provisions relating to the ongoing project, carrying out of remaining development work. It was submitted that petitioners are not against the interest of allottees in regulating the sale and purchase of the immoveable property during the real estate transactions. But, while doing so, the Parliament ought to have struck proper and reasonable balance by taking care of the interest of the promoters, developers, builders. In the

view of the learned counsel, the RERA aims at promoting and protecting interest of the allottees alone, while the promoters' rights are totally given a go-bye which not only would cause tremendous financial loss and damage, but would seriously jeopardize and hamper the real estate market in respect of the ongoing projects and even the new projects.

14. The learned counsel submits that the proviso to Section 3(1) needs to be declared as illegal and unconstitutional as the RERA has failed to provide reasonable, fair and transparent mechanism to balance the rights and liabilities of the promoters and allottees.

15. In respect of the provisions of Section 6, regarding extension of registration, the learned counsel submitted that though the promoter has been given a liberty to declare the tenure during which the project will be completed while getting the project registered, the extension of registration granted under Section 5 by the authority is restricted to a period of one year. This, in the submission of the learned counsel, is unreasonable and arbitrary provision which fails to take into consideration circumstances which are beyond the control of the promoter while carrying out the developmental work. The counsel submitted that under the provisions of Section 6, a relaxation is prescribed for extension of period of registration

in case the promoter applies for extension due to *force majeure*. The explanation to Section 6 states that expression "***force majeure***" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project. In the submission of the counsel, the authority ought to have been given discretion to consider application made by the promoter for extension of the registration in respect of the circumstances due to which the project could not be completed. For example, a genuine dispute between the parties resulting in order of stay, injunction, prohibition in respect of the ongoing project. The counsel cite instances like shortage of raw material like cement, steel etc. in the open market due to which the project could be delayed. The authorities are left with no discretion to consider circumstances other than *force majeure* for extending the period of registration beyond aggregate period of one year under the provisions of Section 6. Therefore, the counsel submitted that the proviso to Section 6 be declared as illegal, unreasonable, unconstitutional and contrary to the spirit of the provisions of Articles 14, 19(1)(g) and 20 of the Constitution.

16. In the alternative, the counsel submitted that such a provision could be held to be directory and not mandatory so that the authority

constituted under the RERA could deal with the individual cases based on the facts and circumstances brought before it.

17. Provisions of Section 8 refers to obligation of authority consequent upon lapse or on revocation of registration. The learned Senior counsel Mr. Chinoy submitted that the said provision is unreasonable and adversely affects rights of the promoters. It is contrary to the contractual rights established between the promoters and the allottees under agreements executed by them prior to registration of the project under RERA. The provisions are vague in nature, lacks clarity and its implementation would lead to further complications in getting the project completed. In that sense, the counsel submitted that it is not in the interest of the allottees too.

18. The learned counsel by referring to provisions of Section 18 submitted that the provisions of Section 18(1)(a) are highly arbitrary in nature. Their operation is retrospective / retro-active. Its application would seriously prejudice and affect the rights of the promoter in carrying out trade and business. It is, therefore, contrary to the Articles 14 and 19(1)(g). It was submitted that in case an allottee does not withdraw from the project

and the registration of the promoter gets revoked or if promoter is unable to give possession of an apartment, then till the possession is handed over to the allottee, a promoter has to pay interest for every month of delay till the handing over of the possession at such rate as may be prescribed. The learned counsel submitted that mandate to pay interest and compensation under Section 18 be held to be unreasonable, arbitrary and unconstitutional. In the alternative, the counsel submitted that at the most the promoter may be directed to pay interest in respect of the delay in handing over of possession to the allottee from the date of registration and not from the date of agreement of sale entered into by him and the allottee. The provisions of Section 18 are retro-active in nature which affects the past transaction entered into between the promoter and allottee prior to registration of the project under RERA. The counsel submits that the provisions are unworkable.

19. The learned Senior Counsel places reliance on the judgments of the Supreme Court as well as Kolkata High Court and this court. We may refer the said judgments :-

(a) In the case of Saghir Ahmad and anr. Vs. State of U.P. and ors.[1], the Apex Court, in paras (22) & (23) observed thus:

> "(22)……In order to judge whether State monopoly is reasonable or not, regard therefore must be had to the facts of each particular case in its own setting of time and circumstances. It is not enough to say that as an efficient transport service is conducive to the interests of the people, a legislation which makes provision for such service must always be held valid irrespective of the fact as to what the effect of such legislation would be and irrespective of the particular conditions and circumstances under which the legislation was passed. It is not enough that the restrictions are for the benefit of the public, they must be reasonable as well and the reasonableness could be decided only on a conspectus of all the relevant facts and circumstances.
>
> (23) With regard to the second point also we do not think that the learned Judges have approached the question from the proper stand point. There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid

1 **[AIR 1954 SC 728]**

down in clause (6) of the article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community……"

(b) In the case of Ritesh Agarwal and anr. Vs. Securities and Exchange Board of India and ors.[2] **,** the Apex Court, in para 25 observed thus:-

"25. The question as to whether the provisions of the FUTP Regulations are attracted in this case may now be examined. The FUTP Regulations came into force for the first time on 25.10.1995. Would it apply in a case where the cause of action arose prior thereto? Ex facie, a penal statute will not have any retrospective effect or retroactive operation. If commission of fraud was complete prior to the said date, the question of invoking the penal provisions contained in the said Regulations including Regulations 3 to 6 would not arise. It is not that Parliament did not provide for any penal provision in this behalf. If the appellants have violated the provisions of the Companies Act, they can be prosecuted thereunder. If they have violated the provisions of the SEBI Act, all actions taken thereunder may be taken to their logical conclusion. A citizen of India has a right to carry on a profession or business as

2 **[(2008) 8 SCC 205]**

envisaged by Article 19(1)(g) of the Constitution of India. Any restriction imposed thereupon must be made by reason of a law contemplated under Clause (6) thereof. In the absence of any valid law operating in the field, there would not be any source for imposing penalty. A right to carry on trade is a constitutional right. By reason of the penalty imposed, the Board inter alia has taken away the said constitutional right for a period of ten years which, in our opinion, is impermissible in law as the Regulations were not attracted."

(c) In the case of Madras Forging and Allied Industries (C.B.C.) Ltd. Vs. Suresh Chandra and anr.[3] , the Division Bench of the Kolkata High Court, in paras 13, 14 and 17 observed thus:-

13. The question is whether the Amendment Act of 1988 has retrospective operation. The general principle is that unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective operation. The essential idea of legal system is that current law should govern current activities. An act or omission is not criminal unless forbidden by law. If it is done today, the law applying to it should be the law in force today. Article 20(1) of the Constitution provides as follows :

"20(1). No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be

3 **[[1992] 73 Comp Cas 385(Cal)]**

subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

14. Article 7 of the European Convention of Human Rights states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Where the act or omission did constitute an offence when committed, no penalty is to be imposed which is heavier than the one applicable at that time. Willes J. in Phillips v. Eyre [1870] LR 6 QB 1, observed as follows:

> "……contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

17. It cannot be gainsaid that a new offence has been created by the Amending Act of 1988 from April 1, 1989. There was no law in force at the time when the accused issued the cheques that if any cheque is issued in discharge of a debt or liability and is dishonoured by non-payment and the drawer does not pay within 15 days of receipt of the notice of such dishonour, he

will be deemed to have committed an offence. The accused is, therefore, entitled to the protection of Article 20(1) of the Constitution. When no such provisions as contained in Sections 138 and 141 were in existence at the relevant time, the accused cannot, therefore, be said to have committed on offence under the aforesaid provisions. In other words, the said provisions are not retrospective in operation."

(d) In the case of Badrinarayan Shankar Bhandari and ors. Vs. Omprakash Shankar Bhandari and ors.[4] , the Full Bench of this court in para 38 observed as under :-

"38. (i) A prospective statute operates forwards from the date of its enactment conferring new rights on parties without reference to any anterior event, status or characteristic;

(ii) Retrospective statute, on the other hand, operates backwards, attaches new consequences, though for the future, but to an event that took place before the statute was enacted. It takes away vested rights. Substantive benefits which were already obtained by a party are sought to be taken away because of legislation being given effect to from a date prior to its enactment. The Rules of Interpretation of Statute raise a presumption against such retrospective effect to a legislation. In other words, if the Legislature has not expressly or by necessary implication given effect to a statute from a date prior

4 **[2014 (3) MWN (Civil) 225]**

to its enactment, the Court will not allow retrospective effect being given to a legislation so as to take away the vested rights. Statutes enacted for regulating succession are ordinarily not applicable to successions which had already opened, as otherwise the effect will be to divest the estate from persons in whom it had vested prior to coming into force of the new statutes. Muhammed Abdus Samad v. Qurban Hussain, ILR (26) All. 119 (129) P.C.

(iii) There is the intermediate category called "Retroactive Statute" which does not operate backwards and does not take away vested rights. Though it operates forwards, it is brought into operation by a characteristic or status that arose before it was enacted. For example, a provision of an Act brought into force on 1st January 2014, the Act applies to a person, who was employed on 1st January 2014 has two elements:

(a) That the person concerned took employment on 1st January 2014 – an event.

(b) That the person referred to was an Employee on that day – a characteristic or status which he had acquired before 1st January 2014.

Insofar as the Act applies to a person, who took employment on 1st January 2014, the Act is prospective. Insofar as the Act applies to a person, who had taken employment before 1st January 2014, the Act is retroactive."

(e) In the case of Prakash and ors. Vs. Phulavati and ors.[5] , in para 19, the Apex Court observed thus:-

> "19. Interpretation of a provision depends on the text and the context. Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given."

(f) In the case of State of Andhra Pradesh and ors. Vs. CH. Gandhi[6], the Apex Court in pars 45 and 49 observed thus:-

> "45. Before we proceed to scan the Rule position, we would like to refer to certain authorities rendered in the context of clause (1) of Article 20 of the Constitution. We are absolutely conscious that there are certain authorities of this Court wherein it has been laid down that Article 20(1) of the Constitution is not applicable to civil consequences but only to criminal offences. However, by way of analogy, we will be referring to certain authorities for the purpose of understanding what constitutes retrospective penal consequence in its conceptual essentiality.

5 **[(2016) 2 SCC 36]**

6 **[(2013) 5 SCC 111]**

49. In Tiwari Kanhaiyalal v. CIT, while dealing with a penal provision under the Income Tax Act, 1922 and Income Tax Act, 1961 in the backdrop of clause (1) of Article 20 of the Constitution, this Court opined that the punishment provided under the 1961 Act being greater than the one engrafted under the provisions under the 1922 Act, the appellant therein was not entitled to press into the service the second part of clause (1) of Article 20 of the Constitution."

SUBMISSIONS ON BEHALF OF THE PETITIONERS IN WRIT PETITION NO. 2711 OF 2017 (WPL NO. 1965/2017):

20. The learned Senior Counsel Mr. S. U. Kamdar advanced submissions in respect of the challenges made to the provisions of Sections 6, 7, 8 and 18 of the RERA. The learned Senior Counsel submitted that under RERA, interest of the promoter has not been taken into consideration. The provisions could be used for taking action against the promoter in not completing the project, even for reasons beyond the control of the promoter. The provisions relating to obligation put on the promoter to pay interest and compensation to allottee are penal in nature as they affect transaction prior to registration of the project under Section 3 of the RERA. There is no provision made in the RERA to refund the money invested by the promoter in the project in case the promoter desires

to leave the project or his registration gets cancelled. The counsel compared the provisions of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short MOFA) and the RERA. In the submission of the learned counsel, under Section 8 of the MOFA if promoter fails to give possession in accordance with the terms of his agreement or any further date or dates agreed by the parties, or for reasons beyond his control and his agents, he shall be liable, on demand, to refund the amount with simple interest at the rate of 9% per annum till the date the amounts and interest thereon is refunded. It was submitted that the provisions of RERA in respect of the payment of interest are retrospective in nature affecting the past transaction entered between the promoter and allottee. The rate of interest is on higher side and the interest is to be paid till handing over of possession to the allottee, even if the registration of the promoter is revoked and is not in-charge of the project in carrying out the development work. There is no mechanism provided under the provisions of Sections 6 and 8 for redressal of grievances of the promoter. In that sense, both the provisions are unworkable and the proviso to Section 6 and the provisions of Section 8 are thus unreasonable and unconstitutional.

21. The learned counsel while challenging the validity of Section 18, submitted that the provisions of Section 18(1)(a) have been given retrospective effect and are arbitrary. Its breach is punishable. The penal provisions are also unreasonable and unconstitutional as a person cannot be punished for the act done by him prior to enacting the penal provision. The learned counsel submitted that the provisions are contrary to Article 20 of the Constitution.

22. The learned Senior Counsel submitted that provisions of Sections 6 and 7 contemplate lapsing of registration, revocation of registration. This would result in taking over of the project by the RERA authority under Section 8 thereof. The provisions of Section 8 do not provide any guidelines and/or any yardstick or any procedure or method by which remaining construction work will be completed and whether the Contractor appointed for remaining construction work would be bound by the provisions of the RERA. Section 8 does not contemplate or provide for procedure of handing over possession of the project which could be taken over by RERA authority in exercise of power conferred under Section 8. It may happen that the RERA authority would take possession

and would never return the project back to the promoter. Handing over of the possession of the project was essential because the RERA requires that after completion of the project and after receiving completion certificate, the promoter has to transfer title to the flat purchasers. In the absence of return of the project and handing over the possession, the promoter can never comply with its obligations under Section 17 of RERA. There can be no sale of property by the RERA authority in the nature of unsold flats unless and until the provisions of Section 8 empowers and vests the property in the RERA authority with a right to sell the same. The said provisions are expropriatory in nature and are violative of Article 300-A of the Constitution of India. If in any project flats remain unsold, then such unsold flats would be property of the promoter. Upon Section 8 coming into play, the promoter immediately loses its right to sell or dispose of any of the unsold flats and also to collect balance 30% payments due to it in relation to the flats already sold. The authority while exercising powers conferred on it under Section 8 may sell or deal with or dispose of unsold flats for the purpose of generating funds for completion of the balance work which is violative of promoter's constitutional rights under Article 300-A of the Constitution. There is no prescription of time period within which the authority is mandated to

complete the unfinished development work which is again violative of Article 14, defeating the object of the RERA. The counsel submitted that provisions of Section 6 penalizes the promoter in case the project could not be completed.

23. In respect of provisions of Section 18 of RERA, it was submitted that penalty cannot be imposed in respect of the acts or defaults or offences having already committed prior to the RERA coming into force. The provisions of Section 18(1)(a) operates retrospectively and imposes a penalty in that behalf. There is a constitutional bar to recover such a penalty in respect of the offences committed prior to RERA coming into force. It is submitted that provisions of Section 4 of the RERA are in fact in conflict with the provisions of Sections 4(2)(l)(C) in respect of on-going projects. If the RERA provides for an extension of time to complete the real estate project then by necessary corollary, the RERA must accordingly also provide for an extension of the date for handing over possession of the flats.

24. In respect of Section 18(1)(b), the learned counsel submitted that it is plainly and totally ultra vires Article 19(1)(g) of the Constitution and cannot be saved under Article 19(6) of the Constitution. In view of

authority exercising powers under Sections 7 and 8, money deposited in the account which is 70% of the amount recovered from the allottees is also taken over by RERA authority and is no longer in the possession and control of the promoter.

25. If the money recovered from the flat purchaser is deposited in the account and the said money is taken over by RERA Authority, it is highly unreasonable to ask the promoter to then refund the amount which would be in the custody of the RERA authority. These provisions, therefore, are contrary to Articles 14 and 19(1)(g) of the Constitution. The counsel raised issue in respect of deposit of 70% of the amount received from flat purchasers in a separate bank without promoter being allowed to operate his bank account. The promoter would be divested of his right to property and would be exposed to statutory adverse consequences.

26. The learned Senior Counsel places reliance on the judgments of the Supreme Court. We may refer the judgments :-

(a) In the case of Rajiv Sarin and anr. vs. State of Uttarakhand and ors.[7] , the Supreme Court observed in paras 69, 70, 78 and 82 as under :

7 **[(2011) 8 SCC 708]**

“69. With regard to claiming compensation, all modern Constitutions which are invariably of democratic character provide for payment of compensation as the condition to exercise the right of expropriation. The Commonwealth of Australia Constitution Act, the French Civil Code (Article 545), the 5th Amendment to the Constitution of U.S.A. and the Italian Constitution provided principles of "just terms", "just indemnity", "just compensation" as reimbursement for the property taken, have been provided for.

70. Under Indian Constitution, the field of legislation covering claim for compensation on deprivation of one's property can be traced to Schedule VII List III Entry 42 of the Constitution. The Constitution (Seventh Amendment) Act, 1956 deleted Schedule VII List I Entry 33, List II Entry 36 and reworded List III Entry 42 relating to "acquisition and requisitioning of property". The right to property being no more a fundamental right, a legislation enacted under the authority of law as provided in Article 300-A of the Constitution is not amenable to judicial review merely for alleged violation of Part III of the Constitution.

78. When the State exercises the power of acquisition of a private property thereby depriving the private person of the property, provision is generally made in the statute to pay compensation to be fixed or determined according to the criteria

laid down in the statute itself. It must be understood in this context that the acquisition of the property by the State in furtherance of the Directive Principles of State Policy is to distribute the material resources of the community including acquisition and taking possession of private property for public purpose. It does not require payment of market value or indemnification to the owner of the property expropriated. Payment of market value in lieu of acquired property is not a condition precedent or sine qua non for acquisition. It must be clearly understood that the acquisition and payment of amount are part of the same scheme and they cannot be separated. It is true that the adequacy of compensation cannot be questioned in a court of law, but at the same time the compensation cannot be illusory.

82. A distinction and difference has been drawn between the concept of 'no compensation' and the concept of 'nil compensation'. As mandated by Article 300A, a person can be deprived of his property but in a just, fair and reasonable manner. In an appropriate case the Court may find 'nil compensation' also justified and fair if it is found that the State has undertaken to take over the liability and also has assured to compensate in a just and fair manner. But the situation would be totally different if it is a case of 'no compensation' at all.

(b) In the case of K. T. Plantation Private Limited and anr. vs. State of Karnataka[8] , in para 120, the Supreme Court observed thus:-

> "120. Shri Andhyarujina, learned senior counsel submitted that Art.300A and the statute framed should satisfy the twin principles of public purpose and adequate compensation. Learned counsel submitted that whenever there is arbitrariness in State action whether it be of the legislature or of the executive or of an authority under Article 12, Art. 14 springs into action and strikes down such State action as well as the legislative provisions, if it is found to be illegal or disproportionate. Reference was made to the judgments of this Court in Kavalappara Kottarathil Kochuni case, E.P Royappa v. State of T.N., Maneka Gandhi v. Union of India, Ramana Dayaram Shetty v. International Airport Authority of India, Kasturi Lal Lakshmi Reddy v. State of J & K."

(c) In the case of Cellular Operators Association of India and ors. vs. Telecom Regulatory Authority of India and ors.[9] , the Supreme Court in paras 42, 43, 46, 48, 53 and 89 observed as under :-

8 **[(2011) 9 SCC 1]**
9 **[(2016) 7 SCC 703]**

"42. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation - (See: Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, SCC at p.689, para 75).

43. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In Khoday Distilleries Ltd. v. State of Karnataka, this Court held (SCC p. 314, para 13):

> *"It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article 14 of the Constitution. Although the protection of Article 19(1) (g) may not be available to the appellants, the rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the*

law making power. In Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary". Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such Rules; they are unreasonable and ultra vires". In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."

46. Under Article 19(6) of the Constitution, the State has to conform to two separate and independent tests if it is to pass constitutional muster - the restriction on the appellants' fundamental right must first be a reasonable restriction, and secondly, it should also be in the interest of the general public. Perhaps the best exposition of what the expression "reasonable restriction" connotes was laid down in Chintamanrao v. State of M.P., as follows: (SCR p.763; AIR p.119, para 7)

"The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality."

48. Similarly, the first amendment to the Constitution also amended Article 19(6), with which we are directly concerned, to provide for a State monopoly, which would not have to be tested on the ground of reasonable restrictions. Therefore, the first amendment to the Constitution of India has made it clear that reasonable restrictions, added in Article 19(2) and subtracted from Article 19(6) (insofar as State monopolies are concerned), point to the fact that this test is a test separate and distinct from the test of the law being in the interest of the general public. Why we are at pains to point this out is because the learned Attorney General's argument focused primarily on the Impugned Regulation being in the public interest. He referred to Delhi Science Forum v. Union of India, for the proposition that

TRAI, as an active trustee, has framed this Regulation for the common good. While accepting that TRAI may have done so, yet it is important to note that, apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. We cannot forget that when viewed from the angle of manifest arbitrariness or reasonable restriction, sounding in Article 14 and Article 19(1)(g) respectively, the Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates. Any arbitrary invasion of a fundamental right cannot be said to contain this quality. A proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest.

53. The other string to the bow of this argument is that the Impugned Regulation would be worked in such a manner that the service provider would be liable to pay only when it is found that it is at fault. This again falls foul of constitutional doctrine. In Collector of Customs v. Nathella Sampathu Chetty, this Court held: (SCR pp. 825-26: AIR p. 332, para 33)

> *"The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse*

must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged, it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements."

89. In another context also this Court has emphasized the importance of openness of governance. In Global Energy Ltd. V. Central Electricity Regulatory Commission, this Court stated: (SCC p. 589. para 71)

"The law sometimes can be written in such a subjective manner that it affects the efficiency and transparent function of the Government. If the statute provides for pointless discretion to agency, it is in essence demolishing the accountability strand within the administrative process as the agency is not under obligation from an

objective norm, which can enforce accountability in decision-making process. All law-making, be it in the context of delegated legislation or primary legislation, has to conform to the fundamental tenets of transparency and openness on one hand and responsiveness and accountability on the other. These are fundamental tenets flowing from due process requirement under Article 21, equal protection clause embodied in Article 14 and fundamental freedoms clause ingrained under Article 19. A modern deliberative democracy cannot function without these attributes."

(d) In the case of Hitendra Vishnu Thakur and ors. vs. State of Maharashtra and ors.[10] , in para 26, the Supreme Court observed thus:

"26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

10 **[(1994) 4 SCC 602]**

> *(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. …....”*

(e) In the case of Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and ors.[11] **,** in para 125, the Supreme Court observed asunder :

> “125. I am conscious that clear intention as indicated in a legislation cannot be permitted to be defeated by means of construction. It has been said that if the legislature has manifested a clear intention to exercise an unlimited power, it is impermissible to read down the amplitude of that power so as to make it limited. I do not agree. Our legislatures are limited by the Constitutional inhibitions and it is time, in my opinion, that we should read their Acts and enactments with the attribute that they know their limits and could not have intended to violate the Constitution. It is true that where there are clear, unambiguous and positive terms of a legislation, the Court should be loath to

11 **[1991 Supp (1) Supreme Court Cases 600]**

read down. It should proceed with a straight-forward method of striking down such legislations. But where the statute is silent or not expressive or inarticulate, the Court must read down in the silence of the statute and in the inarticulation of its provisions, the Constitutional inhibitions and transmute the major inarticulate premise into a reality and read down the statute accordingly. It is true perhaps, as has been said, that in the history of constitutional law, statutes are seldom read down to mean what they say and intend. It is begging the question. If the statute does not specifically say, in such circumstances, as to how do we find the intention to transgress the Constitutional limitations. At least, the relevant provisions of the relevant statutes and the rules, mentioned hereinbefore, are, in my opinion, on these points, not expressive enough to betray an intention to transgress constitutional limitations. I am afraid that reference to Elliott Ashton Welsh, II v. United States, is inept in the background of the principles we are confronted with. The plain thrust of legislative enactment has to be found out in the inarticulate expressions and in the silence of the legislation. In doing so, to say what the legislature did not specifically say, is not distortion to avert any constitutional collision. In the language of the relevant provisions with which we are confronted, I do not find that intention of the legislature to flout the Constitutional limitations."

SUBMISSIONS ON BEHALF OF THE PETITIONERS IN WRIT PETITION NO. 2255 OF 2017 :

27. Writ Petition No. 2255 of 2017 was originally filed before the Bench at Nagpur. The petitioner therein had challenged validity of first proviso to Section 3(1), Section 3(2)(a), Explanation to Section 3, Section 4(2)(l)(D). Apart from the constitutional challenge to the provisions of Sections 3 and 4, the petitioner had prayed for a declaration that RERA shall not be made applicable to the completed project of the petitioner – society for which completion certificate has not been issued by the competent authority. The learned counsel Mr. Prakash Randive, submitted that the petitioner is a cooperative society (Nirmal Ujwal Credit Co-op Society [Multi-state], Nagpur, which constructed apartment for the benefit of its members. The petitioner submitted that a project in the name and style as Nirmal Nagari was undertaken by the petitioner – society. The petitioner constructed 504 residential flats, 60 row-houses, 20 spearate bungalows and 360 small tenements. According to the sanctioned plan, the construction was carried out, which came to be completed by the month of March, 2012. Around 80% members of the society got possession of the flats and they are residing there since 2012. It is submitted that 96 flats,

55 bungalows and 194 small tenements are vacant and are ready for allotment to its members. It is the petitioner's case that after inspection, a completion certificate was issued from the Architect which was forwarded to the Building Engineer of Nagpur Municipal Corporation stating therein that the construction was carried out in accordance with the sanctioned plan. The petitioner – society had already applied to the Building Engineer of the Corporation on 27/3/2012 to arrange for inspection and permission for occupation of the building. However, till date no communication has been received by the petitioner. In this context, the learned counsel submits that under the provisions of Section 263 of the Maharashtra Municipal Corporation Act, 1949 the occupation certificate is deemed to have been granted. Therefore, the project undertaken by the petitioner need not be registered under RERA. In case such projects are also made to be registered under RERA, then the same would be unreasonable, arbitrary and contrary to Articles 14, 19(1)(g) of the Constitution. Section 263 of the Maharashtra Municipal Corporation Act, 1949 reads as under :-

> "**263. Completion certificates permission to occupy or use**. (1) Every person shall, within one month after the completion of the erection of a building or the execution of any such work as is described in section 254, deliver or send

or cause to be delivered or sent to the Commissioner at his office notice in writing of such completion, accompanied by a certificate in the form prescribed in the bye-laws signed and subscribed in the manner so prescribed, and shall give to the Commissioner all necessary facilities for the inspection of such building or of such work and shall apply for permission to occupy the building.

(2) No person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by any work, until -

(a) permission has been received from the Commissioner in this behalf, or

(b) the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate his refusal of the said permission.

28. It was submitted that as the project of the petitioner is complete, the petitioner cannot comply with the conditions of 70% deposit of the amount realized from the proposed allottees. In the submission of the learned counsel 80% of the work is already complete and the members are residing there after getting possession of their respective unit. It would be injustice to the petitioner to get itself registered under RERA. The counsel

submitted that provisions of RERA shall not be implemented retrospectively to affect projects like the petitioner. The project like the petitioner shall not be treated as ongoing project compelling the petitioner to get registration under Section 3 of the RERA. The learned counsel has adopted the submissions of the learned Senior Counsel Mr. Aspi Chinoy and Mr. S. U. Kamdar.

SUBMISSIONS ON BEHALF OF THE PETITIONER IN WRIT PETITION NO. 2708 OF 2017 (WPL/ 2034/2017) :

29. The learned Senior Counsel Dr. Veerendra Tulzapurkar submitted that the petitioner is challenging validity of the provisions of Section 22 and Section 46(1)(b) of RERA, which are already quoted above.

The learned Senior Counsel submitted that there is no provision in law to appoint a judicial member as one of the member of the authority constituted under Chapter V of the RERA. The counsel narrated functions to be carried out by the authority under Chapter V. By referring to various other provisions of the RERA, it was submitted that the `authority' would carry judicial scrutiny of the matters coming before it

and would take decisions on the conflicting claims of the parties by looking into the material brought before it. It was submitted that under the provisions of Section 44 of the RERA, appeal is prescribed against the order passed by the authority to Appellate Tribunal. The composition of Appellate Tribunal is prescribed under Section 45, which mandates that the Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial Member and other shall be a Technical or Administrative Member. The counsel submitted that the explanation to Section 45 refers to definition of a Judicial Member as defined under Section 46. Section 46(1)(b) refers to definition of a Judicial Member, which includes a Judicial Member, a Member of the Indian Legal Service having held the post of Additional Secretary of that service or equivalent post or an Advocate having 20 years practice. In the submission of the counsel, reference to `inclusion of Member of the Indian Legal Service who had held the post of Additional Secretary' is contrary to the settled law in the case of Union of India vs. R. Gandhi, President, Madras Bar Association[12] and to that extent the definition prescribed under Section 46(1)(b) shall be held to be arbitrary, contrary to law and against the letter and spirit of provisions of Section 45. The learned counsel

12 **[(2010) 11 SCC 1]**

submits that whenever an authority would discharge adjudicatory functions, presence of Judicial Member has been held to be mandatory. The learned counsel places reliance on para 106 of the judgment in the case of Madras Bar Association (Supra), which reads as under :-

> "106. We may summarise the position as follows :
>
> (a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.
>
> (b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.
>
> (c) Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does

not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful and necessary, tribunals should have technical members. Indiscriminate appointment of technical members in all tribunals will dilute and adversely affect the independence of the judiciary.

(d) The legislature can reorganise the jurisdictions of judicial tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (a standard example is the variation of pecuniary limits of the courts). Similarly while constituting tribunals, the legislature can prescribe the qualifications/eligibility criteria. The same is however subject to judicial review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of the judiciary or the standards of the judiciary, the court may interfere to preserve the independence and standards of the judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive."

30. The learned counsel has also raised challenge to the Selection Committee and its constitution under Section 22 as bad in law and against the principles settled in the case of Madras Bar Association (Supra).

SUBMISSIONS ON BEHALF OF THE PETITIONERS IN WRIT PETITION NO. 2727 OF 2017 (WPL/1967/2017) :

31. The learned counsel Mr. G. S. Godbole has referred to various provisions, particularly, of Sections 35 to 38. While referring to Section 71, it was submitted that presence of a judicial officer was felt necessary by the framers but while constituting Real Estate Regulatory Authority under Section 20, Judicial Member was not included in the panel of members. As the authority under the RERA will be discharging judicial functions, it is necessary and mandatory that the presence of a judicial member was prescribed. In the submissions of the learned counsel, a judicial member will be best suited to look into the evidence placed on record, frame proper issues, deal with the submissions of the contesting parties and pass a reasoned order, which exercise is not expected from non-judicial members. The learned counsel specifically challenged the provisions of Sections 3(1) and 3 to 8 of RERA. It was submitted that the RERA does not provide for provisions regarding assessment of cost of

project and further necessary details regarding execution of the project. The explanation provided to Section 3 is arbitrary and its application would adversely affect the promoter's interest. The learned counsel further referred to provisions of Sections 4(2)(l)(C)(D) and Section 19(7), (8), (9) of the RERA. The learned counsel submitted that the ongoing project shall not be made to register under the RERA as it would be affecting the past transactions of the parties and consequently the promoter's interest. The provisions are contrary to Articles 14 and 19(1)(g) of the Constitution. In respect of the interpretation on Section 6 of the RERA, the learned counsel adopted the submissions of the learned Senior Counsel Mr. Aspi Chinoy.

SUBMISSIONS ON BEHALF OF THE PETITIONERS IN WRIT PETITION NOS. 2256/2017 & 2730/2017 (WPL/2011/2017) :

32. Mr. Nikhil Sakhardande, the learned counsel appearing for the petitioners in Writ Petition Nos. 2256 of 2017 and Ms. Rujuta Patil, learned counsel appearing for petitioners in Writ Petition No. 2730 of 2017 adopted the submissions of the learned Senior Counsel Mr. Chinoy and learned counsel Mr. Godbole.

SUBMISSIONS ON BEHALF OF RESPONDENT - UNION OF INDIA :

33. On behalf of the respondent – Union of India, we heard the learned Additional Solicitor General Mr. Anil Singh, who submitted that the object and purpose in enacting RERA needs to be closely and carefully examined and considered while appreciating the submissions of the contesting parties. Since last few years it was felt by the Government and other agencies that there must be a regulatory authority in the field of real estate development. The Union Government, the various State Governments received number of representations from various organizations, including the consumer organization for enacting a law regulating and developing the real estate sector. The learned ASG had taken us through various provisions of RERA and has replied to the issues raised by the petitioners. The learned ASG referred to the provisions of MOFA while dealing with the provisions of the RERA.

REPLY TO CHALLENGE TO SECTION 3 :

34. The learned ASG submitted that provisions of Section 3 are reasonable and have been made in the larger public interest. As regards the provisions of Section 3, 4(2)(l)(C)(D), the learned ASG submits that if a

promoter furnishes account showing that he had spent 70% of the amount realized from the allottees on the subject project, he need not deposit 70% of the amount again while getting the project registered under RERA. The learned ASG referred to Rules framed by the State of Maharashtra (the Maharashtra Rules of 2017) and the Union of India (the National Capital Territory of Delhi Real Estate (Regulation and Development) (General) Rules, 2016) in respect of the mandatory deposit of 70% of the amount realized from the allottees to be deposited by the promoter with the authority concerned. In view of the object and purpose for which the RERA was drafted, the learned ASG submitted that the challenge made to the constitutionality of first proviso to Section 3(1) needs to be rejected outright.

REPLY TO CHALLENGE TO SECTION 6 :

35. The learned ASG submitted that proviso to Section 6 prescribes that the authority could extend the registration period granted to a project not exceeding a period of one year. For timely completion of the remaining development work, such a restriction is necessary otherwise on one or the other ground, completion of the remaining development work

could be further delayed for a indefinite period. The provisions were thoughtfully made, keeping in mind the interest of the allottees who have been waiting for getting possession of their apartments/residential houses since last several years in various cities of the country. After paying substantial amount to the promoter the allottees are left with no choice than to wait for getting possession. Therefore, keeping in view the object and purpose for which Section 6 was enacted, this court would reject the contention raised by the petitioners, otherwise the purpose for which mandatory period was prescribed would get defeated.

REPLY TO CHALLENGE TO SECTION 8 :

36. The learned ASG submitted that in case the registration of the promoter lapses or it is revoked by the authority, then the authority would exercise power under Section 8 for taking action as it may deem fit, including carrying out remaining development work. The authority may direct the same promoter to continue with the remaining development work under the supervision of the concerned authority. Therefore, the fear that after lapsing of the registration, the promoter would be deprived of right to carry out the development work is baseless. Apprehensions of such

promoters are taken care of by the RERA by conferring power on the RERA authority under Section 8 of the Act. In that sense the promoter is not debarred from carrying out the development work. The authority is conferred with wide powers under the RERA with a sole object and purpose to complete the remaining development work and hand over possession to the allottees within a prescribed time schedule.

37. The learned ASG submits that there are sufficient safeguards in case the registration is revoked under the provisions of Section 7. The promoter is provided with a forum to approach the Tribunal and ultimately to High Court. Right of judicial review of the decisions taken by the authority is made available under the RERA. Therefore, the submissions advanced that the promoter is left with no other choice but to face the consequences on expiry of the period / tenure declared by him is baseless and without any foundation.

38. The learned ASG submitted that after lapse or revocation of the registration, the authority will take necessary steps to complete the remaining work and after the project is completed, the project again could be handed over to the same promoter, who can deal with the project

accordingly by selling the apartments and dealing with the project as agreed between him and the allottees. These provisions cannot be interpreted to mean automatic secession of the promoter's rights. It is submitted that once an Occupation Certificate is issued, the promoter could deal with the project. A honest and dedicated promoter need not worry about the provisions of the RERA. The authority would be manned by a Senior Officers of vast experience. They would certainly look into all the aspects and issue necessary directions to fulfill the objects of the RERA.

REPLY TO CHALLENGE TO SECTION 18 :

39. The learned ASG submits that Section 8(b) of MOFA which mandates payment of interest in case promoter fails to hand over possession within specified time. Under the provisions of Section 18 of RERA, interest of allottees is protected. It is submitted that these provisions are reasonable and do not offend any legal and constitutional provisions. The challenge made to these provisions, therefore, should fail. It was experienced that the various allottees had approached forums like Consumer Forum, Civil Courts, higher courts by filing writ petition under Article 226 of the Constitution of India seeking direction to promoter for

various reliefs, including completion of remaining work, withdrawal of amount, payment of interest till handing over possession, monthly compensation while they were in a transit camp etc. The provisions of RERA take care of allottees who had to run from pillar to post for securing their rights. The learned ASG submitted that a mechanism is prescribed for assessing interest and compensation. The Parliament had the legislative competence to frame subject law, particularly the provisions of Section 18, governing the transactions of the promoter and the allottee under the agreement for sale executed between them prior to registration of the project under RERA. There is absolutely no arbitrariness in framing the provisions of Section 18(1)(a) and conferring rights on the allottee to claim interest and compensation. The learned ASG refers to provisions of Sections 71 and 72, which refer to power to adjudicate and factors to be taken into account by the adjudicating officer. A mechanism has been prescribed under the RERA where the parties would be heard and thereafter a decision taken. An aggrieved party has remedy of further appeals upto the High Court. Therefore, the apprehension expressed by the promoters are baseless.

REPLY TO CHALLENGE TO SECTION 22 :

40. The learned ASG submitted that the provisions of Section 22 are legal and constitutionally valid. There are many statutory authorities under several Acts which are discharging judicial functions without there being a judicial member. The learned ASG referred to provisions of the Securities and Exchange Board of India Act, 1992 (for short "SEBI Act") and provisions of Section 11(3) of MOFA. The learned ASG specifically referred to provisions of Section 15(1), 15M, 15T, 15Y, 15Z of the SEBI Act. A further reference was made to the provisions of Section 48 of the Prevention of Money-Laundering Act, 2002, Sections 58-A and 146 of the Representation of the People Act, 1951, Sections 3 and 8 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and Sections 40 and 44 of the Maharashtra Rent Control Act, 1999.

41. The learned ASG submitted that in the case of Madras Bar Association (Supra), in respect of challenge raised to creation of National Company Law Tribunal (NCLT), the Apex Court does not lay down general proposition that the bureaucrats like Additional Secretary cannot discharge judicial function.

REPLY TO CHALLENGE TO SECTIONS 44 AND 45 :

42. By making reference to provisions of Section 46, the learned ASG submitted that the Chairperson of the Tribunal under the Act is or has been a High Court Judge and one of the member is a Judicial Member as defined under Section 46. These provisions are similar to provisions of SEBI Act. The Additional Secretary is experienced person / bureaucrat working in the law department (Indian Judicial Service). Therefore, his inclusion in the Tribunal will not adversely affect the function of the Tribunal. In the facts and in view of the powers conferred, SEBI and RERA authority's function in different manner. Under the RERA appeal is prescribed under Section 58 to High Court which indicates that the aggrieved party has all the rights and liberty to approach the High Court for redressal of their grievances. He submitted that Article 323B of the Constitution does not mandate that Tribunal shall have a judicial member. It must be left to the wisdom of the legislature, which enacted these provisions in the best interest of both, the promoters and the allottees.

43. While replying to comments made in respect of the provisions of penalty appearing under Chapter VIII of the RERA, the learned ASG

submitted that interest and compensation to be awarded under Section 18 cannot be termed as penalty. Penalty is to be imposed for reasons where a party violates order passed by the authority / Tribunal. These provisions are made so that timely compliance of the orders passed by the authorities is made. The provisions are in the larger interest of the public, more particularly the helpless allottees who are at the mercy of the promoter after investing their life savings.

44. The learned ASG placed reliance on the affidavit-in-reply, dated 4/10/2017, filed by Mr. Shailesh Jogiani, Under Secretary in the Ministry of Housing and Urban Affairs, Government of India. We may refer to some of the averments made in the said affidavit-in-reply.

> "7. The Real Estate (Regulation and Development) Act, 2016 does not have retrospective applicability as it only applies to those ongoing projects which have not received `completion certificate' as on 1st May, 2017. As per section 3(2)(b) of the Real Estate Act, 2016 projects that have received completion certificate prior to 1st May, 2017 are not covered under the Act. Thus, it is not a case of retrospective application of the law as the ongoing project is neither complete nor settled. The Act provides for imposition of penalties for violations of the provisions of the Act only subsequent to 1st May, 2017, as

section 3 was notified for commencement with effect from 1st May, 2017.

10. Without prejudice to the above, assuming whilst denying that the Petitions are found to be maintainable, even then, it is submitted that several of the challenges raised in the petitions are academic and there are no material facts pleaded to show how certain provisions of RERA are attracted and hence, the challenges raised are purely academic at this stage.

15. A quick look at the following factors in the process of enactment of the "RERA" legislation is necessitated in order to understand that the legislation is a well thought, debated and deliberated one:-

(i) The erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs) had sought an opinion from the Ministry of Law & Justice, Government of India on the competence of Parliament to enact the Real Estate (Regulation and Development) Bill. The Department of Legal Affairs, Ministry of Law & Justice, Government of India had opined that the Parliament had the competence to enact the Bill and the Legislative Department, subsequently, vetted the Draft Bill.

(ii) The Real Estate (Regulation and Development) Bill, after the approval of the Union Cabinet on 4th June 2013 was introduced in the Rajya Sabha on 14th August, 2013.

(iii) The Real Estate (Regulation and Development) Bill, 2013 was referred to the Standing Committee of Urban Development on 23rd September, 2013 for examination.

(iv) The Standing Committee sought public opinion through press release and analysed the memoranda / suggestions received from various stake holders/experts, developer associations such as Confederation of Indian Industry (CII), Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Real Estate Developers' Associations of India (CREDAI), National Real Estate Development Council (NAREDCO) & other Associations working in the field of real estate, on various provisions of the Bill.

(v) The Standing Committee also had the briefing of the representatives of the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs), Ministry of Finance, Reserve Bank of India, National Housing

Bank, Ministry of Consumer Affairs, Ministry of Law and Justice (Department of Legal Affairs and Legislative Department), State Bank of India and other Banks. The Committee also heard views of NGOs working in the field of real estate and sought clarifications on various issues.

(vi) The Report of the Standing Committee was tabled in the Rajya Sabha on 13th February, 2014 and in the Lok Sabha on 17th Feburary, 2014.

(vii) The Union Cabinet approved Official Amendments to the Real Estate (Regulation and Development) Bill, 2013, based on the recommendations of the Standing Committed of Urban Development and stake-holder's suggestions on 7th April, 2015.

(viii) The Real Estate (Regulation and Development) Bill, 2013 and Official Amendments, 2015 were referred to the Select Committee of Rajya Sabha on 6th May, 2015 for examination and submission of Report.

(ix) The Select Committee held 17 sitting of which 8 sittings were held outside Delhi namely at Mumbai, Kokata, Bengaluru and Shimla. The Committee heard 445 witnesses in all at different places representing different categories / groups of stake holders i.e. representatives of promoters /

builders, consumers / resident welfare associations, banking / financial institutions, representatives of State Governments, law firms / legal experts and other independent experts in the field of real estate.

(x) The Select Committee also invited public comments through a press communique vide which 273 memoranda were received. It also heard the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs), Ministry of Law & Justice, Reserve Bank of India amongst others.

(xi) The Select Committee tabled its report along with the Real Estate (Regulation and Development) Bill of 2015 on 30th July, 2015 in the Rajya Sabha.

(xii) The Real Estate (Regulation and Development) Bill, 2015, as reported by the Select Committee, was approved by the Union Cabinet on 9th December, 2015.

(xiii) The Real Estate (Regulation and Development) Bill, 2015 was listed for consideration and for the purpose of passing in Rajya Sabha on 22nd and 23rd December, 2015, but could not be taken up.

(xiv) "RERA" was passed by Rajya Sabha on 10th March, 2016 and by the Lok Sabha on 15th March, 2016.

(xv) The Real Estate (Regulation and Development)

Act, 2016 was published in the Gazette of India on 26th March, 2016 for public information.

(xvi) Sections 2, 20 – 39, 41 – 58, 71 – 78 and 81 – 92 of the Real Estate (Regulation and Development) Act, 2016 were notified for commencement, mainly towards notification of Rules and establishment of Regulatory Authority and Appellate Tribunal w.e.f. 1st May 2016.

(xvii) Sections 3 to 19, 40, 59 to 70, and 79 to 80 of the Real Estate (Regulation and Development) Act, 2016 were notified for commencement, bringing the full Act into force, w.e.f. 1st May 2017.

The Respondent craves leave to refer to and rely upon the above documents as and when produced.

69. The Promoter while registering the ongoing project with the Regulatory Authority will be entitled to provide new timelines for project completion. As per section 59 if the Promoter does not register his project with the Regulatory Authority as per section 3(1) and within the timeline he would be liable to monetary penalty. In case the promoter continues not to register in-spite of the directions of the Authority he may in that scenario be liable to additional monetary penalty or imprisonment or both. The penalty for violation of section 3 is for non-action after the commencement of the Act and not for action / in-action prior to the commencement of the Act.

90. As regards the challenge on the ground of violation of Article 14 or purported unworkability of the Act, one only needs to see the number of registrations that have taken place without demur to appreciate that such a challenge has actually no legs to stand on. As on the present date the following are the related figures for the State of Maharashtra:-

(a) Total Registered Projects : 13414
(b) Total Ongoing Projects : 12608
(c) Total New Projects : 806

45. The learned ASG places reliance on the judgments of the Supreme Court. We may refer the said judgments :-

(a) In the case of Binoy Viswam vs. Union of India and ors.[13] , in para 83, the Supreme Court observes as under :

"83. It is, thus, clear that in exercise of power of judicial review, Indian Courts are invested with powers to strike down primary legislation enacted by Parliament or the State legislatures. However, while undertaking this exercise of judicial review, the same is to be done at three levels. In the first stage, the Court would examine as to whether impugned provision in a legislation is compatible with the fundamental

13 **[(2017) 7 SCC 59]**

rights or the constitutional provisions (substantive judicial review) or it falls foul of the federal distribution of powers (procedural judicial review). If it is not found to be so, no further exercise is needed as challenge would fail. On the other hand, if it is found that Legislature lacks competence as the subject legislated was not within the powers assigned in the List in Schedule VII, no further enquiry is needed and such a law is to be declared as ultravires the Constitution. However, while undertaking substantive judicial review, if it is found that the impugned provision appears to be violative of fundamental rights or other constitutional rights, the Court reaches the second stage of review. At this second phase of enquiry, the Court is supposed to undertake the exercise as to whether the impugned provision can still be saved by reading it down so as to bring it in conformity with the constitutional provisions. If that is not achievable then the enquiry enters the third stage. If the offending portion of the statute is severable, it is severed and the Court strikes down the impugned provision declaring the same as unconstitutional.

(b) In the case of N. K. Bajpai vs. Union of India and anr.[14] , in para 34, the Supreme Court observes thus:

"34. Similarly, while dealing with the question as to whether the closure of butcher houses on national holidays or on certain particular days was unconstitutional and violative of the

14 **[(2012) 4 SCC 653]**

fundamental right to carry on business in terms of Arts. 19(1)(g), 19(6) and 14 of the Constitution in Municipal Corpn. of the City of Ahmedabad v. Jan Mohammed Usmanbhai, a Constitution Bench of this Court, while rejecting the challenge, held as under: (SCC pp.30 & 31-33, paras 17 & 19-24)

> *"17. Cl. (6) of Art. 19 protects a law which imposes in the interest of general public reasonable restrictions on the exercise of the right conferred by sub-cl. (g) of cl. (1) of Art. 19. Obviously it is left to the court in case of a dispute to determine the reasonableness of the restrictions imposed by the law. In determining that question the court cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The right conferred by sub-cl. (g) is expressed in general language and if there had been no qualifying provision like cl. (6) the right so conferred would have been an absolute one. To the persons who have this right any restriction will be irksome and may well be regarded by them as unreasonable. But the question cannot be decided on that basis. What the court has to do is to consider whether the restrictions imposed are reasonable in the interest of general public. In State of Madras v. V.G. Row, this Court laid down the test of*

reasonableness in the following terms:(AIR p. 200, para 15)

> *"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."*

(c) In the case of Government of Andhra Pradesh and ors. vs. P. Laxmi Devi (Smt)[15] , the Supreme Court in paras 55, 56 and 57 observed as under :

> "55. In Keshvananda Bharati vs. State of Kerala (vide AIR para 1547) Khanna J. observed: (SCC p.821, para 1535)
>
> "1535. In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the

15 **[(2008) 4 SCC 720]**

government. The door has to be left open for trial and error."

56. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimization of the judges personal preferences. The Court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislature elected by the people is a grave step. As observed by this Court in State of Bihar vs. Kameshwar Singh : (AIR p. 274, para 52)

"52.....The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence".

57. In our opinion, the Court should, therefore, ordinarily defer to the wisdom of the legislature unless it enacts a law about which there can be no manner of doubt about its unconstitutionality.

(d) In the case of Modern Dental College and Research Centre and ors. vs. State of Madhya Pradesh and ors[16]. , the Supreme Court in paras 65 and 89 observed as under :

"65. We may unhesitatingly remark that this Doctrine of Proportionality, explained hereinabove in brief, is enshrined in

16 **[(2016) 7 SCC 353]**

Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in plethora of judgments has held that the expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). It is held that the expression 'reasonable' connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (See P.P. Enterprises v. Union of India). At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations (see Mohd. Hanif Quareshi v. State of Bihar). In M.R.F. Ltd. v. State of Kerala, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) The Directive Principles of State Policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour the constitutionality of the Act will naturally arise.

89. With the advent of globalization and liberalization, though the market economy is restored, at the same time, it is also felt that market economies should not exist in pure form. Some regulation of the various industries is required rather than allowing self-regulation by market forces. This intervention

through regulatory bodies, particularly in pricing, is considered necessary for the welfare of the society and the economists point out that such regulatory economy does not rob the character of a market economy which still remains a market economy. Justification for regulatory bodies even in such industries managed by private sector lies in the welfare of people. Regulatory measures are felt necessary to promote basic well-being for individuals in need. It is because of this reason that we find Regulatory bodies in all vital industries like, Insurance, Electricity and Power, Telecommunications, etc.

(e) In the case of Virender Singh Hooda and ors. vs. State of Haryana and anr.[17] , the Supreme Court in paras 33, 34 and 35 observed as under :

> "33. The legislative power to make law with retrospective effect is well recognised. It is also well settled that though the legislature has no power to sit over Court's judgment or usurp judicial power, but, it has, subject to the competence to make law, power to remove the basis which led to the Court's decision. The legislature has power to enact laws with retrospective effect but has no power to change a judgment of court of law either retrospectively or prospectively. The Constitution clearly defines the limits of legislative power and

17 **[(2004) 12 SCC 588]**

judicial power. None can encroach upon the field covered by the other. The laws made by the legislature have to conform to the Constitutional provisions. Submissions have also been made on behalf of the petitioners that by enacting law with retrospective effect, the legislature has no power to take away vested rights. The contention urged is that the rights created as a result of issue of writ of mandamus cannot be taken away by enacting laws with retrospective effect. On the other hand, it was contended on behalf of the respondent-State that the power of the legislature to enact law with retrospective effect includes the power to take away vested rights including those which may be created by issue of writs.

34. Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes power to give it retrospective effect. Craies on Statute Law (7th Edn.) at page 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".*

Judicial Dictionary: (13th Edition) K.J. Aiyar, Butterworth, pg.857, states that the word 'retrospective' when used with

reference to an enactment may mean (i) affecting an existing contract; or (ii) re-opening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases: Permanent Edition: Vol.37A page 224/225. 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.

(f) In the case of Marida Chemicals Ltd., etc. vs. Union of India and ors.[18] , the Supreme Court in para 72 observes as under :

"72. Shri Soli J. Sorabjee, learned Attorney General submits that basically there is a presumption in favour of the Constitutionality of an enactment and unless it is found that a provision enacted results in palpably arbitrary consequences, courts refrain from declaring the law invalid as legislated by the legislature. In support of this contention, he has relied upon a decision of this Court reported in (1981) 4 SCC 675, R.K.Garg V. Union of India. He has particularly drawn our attention to the following passage :

18 **[AIR 2004 SC 2371]**

"The first rule is that there is always a presumption in favour of the Constitutionality of a statute .... This rule is based on the assumption, judicially recognized and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience ... Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method …There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot..... be converted into tribunals for relief from such crudities and inequities..... The Court must therefore adjudge the Constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. ....The Court must defer to legislative judgment in matters relating to social and economic policies and must not interfere, unless the exercise of legislative judgment appears to be palpably arbitrary".

(g) In the case of Amrit Banaspati Co. Ltd. vs. Union of India and ors.[19] , the Supreme Court, in para 6, observes as under:

19 **[(1995) 3 SCC 335]**

"6. It is settled law that the allegations regarding the violation of constitutional provision should be specific, clear and unambiguous and should give relevant particulars, and the burden is on the person who impeaches the law as violative of constitutional guarantee to show that the particular provision is infirm for all or any of the reasons stated by him. In the recent decision of this Court Gauri Shanker and ors. v. Union of India to which both of us were parties, it was reiterated that-

(a) there is always a presumption in favour of the Constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles;

(b) it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(c) in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

(h) In the case of K. B. Nagpur, M.D. (Ayurvedic) vs. Union of India[20] , the Supreme Court in para 21, observed as under:

> "21. From the above discussion, it is clear that question of constitutionality of a provision is a matter which the courts would venture to examine only for valid, proper and sustainable grounds. We do not see that the provisions of S. 7 of the Act, or any part thereof, suffer from any legal infirmity, excessive legislative power or violate any legal right of any person, including the petitioner, much less a constitutional right. Keeping the principle of strict necessity in mind, the courts do not venture to examine the Constitutional validity of a provision and even strike down such provisions, if they are constitutional and a Court does so only if the situation created by such legislation is irremediable or unredeemable. None of these circumstances exist in the present case.

(i) In the case of Shayara Bano vs. Union of India and ors. (Ministry of Women and Child Development Secretary and ors.)[21] , the Supreme Court, observed as under :

> "99. However, in State of Bihar v. Bihar Distillery Ltd., SCC at para 22, in State of M. P. v. Rakesh Kohil, SCC at paras 17 to 19, in Rajbala v. State of Haryana, SCC at paras 53 to 65 and in

20 **[(2012) 4 SCC 483]**
21 **[(2017) 9 SCC 1]**

> Binoy Viswam v. Union of India, SCC at paras 80 to 82, McDowell was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this Judgment, McDowell itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell are, therefore, no longer good law."

SUBMISSIONS MADE BY THE LEARNED ADOVICATE GENERAL :

46. The learned Advocate General Mr. A. A. Kumbhakoni submits that during the course of hearing none of the petitioners have specifically raised any challenge to the Rules framed by the Maharashtra State under the RERA. The learned AG has assisted the court in putting up his views on the interpretational aspect from the point of view of the State Government. The learned AG submitted that under the provisions of RERA, there is no acquisition of project by the authority nor vesting of the title of the project in the authority.

47. The learned AG submitted that the legislature has a competence to rewrite a contract executed by the private parties. There is no

constitutional guarantee that private contract entered between the parties could not be subject matter of legislative mandate in the larger public interest. It was submitted that after accepting huge amount from the allottees if the promoter for whatever reasons was not handing over possession, then the same would amount to breach and promoter will have to pay interest to the allottee. It cannot be termed a penal consequence. The learned AG refers to Section 9 of the MOFA and provisions of RERA and the Rules framed by the State in this regard. It is submitted that under MOFA, 9% interest is to be paid by the promoter and under RERA it is 8+2 i.e. 10% from the date money is received by the promoter from the allottee till handing over possession.

48. The learned AG submits that in case while interpreting the provisions, if the court finds that the challenge made to the proviso to Section 6 would affect a honest and dedicated promoter then the same could be harmoniously construed by striking out balance instead of declaring the provisions as invalid. The State has made Rules in respect of deposit of 70% of the amount by the promoter while getting the project registered. He refers to the Rules framed by the State Government and submitted that similar interpretation is put up by the Union while framing

the Rules. The RERA aims at protecting larger interest of lacs of allottees who are waiting for getting their possession and are helpless in getting speedy remedy to their endless problems.

49. The learned AG places reliance on the judgment in the case of Seaford Court Estates Ltd. Vs. Asher[22], King's Bench Division, observed thus:

> "…… Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precession. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized……"

50. The learned AG also placed reliance on the judgment in the case of Indian Handicrafts Emporium and ors. Vs. Union of India and ors.[23], wherein the Supreme Court referred to the earlier judgment in the case of Har Shankar v. Dy. Excise and Taxation Commr. [(1975) 1 SCC 737]. Para 37 reads as under:

22 **[1948] A.C. 291**
23 **[(2003) 7 SCC 589]**

"37. In Har Shankar v. Dy. Excise and Taxation Commr. This Court held:

> "The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants – its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. In American Jurisprudence, Vol.30 it is stated that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to governmental control (p.538). This power of control is an incident of the society's right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime (pp.539, 540, 541)."

51. The learned AG further places reliance on the judgment in the case of M/s. Raghubar Dayal Jai Prakash vs the Union Of India And Others[24] . Para 25 of the said judgment reads as under:-

24 **[AIR 1962 SC 263]**

“25. Learned Counsel referred us to some decisions of the Supreme Court of the United States but to these we do not consider it necessary to advert. Article 1, Section 10 (1), of the American Constitution lays a ban on the enactment by the States of inter alia "any ex post-facto law or low impairing the obligation of contracts, or grant any title of nobility" Our Constitution-makers while making provision against "ex post-facto laws" in Art. 20(1) and “against titles" in Art. 18(1), studiously refrained from including a guarantee regarding the impairment of obligations of contracts. There is therefore no scope for the argument that a law which affects or varies rights under a contract is for that reason constitutionally invalid as an unreasonable restriction on the right either to property or to carry on trade or business. It may be pointed out that even in the United States the recent decisions have made such inroads upon that doctrine that it had been stated by Prof. Corwin that "The protection afforded by this clause does not today go much, if at all, beyond that afforded by, Section 1 of the Fourteenth Amendment (against deprivation of life, liberty or property without due process of law)". The learned another author proceeding to quote from the decision in Atlantic Coast Line R. Co. v. Goldsboro (1913) 232 US 548, continues:

"In the words of the Court : It is settled that neither the contract clause nor the due process clause has the effect of

overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community'- in- short, its police power. And what is reasonably necessary' for these purposes is today a question ultimately for the Supreme Court; and the present disposition of the Court is to put the burden of proof upon any person who challenges State action as not reasonably necessary.

adding:

"Till after the Civil War the principal source from which cases stemmed challenging the validity of State legislation, the 'obligation of contracts' clause is today of negligible importance, and might well be stricken from the Constitution. For most practical purposes, in fact, it has been." (Vide Constitution and what it means today, 12th Edn., p. 84)'

If that is the position in America where the Constitution contains a guarantee against the impairment of obligations arising from contracts, the position under our Constitution must a fortiori be so. Affecting a subsisting contract by modifying its terms cannot ipso jure be treated as outside the permissible limits laid by cl. (5) or (6) of Art. 19. The "reasonableness" of the provisions of a statute are not to be' judged by a priori standards unrelated to the facts and circumstances of a situation which occasioned the

legislation. In an oft-quoted passage Patanjali Sastri, C. J., observed in State of Madras v. V. G. Row, 1952 SCR 597 at p. 607 : (AIR 1952 SC 196 at p. 200):

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned', and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

52. The learned AG next places reliance on the Full Bench decision of Nagpur Bench of this Court in the case of Sheoshankar vs. State Govt. of Madhya Pradesh and ors.[25] . Paras 60 and 65 of the said judgment read as under:-

"60. The learned author (American Constitutional Law, 1937, pages 84, 86) summarizes these self-imposed limitations thus:

25 **[AIR (38) 1951 Nagpur 58]**

"Acceptance of the exercise of the power by the Courts is in part attributable to the caution with which these have wielded it. The following rules have been laid down to govern the exercise of the power:

1. Questions as to constitutionality will not be passed upon unless they are essential to the decision in the case.

2. One who relies on the invalidity of a statute has the burden of proving its unconstitutionality. If the burden is not sustained the Court will presume that the statute is constitutional. "This rule applies especially where the issue is the reasonableness of the enactment in the light of existing conditions.

3. The unconstitutional character of the legislation must be clear regardless of the interpretation put upon it. Hence, where alternative constructions are possible, the law must be so construed as to preserve its validity.

4. The power cannot be extended to permit the Court to pass upon the question of the expediency or wisdom of particular legislation.

5. The motives of the legislature in passing particular statutes cannot be made the subject of judicial examination.

6. The power may be exercise only in actual litigation since under Art.II of the Constitution the judicial power extends only to "cases" & "controversies". This means that there must be a real controversy between parties having opposing interests, & that one who contests the validity of a statute must show that substantial interests of his own will be adversely affected by its enforcement. The federal courts will not decide moot cases (i.e. they will not decide what the law would be on a hypothetical state of facts) nor will they render advisory opinions in cases where an abstract determination of the constitutionality of a statute is sought."

Only in one case Nashville v. Wallace, (1933) 288 U S 249, a declaratory judgment was given on the assumption, regardless of form, that an "actual" & "justiciable" controversy existed."

65. The petitioner has filed the petition for a mere declaratory opinion. He has done no act under the Act, nor has any action been taken under the Act to his detriment. He has not even made a demand for a permit, & thus there is no

demand & refusal. The Prohibition Act has not been enforced against him as such. His only complaint is that as a result of the impugned Act he cannot do many things which he has in his mind. Mandamus cannot issue unless there is a demand & a refusal or some act or omission is to be ordered. It is not to be expected that this Court will sit down to examine the constitutionality of all the sections of the Act & the rules & notifications with a view to finding out what is constitutional or what is not."

SUBMISSIONS BY THE LEARNED AMICUS CURIAE :-

53. We had requested the learned Senior Counsel Mr. D. J. Khambata to assist the court as an Amicus Curiae. On his accepting our request, he was appointed as Amicus Curiae by an order dated 30/10/2017 along with Ms. Naira Jejeebhoy and Mr. Pheroze F. Mehta.

54. The learned Senior Counsel Mr. Khambata had broadly described the scheme of the RERA. The purpose and object of enacting the law. The counsel had dealt with specific challenges raised regarding constitutional validity of certain provisions by the petitioners and placed on record certain judgments on the relevant issues emerging from the arguments and discussions made in the court during the course of hearing

of these petitions. The learned Senior Counsel submitted that the constitutionality of various provisions of RERA has been broadly challenged on three grounds, namely,

(a) Retrospective / retro-active application of certain provisions;

(b) Unreasonable restrictions (under Article 19(1)(g) read with Articles 19(6)) imposed by certain provisions and arbitrariness of certain provisions (violating Article 14);

(c) Mandatory requirement of a Judicial Member in the Authority and on the Appellate Tribunal.

55. It was submitted by the learned Senior Counsel that the retrospective or retro-active law is one which takes away or impairs vested or accrued rights [Virender Singh Hooda v. State of Haryana (Supra) – para 33]. The proviso to Section 3(1) of RERA provides that the projects which are ongoing on the date of commencement of RERA and for which completion certificates have not been issued required registration. Under the said provision, the projects which are already completed are not affected. No vested or accrued rights are being affected by the RERA. The obligations imposed by RERA applied prospectively i.e. after the commencement of RERA. The counsel has referred to para 69 of the

affidavit-in-reply filed by the Union of India in support of the submissions, wherein it was averred that promoter is entitled to provide new timelines for project completion. The obligations imposed and consequences for breach of such obligations under RERA are all prospective in their operation. It is not made applicable to past acts which have been completed. It merely relied on continuing acts, although their commencement was antecedent in point of time. Therefore, only a part of the requisites for action under RERA are antecedent to the coming into force of RERA.

56. By referring to the judgment cited by the petitioners in the case of Badrinarayan Shankar Bhandari (Supra), the learned counsel submitted that since the operation of RERA applies to ongoing projects, the decision cited by the petitioners do not appear to be applicable or relevant.

57. It was submitted that in any event no contractual rights are affected by RERA since its provisions operate so as to regulate the existing contracts and facilitate completion of construction in accordance with their terms. The date of contracts entered into by the petitioners with the purchasers is relevant and all that is to be seen is whether a completion certificate has been issued.

ON ARTICLE 19(1)(g) OF THE CONSTITUTION OF INDIA:

58. On Article 19(1)(g), the learned counsel submitted that reasonableness or otherwise of the restrictions imposed by the RERA has to be considered in the context of certain established principles. There is a presumption of constitutionality, especially for economic legislation. Implicit in the power to regulate is the power to prohibit. Individual rights, including private contracts, may have to give way to legislative measures taken in public interest. It is necessary to ascertain true nature of the legislation having due regard to relevant factors such as the history of the legislation, its purpose, the surrounding circumstances and conditions, mischief, its intent etc.

SECTION 6 OF RERA :

59. This provision puts a reasonable restriction when considered in the context of public interest. If the promoter is genuinely suffering hardship as a consequence of the lapse of registration under Section 6, this hardship can also be alleviated by the Authority while passing an order under Section 8 or while giving directions under Section 37 of RERA. The

time limit prescribed by Section 6 is reasonable and has been imposed in public interest.

60. The learned Senior Counsel, in the alternative, submitted that although Section 6 provides that registration may be extended for an aggregate period of one year, it is possible to exclude from the total period of registration the time that has lapsed due to a court injunction, by applying principle "*Actus Curiae Neminem Gravabit*" [Raj Kumar Dey v. Tarapada Dey - AIR 1987 SC 2195].

SECTION 18 OF RERA :

61. The obligation imposed on the promoter to pay interest until such time as the flat is handed over to the flat purchaser is not unreasonable. Interest is merely compensation for use of money. It is commonly ordered by courts for money to be returned together with interest. The interest would be payable as a consequence of the promoter's own default. In the circumstances, the provisions of RERA for payment of interest are reasonable restrictions and are also in furtherance of the public interest.

PRESENCE OF A JUDICIAL MEMBER ON THE AUTHORITY AND THE TRIBUNAL:

62. The learned Senior Counsel submitted that there is no requirement of Judicial Member merely because Authority may exercise quasi-judicial powers. Reliance is placed by the petitioners on the judgment of the Supreme Court in the case of Madras Bar Association (Supra). In respect of the said judgment, the learned counsel submits that the said judgment does not pertain to all authorities that carry out quasi-judicial functions, but only to those authorities / tribunals to which any existing jurisdiction of courts is transferred and that takes over its functions in that regard. The said judgment is not applicable to the facts of the present case as no existing jurisdiction of courts has been transferred to the RERA Authority; its functions are simply quasi-judicial.

APPELLATE TRIBUNAL :

63. The learned Senior Counsel referred to Sections 45 and 46 of RERA. The RERA requires one of the Members of the RERA Appellate Tribunal to be a Judicial Member. Hence, there is no need to decide whether the powers and functions of the RERA Appellate Tribunal are of

the character of those exercisable by a court. In the submissions of the learned counsel, the Member of the Indian Legal Service having held the post of Additional Secretary is neither a retired Judge nor qualified to be appointed as a Judge. He can never fall within a definition of "Judicial Member" as per Section 46. The counsel submitted that Section 46(1)(b) to the said extent is bad in law. It was submitted that it is well settled that a court can sever an unconstitutional provision from an otherwise constitutional measure [D.S. Nakara v. Union of India – (1983) 1 SCC 305 – para 60]. The counsel submitted that said part of definition prescribed in Section 46 is unconstitutional and is liable to be struck down.

64. None of the provisions of RERA imposes any penalty retrospectively even in the case of ongoing projects. The offences referred to in Chapter VIII (Sections 59 to 68) apply to offences committed after the commencement of RERA. The requirement to pay interest under Section 18 of the RERA is not a penalty since payment of interest is compensatory in nature in the light of the delay being suffered by the flat purchaser, who had paid for his flat but did not get the possession. Even assuming that the interest is penal in nature, the levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively. The interest

payable under Section 18 as per the definition of interest in Section 2(za) Explanation (ii), is the same interest that would have been payable by the flat purchaser for causing delay in payment.

WHETHER SECTION 18 IS CONTRARY TO ARTICLE 20 OF THE CONSTITUTION :

65. The provisions of Section 18 were framed to be an effective deterrent to stop practices which the Legislature considers against public interest. The learned Senior Counsel, in the alternative, submitted that in case the court decides that Section 18 is penal in nature affecting the contractual rights entered into between the parties prior to its registration, then the provisions of Section 18 could be read down so as to require the payment of such interest only for the contractual period of delay after registration under the RERA and not from the date on which the flat was to be handed over under the agreement. In the circumstances, no penalty is being imposed retrospectively. The Legislature has the power to make laws with retrospective effect. Even assuming that RERA operates retrospectively, the same would not render it unconstitutional, unless the retrospectivity is shown to be excessive or harsh and injuriously affects a substantial or vested rights.

66. The learned Senior Counsel Mr. Khambata submitted that RERA is a curative or remedial law. The Supreme Court has clarified that public interest is relevant consideration in determining the constitutional validity of retrospective legislation. The RERA was enacted in public interest.

PENALTY :

67. The learned counsel referred to Sections 4(2)(l)(D), Sections 12, 14(3), 18(1)(2)(3), 40, 59, 60, 61, 62, 63, 65, 67, 59(2), 64, 66 and 68 of RERA. By referring to these provisions and the settled principles and the case laws, the counsel submitted that these provisions prescribed that certain penalties are made applicable on the failure to discharge obligation by promoter under RERA. These provisions are made in the larger public interest and only on the failure of the promoter, such penalties could be imposed in given facts and situation of the case by the concerned authority.

68. The learned Senior Counsel Mr. Khambata places reliance on the judgments of the Supreme Court and High Courts. We may refer the said judgments:

(a) In the case of Chandrakant Shankar Pradhan vs. M/s. Verma Investment Corporation and ors.[26] , the learned Single Judge of this court observed in para 9 as under :

> "9. ……..It is time to recall the words of Father of Nation, Mahatma Gandhi, extracted in the judgment of the Supreme Court as a supreme guide in matters of this kind. It was observed by the Hon'ble Mr. Justice Chandrachud in the case of His Holiness Keshavananda Bharati vs. State of Kerala, AIR 1973 SC 1461 at page 2054 – paragraph 2155 – as :
>
> > "We are all conscious that this vast country has vast problems and it is not easy to realise the dream of the Father of the Nation to wipe every tear from every eye." …….

(b) In the case of the State of Bombay (now Maharashtra) v. Vishnu Ramchandra[27] , the Supreme Court, in paras 6 and 7 observed as under :

> "6. At the hearing before us, the respondent was not represented. We have heard Mr. Dhebar in support of the appeal, and, in our opinion, the High Court was not right in the view it had taken of s. 57 of the Act. The question whether an

26 **[1992 Mh.L.J. 1016]**
27 **[AIR 1961 SC 307]**

enactment is meant to operate prospectively or retrospectively has to be decided in accordance with well- settled principles. The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statutes makes them retrospective, either expressly or by necessary implication. Penal statutes which create new offences are always prospective, but penal statutes which create disabilities, though ordinarily interpreted prospectively, are sometimes interpreted retrospectively when there is a clear intendment that they are to be applied to past events. The reason why penal statutes are so construed was stated by Erle, C. J., in Midland Rly. Co. v. Pye (1861) 10 C.B. NS 179 at p. 191) in the following words:

> *"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment".*

This principle has now been recognised by our Constitution and established as a Constitutional restriction on legislative power.

7. There are, however, statutes which create no new punishment, but authorise some action based on past conduct. To such statutes, if expressed in language showing retrospective operation, the principle is not applied. As Lord Coleridge, C. J., observed during the course of arguments in Rex v. Birthwhistle Etc. JJ. (1889) 58 L.J. MC. 158:

> *"Scores of Acts are retrospective, and may without express words be taken to be retrospective, since they are passed to supply a cure to an existing evil."*

Indeed, in that case which arose under the Married Women (Maintenance in Case of Desertion) Act, 1886, the Act was held retrospective without express words. It was said:

> *"It was intended to cure an existing evil and to afford to married women a remedy for desertion, whether such desertion took place before the passing of the Act or not."*

(c) In the case of Vijay vs. State of Maharashtra and ors.[28] , the Supreme Court in para 12 observes as under :

"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

28 **[(2006) 6 SCC 289]**

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 statute may be held to be retrospective in nature. The appellant does not and cannot question the competence of the legislature in this behalf."*

(d) In the case of National Securities Depository Limited vs. Securities and Exchange Board of India[29] , in paras 13 and 14, the Supreme Court observed as under :

"13. This celebrated passage has been referred to time and again in the Supreme Court's judgments. Thus in Province of Bombay vs. Kushaldas S. Advani, it was held: (SCR p. 725: AIR pp. 259-60, para 173)

"173.....(i) That, if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie, and in the absence of anything in the statute to the contrary it is the duty of

29 **[(2017) 5 SCC 517]**

the authority to act judicially and the decision of the authority is a quasi-judicial act; and,

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

14. This statement of the law has been followed in Shivji Nathubhai vs. Union of India, where the question which faced the Supreme Court was whether the Central Government's power under Rule 54 of the Mineral Concession Rules, 1949, to review administrative orders could be stated to be in a quasi-judicial capacity. After setting out Lord Justice Atkin's passage in Advani case, this Court held that three requisites were necessary in order that the act of an administrative body be characterized as quasi-judicial :

(i) There must be legal authority;

(ii) This authority must be to determine questions affecting the rights of subjects; and,

(iii) There must be a duty to act judicially.

Applying the aforesaid tests, it was held that the Central Government's power of review under Rule 54 was quasi-judicial in that there is legal authority to determine questions affecting the rights of subjects and the duty to act judicially which involves a hearing and a decision on the merits of the case.

(e) In the case of S. Manoharan vs. The Deputy Registrar, Central Administrative Tribunal, Principal Bench, New Delhi[30], the Division Bench of Madras High Court, in para 43, observed as under:

"43. If we carefully analyse the scheme of Section 5(4)(d) of the Administrative Tribunals Act, 1985 and the Proviso thereunder, in the context of Section 4(4)(c) and the Proviso thereunder of the National Green Tribunal Act, 2010, in the backdrop of the development of law from S.P. Sampath Kumar to L. Chandra Kumar to R.Gandhi to Madras Bar Association, it will be clear that a Bench of more than three Members cannot be overloaded with Administrative Members. The Parliament itself appears to have understood the difficulty of allowing a Bench of any Tribunal to be overloaded with Administrative or Technical or Expert Members. That is why it sought to provide equality of representation between Judicial and Expert Members in the National Green Tribunal. If substantial questions of law, as per the decision in the National Tax Tribunals Act case,

30 **[2015-2-L.W. 343]**

cannot be decided by Tribunals loaded with Administrative Members, it is incomprehensible that a reference made to a larger Bench of an Administrative Tribunal, which would ordinarily require an exposition of a substantial question of law, can be decided by two Administrative Members, making the Judicial member a minority. What John Marshall said in Marbury Vs. Madison [2 L Ed 60 : 5 US(1) Crunch 137 (1803) could be of assistance in resolving the issue on hand and hence, it is extracted as follows:

> "It is emphatically the province and duty of the Judicial Department to say what the law is …...If two laws conflict with each other, the Courts must decide on the operation of each....."

(f) In the case of Bank of India and anr. vs. K. Mohandas and ors.[31] , in para 54, the Supreme Court observed as under :

> "54. A word about precedents, before we deal with the aforesaid observations. The classic statement of Earl of Halsbury , L.C. in Quinn vs. Leathem, is worth recapitulating first (AC p.506):
>
> > *"…...before discussing Allen v. Flood and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before that every judgment*

31 **[(2009) 5 SCC 313]**

must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logically at all."

This Court has in long line of cases followed the aforesaid statement of law.

(g) In the case of Hamdard Dawakhana (WAKF) Lal Kuan, Delhi and anr. Vs. Union of India and ors.[32] , in para 26, the Supreme Court has observed as under :

"26. It was next contended that the Act was not in the interest of the general public as it could not be said that the mention of the names of diseases or instructions as to the use of particular medicines for those diseases was not in the interest of the

32 **[(1960) 2 SCR 671]**

general public. Besides, it would prevent the medicines being brought to the notice of the practising medical practitioners or distributing agencies. It would also prevent a properly worded advertisement suggesting cure of diseases to people who for the sake of prestige and other understandably valid reasons do not like to confide to any person the nature of their diseases and that it would prevent medical relief in a country where such relief is notoriously inadequate. We have already set out the purpose and scope of the Act, the conditions in which it was passed and the evils it seeks to cure. If the object is to prevent self-medication or self treatment, as it appears to be then these are exactly the evils which such advertisements would sub serve if a piece of legislation like the Act did not exist. It has not been shown that the restrictions laid down in the Act are in any manner disproportionate to the object sought to be attained by the Act nor has it been of shown that the restrictions are outside the permissible limits.

(h) In the case of Secretary, Irrigation Department, Govt. of Orissa and ors. vs. G.C. Roy[33] , the Supreme Court in para 43 observed as under :

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are

33 **[(1992) 1 SCC 508]**

dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) an arbitrator is an alternative form (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement

must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena's case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

(i) In the case of Jyoti Pershad vs. Administrator for the Union Territory of Delhi[34] , the Supreme Court in para 13 observed as under :-

34 **[(1962) 2 SCR 125]**

"13. Such guidance may thus be obtained from or afforded by (a) the preamble read in the light of the surrounding circumstances which necessitated the legislation, taken in conjunction with well-known facts of which the Court might take judicial notice or of which it is appraised by evidence before it in the form of affidavits, Kathi Raning Rawat v. The State of Saurashtra being an instance where the guidance was gathered in the manner above indicated, (b) or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the object sought to be achieved by the enactment.

> *"The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the Textile Commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample power in the Courts to undo the mischief."*

(j) In the case of Commissioner of Income Tax, Gujarat vs. Vadilal Lallubhai, etc.[35] , the Supreme Court in para 15 observed as under :

35 **[(1973) 3 SCC 17]**

"15. In order to find out the legislative intent, we have to find out what was the mischief that the legislature wanted to remedy. The Act was extensively amended in the year 1939. Section 44-F was not in the draft bill. That section was recommended by the Select Committee consisting of very eminent lawyers. It will not be inappropriate to find out the reasons which persuaded the Select Committee to recommend the inclusion of s. 44-F, if the section is considered as ambiguous-see Commissioner of Income-tax, Madhya Pradesh and Bhopal v. Sodra Devi etc. In recommending the inclusion of s. 44-F, this is what the Select Committee observed :

> *"The new Sections 44E and 44F are designed to prevent avoidance of tax by what are known as "bond washing" transactions, involving the manipulation of securities so that the securities will pass temporarily in the legal ownership of some second person who is either not liable at all or liable in a lessor degree to tax, under such conditions that the interest on the securities is the income of this second person. A common form of the process is the sale of securities-cum-interest with a simultaneous contract to purchase them ex-interest. Where foreign securities are concerned this second person may be a foreigner resident abroad entitled to claim exemption from the tax on the interest. More often a financial concern in India is utilised whose computation of profits includes the results of*

realising securities, so that the concern can profitably offer "bond- washing" facilities to the owner of securities bearing fixed interest where the owner himself is not liable to taxation on the realisation of the securities."

(k) In the case of R.S. Nayak vs. A. R. Antulay[36] , the Supreme Court, in para 34, observed as under :

"34. Approaching the matter from this angle, the Constitution Bench looked into the proceedings of the Constituent Assembly and The Framing of India's Constitution; A Study' by B. Shiva Rao. It was however urged that before affirmatively saying that in Bidap's case this Court has finally laid to rest this controversy, the court may refer to Commissioner of Income Tax, Andhra Pradesh, Hyderabad v. Jaya lakshmi Rice and oil Mills Contractor Co. a bench of three Judges of this Court without so much as examining the principle underlying the exclusionary rule dissented from the view of the High Court that the report of the Special Committee appointed by the Government of India to examine the provisions of the Bill by which Sec. 26A was added to the Income-tax Act, 1922 can be taken into consideration for the purpose of interpreting relevant provisions of the Partnership Act. However it may be stated that the Court did not refer to exclusionary rule." It dissented from the view of the High Court on the ground that the statement relied upon by the High Court was relating to cl. 58

36 **[(1984) 2 SCC 183]**

corresponding to Sec. 59 of the Partnership Act and that statement cannot be taken into consideration for the purpose of interpreting the relevant provisions of the Partnership Act. This decision was not noticed in Bidap's case but the decision in Assam Railways & Trading Co. Ltd relied upon by Mr. Singhvi was specifically referred to. This decision cannot therefore be taken as an authority for the proposition canvassed by Mr. Singhvi. Further even in the land of its birth, the exclusionary rule has received a serious jolt in Black-Clawson International Ltd. v. Paperwork Waldhef Ascheffenburg AC Lord Simon of Claisdale in his speech while examining the question of admissibility of Greer Report observed as under:

> *At the very least, ascertainment of the statutory objective can immediately eliminate many of the possible meanings that the language of the Act might bear and if an ambiguity still remains, consideration of the statutory objective is one of the means of resolving it.*

> *The statutory objective is primarily to be collected from the provisions of the statute itself. In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity-it is the plainest of all the guides to the general objectives of a statute. But it will not always help as to particular provisions. As to the statutory objective*

of these a report leading to the Act is likely to be the most potent aid and, in my judgment, it would be more obscurantism not to avail oneself of it. There is, indeed clear and high authority that it is available for this purpose".

And in support of this statement of law, a number of cases were relied upon by the learned Law Lord. It may also be mentioned that Per Curiam it was held that "where there is an ambiguity in a statute, the court may have regard to the Report of a Committee presented to Parliament containing proposals for legislation which resulted in the enactment of the statute, in order to determine the mischief which the statute was intended to remedy". Though the unanimous view was that the report of a committee presented to Parliament preceding the statute could be seen for finding out the then state of the law and the mischief required to be remedied, it must be stated that the majority were of the opinion that report could not be looked at to ascertain the intention of Parliament. The minority (per Lord Dilporne and Lord Simon) were of the opinion that when a draft bill was enacted in a statute without any alteration, Parliament clearly manifested its intention to accept committee's recommendation which would imply that Parliament's intention was to do what committee wanted to achieve by its recommendations. A reference to Halsbury's Laws of England, Fourth Edition, Vol. 44 paragraph 901, would leave no one in doubt that 'reports of

commissions or committees preceding the enactment of a statute may be considered as showing the mischief aimed at and the state of the law as it was understood to be by the legislature when the statute was passed.' In the footnote under the statement of law cases quoted amongst others are R. v. Ulugboja R. v. Blexham in which Eigth report of Criminal Law Revision Committee was admitted as an extrinsic aid to construction. Therefore, it can be confidently said that the exclusionary rule is flickering in its dying embers in its native land of birth and has been given a decent burial by this Court. Even apart from precedents the basic purpose underlying all canons of construction is the ascertainment with reasonable certainty of the intention of Parliament in enacting the legislation. Legislation is enacted to achieve a certain object. The object may be to remedy a mischief or to create some rights, obligations or impose duties. Before undertaking the exercise of enacting a statute, Parliament can be taken to be aware of the Constitutional principle of judicial review meaning thereby the legislation would be dissected and subjected to microscopic examination. More often an expert committee or a Joint Parliamentary committee examines the provisions of the proposed legislation. But language being an inadequate vehicle of thought comprising intention, the eyes scanning the statute would be presented with varried meanings. If the basic purpose underlying construction of a legislation is to ascertain the real intention of the Parliament, why should the aids which

Parliament availed of such as report of a special committee preceding the enactment, existing state of law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the court of a substantial and illuminating aid to construction. Therefore, departing from the earlier English decisions we are of the opinion that reports of the committee which preceded the enactment of a legislation, reports of Joint Parliamentary Committee, report of a commission set up for collecting information leading to the enactment are permissible external aids to construction. In this connection, it would be advantageous to refer to a passage from Crawford on Statutory Construction (page 388). It reads as under:

> *"The judicial opinion on this point is certainly not quite uniform and there are American decisions to the effect that the general history of a statute and the various steps leading upto an enactment including amendments or modifications of the original bill and reports of Legislative Committees can be looked at for ascertaining the intention of the legislature where it is in doubt but they hold definitely that the legislative history is inadmissible when there is no obscurity in the meaning of the statute".*

In United States v. St.Paul M.M. Rly. Co. it is observed that the reports of a committee, including the bill as introduced, changes 'made in the frame of the bill in the course of its passage and the statement made by the committee chairman incharge of it, stand upon a different footing, and may be resorted to under proper qualifications'. The objection therefore of Mr. Singhvi to our looking into the history of the evolution of the section with all its clauses, the Reports of Mudiman Committee and K Santhanam Committee and such other external aids to construction must be overruled.

(l) In the case of Haldiram Bhujiawala and anr. vs. Anand Kumar Deepak Kumar and anr.[37], the Supreme Court in para 15 observed as under:

"15. In our view, it will be useful in this context to refer to the Report of the Special Committee (1930-31) which examined the Draft Bill and made recommendations to the legislature."

(m) In the case of Kalpana Mehta and ors. vs. Union of India and ors.[38] , the Supreme Court in para 54, observed as under:

"54. As the Constituent Assembly Debates are referred to for interpretation of a constitutional provision and especially to

37 **[(2000) 3 SCC 250]**
38 **[(2017) 7 SCC 296]**

understand the context, similarly judicial notice of parliamentary proceedings can be taken note of for the purpose of appreciating the intention of the legislature."

SUBMISSIONS ON BEHALF OF APPLICANT IN CHAMBER SUMMONS NO. 224 OF 2017 :

69. The learned Senior Counsel Mr. Siraz Rustomjee appearing for the applicant – Forum for People's Collective Efforts (F.P.C.E.) in Chamber Summons No. 224 of 2017, submitted that the applicant represents the interests of consumers / purchasers in the real estate sector. The members of the applicant initially participated in the process of the preparation of the Real Estate (Regulation & Development) Bill, 2016, by submitting their comments / suggestions on the Bill to the Select Committee that was constituted by the Rajya Sabha to examine the Real Estate (Regulation and Development) Bill, 2013 and the Official Amendments, 2015. Subsequently, the members came together and started a collective effort under the banner "Fight for RERA" with the objective of creating awareness with respect to and petitioning for the adoption and passing of the Bill.

SECTION 3 :

70. The imposition of statutory liability or obligation from the date of introduction of the statute is for its requisites, or liabilities with respect to "prior arrangements" does not mean that the statute is being applied retrospectively. There is no imposition of any loss to anyone. Even assuming that there is some restriction imposed on the fundamental right guaranteed by Article 19(1)(g), the exemptions from registration in the section itself would demonstrate that these restrictions are reasonable. The RERA has been introduced in the public interest of the consumers and in order to cure existing evils. The requirement to register ongoing projects under the proviso to section 3(1) is not retrospective, is legal, valid and not arbitrary. It constitutes a reasonable restriction as contemplated by Article 19(6) of the Constitution of India.

SECTION 4(2)(l)(C) :

71. It is clarified on behalf of the Union of India that this declaration of period within which a promoter undertakes to complete a project under RERA in the case of ongoing projects is independent of the date that may have been stipulated under existing agreements for sale. The

authority has the discretion either to grant or reject registration and, therefore, must be regarded as having discretion to reject a period put forward by the promoter that is manifestly unreasonable. This position is supported by the fact that Section 5(1) of the RERA contemplates a hearing being afforded to an applicant before an application is registered.

SECTION 4(2)(l)(D) :

72. A plain reading of Section 4(2)(l)(D) indicates that in the case of ongoing projects 70% of the amount already collected prior to registration, if any, and which has not been expended on costs of construction and land is required to be deposited in the designated account. It is only the requirement of deposit which has explicitly been made a requirement post registration. However, the deposit is required with reference to all amounts collected including those collected in the past, after adjusting amounts spent on construction and land. To read the section in the manner that the petitioners want, would run counter to and would defeat the intent of the statute and would prevent realization of its objects. The applicants have handed over a chart / table encapsulating comparative position between the respective Rules framed by various State Governments with respect to

section 4(2)(l)(D) of the RERA. Maharashtra and Gujarat States used the words "to be realized from the allottees". In contradistinction, fifteen States and Union territories have specific provisions with respect to deposit of amounts received prior to the coming into force of RERA. The remaining 9 States and Union territories do not have any specific provision on this regard relating to the deposit of monies and would thus be governed by the provisions of section 4(2)(l)(D).

SECTION 6 :

73. The scheme of RERA and its provisions read as a whole would demonstrate how a promoter is expected to commence / register a project after having proper title, sanctioned plans, permissions, sources of funding etc. Therefore, except in cases of *force majeure* or extension for a maximum period of one year, the registration will lapse. Under Section 8 of RERA, the authority has wide power to take appropriate action, and in a given case may require the promoter to continue / complete construction, allow him to sell flats, or entrust the completion to the allottees or such third parties as it may deem fit.

SECTION 7 :

74. There is no expropriation of property, either by the authority or anyone else, upon the lapsing or revocation of registration, as erroneously contended on behalf of the petitioner. On the authority appointing a new entity or person, the person so appointed to carry out the remaining development work is merely an agency engaged by the authority for that purpose and does not become a promoter in place of the original promoter. Under Section 8, the authority has wide powers to take appropriate action.

SECTION 18 :

75. The section is not at all penal in nature and in fact is compensatory. It appears that object and intent of provision is to recompense an allottee for depriving him the use of the funds paid by him. The RERA does not provide any particular rate of interest to be applied and does not levy penal interest at all, and only provides for interest and compensation. Assuming that Section 18 operates retroactively / retrospectively, the Parliament is empowered to enact such a provision having regard to the prevalent situation, including, inter alia, the unequal bargaining power between an allottee and a promoter in the normal course.

It was submitted that Section 18, even if it is regarded as being retrospective / retroactive, is still within the legislative powers of the Parliament.

ARTICLES 19 (1)(g) AND 20 :

76. The learned Senior Counsel submitted that laws have to be tested in the ordinary course and not in extraordinary situations. Chapter VIII of RERA deals with Offences, Penalties and Adjudication. Neither sections contemplate imprisonment for past acts before the RERA became effective. Sections 59 and 64 provide for imprisonment in certain cases. Article 20 can, therefore, have no application if the promoter contravenes a provision of an existing law post registration.

RERA AUTHORITY AND TRIBUNAL :

77. The composition and qualifications prescribed under RERA are in consonance with the functions to be discharged by the Authority. As regards the Appellate Tribunal, it was submitted that ratio in the case of Union of India vs. R. Gandhi is not applicable in the present case. Under

RERA, cases pending before the High Courts were not transferred to the authority or Tribunal. The Tribunal hears appeal against orders/directions of the Authority / Adjudicating Officer.

78. The learned Senior Counsel Mr. Siraz Rustomjee, places reliance on the judgments of the Supreme Court. We may refer the judgments:-

(a) In the case of Securities and Exchange Board of India vs. Ajay Agarwal[39], in para 30, the Supreme Court observed asunder :-

> 30. Article 20(1) was interpreted by the Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh Jagannadha Das,J. speaking for the Constitution Bench, on a comparison of similar provisions in English Law and American Constitution, opined that the language used in Art. 20 is in much wider terms. This Court held that: (AIR p.398, Para 8)
>
> *"8.....what is prohibited is the conviction of a person or his subjection to a penalty under 'ex post facto' laws. The*

39 **[(2010) 3 SCC 765]**

prohibition under the Article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an 'ex post facto' law."

(b) In the case of Dilip vs. Mohd. Azizul Haq and anr.[40] , the Supreme Court, in para 9, observed as under :

"9. The problem concerning retrospectively concerning enactments depends on events occurring over a period. If the enactment comes into force during a period it only operates on those events occurring then. We must bear in mind that the presumption against retrospective legislation does not necessarily apply to an enactment merely because a part of the requisites for its action is drawn from time antecedent to its passing. The fact that as from a future date tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed as held in Commissioners of Customs and Excise v. Thorn Electrical Industries Ltd. Therefore, the view of the High Court that clause 13-A is retrospective in effect is again incorrect.

(b) In the case of Dr. Indramani Pyarelal Gupta and ors. vs. W. R.

40 **[(2000) 3 SCC 607]**

Natu and ors.[41], the Supreme Court in para 26 and 27, observed as under :

> "26. If he was wrong in his argument that the byelaw on its proper construction did not affect subsisting contracts such as these of the Appellants, Mr. Pathak's further submission was that the impugned bye-law was invalid and ultra vires of the Act because it purported to operate retrospectively affecting vested rights under contracts which were subsisting on the day on which the bye-law came into force.
>
> 27. Mr. Pathak invited our attention to a passage in Craies' Statute Law, 5th Ed. p. 366 reading:
>
> > *"Sometimes a statute, although not intended to be retrospective, will in fact have a retrospective operation. For instance if two persons enter into a contract, and afterwards a statute is passed which, as Cockburn, C. J., said in Duke of Devonshire v. Barrow, etc., Co. (1877) 2 Q. B. D. 286 at p. 289) "engrafts an enactment upon existing contracts' and thus operates so as to produce a result which is something quite different from the original intention of the contracting parties, such statute has, in effect a retrospective operation."*

(c) In the case of Zile Singh vs. State of Haryana and ors.[42], the Supreme Court, in para 13, observed as under :

41 **[AIR 1963 SC 274]**
42 **[(2004) 8 SCC 1]**

> "13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only '*nova constitutio futuris formam imponere debet non praeteritis*' a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440)."

(d) In the case of Shiv Shakti Coop. Housing Society, Nagpur vs. Swaraj Developers and ors.[43] , in para 27, the Supreme Court observed as under :

> "27. Laws ought to be, and usually are, framed with a view to such cases as are of frequent rather than such as are of rare or accidental occurrence; or, in the language of the civil law, jus

43 **[(2003) 6 SCC 659]**

constitui oportet in his quae ut plurimum accidunt, non quae ex inopinato; for, neque leges neque senatus consulta ita scribi possunt ut omnis casus qui quandoque in sediriunt comprehendantur, sed sufficit ea quae plaerumque accident contineri; laws cannot be so worded as to include every case which may arise, but it is sufficient if they apply to those things which most frequently happen. All legislation proceeds upon the principle of providing for the ordinary course of things, and to this principle frequent reference is to be found, in the reports, in answer to arguments, often speciously advanced, that the words of an Act cannot have a particular meaning, because in a certain contingency that meaning might work a result of which nobody would approve. In Miller v. Salomons it was argued that Parliament could not have intended that a Jew, before sitting in the House of Commons, must use the words "on the true faith of a Christian," prescribed in the oath of abjuration of 6 Geo. 3, c.53, because any person, refusing to take the same oath when tendered by two justices, would, under the 1 Geo. 1, st.2, c.13, be deemed to be a popish recusant, and would be liable to penalties as such; and to enforce these provisions against a Jew, it was said, would be the merest tyranny. But Baron Parke thus replied to this argument: -

> *"If in the vast majority of possible cases in all of ordinary occurrence the law is in no degree inconsistent or unreasonable construed according to its plain words, it seems to me to be an untenable proposition, and*

unsupported by authority, to say that the construction may be varied in every case, because there is one possible but highly improbably one in which the law would operate with great severity, and against our own notions of justice. The utmost that can be reasonably contended is, that it should be varied in that particular case, so as to obviate that injustice no further."

(e) In the case of Shiv Dutt Rai Fateh Chand and ors. vs. Union of India and anr.[44] , the Supreme Court in para 33 observed as under :-

"33. …….A power to make a law, therefore, includes within its scope to make all relevant provisions which are ancillary or incidental to it. The provision for levying of interest and to levy penalties retrospectively and to validate earlier proceedings under laws which have been declared unconstitutional after removing the element of unconstitutionality is included within the scope of legislative power. ……."

SUBMISSIONS ON BEHALF OF APPLICANT IN CHAMBER SUMMONS NO. 223 OF 2017 :

79. The learned counsel Mr. Tanveer Nizam appearing for applicant in Chamber Summons No. 223 of 2017 submitted that four petitions filed are associated with D.B. Realty Limited. The counsel detailed out the

44 **[(1983) 3 SCC 529]**

problems faced by the allottees who are lacs in number waiting for possession of their flats. Inspite of paying substantial amount out of their life earning, the promoters are defaulting and there is no regulatory authority to control their misconduct. Some allottees though had approached Consumer Forms, High Court, but the final outcome takes a long time and the ultimate sufferer are the consumers. It is submitted that in some cases possession was not given for more than five years. In the larger public interest the Parliament has passed this law. Keeping in view the object and purpose for which it was enacted, the issues raised by the petitioners be dealt with. Reliance is place on the judgment of the Full Bench of this court in the case of D. R. Patil vs. State of Maharashtra and ors.[45].

REASONING :

80. A batch of eight petitions were listed before this court for final disposal. One of the Writ Petitions bearing Writ Petition Lodging No. 2023 of 2017 was disposed of by an order dated 14/11/2017. These remaining 7 petitions raise issue of constitutional validity of certain provisions of RERA. Though in the prayer clauses, the petitioners sought to challenge

45 **[2010 (1) Mh.L.J. 765]**

constitution validity of various provisions of RERA, but during the course of arguments, the learned Senior Counsel appearing for the petitioners advanced submissions in respect of the challenge raised to some of the provisions of RERA. During the course of hearing the learned counsel sought to question the constitutional validity of first proviso to Section 3(1), Section 4(2)(l)(C)(D), first proviso to Section 6, Sections 7, 8, 18, 22, 46 and provisions under Chapter VIII of RERA.

81. We find broadly three grounds on which the petitioners have challenged the various provisions of RERA, namely, (i) retrospective / retroactive application of certain provisions, (ii) unreasonable restrictions placed by certain provisions contrary to Article 19(1)(g) and violation of Article 14 of the Constitution of India and (iii) absence of a Judicial Member in the Authority constituted under Section 22 and definition of the Judicial Member as defined under Section 46 of RERA.

82. The Union of India in its affidavit-in-reply submitted that a Writ Petition was filed in the Supreme Court of India by one Sanrakshak – The Protector v. Union of India & Ors. being Writ Petition (L) No. 112 of 2007, praying, inter alia, for framing national guidelines in respect of issuance of advertisements by developers, to require them to mandatorily provide all

concerned documents so that the claims in the advertisements could be counter-checked to prevent innocent flat purchasers from being defrauded. It is averred in the reply that the Supreme Court, during the course of hearing of the said writ petition was apprised by the UOI of the proposed legislation for regulating the contractual obligations of buyers and sellers in the real estate sector. The Supreme Court had kept the matter pending to monitor progress of the said legislation and disposed of the said writ petition only after the passage of the RERA in terms of order dated 2/5/2016 on a statement made by the learned ASG to the Apex Court. The UOI further refers to order passed by the Competition Commission of India on 12/8/2011 in the matter of DLF and Ors. vs. Belaire Owner's Association (Case No. 19 of 2010), wherein it was observed as under :

> "..The absence of any single sectoral regulator to regulate the real estate sector in totality, so as to ensure adoption of transparent & ethical business practices and protect the consumers, has only made the situation in the real estate sector worse."

83. Similar recommendations were made by the Tariff Commission, Department of Industrial Policy and Promotion, Government of India and other studies / reports for having a sectoral law for regulating the real

estate sector. A joint meeting of all the Housing Ministers of State / Union Territories was held and it was resolved that a Central Legislation be made to regulate the real estate sector in order to infuse transparency in the sector and to protect consumer interest. The UOI had listed various instances which prompted to have a regulatory law on the subject. The real estate sector was unregulated in several States which did not have laws governing the subject at all. According to UOI, RERA has been enacted to bring transparency in the real estate sector like other sectors i.e. banking, insurance, securities, food etc. The real estate sector has been in dire need for regulations to protect the life savings of consumers / buyers. The RERA is aimed at improving the eco-system to ensure consumer protection, transparency and fair and ethical business practices in matters of sale and purchase of properties in the real estate sector. RERA provides for institution of a uniform regulatory environment, aimed at protecting the interests of all stakeholders, including consumers and establishing an adjudicatory mechanism for speedy adjudication of disputes. In para 30 of their reply, the UOI has in detail set out main objects of RERA. In the affidavit-in-reply, the UOI referred to steps taken prior to enactment of RERA, which included the opinion expressed by various ministries, reports of Standing Committee and Select Committee.

84. RERA relates to the development of buildings / projects and sale of flats therein. The statute does not interfere with any ownership rights of the owner or developer of the property. RERA regulates the development of real estate project in respect of constructions which are not complete wherein occupation certificate had not been obtained on the date of commencement of provisions of RERA.

ANALYSIS OF CHALLENGE TO VALIDITY OF CERTAIN PROVISIONS :

SECTION 3 :

85. Section 3 of RERA prevents the promoter to advertise, market, book, sell or offer for sale, or invite persons to purchase unit in the real estate project without getting registration under RERA. First proviso to Section 3(1) mandates that ongoing project on the date of commencement of RERA, of which completion certificate had not been issued, are covered under the provisions of RERA and such promoter shall make an application to the authority for registration of the project.

86. On behalf of the petitioners it was submitted that registration of ongoing project under RERA would be contrary to the contractual rights

established between the promoter and allottee under the agreement for sale executed prior to registration under RERA. In that sense, the provisions have retrospective or retroactive application. After assessing, we find that the projects already completed are not in any way affected and, therefore, no vested or accrued rights are getting affected by RERA. The RERA will apply after getting the project registered. In that sense, the application of RERA is prospective in nature. What the provisions envisage is that a promoter of a project which is not complete / sans completion certificate shall get the project registered under RERA, but, while getting project registered, promoter is entitled to prescribe a fresh time limit for getting the remaining development work completed. From the scheme of RERA and the subject case laws cited above, we do not find that first proviso to Section 3(1) is violative of Article 14 or Article 19(1)(g) of the Constitution of India. The Parliament is competent to enact a law affecting the antecedent events. In the case of State of Bombay vs. Vishnu Ramchandra (Supra), the Apex Court observed that the fact that part of the requisites for operation of the statute were drawn from a time antecedent to its passing did not make the statute retrospective so long as the action was taken after the Act came into force. The consequences for breach of such obligations under RERA are prospective in operation. In

case ongoing projects, of which completion certificates were not obtained, were not to be covered under RERA, then there was likelihood of classifications in respect of undeveloped ongoing project and the new project to be commenced. In view of the material collected by the Standing Committee and the Select Committee and as discussed on the floor of the Parliament, it was thought fit that ongoing project shall also be made to be registered under RERA. The Parliament felt the need because it was noticed that all over the country in large number of projects the allottees did not get possession for years together. Huge sums of money of the allottees is locked in. Sizable section of allottees had invested their hard earned money, life savings, borrowed money, money obtained through loan from various financial institutions with a hope that sooner or later they would get possession of their apartment/flat/unit. There was no law regulating the real estate sector, development work/obligations of promoter and the allottee. Therefore, the Parliament considered it to pass a central law on the subject. During the course of hearing, it was brought to notice that in the State of Maharashtra a law i.e. MOFA on the subject has been in operation. But MOFA provisions are not akin to regulatory provisions of RERA.

87. The important provisions like Sections 3 to 19, 40, 59 to 70 and 79 to 80 were notified for operation from 1/5/2017. RERA law was enacted in the year 2016. The Central Government did not make any haste to implement these provisions at one and the same time, but the provisions were made applicable thoughtfully and phase-wise. Considering the scheme of RERA, object and purpose for which it is enacted in the larger public interest, we do not find that challenge on the ground that it violates rights of the petitioners under Articles 14 and 19(1)(g) stand to reason. Merely because sale and purchase agreement was entered into by the promoter prior to coming into force of RERA does not make the application of enactment retrospective in nature. The RERA was passed because it was felt that several promoters had defaulted and such defaults had taken place prior to coming into force of RERA. In the affidavit-in-reply, the UOI had stated that in the State of Maharashtra 12608 ongoing projects have been registered, while 806 new projects have been registered. This figure itself would justify the registration of ongoing projects for regulating the development work of such projects.

88. On behalf of the petitioners it was submitted that Parliament lacks power to make retrospective laws. Series of judgments cited above

would indicate a settled principle that a legislature could enact law having retrospective / retroactive operation. It cannot be countenance that merely because an enactment is made retrospective in its operation, it would be contrary to Article 14 and Article 19(1)(g). We find substance in the submissions advanced by the learned counsel appearing for the respondents that Parliament not only has power to legislate retrospectively but even modify pre-existing contract between private parties in the larger public interest. No enactment can be struck down merely by saying that it is arbitrary and unreasonable unless constitutional infirmity has been established. It is settled position that with the development of law, it is desirable that courts should apply the latest tools of interpretation to arrive at a more meaningful and definite conclusion. A balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6). The application of the principles will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

89. Legislative power to make law with retrospective effect is well recognized. In the facts, it would not be permissible for the petitioners to

say that they have vested right in dealing with the completion of the project by leaving the proposed allottees in helpless and miserable condition. In a country like ours, when millions are in search of homes and had to put entire life earnings to purchase a residential house for them, it was compelling obligation on the Government to look into the issues in the larger public interest and if required, make stringent laws regulating such sectors. We cannot foresee a situation where helpless allottees had to approach various forums in search of some reliefs here and there and wait for the outcome of the same for indefinite period. The public interest at large is one of the relevant consideration in determining the constitutional validity of retrospective legislation.

90. The provisions of Section 3(2) states that notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required in cases falling under Clauses (a), (b) and (c). The RERA takes care of exclusion of certain projects / constructions which will not be governed under RERA.

91. We, therefore, hold that challenge made to first proviso to Section 3(1) as contrary to Articles 14 and 19(1)(g), is merit-less and the contentions raised in that behalf are negatived.

SECTIONS 4, 5(3) :

92. Section 4 of RERA deals with application for registration of real estate projects. This provision states that every promoter shall make an application to the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. Section 4(2) prescribes requirement of necessary documents and information along with the application. A long list of documents is mentioned under Section 4(2) which is required to be submitted for the purposes of application for registration. This indicates that before an application is made by the promoter, all the necessary formalities need to be complied. An could be presented for registration which is complete in all respect. This is a departure from the earlier practices and even provisions of MOFA, where the promoter could start a project without having complete sanction papers. This provision is crucial for understanding and appreciating the other provisions of RERA.

93. It was submitted on behalf of the petitioners that under Clause (C) of Section 4(2)(l) a declaration has to be given by the promoter in respect of the time limit during which the promoter wold complete the

development work. This is a voluntary act to be performed by the promoter as he has to mention the period for completion of construction. Considering the scheme of RERA, we find that in case the promoter mentions unreasonable period to complete construction, certainly the authority would not register such an application of the promoter and issue necessary directions to the promoter, taking into consideration the facts of each case. We, therefore, do not find any arbitrariness in making the promoter to disclose a time-line at the time of getting registration of the ongoing projects. Such a declaration by the promoter would bind him to complete the remaining work which was pending, may be, for years together, without fault of the allottee.

94. Section 4(2)(l)(D) mandates that 70% of the amount realized for the real estate project from the allottees from time to time shall be deposited in separate account in a scheduled bank to cover the cost of construction, land and shall be used only for that purpose. This is an important provision under the scheme of RERA. It was submitted during the course of argument that throughout the country and more so in Mega Cities like Delhi and Mumbai number of cases are coming to light, that huge projects are left incomplete by the builders without giving timely

possession to the allottees as proposed in the agreement. Allottees have approached the Apex Court / High Courts. Several stringent actions have been initiated by the courts. The purpose behind framing this provision is to see that amount collected from the allottees by the promoter is invested for the same project only. The promoter shall not be entitled to divert the said fund for the benefit of other project or for utilization as per desire of the promoter. Such practices have been curbed under the scheme of RERA and one of such move is to introduce such provision wherein one is bound to deposit 70% amount collected from the allottees to be invested on the project. This is again a legislation in the larger public interest of the consumer and allottee. We do not find any arbitrariness in this provision.

95. It was submitted that, (a) there is no guidance prescribed in respect of deposit of 70% of the amount realized from the allottees. In a given case, the said amount could have been invested or spent on the project by the promoter; (b) it is possible that promoter would have invested or spent 50% of the amount out of 70% on the said project; (c) it is possible that the allottees fail to deposit according to the terms of the agreement or the promoter could not receive 70% of the amount from the allottees; (d) it is possible in a given case that allottees are at fault in not

contributing their share with the promoter and due to their default the promoter is unable to collect the amount. Various situations were deliberated upon during the course of hearing of these petitions. We hasten to add here that legislation cannot be drafted by keeping in view all the possible eventualities, questions and answers. Merely on academic basis it would not be possible to consider the challenge to an enactment. We will have to wait and see how the Act is implemented by testing the provisions of the Act in the real fact situation emerging from case to case.

96. However, the doubts expressed on behalf of the petitioners can be very well explained. The Union of India has clarified that in case 70% amount was invested or spent by a promoter on the project, then such a promoter need not deposit 70% amount realized from the allottees while getting the project registered. It is sufficient if necessary certificate is furnished to the authority concerned to their satisfaction that amount realized from the allottees was spent on the said project. Even if 50% amount was collected from the allottees and spent accordingly, then the authority under RERA would look into the same and deal with the fact situation and pass necessary orders. In case the allottees default in payment, the it would be for the authority to issue necessary instructions

and directions so that allottees are made to deposit the amount with the promoter. A promoter would remain always a promoter under RERA. What is registered under Section 3 of RERA is a project and not a promoter. This is a crucial distinction which needs to be understood while analyzing the scheme of RERA. In a given fact situation of the case, the authority may ask the promoter to sell already constructed flats for generating finances so that one is not put to any loss and the remaining development work is carried out. We cannot encompass all the situations for all the times to come at this stage. It is left to the wisdom of the authority concerned, which is expected to deal with the facts of each case while discharging its obligation in implementing the provisions of RERA in letter and spirit.

97. The amount realized by the promoter would remain his money and in no case expropriated or taken over in any way by authority under RERA. The amount is merely sought to be deposited in a separate account to ensure timely completion of the project. The deposit made by the promoter can duly be withdrawn upon certification and under the instructions of the authority. There is no restriction upon the right of the promoter. The money is to be deposited for ensuring that it is utilized for

the purpose of project and not misused.

98. The provisions of Section 4(2)(l)(C)(D) states that 70% of amount realized for the real estate project from the allottees to be deposited in a separate account, which means that 30% of the amount realized shall remain with the promoter / developer, which would be to the benefit of the promoter. In that way, the provision balances rights of promoter and the allottee.

99. In respect of Rules to be framed under RERA, the learned counsel appearing for the Union of India submitted that out of 35 States and Union Territories, Rules have not been notified by 9 States. Remaining 26 States and Union Territories have already notified the Rules. 15 Stats / Union Territories make it mandatory to account for 70% of past collections for ongoing projects and deposit the money which was not spent on the project. 9 States do not provide for any express provision for deposit of past collections. Only 2 States i.e. State of Maharashtra and Gujarat provide for deposit of amounts to be realized from the allottees.

100. Rule 6(a) of the Maharashtra Rules 2017 refers to grant or rejection of registration of the project. It is submitted that said Rule permits the exclusion of time consumed due to stay or injunction orders from any court of law or tribunal, competent authority, statutory authority or due to such mitigating circumstances as may be considered by the authority in deciding time-line for construction of project. Considering the interpretation placed by us in the above stated paragraphs on the statutory provisions, the State Government would undertake a fresh survey of the Rules.

101. We are, therefore, of the view that provisions of Section 4(2)(l)(C)(D) are reasonable and are not contrary to Articles 14, 19(1)(g) and 300-A of the Constitution of India.

102. In view of the object and scheme of the RERA and considering the reasoning as stated above, we hold that provision of Section 5 (3) is constitutionally valid and is not contrary to Articles 14, 19(1)(g), 20 and 300-A of the Constitution of India.

SECTION 6 :

103. This provision refers to extension of registration. On behalf of the petitioners strong objection was raised in respect of first proviso to Section 6. Section 6 of RERA seeks to extend the period of registration granted under Section 5 on application made by the promoter, except in case for "*force majeure*" which means a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project. Section 6 of RERA provides that registration granted under Section 5 may be extended by the authority on application made by the promoter due to "force majeure". Explanation to Section 6 reads as under:-

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

The first proviso to Section 6 has been challenged by the petitioners as being contrary to Articles 14 and 19(1)(g) of the Constitution. Under the said provision, it is prescribed that the authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing,

extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year. The authority is bound to provide hearing to the parties while dealing with an application for extension. The learned Senior Counsel appearing for the petitioners submitted that this provision restricts the freedom of trade and business and mandates that promoter shall complete the real estate project under whatever circumstances and in case they fail to complete during the period prescribed in the initial declaration under Section 4(2)(l)(C), then the maximum period of one year could be provided by the authority to complete the project. The learned counsel submitted that such a provision does not take into consideration practical difficulties of the promoter. According to the petitioners there could be a situation which is beyond the control of the promoter to complete the project. For example, due to non supply of raw material, due to unavailability of labour, due to stoppage of work for reasons beyond the control of the promoter, due to non cooperation of the allottees, due to orders passed by the court or other forum injuncting or staying the construction work. The scheme of RERA does not have any answer, according to the learned counsel to such eventualities and no discretion has been given under RERA to the authority concerned to grant further extension beyond the period of one year. Such a

mandate is contrary to Articles 14 and 19(1)(g), according to the learned counsel for the petitioners.

104. We do find that this provision requires a serious attention. It is possible that the situation as narrated above by the learned counsel for the petitioners may arise in respect of a project. It is possible that a genuine promoter, after making good efforts is unable to complete the project within the time stipulated at the time of initial declaration or under extended period. It is not possible for us to say that nothing of the sort, which is stated above, could happen. But, at the same time, the issues raised on behalf of the UOI and other consumer organizations has also to be looked into and we have accordingly appreciated the contention raised by both the sides.

105. Under the scheme of RERA, we find that provisions of Sections 6, 7(3), 8 and 37 are required to be considered and understood in a way to advance the purpose for which such provisions are made by the Parliament. On behalf of the UOI, it was submitted that once the court holds or declares first proviso to Section 6 to be directory and not mandatory, then it would open floodgates for some promoters or section of allottees to create litigation, obtain stay/injunction orders and get the project delayed. The

entire purpose of the law would get frustrated. Purposefully a limited period of extension was prescribed under Section 6 of RERA. On behalf of the UOI, learned ASG submitted that the promoter need not be apprehensive about provisions of Section 6 as there are sufficient provisions under the RERA which will take care of interest of the promoter.

106. We are of the view that just because law prescribes aggregate period of extension of one year, a provision need not to be held to be arbitrary and constitutionally invalid. We find that such provisions can be harmoniously construed to strike a balance so that interest of genuine / non defaulting promoters is protected. We do not view this provision to be one-sided. RERA is enacted to regulate private sector transaction of sale and purchase. Bearing this in mind, we would like to approach this issue to find answers. We find that the answers are inbuilt under the scheme of the RERA itself.

107. The provisions of Section 7 refers to revocation of registration. Section 7(1) empowers the authority to revoke registration granted under Section 5, if the promoter had made defaults in doing anything required by or under RERA, Rules and Regulations, violates any of the terms and

conditions of approval given by the competent authority or if the promoter is involved in any kind of unfair practice or irregularities. Explanation to Section 7(1) defines the term "unfair practice", which means, (a) false representation in respect of the services provided by the promoter, (b) false representation in respect of approval or affiliation which the promoter does not have and (c) if the promoter makes misleading representation concerning the services. The registration could also be cancelled if the promoter indulges in any fraudulent practices. This provision confers wide powers on the authority to regulate conduct of the promoter and in a deserving case cancel the registration. It is obligatory on the part of the authority to issue a notice for reaching satisfaction as to whether a case is made out for taking action under Section 7. Under Section 7(4), the authority is conferred with power on revocation to debar the promoter and to carry out the remaining work in accordance with the provisions of Section 8. It also authorizes the authority to freeze the account of the promoter and to protect the interest of the allottee and in the public interest issue such directions as it may deem necessary.

108. Considering the extent of power conferred on the authority under Section 7, we need to put up a harmonious construction on the

provision of Section 6 of RERA. The law confers powers under Section 7 on the competent authority, in the larger public interest to regulate the real estate sector. The authority shall be entitled to take into consideration reasons and circumstances due to which the project could not be completed within the extended aggregate period of one year as prescribed under Section 6. We, therefore, find that a balanced approach keeping in view the object and intent of the enactment and the rights and liabilities of promoter and allottee in larger public interest is to be adopted. The authority would exercise its discretion while dealing with the cases under Sections 6, 7, 8 read with Section 37 of RERA. We do not find that on the plea of the petitioners and for the reasons set out by the petitioners, first proviso to Section 6 needs to be declared as unreasonable, arbitrary, violating constitutional mandate of Articles 14, 19(1)(g) and 300-A of the Constitution of India. A harmonious and balance construction of the provisions shall suffice the purpose.

Section 7(3) reads as under :

> "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.

Section 8 refers to obligation of Authority consequent upon lapse of or on revocation of registration. Under these two provisions, the authority concerned is entitled to impose, in the interest of allottees, any such terms and conditions instead of revoking the registration. Even in case of lapse or revocation of registration, under Section 8, the authority would consult the appropriate Government and take necessary steps to carry out remaining development work by adopting suitable measures as determined by the authority concerned. There is rider in the first proviso prescribed under Section 8, which states 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 RERA. We are of the view that a proper construction of the provisions would mean that even in case of lapsing of or on revocation of registration, the authority shall not mechanically terminate the registration of the promoter or injunct him to act as a promoter, but in the facts of a case would take necessary steps in the interest of allottees permitting the promoter to carry on the remaining development work. We would observe that in case the promoter fails to complete the project in the prescribed time declared by him or the extended time under Section 6, then it shall not mean that the only outcome would be to oust the promoter from the project.

109. In case the promoter establishes and the authority is convinced that there were compelling circumstances and reasons for the promoter in failing to complete the project during the stipulated time, the authority shall have to examine as to whether there were exceptional circumstances due to which the promoter failed to complete the project. Such an assessment has to be done by the authority on case to case basis and exercise its discretion to advance the purpose and object of RERA by balancing rights of both, the promoter and the allottee. In such exceptional cases, the authority would be entitled to allow the same promoter to continue with the subject project for getting the remaining development work complete as per the directions issued by the authority. It shall not be interpreted to mean that in every case a promoter who fails to complete the project under the extended time under Section 6 would get further extension as of right.

110. It is necessary to consider the consequence of the lapse of time-line. The promoter cannot advertise or sell the flats until the project is completed and the title has been conveyed under Section 17. Under Section 17 it is again the responsibility and right of the promoter to transfer

the title. If for some period the promoter is not associated with the project, then after completion of the project, the promoter would step in as in-charge of the project for conveying the title / registering conveyance in favour of the allottees and/or for taking necessary steps in accordance with the law. Therefore, the time prescribed under Section 6 is reasonable and has been prescribed in public interest.

111. The RERA makes a shift from MOFA wherein prior permissions, sanctions and approvals were not necessary for the purposes of entering into a sale agreement. Under the provisions of Section 4(2)(l)(C) a promoter has to self-assess his project completion date after having all his permissions including commencement certificate. It is not that entire burden is shifted under the RERA on the promoter. Section 19 refers to various rights and duties of allottees. They are bound to make timely payment and delayed payments result in interest being payable by the allottees, which shows that RERA has struck balance while considering the rights and duties of both, the promoter and the allottee. We find substance in the submissions advanced by the learned Senior Counsel Mr. Khambata, Amicus Curiae, that in such a situation the promoter would be acting as an agent of the allottee. Though the learned Advocate General

alternatively submitted that possibly the authority may consider cases where the project is held-up due to court orders or injunction and if such situation arise, time consumed in the litigation be excluded from consideration of period of one year under Section 6. We find that such a interpretation will frustrate the object and purpose of the RERA. It is possible that a tendency would develop to ask for extension for indefinite period by creating some or the other ground. We are of the view that the framers of the RERA did not expect this situation to arise.

112. The learned counsel appearing for the petitioners submitted that in case the project could not be completed for no fault of the promoter inspite of getting aggregate extension under Section 6, the promoter would be ousted from the project and it would not be known as to what will happen to the project, the property which is owned by the promoter. A promoter cannot be divested from his property by a retrospective legislation according to the learned counsel. We do not find the submissions to be totally merit-less, but will have to find an answer under the given scheme of the RERA to cover such eventuality. It is to be noted that the consequence of lapse or revocation of registration is that till remaining development work is pending, the promoter cannot sell,

advertise or market in view of Section 3 of RERA. At the cost of repetition, we may say, what is registered under the provisions of RERA is a project and it is clearly mandated under Section 3 that no promter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the project under RERA. There is a limited restriction put on the promoter without divesting his right to property and his status as a promoter. This underlining feature is crucial for understanding the intent of RERA. Hence, there is no expropriation and/or acquisition of the promoter's rights and/or interest as pleaded on behalf of the petitioners. Under Section 17 it is the same promoter who has responsibility and right to convey the property to flat purchasers. Under the scheme of RERA, the authority merely takes over the obligation of the promoter of completing / facilitating the remaining development work.

113. It was rightly submitted by the learned ASG, learned Amicus Curiae and the learned counsel appearing for the consumer organizations that this would not be an appropriate stage to consider the validity of said time period since for the present issue is merely academic. The court

should not enter into academic consideration of the provisions of any statute. This submission was based by the learned counsel in view of the judgment of the Apex Court in the case of State of Bihar vs. Rai Bahadur – **AIR 1960 SC 378** (para 7), K. B. Nagur vs. UOI – **(2012) 4 SCC 483** (paras 20 and 21) and Sheo Shankar vs. State of M.P. – **AIR (38) 1951 Nagpur 58** (Paras 44, 60, 65 and 66).

SECTION 7 :

114. Section 7 deals with revocation of registration. Sections 7(3) needs to be considered by reading provisions of Sections 8 and 37 together. Under these provisions, the authority would take appropriate steps and issue directions in the given fact situation of the case to carry out the remaining development work. While doing so, the authority ought to be conscious of the promoters' bona fides, reasons for delay and the rights and duties of the allottees. RERA aims at striking a balance by placing restriction on the promoter for timely completion of the project and on failure, the remaining development work is controlled by the authority. In that sense, there is no divesting of rights in the property from the promoter to the authority. It is not vesting of rights, neither there is expropriation

as alleged on behalf of the petitioners. The property of the promoter is neither confiscated nor acquired in that sense.

Under the provisions of Section 7(3), the authority is empowered to continue the registration of the project without revoking it on such further terms and conditions as it thinks fit in the interest of allottees. Section 6 refers to extension of period of registration for an aggregate period of one year only. Provisions of Section 7(4) prescribes steps to be taken by the authority upon revocation of the registration. Even under this provision, the promoter's interests are protected. The authority shall debar the promoter from accessing its website in relation to that project. The remaining development works are to be carried out in accordance with the provisions of Section 8. The authority would then direct the bank to freeze the account of the promoter in relation to the subject project which could be de-freezed at a proper state for facilitating remaining development work in accordance with the provisions of Section 8. Wide powers are conferred on the authority under Section 7(4) to issue such directions as it may deem necessary in larger public interest. Therefore, considering the object and scheme of the RERA, we find that a harmonious construction would advance the purpose of enactment of the

RERA and would protect public interest and interest of the promoter and the allottee, both. Needless to mention that authority shall hear the associations of allottees in case the same promoter is to be continued without revoking the registration, in case of promoter failing to complete the project under the extended time under second proviso to Section 6.

Therefore, the submissions that provisions are retrospective in nature, contrary to Articles 14, 19(1)(g) and 300-A of the Constitution of India are not sustainable.

SECTION 8 :

115. The provisions of Section 8 refer to obligation of authority consequent upon lapse of or on revocation of registration. Under these two contingencies, the authority is required to take necessary steps. It is conferred with wide powers under the RERA. The authority has to hear the parties before taking action. Under second proviso to Section 8, it is prescribed that in case of revocation of registration of a project, the association of allottees shall have the first right of refusal for carrying out the remaining development work. It was submitted on behalf of the petitioners that there is no choice left with the authority then to hand over

the project for its completion in favour of the allottees in case they apply for the same. We find that again it requires a harmonious and balanced construction of the provisions of Section 8 read with other provisions of RERA because it would do harm in case individual provision of this nature and their clauses are considered in isolation and by separating them from one to another. As a scheme, we will have to understand and appreciate provisions of this beneficial legislation. Even if under second proviso to Section 8, the association of allottees may deserve first consideration, but under the wide powers conferred under Sections 7(3), 8 and 37 of the RERA, the authority could mould its directions in such a way so that the object and purpose of this Act i.e. to complete the development work within the stipulated time frame is achieved. If the authority does not find any deliberate lapses on the part of the promoters and in case the authority is convinced that there are exceptional circumstances compelling in nature which prevented the promoter to complete the development work, then it shall be necessary for the authority to continue the same promoter under its directions. The authority dealing with such contingencies, if any, would deal with the relevant issues after hearing allottees / associations of allottees and other stakeholders, if any. It is expected that the authority would prescribe brief reasons while passing orders in this regard. As to

how the authority will act in furtherance of the provisions and the powers conferred on it, is required to be seen as and when such situation arises in a given facts and circumstances of a case. It would not be advisable to imagine, invent and apprehend certain situations at this stage.

116. Section 8 seeks to ensure completion of an obligation of a promoter and does not result in expropriation and/or ouster and is not penal in operation.

117. Having a careful scrutiny of the relevant provisions of the RERA, its object and scheme and considering the submissions advanced, we have harmoniously construed the provisions of Sections 6, 7, 8 and 37 of RERA. We hold that in case the authority is satisfied that there are exceptional and compelling circumstances due to which promoter could not complete the project in spite of extension granted under Section 6, then the authority would be entitled to continue the registration of the project by exercising powers under Sections 7(3), 8 or 37 of the RERA. Such powers shall be exercised on case to case basis. We hold that while exercising powers in this regard, the authority shall be bound to hear the promoter, allottee or associations of allottees, as the case may be. In deserving cases the authority would be even entitled to consult the appropriate

Government. The authority, while dealing with such cases, shall be bound to pass a reasoned order.

The construction placed by us on these provisions shall not be construed to mean that in every case of failure of promoter to complete the project within the extended time as prescribed under Section 6, the promoter shall be entitled as of right to seek further extension.

SECTION 18 :

118 . Section 18(1)(a) and (b) reads as under :

> **Section 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, 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.

The learned counsel appearing for the petitioners submit that Section 18(1)(a) operates retrospectively or at least retroactively. The learned counsel submitted that legislature cannot enact a law which would affect past contractual rights of the parties, which would involve application of provisions of the Contract Act, Transfer of Property Act etc. Section 18(1)(a) stipulates that the promoter is bound to pay interest from the date of agreement for sale entered into between the promoter and the allottee prior to registration under RERA till the handing over of possession. In case the allottee wishes to withdraw from the project, he shall be paid with interest at such rate as may be prescribed in this behalf, including compensation, in the manner as provided under this Act. In case the 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. The learned counsel

submitted that the provisions are arbitrary in nature and contrary to Articles 14 and 19(1)(g). The past obligation of the promoter with the allottee cannot be taken into consideration when the project gets registered under Section 3 and when new time-line is prescribed. In case the project is not complete, then the authority would engage any other agency to complete the project. In such a situation also the promoter is bound to pay interest / compensation to the allottee. This provision is highly arbitrary and unreasonable, according to the petitioners. In a given fact situation, promoter may not have resources to pay interest and compensation and on failure thereto, he would meet with penal consequences, monetarily or even face a jail sentence. These provisions are drastic, harsh and against the business interest of the promoter. This provision too is required to be closely scrutinized by us.

119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract

between the flat purchaser and the promoter. The promoter would tender an application for registration with the necessary preparations and requirements in law. While the proposal is submitted, the promoter is supposed to be conscious of the consequences of getting the project registered under RERA. Having sufficient experience in the open market, the promoter is expected to have a fair assessment of the time required for completing the project. After completing all the formalities, the promoter submits an application for registration and prescribes a date of completion of project. It was submitted that interest be made payable from the date of registration of the project under RERA and not from the time-line consequent to execution of private agreement for sale entered between a promoter and a allottee. It was submitted that retrospective effect of law, having adverse effect on the contractual rights of the parties, is unwarranted, illegal and highly arbitrary in nature.

120. Under the provisions of Section 4(2)(l)(D), the promoter would deposit 70% of the amount realized for the real estate project from the allottees in a separate account which means that 30% of the amount realized by the promoter from the allottees will be retained by him. In such case, if the promoter defaults to hand over possession to the allottee in the

agreed time limit or the extended one, then the allottee shall reasonably expect some compensation from the promoter till the handing over of possession. In case the promoter defies to pay the compensation, then the same would amount to unjust enrichment by the promoter of the hard earned money of the allottees which he utilized. Such provisions are necessary to be incorporated because it was noticed by the Select Committee and the Standing Committee of the Parliament that huge sums of money collected from the allottees were not utilized fully for the project or the amounts collected from the allottees were diverted to other sectors than the concerned project. We do not notice any constitutional impropriety or legal infirmity or unreasonableness in incorporating these provisions under the RERA.

Under Section 17, the promoter is entitled to execute a registered conveyance deed in favour of the allottee. After obtaining occupancy certificate and handing over physical possession to the allotee, it shall be the responsibility of the promoter to hand over necessary documents also. Section 19 figures under Chapter IV (Rights and Duties of Allottees). The provisions of Section 19 prescribe that the allottee shall be responsible to make necessary payment in the manner and within the time

as specified in the agreement for sale. In case the allottee fails to pay the amount to the promoter in time, then he shall be liable to pay interest at such rate as may be prescribed for any delay. These provisions indicate that a balance is struck while framing provisions of RERA with the aim to regulate the real estate sector and bring transparency and professionalism.

121. The thrust of the argument of the learned counsel for the petitioners was that provisions of Sections 3(1), 6, 8, 18 are retrospective / retroactive in its application. In the case of State Bank's Staff Union vs. Union of India and ors.[46] the Apex Court observed in paras 20 and 21 as under :-

> 20. Judicial Dictionary (13th Edn.) 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 transaction or considerations already past.

46 **[(2005) 7 SCC 584]**

21. In Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edition, 2005) the expressions "retroactive" and "retrospective" have been defined as follows at page 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. (Blacks Law Disctionary, 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, The Foundations of European Community Law 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 and antecedents to its passing. (Vol.44 Halsbury's Laws of England, Fourth Edition, Page 8 of 10 page 570 para 921)."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by

the Standing Committee and Select Committee, which submitted its detailed reports. As regards Article 19(1)(g) it is settled principles that the right conferred by sub-clause (g) of Article 19 is expressed in general language and if there had been no qualifying provisions like clause (6) the right so conferred would have been an absolute one.

123. The petitioners have challenged validity of Sections 18(1), (2), (3) and 40. As discussed above and in view of the object and scheme of RERA and considering the law laid down in respect of retrospectivity / retroactivity, we are of the view that the challenge made by the petitioners to these provisions as being violative of Articles 14 and 20 is not sustainable in law. The petitioners have failed to establish that the above stated statutory provisions needs to be struck down. We find that RERA has adequate mechanism, which balances the rights and obligations of the promoter, real estate agent and the allottee. The adjudicatory mechanism is prescribed at each level. The provisions of Section 71(1) refers to power to adjudicate. Such powers will be exercised by a person who has been a District Judge, after holding appropriate inquiry. It was submitted that there is no mechanism for adjudication in respect of amount of interest. If we peruse Section 71(3), it is made clear that adjudicatory

authority would direct payment of compensation or interest as the case may be. Harmonious reading of these provisions would indicate that adequate mechanism and safeguards are prescribed by the RERA.

124. The entire scheme of the RERA is required to be kept in mind. It is already submitted during the course of hearing that in many cases helpless allottees had approached consumer forum, High Courts, Apex Court in a given fact situation of the case. The courts have been passing orders by moulding reliefs by granting interest, compensation to the allottees, and issuing directions for timely completion of project, transit accommodation during completion of project, so on and so forth. Under RERA now this function is assigned to the authority, tribunal. An appeal lies to the High Court. Under one umbrella, under one regulation and one law all the issues are tried to be resolved. Provisions of Section 71 refers to power to adjudicate. A District Judge is conferred with the power to adjudicate compensation under Sections 12, 14, 18 and 19. A promoter could very well put up his case before the adjudicator who deals with the issues in the light of the fact situation of each case. Therefore, there should not be any apprehension that mechanically compensation would be awarded against a promoter on failure to complete the development work.

The proviso to Section 71(1) provides that any person whose complaint in respect of matters covered under Sections 12, 14, 18 and 19 if pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under Section 9 of the Consumer Protection Act, 1986 on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act. Proviso to Section 71(1) reads as under:-

> "**71. Power to adjudicate.** - (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard.
>
> Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986 (68 of 1986), on or before the commencement of this Act he may, with the permission of

such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

125. The proviso to Section 71(1), as quoted above, is clear indicator that even pending complaint before the Consumer Forum could be transferred to the adjudicator under RERA. A submission was advanced that allottee is free to approach whatever forum in respect of the defaults committed, if any, in compliance with the agreement of sale entered into between the promoter and the allottee prior to registration of RERA. In view of the scheme of RERA, we find that this contention of the petitioners cannot be upheld. It will be unreasonable to expect the allottee to resort to proceeding in different forums prior to registration of project in respect of the agreement executed prior to registration under RERA and post registration. Under the scheme of RERA, the adjudicatory mechanism is prescribed under one umbrella. We do not notice any illegality in the same.

Section 71 is framed in the larger interest of the consumers. The adjudicator who would be a judicial member of the rank of District Judge would be dealing with all the issues and the pleas raised by the promoter, allottees and other stakeholders before adjudicating claim for

compensation. The orders are subject to judicial review by higher forum. Therefore, promoter should not have apprehension that they would be remediless or there is no scope under the scheme of the RERA for consideration of their claim.

126. The another plea raised is as to why a promoter shall pay interest for the past contractual rights, in case of failure to complete the project after registration under RERA, till the possession is handed over. Under the scheme of the RERA it is clear by now that a promoter has to self assess and declare time period during which he would complete the project. But in case, inspite of making genuine efforts, a promoter fails to complete the project, then the concerned authorities, adjudicators, forums, tribunals would certainly look into genuine cases and mould their reliefs accordingly. We do not find that on that count the provisions of Section 18(1)(a) are to be declared as contrary and violative of Articles 14 and 19(1)(g). Considering the scheme of the RERA and the provisions of Section 18(1)(b), we are of the view that the same are not contrary to Articles 14 and 19(1)(g) of the Constitution. The provisions cannot be struck down on the ground of challenge that its operation is retroactive in nature. Neither the provisions of Section 18(1)(a) and (b) violate Article 20

of the Constitution. The payment of interest under Section 18 is compensatory in nature [Abati Bezbaruah vs. Director General, Geological Survey of India – **(2003) 3 SCC 148** (para 18) and Alok Shanker Pandey vs. UOI – **(2007) 3 SCC 545** (para 9)].

The provisions of Section 18 must be read with Sections 71 and 72. The adjudicator would consider each case on its merits and unless such cases emerge and decisions are taken by the authority, it would not be appropriate at this stage to hypothetically consider a situation and decide constitutional validity of statutory provisions.

127. It was submitted on behalf of the Union that MOFA provides for interest to be paid in certain cases (Section 8) and the constitutional courts too had granted interest to flat purchasers in case of defaults by the promoters.

The requirement to pay interest under Section 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchasers (Alok Shanker Pandey vs. Union of India (Supra). Even assuming that the interest is penal in nature, levy of interest is not

retrospective but is only based on antecedent facts; it operates prospectively.

The interest payable under Section 18 is as per the definition of "interest" under Section 2(za) Explanation (ii), the same interest that would have been payable by the flat purchaser for delay in payment. Therefore, the payment of interest payable cannot be said to be penal in nature.

128. The legislature has power to make laws with retrospective effect. Therefore, even assuming that RERA or any part thereof operates retrospectively, such retrospective operation would not render it unconstitutional, unless the retrospectivity is shown to be excessive or harsh which injuriously affects a substantive or vested right. The inhibition against retrospective construction of a statute is not a rigid rule and has been held not to apply to a curative statute or a law enacted for the benefit of the community as a whole, which may be held to be retrospective even in the absence of any provision: (Vijay vs. State of Maharashtra – **(2006) 6 SCC 289** – paras 10, 12 and Virender Singh Hooda vs. State of Haryana – **(2004) 12 SCC 588** – para 35. RERA is enacted to protect the interest of consumer in the real estate sector. It was enacted in the public interest.

SECTIONS 22 AND 46 :

129. The learned Senior Counsel Dr. Tulzapurkar appearing for the petitioners submitted that the Authority and the Tribunal ought to have a Judicial Member on its panel. Even the constitution of Selection Committee for selecting Members of Authority was defective. Reliance was placed on the judgment of the Supreme Court in **Union of India vs. R. Gandhi, President, Madras Bar Association (Supra).** The learned counsel submitted that in view of the settled principles of law by the Apex Court, the provisions of Sections 22 and 46 be held to be unconstitutional.

Section 21 refers to composition of Authority. The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government. Section 22 refers to qualifications of Chairperson and Members of Authority. The Chairperson and other Members of the Authority shall be appointed by the appropriate Government on the recommendations of a Selection Committee consisting of the Chief Justice of the High Court or his nominee; the Secretary of the Department dealing with Housing and the Law Secretary, in such manner

as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of Members in urban development, housing, real estate development, infrastructure, economics, technical experts from relevant fields, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration. Section 45 refers to composition of Appellate Tribunal. Section 46 refers to qualification for appointment of Chairperson and Members. It was submitted that Authority under Section 22 and Appellate Tribunal under Section 45 both exercise judicial functions, hence there shall be a Judicial Member on the authority and tribunal.

130. On behalf of the UOI, it was submitted that there is no provisions in the Constitution of India which mandates requirement of a Judicial Member and in fact Article 323A of the Constitution provides that Parliament may constitute Tribunals as per the requirement, “in each case”. It was, therefore, submitted that the authority primarily performs administrative functions and incidentally some quasi-judicial functions. It cannot be said to be a judicial tribunal in that sense. The judgment relied upon by the petitioners dealt with a case where the erstwhile company

jurisdiction of the High Court was sought to be transferred to a Tribunal. The observations of the Apex Court must be read in the light of the said factual scenario.

131. The RERA authority discharges several functions which are envisaged under Sections 32 and 34. The learned ASG appearing for Union of India has placed reliance on several statutes such as the SEBI Act, 1992, Prevention of Money Laundering Act, 2002, Public Premises (Eviction of Unauthorised Occupants) Act, 1971 etc. to show that authorities are constituted under several statutes which do exercise quasi-judicial functions but do not require appointment of a judicial member.

132. We find that provisions of Section 22 do not refer to presence of a Judicial Member. The learned Senior Counsel Mr. Khambata submitted that a quasi judicial proceeding is one in which a lis between two parties with opposing claims is decided. In the absence of a statutory provision to the contrary it is the duty of an authority deciding such a lis to act judicially and the decision of the authority is quasi-judicial. If an authority had the power to do any act that prejudicially affects a person and the authority is required by the statute to act in a judicial manner, even in absence of two

parties and a lis; will be a quasi-judicial act (National Securities Depository Limited vs. Securities and Exchange Board of India (Supra) (paras 11 and 19).

133. In the submissions of the learned Senior Counsel Mr. Khambata there is no requirement of judicial member merely because authority may exercise quasi judicial powers. It is not a requirement of law that in all cases where an authority discharges quasi judicial functions, it must have judicial member as one of its members. It was sought to be contended by the learned counsel Mr. Khambata that petitioners' reliance on the judgment of Madras Bar Association (Supra) was misplaced for the following reasons:

(a) The Supreme Court was considering the case of a National Company Law Tribunal to which the company jurisdiction previously vested in the High Court was trasnferred:

(b) The Apex Court, in this regard, observed in para 120 as under:

"As NCLT takes over the functions of the High Court, the members should as nearly as possible have the same position and status as High Court judges".

(c) The Supreme Court summarized the law in regard to the requirement of judicial members inter alia as follows;

> "106…… (b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a judicial tribunal. This means that such tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the tribunal should have the independence and security of tenure associated with judicial tribunals.
>
> (c) Whenever there is need for "tribunals", there is no presumption that there should be technical members in the tribunals. When any jurisdiction is shifted from courts to tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the tribunals should normally have only judicial members…"

134. In view of the scheme of the RERA and the powers to be exercised by the authority, we find that the authority would be discharging not only administrative functions but also quasi judicial functions. But, then considering the afore-stated submission made on behalf of the UOI and the learned counsel appearing for the respondents, we do not find that a judicial member is mandatorily to be appointed. We do not find that the composition of the Selection Committee could be faulted as contrary to the

judgment in the case of Madras Bar Association (Supra). The challenge to validity of constitution of Selection Committee and qualification of members of authority under Section 22 of RERA fails.

135. In respect of submission of having judicial member on the Appellate Tribunal, we may refer to Section 45 of the RERA which relates to Composition of Appellate Tribunal. It is mandated under Section 45 that Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial Member and other shall be a Technical or Administrative Member. Provisions of Section 46 refers to qualifications for appointment of Chairperson and Members. Section 46 (b) defines a judicial member, which includes a member of Indian Legal Service who had held the post of Additional Secretary on that service or any equivalent post. The learned Senior Counsel Dr. Tulzapurkar submitted that this portion of the provision could be severed and be declared as illegal and contrary to the judgment of the Apex Court in the case of Madras Bar Association (Supra). The provision is contrary to the express provision of Section 45, which mandates that the Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a judicial member.

136. We find that submissions advanced by the learned Senior Counsel Dr. Tulzapurkar deserve consideration. On behalf of the UOI, it was submitted that merely because the nomenclature used is "Judicial Member" would not mean that the said member must have a judicial background. A judicial member for the purposes of RERA must be held to be a person as defined under Section 46. We do not accept this interpretation placed by the learned ASG Mr. Singh.

137. In view of mandate of Section 45, the nature of functioning of the Tribunal, it is mandatory to have a judicial member on the Tribunal. The learned ASG Mr. Singh submitted that the Additional Secretary or person having equivalent post in Indian Legal Service is experienced, knowledgeable and qualified person to hold the post. Under various enactments a tribunal is manned by person from Indian Legal Service and, therefore, the provisions are in tune with the requirements of law and there is no illegality to strike it down. It was submitted that a member of Indian Legal Service who is of the rank of Additional Secretary plays an important role in law making and would even be a part of the Law Commission. Such a person would normally be having an experience of

more than 25 years in service. In the submissions of the counsel, reliance placed on the Judgment in the case of Madras Bar Association (Supra) is not applicable to the facts of the present case. The counsel submitted that an appeal is also provided from the Appellate Tribunal to the High Court under Section 58 of RERA, whereas from the NCLT, the appeal lies directly to the Supreme Court and, therefore, to that extent there is a clear distinction between the scope and scheme of the Tribunals set up under the RERA and the Companies Act, 2013. Reliance is placed on the provisions of Article 323A of the Constitution. The learned counsel, therefore, submitted that provisions of Section 46 are valid and there is no lacuna and defect in enacting the provisions of Section 46.

138. We are in agreement with the submission of Dr. Tulzapurkar. A Member of Indian Legal Service, who has held the post of Additional Secretary of that service or any equivalent post is neither a retired Judge nor qualified to be appointed as a Judge. He can never fall within a definition of "Judicial Member". Section 46(1)(b) being contrary to the express mandate of Section 45 of the RERA is, therefore, bad in law. It is well settled that a Court can sever an unconstitutional provision from an

otherwise constitutional measure (D. S. Nakara vs. Union of India – **(1983) 1 SCC 305** – para 60. We, therefore, hold that expression of the definition relating to member of Indian Legal Service could be severed and be declared as unconstitutional and be struck down accordingly.

Under the scheme of RERA, we find that the Tribunal which has judicial member on it would hear and decide cases in appeal against the decisions taken by the authority concerned. The Tribunal will be discharging judicial / quasi-judicial functions. It is very likely that in a given case it may not appoint a judicial member, who has been a Judge, as one of the members on the Tribunal. This would defeat the purpose of establishing the Tribunal. We are of the view that the entire Section 46 need not be struck down as portion of the definition relating to member of Indian Legal Service could be severed.

139. We, therefore, hold that a Member of an Indian Legal Service holding post of Additional Secretary of that service or an equivalent post, shall not be entitled to be considered for appointment as a Judicial Member on the Appellate Tribunal. To that limited extent we hold that provisions of

Section 46(1)(b) to be contrary to Section 45 of RERA, Article 14 and the principles set down by the Apex Court in the case of Madras Bar Association (Supra).

140. The learned counsel appearing for the petitioners submitted that Sections 18(1), 18(2), 18(3), 40, 59, 60, 61, 63 and 64 refer to penalties to be imposed, operate retrospectively. It was submitted that for non compliance of contractual obligations prior to registration of RERA, penal law cannot be retrospectively made applicable. The promoter will be adversely affected due to this and the same is contrary to law, established principles, fair play and reasonableness. These provisions are violative of Articles 14 and 20 of the Constitution of India.

141. We may refer to Chapter VIII of RERA relating to offences, penalties and adjudication.

Section 59 deals with punishment for non-registration under Section 3.

Section 60 deals with penalty for contravention of Section 4.

Section 61 deals with penalty for contravention of other provisions of the RERA.

Section 62 deals with penalty for non-registration and contravention under Sections 9 and 10.

Section 63 deals with penalty for failure to comply with orders of Authority by promoter.

Section 64 deals with penalty for failure to comply with orders of Appellate Tribunal by promoter.

Section 65 deals with penalty for failure to comply with orders of Authority by real estate agent.

Section 66 deals with penalty for failure to comply with orders of Appellate Tribunal by real estate agent.

Section 67 deals with penalty for failure to comply with orders of Authority by allottee.

Section 68 deals with penalty for failure to comply with orders of Appellate Tribunal by allottee.

The learned counsel appearing for the petitioners submitted that these provisions of penalties operate retrospectively / retroactively and,

therefore, they are violative of Articles 14 and 20 of the Constitution of India. Sections 67 and 68 deal with penalties to be paid by allottee for failure to comply with orders of Authority and Appellate Tribunal. Some of the penalties are to be paid by promoter and real estate agent. It is not that entire Chapter of penalty covers provisions relating to penalty to be imposed / awarded against the promoter alone. The RERA has aimed to balance the rights and obligations of promoter and the allottee while drafting the penal provisions.

On behalf of the petitioners there is no specific challenge raised to legislative competence of Parliament to pass RERA. Therefore, we would not deal with the said issue. We had already discussed that the penalties to be imposed under Chapter VIII of RERA are not retrospective in its operation. Merely because it relates to ongoing projects which get registered with the authority, the present statute cannot be said to be operating retrospective. Events taking place and instances occurring after registration of the project are taken note of under the penal provisions. The authority concerned would be dealing with cases coming before it in respect of projects registered under RERA. Therefore, the Parliament was competent enough to enact provisions under Chapter VIII of RERA. The

challenge raised by the petitioners to the penal provisions under Chapter VIII is merit-less.

We have discussed above the judgments cited in respect of retrospective application of law and considering the scheme of the RERA which was enacted in the larger public interest, we do not find that the provisions referred in above para retrospectively penalize the act done by a person prior to registration under RERA. Therefore, we hold that these provisions are not contrary to Article 14, 19(1)(g) and 20 of the Constitution of India.

142. Chapter IX of RERA refers to finance, accounts, audits and reports. Section 73 refers to grants and loans by Central Government. Section 76 refers to crediting sums realized by way of penalties to Consolidated Fund of India or State account. This would indicate that the penalties imposed are to be deposited in the Consolidated Funds of India or State and not to be paid to a party concerned or an allottee.

143. Section 89 of RERA refers to Act to have overriding effect. Section 89 prescribes that the provisions of this Act shall have effect,

notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

144. Provisions of Section 41 of RERA refers to establishment of Central Advisory Council. Section 42 refers to functions of Central Advisory Council, which reads as under:-

> "**42. Functions of Central Advisory Council.** - The functions of the Central Advisory Council shall be to advise and recommend the Central Government, -
>
> (a) on all matters concerning the implementation of this Act;
>
> (b) on major question of policy;
>
> (c) towards protection of consumer interest;
>
> (d) to foster the growth and development of the real estate sector;
>
> (e) on any other matter as may be assigned to it by the Central Government.
>
> (2) The Central Government may specify the rules to give effect to the recommendations of the Central Advisory Council on matters as provided under sub-section (1).

We have considered the submissions advanced as regards provisions of Sections 38 and 40. For the reasons stated above, we find that the challenge to these provisions is merit-less.

REFERENCE TO PETITIONERS' CASE LAW:

145. In the case of Ritesh Agarwal and anr. Vs. Securities and Exchange Board of India and ors. (Supra), it was observed that ex facie, a penal statute will not have any retrospective effect or retroactive operation. The Supreme Court held that the SEBI (Prohibition of Fraudulent and Unfair Practices relating to Securities Market) Regulations, 1995, could not be invoked if the commission of fraud was complete prior to the date of said Regulations came into force. In para 31 of the said judgment the Supreme Court rejects the contention that the offence was a continuing one which indicate that if the fraud had been a continuing one, the said Regulations would have applied.

In the case of Madras Forgings & Allied Industries v. Suresh Chandra (Supra), the High Court was dealing with an amendment to the Negotiable Instruments Act introducing an offence of which one of the essential ingredients was the drawing of a cheque. In the facts of the said case, the court held that the accused could not be deprived of a defence available to him at the time the cheque was drawn.

The case of Badrinarayan Shankar Bhandari vs. Omprakash Shankar Bhandari (Supra) relates to interpretation of the 2005 Amendment to Section 6 of the Hindu Succession Act, 1956 and does not consider whether retroactive legislation is constitutional or not. The distinction between retrospective and retroactive legislation was made for the purposes of interpretation and not to draw any distinction between retrospective and retroactive legislation from the perspective of constitutionality.

The Apex Court in the case of State of Bombay vs. Vishnu Ramchandra (Supra) concluded that the fact that part of the requisites for operation of the statute were drawn from a time antecedent to its passing did not make the statute retrospective, so long as the action was taken after the Act came into force.

In the case of Prakash and ors. Vs. Phulavati and ors.(Supra), in para 19, the Apex Court stated as under :-

> "19. Interpretation of a provision depends on the text and the context. Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given."

In this case the Apex Court applied the principle that in the absence of any express provision or implied intention an amendment dealing with a substantive right is prospective since there was neither any express provision or intendment in the amendment to Section 6 of the Hindu Succession Act giving it retrospective effect. Therefore the application of the Hindu Succession Act in such a situation was found to be prospective and not retrospective.

146. The petitioners further placed reliance on the judgment in the case of Pyare Lal Sharma vs. Managing Director[47] to contend that Article 20 of the Constitution applies even to civil cases. We do not find that the interpretation placed by the petitioners on the said judgment is correct one. It is settled position that a case is only an authority for what it actually decides and not even for what may seem to follow logically from it (Bank of India v. K. Mohandas (Supra) – paras 54 – 57).

Based on the judgment in the case of K. T. Plantation Private Limited and anr. vs. State of Karnataka (Supra), it was submitted that the provisions of RERA are contrary to Article 300-A of the Constitution as the

47 **[(1989) 3 SCC 448]**

provisions divest the promoters from their right to enjoy peaceful possession of their property and, therefore, they are arbitrary in nature. Under the scheme of the RERA we do not find any provision which acquires the property of the promoter in any way. A promoter always remains a promoter. The property of the promoter remains his property. The RERA authority would complete remaining development work and hand over the possession to the allottees concerned and then the original promoter steps in again. Therefore the submissions advanced on behalf of the petitioners that the RERA confines their right to hold possession of property and injuncts them is not tenable.

In the case of Cellular Operators Association of India and ors. vs. Telecom Regulatory Authority of India and ors. (Supra), the Supreme Court held that there cannot be any dispute in respect of settled principles governing provisions of Articles 14, 19(1)(g) read with Article 19(6). But a proper balance between the freedom guaranteed and the social control permitted by Article 19(6) must be struck in all cases. We find that RERA strikes balance between rights and obligations of promoter and allottees. It is a beneficial legislation in the larger public interest occupying the field of regulatory nature which was absent in this country so far.

The learned counsel cited the judgment in the case of Delhi Transport Corp. vs. D.T.C. Mazdoor Congress and ors. (Supra). The learned counsel cited this Judgment to express that the authority would exercise unlimited power.

Under the scheme of RERA, we do not find that authority has unlimited powers to exercise. The orders passed by the authority are amenable to jurisdiction of Tribunal which would be manned by judicial members. It is informed that the Maharashtra State constituted authority having a judicial member on it. The orders passed by the Tribunal are amenable to judicial review before the High Court under Section 58 of RERA. Therefore, the apprehension expressed on behalf of the petitioners that the authority and Tribunal would exercise uncontrolled /undefined power is baseless and cannot be accepted.

In the case of Kesavananda Bharati v. State of Kerala[48] , the Apex Court observed as follows :

> "1535. In exercising the power of judicial review, the courts cannot be oblivious of the practical needs of the Government. The door has to be left open for trial and error."

48 **[AIR 1973 SC 1461]**

In the case of Government of Andhra Pradesh and ors. vs. P. Laxmi Devi (Smt.) (Supra), the Apex Court observed that adjudication must be done within the system of historically validated restraints and conscious minimization of the judges' personal preferences. The court must not invalidate a statute lightly, for, as observed above, invalidation of a statute made by the legislation elected by the people is a grave step.

In the case of State of Bihar vs. Kameshwar Singh[49] , the Apex Court observed that, "…The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence…..". In the case of Mohd. Hanif Quareshi vs. State of Bihar[50], the Constitution Bench of the Supreme Court observed that, "…… The courts, it is accepted, must presume that the legislature understands and correctly appreciate the needs of its own people, that its laws are directed to problems made manifest by experience and that its discrimination are based on adequate grounds…..". It is further observed that, the reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of

49 **[AIR 1952 SC 252]**
50 **[AIR 1958 SC 731]**

view of the persons upon whom the restrictions are imposed or upon abstract considerations.

In the case of M.R.F. Ltd. Vs. State of Kerala[51] , it is observed that, restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public. What is reasonable will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances. A balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

Every sovereign legislature possesses the right to make retrospective legislation. The power to make laws includes power to give it retrospective effect. In Craies on Statute Law (7th Edition), at page 396, it is observed that, "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".

51 **[(1998) 8 SCC 227]**

147. In the case of Shayara Bano vs. Union of India and ors. (Supra), the Apex Court in para 99 observed that, "Judgment in the case of State of A.P. vs. McDowell and co. [(1996) 3 SCC 709] was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this Judgment, McDowell itself is per *incuriam*, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell are, therefore, no longer good law".

148. We perused the report of the Standing Committee. The Standing Committee on Urban Development (2013-2014) submitted its draft report in respect of the Real Estate (Regulation and Development) Bill, 2013 (Thirtieth Report to Fifteenth Lok Sabha). Paras 1 and 2 of Chapter – I titled as "Background" read as under :-

> "1. Over the past few decades, the demand for housing has increased manifold. In spite of Government's efforts through various schemes, it has not been able to cope up with the increasing demands. Taking advantage of the situation, the private players have taken over the real estate sector with no

concern for the consumers. Though availability of loan both through private and public banks have become easier, the high rate of interest and the higher EMI has posed additional financial burden on the people with the largely unregulated Real Estate and Housing Sector. Consequently the consumers are unable to procure complete information or enforce accountability against builders and developers in the absence of an effective mechanism in place. At this juncture the need for the Real Estate (Regulation and Development) Bill is felt badly for establishing an oversight mechanism to enforce accountability of the Real Sector and providing adjudication machinery for speedy dispute redressal.

2. The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated. There is, thus, absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is inadequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums."

The Standing Committee had gone through the written memorandum and suggestions of number of organizations, individuals on the subject matter. The organizations included Developers' Associations, Consumers' Organizations, Institute of Real Estate and Finance, Design & Engineering Consultants Pvt. Ltd., Builders' Federation, National Real Estate Development Council, Apartment Owners Association, Advocates and Solicitors, Indian Institute of Public Administration (Delhi Regional Branch), Department of Economics, University of Mumbai, Confederation of Indian Industry, Federation of Indian Chambers of Commerce and Industry. The representatives from these organizations / the individuals appeared before the Committee for the oral evidence.

149. We perused the report of the Select Committee on the Real Estate (Regulation and Development) Bill, 2013 presented to the Rajya Sabha on 30th July, 2015. Paras 3, 4, 5 and 8 of the introductory note by the Chairman of the Select Committee reads as under :

> "3. The Committee held 17 sittings in all. Out of these, 8 sittings were held outside Delhi and remaining were held in Delhi. The Committee heard 445 witnesses in all at different

places representing different categories / groups of stake holders i.e., representatives of consumers /Residents Welfare Associations, promoters / builders, banking / financial institutions (finances), representatives from Housing Departments of all States and Union Territories and law firms and other independent experts in the field of real estate. The list of witnesses examined is placed as Annexure -I of the Report.

4. The Committee had its first meeting held on the 12th May, 2015 wherein the Committee decided to issue a Press Communique inviting suggestions / views from organizations and public at large. The Committee also decided to undertake visits to Kolkata, Bengaluru, Mumbai and Shimla with a view to interact with various stakeholders in different parts of the country. As per the decision of the Committee, a Press Communique was issued on 2nd June 2015. The Committee in all received 273 Memoranda. The list of individuals / organizations who submitted Memoranda before the Committee is placed at Annexure – II of the Report.

5. In the Second Meeting held on the 26th May, 2015 the Committee heard the views of the Secretary, Ministry of Housing and Urban Poverty Alleviation. The Secretary gave a background of the Bill and apprised the Committee about the important amendments proposed to the Bill on the basis of recommendations made by the Department Related

Parliamentary Standing Committee. The purport behind the present amendments proposed by the Government was also explained to the Committee.

8. The Committee also heard the representatives of the Reserve Bank of India along with leading banking and non-banking financial institutions of the country as financial institutions play an important role in development of real estate sector."

150. We have perused the Rajya Sabha Debates on the Real Estate (Regulation and Development) Bill, 2015. It was informed to the House that the real estate sector is the second largest employer in the country only next to agriculture besides accounting for 9% of the GDP. The construction sector supports 250 ancillary industries. About 10 lakh people buy houses every year with an investment of about Rs.13.5 lakh crores. Information made available for 27 major cities, including 15 Capital cities showed that 2349 to 4488 new housing projects were launched every year between 2011 and 2015. In 27 cities, during the last five years, a total investment value was of Rs.13,69,820 crores. Therefore, it was desirable to have transparent and accountable system in the real estate sector of the country.

From the debate, we noticed that while tabling the Bill, the then Hon'ble Minister of Urban Development, Government of India apprised the House that as per the latest information, the Ministry of Corporate Affairs informed that a total of 76,044 companies were involved in the real estate sector. More than 17,000 companies were engaged in Delhi itself. The demand for granting infrastructure status for real estate sector, which includes affordable housing, could be considered only when there is an effective regulatory mechanism. It was further informed that there is a huge potentiality for foreign investment in the sector. A-day-long workshop was also conducted for different stakeholders and various issues were discussed. It was further informed by the Hon'ble Minister to the House that there is unsold housing stock of over 10 lakh houses in major cities on account of increase in prices due to cost and time overruns and dwindling investor confidence.

151. We have perused Real Estate License Law, New York Department of State, which prescribes Rules and Regulations for license to be granted for real estate brokers, agents, salepersons. A provision refers to revocation and suspension of licenses. A provision is prescribed for

powers and duties of the State real estate board which is established within the Department of State.

We have also perused the provisions of real estate commission of the State of Washington which regulates real estate brokers and managing brokers. The said law provides for adjudicative proceeding.

We have even perused the provisions of Australian law on the subject, namely, Property, Stock and Business Agents Act, 2002. Said Act refers to complaints, power to suspend license, inquiries and investigation, taking of disciplinary action, recovery of monetary penalty, powers of authorized officer, offences of persons etc.

From the material placed on record during the course of hearing, we could realize that a very large number of people spread over various cities across the country have invested their hard earned money in the real estate project for securing roof over their heads. For millions of people a dwelling house in this country is still a dream come true. The respective Governments, Corporations have declared beneficial schemes for low and high income groups for allotment of residential houses. Considering the demand for residential houses in the ever growing urban areas of the

country, the reality sector plays a vital role. The real estate sector has grown significantly in the country. Its activities are largely unregulated. It was informed that in certain States, including the State of Maharashtra, a regulatory law was enacted. The consumers of this sector had to approach various adjudicatory forums for getting redressal of their grievances. Their hard earned money, life time savings were invested in many such projects. We were informed that many projects are lying idle for various reasons due to which public at large, consumers of the real estate sector are adversely affected financially and otherwise. A question of accountability towards consumers remained to be answered. A comprehensive law was a need of the day. The real estate sector requires professionalism and commitment to its consumers. The Parliament, therefore, thought it fit to comprehend under one umbrella regulatory mechanism for a disciplined growth of the real estate sector.

152. It needs to be emphasized that RERA law is not to be considered as anti promoter. It is a law for regulation and development of the real estate sector. Under the scheme of the RERA, the promoter's interests are also safeguarded and there is a reason for the same. Unless a professional promoter making genuine efforts is not protected, then very purpose of

development of real estate sector would be defeated. Therefore, the apprehensions expressed on behalf of the petitioners in this regard are not well founded.

153. During the course of hearing, on behalf of the petitioners, it was strongly canvassed that certain provisions of RERA sound harsh, unreasonable and contrary to the constitutional spirit. Taking into consideration the object, purpose and the scheme of RERA, which was enacted in the larger public interest, we have placed our interpretation to the specific provisions of RERA. We have harmoniously considered interpretational aspects of some of the provisions with a balanced approach so as to advance the object and purpose of RERA. The constitutional challenge to the provisions was based on academic interpretation of law. The practical implementation of these provisions will have to be seen and observed as and when cases would be dealt with by the Authorities, Tribunals and the High Courts.

154. We are conscious of the fact that actual implementation of RERA needs to be closely monitored in years to come. RERA is not a law relating to only regulatory control over the promoter but its object is to develop the

real estate sector, particularly, the incomplete projects across the country. The problems are enormous and it is time to take a step forward to fulfill the dream of the Father of the Nation – Mahatma Gandhi to wipe every tear from every eye.

PER R. G. KETKAR, J.

155. I have perused the draft judgment prepared by my esteemed brother and I entirely agree with the conclusions drawn by him, but since the approach in arriving at a conclusion is as important as the conclusion itself, and particularly in matters involving vital constitutional issues having a far-reaching impact on fundamental freedoms of the people of this country and on the social objectives which the State is enjoined to achieve under the Directive Principles of State Policy, I consider it my duty to express my views in my own way for arriving at those conclusions. I wish to add my own reasons in support of those conclusions. My brother has recorded the submissions advanced by the learned Counsel appearing for the parties. I, therefore, do not propose to pinpoint every now and then what the Counsel for the parties have urged before us, for I apprehend that a faithful reproduction of all that has been said will add to the length, not necessarily to the weight, of this judgment.

156. The petitioners have challenged *vires* of first proviso to Section 3(1), Section 3(2)(a), explanation to Section 3, Section 4(2)(l)(C), Section 4(2)(l)(D), Section 5(3) and the first proviso to Section 6, Sections 7, 8, 18, 22, 38, 40, 46, 59, 60, 61, 63, 64 of the Real Estate (Regulation and Development) Act, 2016 (for short, 'RERA') as also Rules 3(f), 4, 5, 6, 7, 8, 18, 19, 20 and 21 of the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 (for short, 'Maharashtra Rules of 2017').

157. In the judgment proposed by my learned brother, these provisions have been reproduced. It is, therefore, unnecessary for me to reproduce these provisions. As the controversy raised in these Petitions involve interpretation of various provisions of RERA, it is desirable to refer to **"Principles of Statutory Interpretation"** by Justice G.P. Singh, 13th Edition. At page-35 onwards, the learned Author has discussed in extenso aspect of interpretation of statute, and it reads thus :

158. When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in *pari materia,* the general scope of the statute and the mischief that it was intended to remedy [as held in *R.S. Raghunath v. State of Karnataka, AIR 1992 SC 81]*. This statement of the rule was later fully adopted by the Constitution Bench of the Apex Court in *Union of India v Elphinstone Spinning and Weaving Co. Ltd., (2001) 4 SCC 139*.

159. It is a rule now firmly established, [as held in *Philips India Ltd. v. Labour Court, (1985) 3 SCC 103]*, that the intention of the Legislature must be found by reading the statute as a whole. The rule is referred to as an "elementary rule" by Viscount Simonds,; a "compelling rule" by Lord Somervell of Harrow [*as held in AG v. HRH Prince Ernest Augustus, (1957) 1 ALL ER 49]*; and a "settled rule" by B.K. Mukherjee, J. [as held in *Poppatlal Shah v. State of Madras, AIR 1953 SC 274]*. Said Lord Davey: "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter" [as held in *Canada Sugar Refining Co. v. R, (1898) AC 735]*. It is spoken of construction

"*ex visceribus actus." [as held in Newspapers Ltd. v. Industrial Tribunal, U.P. AIR 1957 SC 532].* "It is the most natural and genuine exposition of a statute", laid down Lord Coke "to construe one part of a statute by another part of the same statute, for that best ex-presseth the meaning of the makers."[as held in *Punjab Beverages Pvt. Ltd. v. Suresh Chand, 1978(2) SCC 144]*. To ascertain the meaning of a clause in a statute the court must look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself, [as held in *Queen v. Eduljee Byramjee, (1846) 3 MIA 468]*, and, "the method of construing statutes and I prefer", said Lord Greene, M.R. "is to read the statute as a whole and ask oneself the question: 'In this state, in this context, relating to this subject-matter, what is the true meaning of that word'? [as held in *Re, Bidie (deceased), (1948) 2 ALL ER 995]*. As stated by Sinha, C.J.I.: "The court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs." [as held in *State of W.B. v. Union of India, AIR 1963 SC 1241]*.

160. In this context Chandrachud, C.J.I., as His Lordship then was, observed : "one must have regard to the scheme of the fasciculus of the

relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other interrelated provision becoming otiose or devoid of meaning." [as held in *O.P. Singla v. Union of India, (1984) 4 SCC 450]*.

161. While construction of the words, sufficient regard has to be given to the setting in which they are found [as held in *Vaccum Oil Co. v. Secretary of State, AIR 1932 PC 168]*. It is also settled principle of law that the Courts while pronouncing upon the constitutionality of a statute start with a presumption in favour of constitutionality and prefer a construction which keeps the statute within the competence of the Legislature [as held in *Corporation of Calcutta v. Liberty Cinema, AIR 1965 SC 1107]* and the onus lies on the persons assailing the Act to prove that it is unconstitutional.

162. In **Heydon's case [76 ER 637]** it was held that for the sure and true interpretation of a statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

1st – What was the common law before the making of the Act ?

2nd – What was the mischief and defect for which the common law did not provide ?

3rd – What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and

4th – The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

163. A law may be unconstitutional on a number of grounds, such as, :

(i) Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Article 143: *Special Reference* No.1 of 1964, In re AIR 1965 SC 745 (145): 1965(1) SCR 413)

(ii) Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the 7th Sch., read with the connected articles. (Ref. *Special Reference No.1 of 1964, In re* AIR 1965 SC 745 : (1965) 1 SCR 413)

(iii) Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Article 301. (Ref. Atiabari Tea Co. v. State of Assam, AIR 1961 SC 232)

(iv) In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State. (State of Bombay v. R.M.D. Chamarbaughwala, AIR 1957 SC 699)

(v) That the legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. (Hamdard Dawakhana Wakf v. Union of India : AIR 1960 SC 554 : 1960 Cri LJ 735.

(vi) Manifest arbitrariness or unreasonableness as explained in Cellular Operators Association of India vs Telecom Regulatory Authority Of India, (2016) 7 SCC 703.

164. In **Namita Sharma v. Union of India, (2013) 1 SCC 745**, the Supreme Court observed in paragraph-18 thus :

"18. The principles for adjudicating the constitutionality of a provision have been stated by this Court in its various

judgments. Referring to these judgments and more particularly to Ram Krishna Dalmia v. Justice S.R. Tendolkar : AIR 1958 SC 538 and Budhan Chodhry v. State of Bihar : AIR 1955 SC 191 : 1955 Cri LJ 374, the author Jagdish Swarup in his book Constitution of India (2nd Edition, 2006) stated the principles to be borne in mind by the Courts and detailed them as follows:

(Ram Krishna Dalmia case (supra), pp.547-48, para 11).

> "(a) that a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
>
> (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
>
> (c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
>
> (d) that the legislature is free to recognize decrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
>
> (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
>
> (f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the

> presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

165. In the case of **N.K. Bajpai v. Union of India and another, (2012) 4 SCC 653**, the appellants had challenged *vires* of Section 129(6) of the Customs Act, 1962 which stipulates that on demitting office as member of the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT') a person shall not be entitled to appear before CESTAT, on the ground that it is violative of fundamental rights guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution of India. In paragraph-12, the Apex Court held that **"**..... Firstly, the challenger must show that the restriction imposed, at least prima facie, is violative of the fundamental right. It is then that the burden lies upon the State to show that the restriction applied is by due process of law and is reasonable. If the restriction is not able to satisfy these tests or either of them, it will vitiate the law so enacted and the action taken in furtherance thereto is unconstitutional. ….....**"** In paragraph-13, Apex Court referred to paragraph-45 of the decision of S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 where it was observed that **"**….. The anticipated danger should

not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. ….."

166. In paragraph-32, the Apex Court observed that for two different reasons it was unable to hold that the restriction imposed under Section 129(6) of the Act is unreasonable or ultra vires. Firstly, it is not an absolute restriction. It is a partial restriction to the extent that the persons who have held the office of the President, Vice-President or other members of the Tribunal cannot appear, act or plead before that Tribunal. In modern times, there are so many courts and tribunals in the country and in every State, so that this restriction would hardly jeopardise the interests of any hardworking and upright advocate. The right of such advocate to practice in the High Courts, District Courts and other tribunals established by the State or the Central Government other than CESTAT remains unaffected. Secondly, such a restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. In other words, if the restriction is partial and is intended to serve the larger public interest, it cannot be said to be an unreasonable restriction.

167. In paragraph-34 reference was made to the decision of

Constitution Bench of Apex Court in Municipal Corporation of the City of Ahmedabad v. Jan Mohammed Usmanbhai, (1986) 3 SCC 20. In paragraph-17 of that decision it was observed that **"**..... Obviously it is left to the court in case of a dispute to determine the reasonableness of the restrictions imposed by the law. In determining that question the court cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. ….."

168. Reference was further made to paragraph-15 of State of Madras v. V.G. Row, AIR 1952 SC 196 : 1952 Cri LJ 966, where it was observed that **"**....It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.**"**

169. In paragraph-19 of the same decision it was observed that **"**The expression 'in the interest of general public' is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. ….."

170. In paragraph-20 it was observed that **"**The tests of reasonableness have to be viewed in the context of the issues which faced the legislature. In the construction of such laws and in judging their validity, courts must approach the problem from the point of view of furthering the social interest which it is the purpose of the legislation to promote. They are not in these matters functioning in vacuo but as part of society which is trying, by the enacted law, to solve its problems and furthering the moral and material progress of the community as a whole. ….."

171. In paragraph-23 it was observed that **"**It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation and that in order to pass the test of permissible classification two conditions must be fulfilled, namely,

(i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) such differentia must have rational relation to the object sought to be achieved by the statute in question. The classification, may be founded on different basis, namely, geographical, or according to objects or occupations or the like and what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks it, to show that there has been a clear violation of the constitutional principles. The courts must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed against problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest, and finally that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common rapport, the history of the times and may assume every state of facts which can be conceived to be existing at the time of legislation.**"**

172. In **Government of Andhra Pradesh v P. Laxmi Devi, (2008) 4 SCC 720**, the Apex Court exhaustively dealt with how and when the power of the Court to declare the statute unconstitutional should be exercised. Paragraphs-38 to 52 and 55 read thus :

> **"**38. This is a very important question because invalidating an Act of the Legislature is a grave step and should never be lightly taken. As observed by the American Jurist Alexander Bickel "judicial review is a counter majoritarian force in our system, since when the Supreme Court declares unconstitutional a legislative Act or the act of an elected executive, it thus thwarts the will of the representatives of the people; it exercises control, not on behalf of the prevailing majority, but against it." (See A. Bickel's `The Least Dangerous Branch').
>
> 39. The Court is, therefore, faced with a grave problem. On the one hand, it is well settled since Marbury vs. Madison (supra) that the Constitution is the fundamental law of the land and must prevail over the ordinary statute in case of conflict, on the other hand the Court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people.
>
> 40. The Court must always remember that invalidating a statute is a grave step, and must therefore be taken in very rare and exceptional circumstances.
>
> 41. We have observed above that while the Court has power to declare a statute to be unconstitutional, it should exercise great judicial restraint in this connection. This requires clarification, since, sometimes Courts are perplexed as to whether they should declare a statute to be constitutional or unconstitutional.
>
> 42. The solution to this problem was provided in the classic essay of Prof James Bradley Thayer, Professor of Law of

Harvard University entitled 'The Origin and Scope of the American Doctrine of Constitutional Law' which was published in the Harvard Law Review in 1893. In this article, Professor Thayer wrote that judicial review is strictly judicial and thus quite different from the policy-making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of government. Full and free play must be permitted to that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Thus, for Thayer, legislation could be held unconstitutional only when those who have the right to make laws have not merely made a mistake (in the sense of apparently breaching a constitutional provision) but have made a very clear one, so clear that it is not open to rational question. Above all, Thayer believed, the Constitution, as Chief Justice Marshall had observed, is not a tightly drawn legal document like a title deed to be technically construed; it is rather a matter of great outlines broadly drawn for an unknowable future. Often reasonable men may differ about its meaning and application. In short, a Constitution offers a wide range for legislative discretion and choice. The judicial veto is to be exercised only in cases that leave no room for reasonable doubt. This rule recognizes that, having regard to the great, complex ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is not clearly in violation of a constitutional provision is valid even if the Court thinks it unwise or undesirable. Thayer traced these views far back in American history, finding, for example, that as early as 1811 the Chief Justice of Pennsylvania had concluded: "For weighty reasons, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this Court, and every other Court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the

Constitution is so manifest as to leave no room for reasonable doubt" vide Commonwealth ex. Rel. O'Hara vs. Smith 4 Binn. 117 (Pg.1811).

43. Thus, according to Prof. Thayer, a Court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the Court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is flagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is broad separation of powers under the Constitution, and the three organs of the State the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realize that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed.

44. Apart from the above, Thayer also warned that exercise of the power of judicial review "is always attended with a serious evil", namely, that of depriving people of "the political experience and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors" and with the tendency "to dwarf the political capacity of the people and to deaden its sense of moral responsibility".

45. Justices Holmes, Brandeis and Frankfurter of the United States Supreme Court were the followers of Prof. Thayer's philosophy stated above. Justice Frankfurter referred to Prof Thayer as "the great master of constitutional law", and in a lecture at the Harvard Law School observed "if I were to name one piece of writing on American Constitutional Law, I would pick Thayer's once famous essay because it is the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions". (vide H. Phillip's `Felix Frankfurter Reminisces' 299-300, 1960).

46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to

be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways, e.g. if a State legislature makes a law which only the Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the Court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide Mark Netto vs. Government of Kerala and others AIR 1979 SC 83 (para 6). Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise.

47. In a dissenting judgment in Bartels vs. Iowa 262 US 404 (1923), Holmes J. while dealing with a State statute requiring the use of English as the medium of instruction in the public schools (which the majority of the Court held to be invalid) observed,

> "I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried".

48. The Court certainly has the power to decide about the constitutional validity of a statute. However, as observed by Frankfurter, J. in West Virginia vs. Barnette, 319 U.S. 624 (1943), since this power prevents the full play of the democratic process it is vital that it should be exercised with rigorous self restraint.

49. In this connection we may quote from the article titled 'The Influence of James B Thayer Upon the Work of Holmes, Brandeis & Frankfurter' by Wallace Mendelson published in 31

Vanderbilt Law Review 71 (1978), which is as follows:

> "If, then, the Thayer tradition of judicial modesty is outmoded if judicial aggression is to be the rule in policy matters, as in the 1930's some basic issues remain. First, how legitimate is government by judges ? Is anything to be beyond the reach of their authority ? Will anything be left for ultimate resolution by the democratic processes for what Thayer called "that wide margin of considerations which address themselves only to the practical judgment of a legislative body" representing (as courts do not) a wide range of mundane needs and aspirations ? The legislative process, after all, is a major ingredient of freedom under government.
>
> Legislation is a process slow and cumbersome. It turns out a product laws that rarely are liked by everybody, and frequently little liked by anybody. When seen from the shining cliffs of perfection the legislative process of compromise appears shoddy indeed. But when seen from some concentration camp as the only alternative way of life, the compromises of legislation appear but another name for what we call civilization and even revere as Christian forbearance.
>
> Let philosophy fret about ideal justice. Politics is our substitute for civil war in a constant struggle between different conceptions of good and bad. It is far too wise to gamble for Utopia or nothing to be fooled by its own romantic verbiage. Above all, it knows that none of the numerous clashing social forces is apt to be completely without both vice and virtue. By give and take, the legislative process seeks not final truth, but an acceptable balance of community interests. In this view the harmonizing and educational function of the process itself counts for more than any of its legislative products. To intrude upon its pragmatic adjustments by judicial fiat is to frustrate our chief instrument of social peace and political stability.
>
> Second, if the Supreme Court is to be the ultimate policy-making body without political accountability how

is it to avoid the corrupting effects of raw power? Can the Court avoid the self-inflicted wounds that have marked other episodes of judicial imperialism? Can the Court indeed satisfy the expectations it has already aroused?

A third cluster of questions involves the competence of the Supreme Court as a legislative body. Can any nine men master the complexities of every phase of American life which, as the post 1961 cases suggest, is now the Court's province? Are any nine men wise enough and good enough to wield such power over the lives of millions? Are courts institutionally equipped for such burdens? Unlike legislatures, they are not representative bodies reflecting a wide range of social interest. Lacking a professional staff of trained investigators, they must rely for data almost exclusively upon the partisan advocates who appear before them. Inadequate or misleading information invites unsound decisions. If courts are to rely upon social science data as facts, they must recognize that such data are often tentative at best, subject to varying interpretations, and questionable on methodological grounds. Moreover, since social science findings and conclusions are likely to change with continuing research, they may require a system of ongoing policy reviews as new or better data become available. Is the judiciary capable of performing this function of supervision and adjustment traditionally provided by the legislative and administrative processes?

Finally, what kind of citizens will such a system of judicial activism produce a system that trains us to look not to ourselves for the solution of our problems, but to the most elite among elites: nine Judges governing our lives without political or judicial accountability? Surely this is neither democracy nor the rule of law. Such are the problems addressed by and at least in the minds of jurists like Holmes, Brandeis, and Frankfurter resolved by Thayer's doctrine of judicial restraint".

We respectfully agree with the views expressed above, and endorse Thayer's doctrine of self restraint.

50. In our opinion judges must maintain judicial self-restraint while exercising the power of judicial review of legislation.

> "In view of the complexities of modern society", wrote Justice Frankfurter, while Professor of Law at Harvard University, "and the restricted scope of any man's experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases. The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitation in personal experience and imagination operate as limitations of the Constitution. These insights Mr. Justice Holmes applied in hundreds of cases and expressed in memorable language:
>
> "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong."

(See Frankfurter's 'Mr. Justice Holmes and the Supreme Court')

51. In our opinion the legislature must be given freedom to do experimentations in exercising its powers, provided of course it does not clearly and flagrantly violate its constitutional limits.

52. As observed by Brandeis, J. of the U.S. Supreme Court in his dissenting judgment in New State Ice Co. vs. Liebmann, 285 U.S. 262 (1931) :

> "The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. … There must be power in the States and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. …

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation."

55. In Keshvananda Bharati vs. State of Kerala, AIR 1973 SC 1461 (vide para 1547) Khanna J. observed:

> "1535. In exercising the power of judicial review, the Courts cannot be oblivious of the practical needs of the government. The door has to be left open for trial and error."

173. In the case of **Saghir Ahmad and another v. State of U.P. and others, AIR 1954 SC 728**, the Constitution Bench of Apex Court was considering the validity of U.P. State Road Transport Act (2 of 1951) which became law on and from 10.2.1951. In paragraph-14, the Apex Court noted that the legislation has excluded all private bus owners from the field of transport business from plying motor vehicles on the Buland-Shahr-Delhi route. *Prima facie* it was an infraction of the provisions of Article 19(1)(g) of the Constitution and the question was whether this invasion by the Legislature of the fundamental right can be justified under the provisions of clause (6) of Article 19 on the ground that it imposes reasonable restrictions on the exercise of the right in the interests of the general public.

174. In paragraph-15 it was observed that Article 19(6) of the Constitution of India, as it stands after the amendment of 1951, makes a three-fold provision by way of exception to or limitation upon clause (1)(g) of Article 19. In the first place it empowers the State to impose reasonable restriction upon the freedom of trade, business, occupation or profession in the interest of the general public. In the second place it empowers the State to prescribe the professional and technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. Thirdly and that is the result of the Constitution (First) Amendment Act of 1951 – it enables the State to carry on any trade or business either by itself or through a corporation owned or controlled by the State to the exclusion of private citizens wholly or in part. In the present case, we are not concerned with the second and third category. The High Court held that the creation of a State monopoly in regard to transport service, as has been done under the Act, could be justified as reasonable restrictions upon the fundamental right enunciated in Article 19(1)(g) of the Constitution of India imposed in the interest of the general public. The question was whether the view taken by the High Court was right. In paragraph-16 it was observed thus :

> **"**16. To answer this question three things will have to be considered. The first is, whether the expression "restriction" as used in article 19(6) and for the matter of that in the other sub-clauses of the Article, means and includes total deprivation as well ? **If the answer is in the affirmative, then only the other two questions would arise, namely, whether these restrictions are reasonable and have been imposed in the interests of the general public ?** ….....**"**
>
> [Emphasis supplied]

175. In the case of **Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, (2016) 7 SCC 353** and in particular paragraphs-57, 60, 62 and 65 where it is observed that the right under Article 19(1)(g) is not absolute in terms but is subject to reasonable restrictions under clause (6). Reasonableness has to be determined having regard to nature of right alleged to be infringed, purpose of the restriction, extent of restriction and other relevant factors. The Court has to try to strike a just balance between the fundamental rights and the larger interest of the society. The Court interferes with a statute if it clearly violates the fundamental rights. The Court proceeds on the footing that the legislature understands the needs of the people. The Constitution is primarily for the common man. While examining whether the impugned provisions of the statute and rules amount to reasonable restrictions and

are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as "doctrine of proportionality". Article 19(1)(g) guarantees fundamental rights on one hand and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others.

176. In paragraph-65 it was observed that in a plethora of decisions of the Apex Court it is held that the expression "reasonable" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interest of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object. At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of

view of the persons upon whom the restrictions are imposed or upon abstract considerations.

177. In **Indian Handicrafts Emporium and others v Union of India and others, (2003) 7 SCC 589,** the Supreme Court observed in paragraph-98 that **"**It is now well-settled that for the purpose of interpretation of statute the entire statute is to be read in entirety. The purport and object of the Act must be given its full effect.**"** In paragraph-100 reference was made to Chief Justice of A.P. v. L.V.A. Dixitulu, (1979) 2 SCC 34, and paragraph-66 of that report was extracted to the following effect:

> **"**66. The primary principle of interpretation is that a Constitutional or statutory provision should be construed "according to the intent of they that made it" (Coke). Normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequence that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basis scheme and framework of the statute as a whole, each portion throwing light,

> on the rest, the purpose of the legislation, the object sought to be achieved, and the consequence that may flow from the adoption of one in preference to the other possible interpretation."

178. In paragraph-101, paragraph-231 of Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609 was extracted which is to the following effect:

> **"**231. During the last several years, the 'golden rule' has been given a go-by. We now look for the "intention" of the legislature or the 'purpose' of the statute. first, we examine the words of the statute. If the words are precise and cover the situation on hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-on relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequence.**"**

179. In paragraph-102, the decision of District Mining Officer v. Tata Iron & Steel Co., (2001) 7 SCC 358 was referred. In paragraph-18 it was observed that **"**..... It is impossible even for the most imaginative legislature to forestall exhaustively situations and circumstances that may emerge after enacting a statute where its application may be called for.

Nonetheless, the function of the courts is only to expound and not to legislate. Legislation in a modern State is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully in the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. ……."

180. Bearing in mind the above legal principles, let us consider the background of enacting RERA. Before coming into force of RERA, the regulation of the construction and sale of apartments in Maharashtra was governed by the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short, 'MOFA'). MOFA provided for the statutory rights and obligations of promoters and flat purchasers/allottees (Sections 3, 4, 5, 6, 7 etc.).

However, a very important area was unfortunately not included in the statutory scheme of the MOFA i.e. completion of construction of buildings/projects. This was a serious lacuna in the law given the increasing number of projects where construction was either substantially delayed or not completed at all.

181. There was no accountability as to entity or persons responsible and/or liable for delivering on several projects that were advertised and in respect of which amounts had been collected from individual purchasers. What was promised in advertisements/broachers, such as amenities, specifications of premises etc. was without any basis, often without plans having been sanctioned, and was far from what was finally delivered. Amounts collected from purchasers were either being diverted to other projects, or were not used towards development at all, and the developer would often be left with no funds to finish the project despite having collected funds from the purchasers. For a variety of reasons including lack of funds, projects were stalled and never completed and individual purchasers who had invested their life-savings or had borrowed money on interest, were left in the lurch on account of these stalled projects. Individual purchasers were often left with no choice but to take illegal

possession of premises offered to them under the guise of fit-outs etc., and without the developer having obtained an occupation/completion certificate, which in turn would be on account of a range of different acts of omission and commission such as non-adherence to the sanctioned plans, excess construction, lack of having obtained the requisite permissions etc. Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.

182. The real estate sector has largely been opaque, with consumers often unable to procure complete information, or enforce accountability against builders and developers in the absence of effective regulation. The biggest fallout affecting the sector has been (1) the delay in project completion; (2) diversion of funds collected from buyers, (3) one-sided contracts due to power asymmetry; (4) reneging on contractual commitments by both the developers and the buyers; and (5) constraints in financing and investment options available to the sector, thereby affecting

its long-tern growth.

183. In the affidavit dated 4.10.2017 filed on behalf of Union of India, the factors in the process of enactment of RERA have been set out. It is stated therein that the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs) had sought an opinion from the Ministry of Law & Justice, Government of India on the competence of Parliament to enact the Real Estate (Regulation and Development) Bill (for short, 'said Bill'. The Department of Legal Affairs, Ministry of Law & Justice, Government of India had opined that the Parliament had the competence to enact the Bill and the Legislative Department, subsequently, vetted the Draft Bill. After approval of the Union Cabinet on 4.6.2013, said Bill was introduced in Rajya Sabha on 14.8.2013.

184. On 23.9.2013 said Bill was referred to the Standing Committee of Urban Development for examination. The Standing Committee sought public opinion through press release and analysed the memoranda/suggestions received from various stake holders/experts, developer associations such as Confederation of Indian Industry (CII),

Federation of Indian Chambers of Commerce and Industry (FICCI), Confederation of Real Estate Developers' Associations of India (CREDAI), National Real Estate Development Council (NAREDCO) and other associations working in the field of real estate, on various provisions of the Bill.

185. The Standing Committee also had the briefing of the representatives of the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs), Ministry of Finance, Reserve Bank of India, National Housing Bank, Ministry of Consumer Affairs, Ministry of Law and Justice (Department of Legal Affairs and Legislative Department), State Bank of India and other banks. The Committee also heard views of NGOs working in the field of real estate and sought clarifications on various issues.

186. On 13.2.2014, the report of the Standing Committee was tabled in Rajya Sabha. On 17.2.2014 said report was tabled in Lok Sabha. The Union Cabinet approved the official amendment to the said bill on 7.4.2015 based on the recommendations of the Committee of Urban Development and stake holders suggestions. On 6.5.2015 said Bill and Official

Amendment, 2015 were referred to the Select Committee of Rajya Sabha for examination and submission of report. The Select Committee had 17 sittings, out of which 8 sittings were held outside Delhi, namely at Mumbai, Kolkata, Bengaluru and Shimla. The Committee heard 445 witnesses in all at different places representing different categories/groups of stake holders i.e. representatives of promoters/builders, consumers/resident welfare associations, banking/financial institutions, representatives of State Governments, law firms/legal experts and other independent experts in the field of real estate. The Select committee also invited public comments through a press communique vide which 273 memoranda were received. It also heard the erstwhile Ministry of Housing & Urban Poverty Alleviation (now Ministry of Housing & Urban Affairs), Ministry of Law & Justice, Reserve Bank of India amongst others. On 30.7.2015, the Select Committee tabled its report along with said Bill in Rajya Sabha. On 9.12.2015, said Bill as reported by the Select Committee was approved by the Union Cabinet. Said Bill was listed for consideration and for the purpose of passing in Rajya Sabha on 22nd and 23rd December, 2015. On 10.3.2016, RERA was passed by Rajya Sabha and by Lok Sabha on 15.3.2016. RERA was published in Gazette of India on 26.3.2016 for public information. Sections 2, 20-39, 41-58, 71-78, 81-92 were notified for

commencement w.e.f. 1.5.2016. Sections 3 to 19, 40, 59-70, 79 and 80 were notified for commencement w.e.f. 1.5.2017.

187. The Statement of Objects and Reasons of RERA read thus :

> **"Statement of Objects and Reasons.--** The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.
>
> 2. In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardisation of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.
>
> 3. The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of

information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardisation in the sector, thus paving the way for accelerated growth and investments in the long run.

4. The Real Estate (Regulation and Development) Bill, 2013, *inter alia*, provides for the following, namely:-

(a) to impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority;

(b) to make the registration of real estate project compulsory in case where the area of land proposed to be developed exceed five hundred square meters or number of apartments proposed to be developed exceed eight;

(c) to impose an obligation upon the real estate agent not to facilitate sale or purchase of any plot, apartment or building, as the case may be, without registering himself with the Authority;

(d) to impose liability upon the promoter to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation;

(e) to establish an Authority to be known as the Real Estate Regulatory Authority by the appropriate Government, to exercise the powers conferred on it and to perform the functions assigned to it under the proposed legislation;

(f) the functions of the Authority shall, *inter alia*, include--

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

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

(iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation;

(g) to establish an Advisory Council by the Central Government to advice and recommend the Central Government on –

(i) matters concerning the implementation of the proposed legislation;

(ii) major questions of policy;

(iii) protection of consumer interest;

(iv) growth and development of the real estate sector;

(h) to establish the Real Estate Appellate Tribunal by the appropriate Government to hear appeals from the direction, decision or order of the Authority or the adjudicating officer;

(i) to appoint an adjudicating officer by the Authority for adjudging compensation under sections 12, 14, 18 and 19 of the proposed legislation;

(j) to make provision for punishment and penalties for contravention of the provisions of the proposed legislation and for non-compliance of orders of Authority or Appellate Tribunal;

> (k) to empower the appropriate Government to supersede the Authority on certain circumstances specified in the proposed legislation;
>
> (l) to empower the appropriate Government to issue directions to the Authority and obtain reports and returns from it.
>
> 5. The Notes on clauses explain in detail the various provisions contained in the Real Estate (Regulation and Development) Bill, 2013.
>
> 6. The Bill seeks to achieve the above objectives.**"**

188. The preamble of RERA reads thus:

> **"**An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment of building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.**"**

Validity of first proviso to Section 3(1), Sections 4(2)(l)(C), 4(2)(l)(D), 6, 7 and 8:

189. Real Estate Projects (for short, 'projects') can be divided into two parts, namely, (1) the projects that are launched after coming into force of RERA and (2) the projects launched before coming into force of RERA and for which completion certificate is not issued i.e. on going projects.

(1) the projects that are launched after coming into force RERA :

190. The learned Counsel for the petitioners did not advance detail submissions in respect of these projects. Even otherwise in respect of these projects, the promoter has to make an application to the Authority for registration of the project by enclosing documents and information as per Section 4(2)(a) to (m). In particular, the promoter has to enclose an authenticated copy of the approvals and commencement certificate from the Competent Authority obtained in accordance with the laws as may be applicable for the project mentioned in the application, and where the project is proposed to be developed in phases, an authenticated copy of the approvals and commencement certificate from the Competent Authority for each of such phases [as per clause (c)]; the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the Competent Authority [as per clause (d)]; the plan of development works to be executed in the proposed project and the proposed facilities to be provided thereof including fire fighting facilities, drinking water facilities, emergency evacuation services, use of renewable energy [as per clause (e)]; the location details of the project, with clear

demarcation of land dedicated for the project along with its boundaries including the latitude and longitude of the end points of the project [as per clause (f)]; proforma of the allotment letter, agreement for sale, and the conveyance deed proposed to be signed with the allottees [as per clause (g)]; the number, type and the carpet area of apartments for sale in the project along with the area of the exclusive balcony or verandah areas and the exclusive open terrace areas apartment with the apartment, if any [as per clause (h)]; the number and areas of garage for sale in the project [as per clause (i)]; a declaration supported by an affidavit, which shall be signed by the promoter or any person, authorised by the promoter stating (A) that he has a legal title to the land on which the development is proposed along with legally valid documents with authentication of such title, if such land is owned by another person; (B) that the land is free from all encumbrances, or as the case may be details of the encumbrances on such land including any rights, title, interest or name of any party in or over such land along with details; and (C) the time period within which he undertakes to complete the project or phase thereof, as the case may be.

191. The promoter has to deposit 70% of the amounts realised for the project from the allottees from time to time in the separate account to be

maintained in a Scheduled Bank to cover the cost of construction and the land cost and shall be used only for that purpose. Interest accrued thereon is credited to that account. The promoter retains with himself 30% realised from the allottees. The provisions thereto enable the promoter to withdraw the amount subject to satisfying the conditions stipulated therein as per Section 4(2)(l)(D). As per Section 5(3) the registration granted under Section 5 is valid for a period declared by the promoter under Section 4(2)(l)(C) for completion of the project or phase thereof, as the case may be. In short, when the project or phase is registered all the permissions are in place. The promoter is fully equipped with to start the construction.

192. Interplay between Sections 4 and 5 shows that it is entirely upon the promoter to prescribe the time period for completing the project or phase in terms of Section 4(2)(l)(C). It is for the promoter, depending upon the nature and size of the project, to prescribe the time period for completing the project or phase. If the promoter prescribes unreasonably long period or unrealistic time for completing the project or phase, the prospective buyers will not come forward. It, therefore, follows that the promoter will have to prescribe a reasonable time period keeping in mind the nature and size of the project. Having regard to the fact that all the

permissions are in place, as also the promoter giving time period depending upon the nature and size of the project, it cannot be said that the provisions of Sections 3, 4 and 5 are in any way unreasonable in respect of the projects which are launched after the commencement of RERA.

(2) On going projects :

193. The learned Counsel for the petitioners have mainly advanced the submissions as regards first proviso to Section 3(1) and Sections 4(2)(l)(C), 4(2)(l)(D), 6, 7 and 8 of RERA. In my opinion, all these provisions are required to be construed harmoniously. When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy. It is a rule now firmly established that the intention of the Legislature must be found by reading the statute as a whole. Every clause of a statute has to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter. To ascertain the meaning of a clause in a statute the Court has to

look into the whole statute. To ascertain the meaning of a clause in a statute the court must look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself. An isolated consideration of a provision leads to some other interrelated provision becoming otiose or devoid of meaning.

194. First proviso to Section 3(1) lays down that projects that are ongoing on the date of commencement of the Act and for which the completion certificate has not been issued, the promoter has to make an application to the Authority for registration of the said project within a period of three months from the date of commencement of the Act. Sub-section (2) of Section 3 lays down that no registration of the real estate project shall be required in respect of clauses (a) to (c). Explanation thereto lays down that for the purpose of Section 3, where the 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 the Act for each phase separately. Section 4(2) requires the promoter to enclose documents set out in clauses (a) to (m).

195. In the affidavit dated 4.10.2017 filed on behalf of Union of India, it is clearly stated that in respect of on-going projects the promoter

can prescribe fresh time period independent of the time period stipulated in the agreements for sale entered into between the promoter and the allottees at the time of registration of the project as per Section 4(2)(l)(C). Thus the promoter is given opportunity for completing the project or phase, as the case may be by prescribing fresh time period so that he is not visited with the penal consequences laid down under RERA. If the promoter has all the permissions specified in Section 4(2) in place and is permitted to prescribe new time period, I do not find that first proviso to Section 3(1) is unreasonable. That apart, in terms of first proviso to Section 6, the Authority has discretion, in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, to extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year.

196. I agree with my learned brother that Sections 6, 7, 8 and 37 of RERA are required to be construed harmoniously and the authority, in view of Sections 6, 7(3), 8, 37, can take appropriate decision as per the facts obtaining in each case.

197. Even after granting extension as per first proviso to Section 6 the promoter is not in a position to complete the project or phase, as the case may be, the said contingency is taken care of. Under Section 7, the Authority, on receipt of a complaint or *suo motu* is empowered to revoke the registration after being satisfied that -

(a) the promoter has made default in doing anything required by or under the Act or the Rules or the Regulations made thereunder;

(b) the promoter has violated 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.

198. Instead of revoking the registration under sub-section (1), under sub-section (3) the Authority may permit the registration 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. Thus, even in case the Authority finds that the registration of the promoter is liable to be revoked still discretion is conferred upon the Authority to permit registration to remain in force albeit upon imposing conditions. Likewise under Section 8, the Authority may

continue registration of the promoter for carrying out all the remaining development works. Thus when the Authority is satisfied about the circumstances contemplated by first proviso to Section 6, it has ample power to continue the registration of the project under Section 7(3) and Section 8. Under section 37 the Authority, for the purpose of discharging its functions under the provisions of the Act or Rules or Regulations made thereunder, is empowered to issue such directions from time to time, to the promoters or to the allottees, as the case may be, as it may consider necessary and such direction shall be binding on all concerned. In my opinion, Sections 6, 7, 8 and 37 are required to be construed harmoniously so as to effectuate the object of RERA.

199. Mr. Kamdar relied upon paragraphs-42 to 48, 53 to 59, 61, 64, 66, 82, 89 and 96 of ***Cellular Operators Association of India vs Telecom Regulatory Authority Of India, (2016) 7 SCC 703.*** Mr. Chinoy relied upon paragraph-23 of **Saghir Ahmad** ***(supra)*** and paragraph-49 of ***Rustom Cavasjee Cooper v. Union of India, 1970(1) SCC 248.*** Mr. Chinoy also relied upon paragraphs-12, 49, 52, 55, 63 to 65 and 70 of ***Cellular Operators Association of India (supra).*** They contended that first proviso to Section 3(1), first proviso to Section 6 and Section 8 are illegal and

unconstitutional, inasmuch as they constitute unreasonable, manifestly arbitrary and excessive restriction on the fundamental rights of the promoter to carry on occupation, trade or business.

200. As noted earlier, in the case of **Saghir Ahmed** (supra) the Legislation had excluded all private bus owners from the field of transport business from plying motor vehicles on the Buland-Shahr-Delhi route. In other words total prohibition was imposed on all the private bus owners from plying motor vehicles on that route. In paragraphs-15 and 16, the Apex Court dealt with Article 19(1)(g) and 19(6) and held that Article 19(6) makes a three-fold provision by way of exception to or limitation upon clause (1)(g) of Article 19. In the first place it empowers the State to impose reasonable restriction upon the freedom of trade, business, occupation or profession in the interest of the general public. In paragraph-16 it was observed that whether the expression "restriction" as used in Article 19(6) and for the matter of that in other sub-clauses of the Article, means and includes total deprivation as well. If the answer is in the affirmative, then only the other two questions would arise, namely, whether these restrictions are reasonable and have been imposed in the interests of the general public. In the present case, total prohibition is not imposed

upon the rights of the promoter thereby violating fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India. The other two questions, namely, whether these restrictions are reasonable and have been imposed in the interest of the general public would not arise. RERA regulates the construction activities without imposing total prohibition.

201. In **R.C. Cooper's** case (supra), the Apex Court was considering validity of Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 8 of 1969 promulgated on July 19, 1969, and the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 which replaced the Ordinance with certain modifications. The petitioner contended that these provisions impaired his rights guaranteed under Articles 14, 19 and 31 of the Constitution of India and are on that account invalid.

202. In paragraph-56 the question whether the provisions of Sections 4 & 5 of Act 22, of 1969 and the other related provisions of the Act impaired the fundamental freedoms under Article 19(1)(f) & (g) was considered. By Section 4 the entire undertaking of each named bank vested in the Union, and the Bank was prohibited from engaging in the business of

banking in India and even in a foreign country, except where by the laws of a foreign country banking business owned or controlled by Government could not be carried on, the named bank was entitled to continue the business in that country. The business which the named banks carried on was -- (1) the business of banking as defined in Section 5(b) of the Banking Regulation Act, 1949, and business incidental thereto; and (2) other business which by virtue of Section 6(1) they were not prohibited from carrying on, though not part of or incidental to the business of banking. By Act 22 of 1969 the named banks (14 banks specified in the First Schedule) could not engage in business of banking as defined in Section 5(b) of the Banking Regulation Act, 1949, but could engage in other forms of business. By the Act, however, the entire undertaking of each named bank vested in the new corporation set up with a name identical with the name of that Bank, and authorised to carry on banking business previously carried on by the named bank, and its managerial and other staff was transferred to the corresponding new bank. The newly constituted corresponding bank was entitled to engage in business described in Section 6(1) of the Banking Regulation Act, and for that purpose to utilize the assets, goodwill and business connections of the existing bank.

203. In paragraph-57 it was noted that the named banks were declared entitled to engage in business other than banking : but they had no assets with which that business could be carried on, and since they were prohibited from carrying on banking business, by virtue of Section 7 of the Reserve Bank of India Act, they could not use in their title the words "Bank" or "Banking", and even engage in "non-banking business" in their old names. A business organization deprived of its entire assets and undertaking, its managerial and other staff, its premises, and even its name, even if it has a theoretical right to carry on non-banking business, would not be able to do so, especially when even the fraction of the value of its undertaking made payable to it as compensation, was not made immediately payable to it.

204. In paragraph-60 reference was made to the decision of Saghir Ahmad's case. In paragraph-64 it was observed that by Section 15(2)(e) of the Act, the Banks were entitled to engage in business other than banking. But by the provisions of the Act they were rendered practically incapable of engaging in any business. By the provisions of the Act, a named bank could not even use its name, and the compensation which was to be given was, in

the absence of agreement, to be determined by the Tribunal and paid in securities which were to mature not before ten years. A named bank may, if it agrees to distribute among the share-holders the compensation which it may receive, be paid in securities an amount equal to half the paid-up share capital, but obviously the fund would not be available to the Bank.

205. In paragraph-65 it was observed that where restrictions imposed upon the carrying on of a business were so stringent that the business could not in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable. Reference was made to the decision of Mohammad Yasin v. the Town Area Committee, Jalalabad, and another, AIR 1952 SC 115.

206. In paragraph-67 it was observed that if compensation paid was in such a form that it is not immediately available for restarting any business, declaration of the right to carry on business other than banking became an empty formality, when the entire undertaking of the named banks was transferred to and vested in the new banks together with the premises and the names of the banks, and the named banks were deprived of the services of its administrative and other staff.

207. In paragraph-68, it was held that the restriction imposed upon the right of the named banks to carry on "non-banking" business was unreasonable.

208. In paragraph-71 it was observed that by the definition of "existing bank" in Section 2(d) of the Act, fourteen named banks in the First Schedule were, out of many commercial banks engaged in the business of banking, selected for special treatment, in that the undertaking of the named banks was taken over, they were prevented from carrying on in India and abroad banking business and the Act operated in practice to prevent those banks engaging in business other than banking.

209. In paragraph-74, reference was made to the object of Act 22 of 1969. In paragraph-77 it was observed thus:

> “77. But two other grounds in support of the plea of impairment of the guarantee of equality clause require to be noticed. The fourteen named banks are prohibited from carrying on banking business--a disability for which there is no rational explanation. Banks other than the named banks may carry on banking business in India and abroad: new banks may be floated for carrying on banking business, but the named banks are prohibited from carrying on banking business. Each named bank had even as claimed on behalf of the Union, by its superior management established an extensive business organization, and each bank had deposits exceeding Rs. 50 crores. The

> undertakings of the banks are taken over and they are prohibited from doing banking business. In the affidavit filed on behalf of the Union no serious attempt is made to explain why the named banks should be specially selected for being subjected to this disability."

210. In the case of **Cellular Operators Association of India** (supra), the appellants/Telecom operators had instituted Writ Petitions in the Delhi High Court challenging the validity of the Telecom Consumers Protection (Ninth Amendment) Regulations, 2015 framed by the Telecom Regulatory Authority of India (for short, 'TRAI'). The Regulations were notified on 16.10.2015 and were to take effect from 1.1.2016. The amendment was made purportedly in the exercise of powers conferred by Section 36 read with Section 11 of the Telecom Regulatory Authority of India Act, 1997. By the amendment, every originating service provider who provides cellular mobile telephone services was made liable to credit only the calling consumer (and not the receiving consumer) with one rupee for each call drop (as defined), which takes place within its network, upto a maximum of three call drops per day. The service provider was also to provide details of the amount credited to the calling consumer within four hours of the occurrence of a call drop either through SMS/USSD message. In the case of a post-paid consumer, such details of amount credited in the account of the calling consumer were to be provided in the next bill.

211. The Apex Court referred to the paper called "Technical Paper on call drops in cellular network" issued by TRAI on 13.11.2015. In that TRAI specifically adverted to the fact that the call drops take place due to variety of reasons. It was pointed that one of the reasons was due to the consumer's own fault, and that 36.9% of call drops are attributable to consumer faults. The High Court dealt with the challenge to the Regulation on two grounds, namely, (1) the ground of being *ultra vires* the parent Act, and (2) the ground that the Regulation was otherwise unreasonable and manifestly arbitrary. The High Court repelled the challenge. The High Court held that the power vested in TRAI under Section 36(1) to make Regulations is wide and pervasive, and that the Regulation was made to ensure quality of service extended to the consumer by the service provider, it would fall within Section 36(1) read with Section 11(1)(b)(v). The High Court rejected the contention that the compensation provided under the Regulation amounts to imposition of penalty, since compensation as provided under the Regulation was only notional compensation to consumers who suffered as a result of call drops. The High Court also negatived the contention about impossibility of

identification of the reason for the call drop inasmuch as these reasons were network related, and that was not disputed by telecom equipment manufacturers like M/s. Nokia and M/s. Ericsson. The High Court also held that the Regulation attempted to balance the interest of consumers with the interest of service providers by limiting call drops that are to be compensated to only three and also mandating that only the calling consumer and not the receiving consumer was liable to be so compensated. The High Court also negatived the contention of manifest arbitrariness and upheld the Regulations and Writ Petitions were dismissed.

212. In paragraph-36, the Apex Court referred to the decision in BSNL v. Telecom Regulatory Authority of India : (2014) 3 SCC 222 and extracted paragraphs-89, 99 and 100 of that decision. In paragraph-89 of BSNL (supra) it was held that under sub-section (1) of Section 36, the TRAI can make Regulations to carry out the purposes of the TRAI Act specified in various provisions of the TRAI Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the Regulations must be consistent with the TRAI Act and the Rules made thereunder.

213. In paragraph-37 it was observed that the impugned Regulation referred to Section 11(1)(b)(i) and (v) as the source of power under which the impugned Regulation was framed.

214. In paragraphs-40 and 41, the Apex Court held that the Regulation did not fall under Section 11(1)(b)(i) & (v). It was held that the Regulation does not carry out the purpose of the Act and must be held to be *ultra vires* the Act on this score. In paragraph-48, the Apex Court dealt with the submissions advanced on behalf of the respondent that the Regulation was framed in public interest. While accepting the contention that TRAI may have framed the Regulation in the interest of general public, it was noted that apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. The Regulation must, in order to pass constitutional muster, be as a result of intelligent care and deliberation, that is, the choice of a course which reason dictates. Any arbitrary invasion of a fundamental right cannot be said to contain this quality. A proper balance between the freedoms guaranteed and the control permitted under Article 19(6) must be struck in all cases before the impugned law can be said to be a reasonable restriction in the public interest.

215. In paragraph-49, it was observed that the technical paper dated 13.11.2015 showed that an average of 36.9% can be call drops owing to the fault of the consumer. If this is so, the Regulation's very basis was destroyed. The Regulation was based on the fact that the service provider is 100% at fault. This being a case it was clear that the service provider was made to pay for call drops that may not be attributable to his fault, and the consumer receives compensation for a call drop that may be attributable to the fault of the consumer himself, and that makes the Regulation a Regulation framed without intelligent care and deliberation.

216. In paragraph-52 it was observed that the language of the Regulation is definite and unambiguous. Paragraph-19 of the Explanatory Memorandum to the Regulation made it clear that the Authority has come to the conclusion that call drops were instances of deficiency in service delivery on the part of the service provider. It was thus unambiguously clear that the Regulation was based on the fact that the service provider was alone at fault and must pay for that fault. In these circumstances, to read a proviso into the Regulation that it will not apply to consumers who are at fault themselves is not to restrict general words to a particular

meaning, but to add something to the provision which does not exist, which would be nothing short of the court itself legislating. The Apex Court, therefore, did not accept the contention of the learned Attorney General that the Regulation must be read down in the manner suggested by him.

217. In paragraph-53, the Apex Court dealt with the contention advanced on behalf of the respondent that the Regulation would be worked in such a manner that the service provider would be liable to pay only when it is found that it is at fault. After referring to a decision of Collector of Customs v. Nathella Sampathu Chetty, AIR 1962 SC 316, in paragraph-54 the Apex Court repelled the contention advanced on behalf of the respondent that the Regulation would be administered so that the service provider would be liable under it only when it is at fault for call drops. It is in that context in paragraph-55, the Apex Court observed that orderly growth of the telecom sector cannot be ensured or promoted by a manifestly arbitrary or unreasonable Regulation which makes a service provider pay a penalty without it being necessarily at fault.

218. In paragraphs-56 and 57, the Apex Court dealt with the contention advanced on behalf of the respondent that the Regulation was

framed keeping in mind the small consumer, that is, a person who has a pre-paid SIM Card with an average balance of Rs. 10/- at a time, and that the Regulation goes a long way to compensate such person. The other contention was that though the service providers were making huge profits they are not pouring in enough funds for infrastructural developments. The Apex Court observed that the motive for the Regulation may well be what the Attorney General says it is, but that does not make it immune from Article 14 and the twin tests of Article 19(6). The Authority framing the Regulation must ensure that its means are as pure as its ends - only then will Regulations made by it pass constitutional muster.

219. In paragraph-57 it was held that whether the service providers make profits or losses cannot be said to be relevant for determining whether the Regulation is otherwise arbitrary or unreasonable. It is always open to the Authority, with the vast powers given to it under the TRAI Act, to ensure, in a reasonable and non-arbitrary manner, that service providers provide the necessary funds for infrastructure development and deal with them so as to protect the interest of the consumer.

220. In paragraph-60, the Apex Court dealt with the submissions

advanced on behalf of the appellants that 2% allowance of call drops on the basis of averaging call drops per month had been allowed to them by the Standards of Quality of Service of Basic Telephone Service (Wireline) and Cellular Mobile Telephone Service Regulations, 2009 dated 20.3.2009 (for short, "Quality of Service Regulations"). It was observed that this would amount to the Authority penalizing the service provider even when it complies with another Regulation made under the same source of power, and for this reason alone, the Regulation must be held to be bad as being manifestly arbitrary. On behalf of the respondent it was contended that Quality of Service Regulations and Regulations made to benefit consumers must be viewed separately, as they are distinct Regulations in parallel streams. It was also contended that the 2% average allowance for call drops was different and distinct from paying compensation for call drops inasmuch as, conceivably, in a given set of facts, call drops may take place extensively in a given sector but not in other sectors so that an average of 2% per month is yet maintained, but the service provider would be penalized as it had not been able to maintain a 3% standard laid down qua deficiency of service in individual towers leading to call drops. However, the persons who suffer in the sector in which call drops are many and frequent would then have no protection. The submissions of the respondent

were repelled on the ground that Quality of Service Regulation are made under Section 11(1)(b)(v), which is the very Section which is claimed to be the source of the Regulation. Both the Regulations deal with the same subject matter and both Regulations are made in the interest of the consumer. If an average of 2% per month is allowable to every service provider for call drops, and it is the admitted position that all service providers, short of Aircel, and that too in a very small way, have complied with the standard, penalizing a service provider who complies with another Regulation framed with reference to the same source of power would itself be manifestly arbitrary and would render the Regulation to be at odds with both Articles 14 and 19(1)(g).

221. In paragraph-62 it was observed that the Quality of Service Regulations and the Consumer Regulations must be read together as part of a single scheme in order to test the reasonableness thereof. The countervailing advantage to service providers by way of the allowance of 2% average call drops per month, which has been granted under the Quality of Service Regulations, could not have been ignored by the Regulation so as to affect the fundamental rights of the appellants, and having been so ignored, would render the Regulation manifestly arbitrary

and unreasonable.

222. It is in that context in paragraph-63, the Apex Court observed that no facts were shown which would indicate that a particular area would be filled with call drops thanks to the fault on the part of the service providers in which consumers would be severely inconvenienced. The mere *ipse dixit* of the learned Attorney General, without any facts being pleaded to this effect, cannot possibly make an unconstitutional Regulation constitutional. The Apex Court held that a strict penal liability laid down on the erroneous basis that the fault is entirely with the service provider is manifestly arbitrary and unreasonable. Also, the payment of such penalty to a consumer who may himself be at fault, and which gives an unjustifiable windfall to such consumer, is manifestly arbitrary and unreasonable.

223. In paragraph-64, the Apex Court referred to the decision of Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise, (2016) 3 SCC 643 and extracted paragraph-35. In paragraph-35 of that decision, the Apex Court dealt with the circumstances of force majeure which may prevent a bona fide assessee from paying the duty in time and on given factual circumstances despite there being no fault on the part of the assessee in making the deposit of duty in time, a mandatory penalty of

an equivalent amount of duty would be compulsorily leviable and recoverable from such assessee and this would be extremely arbitrary and violative of Article 14.

224. In paragraph-65, the Apex Court held that a mandatory penalty is payable by the service provider for call drops that may take place which are not due to its fault, and may be due to the fault of the recipient of the penalty, which is violative of Articles 14 and 19(1)(g).

225. In paragraph-70, the Apex Court noted that if an individual consumer were to go to the Consumer Forum for compensation for call drops, he would have to prove that the call drop took place due to the fault of the service provider. He would further have to prove that he has suffered a monetary loss for which he has to be compensated, which the Explanatory Memorandum itself says is impossible to compute. The Regulation completely avoids the adjudicatory process, and legislatively lays down a penal consequence to a service provider for a call drop taking place without the consumer being able to prove that he is not himself responsible for such call drop and without proof of any actual monetary loss.

226. In **Cellular Operators Association of India** (supra), the Apex Court categorically held that the impugned Regulation did not fall under Section 11(1)(b)(i) & (v) as it was not made to ensure compliance with the terms and conditions of the licence nor has it been made to lay down any standard of quality of service that needs compliance. The impugned Regulation is *de hors* Section 11 but cannot be said to be inconsistent with Section 11 of the Act. It was also held that far from carrying out the purposes of the Act, a Regulation is made contrary to such purposes, such Regulation cannot be said to be consistent with the Act, for it must be consistent with both the letter of the Act and the purposes for which the Act has been enacted. The Apex Court held that the impugned Regulation did not carry out the purpose of the Act and was *ultra vires* the Act on this score.

227. In my opinion the facts obtaining in the case of **Cellular Operators Association of India** (supra) and in the present case are materially different. In the present case, Union of India has contended that RERA is enacted under Entries 6, 7 and 46 of List III-Concurrent List of the Seventh Schedule of the Constitution of India. RERA is not enacted under Entry 42 of List III-Concurrent List of the Seventh Schedule of the

Constitution of India. The petitioners have not challenged the legislative competence in enacting RERA. They have also not contended that the impugned legislation does not fall under Entries 6, 7 and 46 of List III-Concurrent List of the Seventh Schedule of the Constitution of India. In fact no argument was advanced on behalf of the petitioners in that regard.

228. Mr. Kamdar submitted that the provisions of Section 8 read with Sections 6 and 7 in so far as they relate to completion of the remaining development works by making funds available through sale of unsold flats is also exfacie confiscatory and expropriatory without payment of compensation. Section 6 contemplates lapsing of registration. Section 7 contemplates revocation of registration by taking over the real estate project by Authority under Section 8. Section 8 does not contemplate or provide for any handing back of the possession to the promoter, which was taken by Authority while exercising power thereunder. Section 8 authorizes the Authority to expropriate the property of the promoter and is, therefore, violative of Article 300-A.

229. Mr. Kamdar relied upon following decisions :

(i) **Rajiv Sarin v. State of Uttarakhand, (2011) 8 SCC 708**, and in particular paragraphs-69, 77, 78 and 82 to 84;

(ii) **K.T. Plantation v. State of Karnataka, (2011) 9 SCC 1**, and in particular paragraphs-119, 120, 189, 192, 219 to 221(e); and

(iii) **Cellular Operators Association of India v. TRAI, (2016) 7 SCC 703**, and in particular paragraphs-40 to 48, 53 to 59, 61, 64, 65, 66, 82, 89 and 96.

230. It is not possible to accept this submission. As rightly contended by the learned Counsel for the respondents, the power under Section 8 must be read as limited to the purpose of completion of the project. But within this purpose there are wide powers to ensure completion of construction. The Authority can reappoint the original promoter if it thinks. However someone else could also take over the obligation of the promoter to construct pursuant to the mandate given by the Authority. Obligation to construct is not a property right under Article 300-A and, therefore, there is no expropriation or acquisition of property. The promoter's rights qua the property/building/apartments are not extinguished. There is no divesting of the title of the promoter over the property and vesting it in the Authority The promoter continues to be the promoter and after completion of the construction, has to execute a registered conveyance deed in favour of the allottee under Section 17 and also hand over possession to the allottees.

231. It was contended that upon revocation of the registration, the

promoter is barred from accessing its website in relation to that project and his name is specified in the list of defaulters and photograph is displayed on the website. The Authority can inform other Real Estate Regulatory Authority in other States and Union Territories about such revocation of the registration. The Authority is empowered to freeze the accounts by directing the bank holding the project bank account specified under clause (D) of clause (l) of sub-section (2) of Section 4. It was submitted that the consequences stipulated under Section 7(4) are drastic and are violative of fundamental rights guaranteed to the promoter under Article 19(1)(g) of the Constitution of India.

232. I do not find any merit in this submission. Revocation of the registration takes place only upon satisfaction of the Authority as regards grounds (a) to (c) of sub-section (1) of Section 7. The Authority, before taking action of revocation of registration has to give not less than 30 days notice in writing stating the ground on which it is proposed to revoke the registration. The Authority has to consider any cause shown by the promoter against the proposed revocation. Any promoter aggrieved by the decision of the Authority has a remedy of appeal before the Appellate Tribunal. Against the decision of the Appellate Tribunal, the promoter has a

remedy of filing an Appeal in the High Court on any one or more of the grounds specified under Section 100 of C.P.C. The power conferred on the Authority under sub-section (4) of Section 7 cannot be said to be unbridled and unguided. It is only in the event of the Authority satisfying as regards one or the other ground under clauses (a) to (c) of sub-section (1) of Section 7, it can revoke the registration. The object behind debarring the promoter from accessing its website and also specifying his name in the list of defaulters and displaying his photograph on the website of the Authority and informing other Real Estate Regulatory Authority in other States and Union Territories about the revocation of the registration is cautioning other public from dealing with such promoter. The purpose behind this is absolutely salutary and no fault can be found with this object. Likewise after revocation of registration the promoter cannot be permitted to deal with the amounts deposited in dedicated bank account as specified in Section 4(2)(l)(D). 70% amount deposited under Section 4(2)(l)(D) covers the cost of construction and the land cost and has to be utilized for that purpose only. The object behind clause (c) of sub-section (4) of Section 7 is also salutary and the amounts deposited in the dedicated account can be utilized by the Authority for carrying out remaining development works which was left behind by the promoter.

233. Mr. Kamdar relied upon the decision of **Rajiv Sarin and another v State of Uttarakhand and others, (2011) 8 SCC 708.** In that case, the appellants had instituted Writ Petition in the High Court of Judicature at Allahabad. The High Court dismissed the Petition by holding that the appellants were not entitled to any compensation even after their forest land was acquired by the Government merely because the appellants had not derived any income from the said forest. The Apex Court considered Article 300-A of the Constitution from paragraph-66 onwards.

234. In paragraph-74, the Apex Court noted the case of the State that the statutory scheme under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (for short, "UPZALR Act") is provided in Section 39(1) (e) in respect of forests. The said section provides for two methods for computation of compensation, namely, the average annual income of last 20 to 40 years as provided in Section 29(1) (e) (i) and the estimate of annual yield on the date of vesting as provided in Section 39(1) (e) (ii). It was further argued that in respect of Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (for short "KUZALR Act"), the same U.P. Legislature which had the example of Section 39(1)(e)

deliberately dropped the second sub-clause and limited the compensation only to the average annual income of the last 20 years. From this it was argued that where there is no annual income, there would be no compensation.

235. In paragraph-78 it was observed that when the State exercises the power of acquisition of a private property thereby depriving the private person of the property, provision is generally made in the statute to pay compensation to be fixed or determined according to the criteria laid down in the statute itself.

236. In paragraph-82 it was observed that a distinction and difference has been drawn between the concept of 'no compensation' and the concept of 'nil compensation'. As mandated by Article 300A, a person can be deprived of his property but in a just, fair and reasonable manner. In an appropriate case the Court may find 'nil compensation' also justified and fair if it is found that the State has undertaken to take over the liability and also has assured to compensate in a just and fair manner. But the situation would be totally different if it is a case of 'no compensation' at all.

237. In paragraph-84, the Apex Court recorded that there was sufficient force in the argument of the Counsel for the appellants that awarding no compensation attracts the vice of illegal deprivation of property. In paragraph-85 it was held that the omission of the Section 39(1) (e) (ii) of the UPZALR Act as amended in 1978 was of no consequence since the UPZALR Act leaves no choice to the State other than to pay compensation for the private forests acquired by it in accordance with the mandate of the law. In the present case there is no acquisition of the promoter's property. Equally there is no expropriation of the promoter's property. In my opinion the decision of Rajiv Sarin (supra) is, therefore, not applicable to the facts of the present case.

238. In the case of **K. T. Plantation Private Limited and another v. State of Karnataka, (2011) 9 SCC 1**, the constitutional validity of Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 (for short "Acquisition Act"), the legal validity of Section 110 of the Karnataka Land Reforms Act, 1961 (for short "Land Reforms Act"), the Notification dated 8th March, 1994 issued by the State Government thereunder and the scope and content of Article 300-A of the Constitution of India, fell for consideration.

239. Dr. Roerich and Mrs. Devika Rani Roerich had owned an Estate called Tatgunni Estate covering 470.19 acres at B.M. Kaval Village of Kengeri Hobli and Manvarthe Kaval Village of Uttarhalli Hobli, Bangalore South Taluk, out of which 100 acres were granted to them by the State Government in the year 1954 vide G.O. dated 16.3.1954 read with decree dated 19.4.1954 for Linaloe cultivation. When the Land Reforms Act came into force, they filed declarations under Section 66 of the Act before the Land Tribunal, Bangalore South Taluk-II stating that they had no surplus lands to surrender to the State since the entire area held by them had been used for the cultivation of Linaloe which was exempted under Section 107(1)(vi) of the Land Reforms Act. Vide order dated 15.3.1982, the Land Tribunal, Bangalore dropped the proceedings instituted under the Act against them holding that the land used for cultivation of Linaloe did not attract the provisions of the Land Reforms Act. By a registered sale deed dated 23.3.1991 Dr. Roerich had sold 141.25 acres (which included 100 acres granted by the Government for Linaloe cultivation) to first appellant. By way of unregistered sale deed dated 16.2.1992, it was claimed that Mrs. Devika Rani Roerich had also sold an extent of 223 acres 30 guntas to the first appellant. The company instituted a suit for a declaration of title and

injunction in respect of that land before the District and Civil Judge, Bangalore. The Company sought registration of the sale deed dated 16.02.1992 before the Sub Registrar, Kingeri, who refused to register the sale deed. It was alleged that some of the persons who were associated with the couple, had an eye on their properties, including the land used for linaloe cultivation, valuable paintings, jewellery, artefacts etc., and began to create documents to grab those properties. On 26.6.1993 the Deputy Commissioner, Bangalore Rural District had reported that though Roerichs had owned 470.19 acres of land including the land used for Linaloe cultivation they had filed declarations only to the extent of 429.26 acres. Out of the extent of 470.19 acres of land owned by them, they had raised Linaloe cultivation to the extent of 356.15 acres and the remaining extent of 114.04 acres was agricultural land. As per the ceiling provisions of the Land Reforms Act they were entitled to hold an extent of 54 acres of agricultural land. As such, the excess of 60.04 acres ought to have been surrendered by them to the Government. The Law Department stated on 18.11.1993 that the earlier order dated 15.03.1982 of the Land Tribunal, Bangalore dropping the proceedings be re-opened and the action under Section 67(1) be initiated for resumption of the excess land. The Deputy Commissioner reported that Dr. Roerich had sold an extent of 137.33 acres

of land comprising of survey Nos. 124, 126 of B.M. Kaval and survey No. 12 of Manavarth Kaval of Bangalore South Taluk on 23.3.1991 to the first appellant and it was reported that the request for mutation in respect of those lands was declined by the local officers and the lands stood in the name of late Dr. Roerich in the Record of Rights. On 1.3.1994, the Department of Law and Parliamentary Affairs opined that the exemption given under Section 107 of the Land Reforms Act, 1961 can be withdrawn by the Government by issuing a notification as per Section 110 of the Land Reforms Act. After obtaining the sanction of Cabinet, the Government issued notification dated 08.03.1994 in exercise of powers conferred by Section 110 of the Land Reforms Act, withdrawing the exemption granted for the lands used for cultivation of Linaloe under Clause (vi) of Sub-Section 1 of Section 107 of the Act. Notification was published in the Government Gazette on 11.03.1994. On 28.3.1984 the Assistant Commissioner, Bangalore sub-division issued a notice to the company to show cause why 137.33 acres of land be not forfeited to the Government, since it had purchased the above mentioned lands in violation of Section 80 and 107 of the Land Reforms (Amendment) Act, 1973. An enquiry under Section 83 of the Land Reforms Act was ordered for violation of the provisions of the Act. The Company, through its Managing Director

instituted Writ Petition No.32560 of 1996 before the Karnataka High Court challenging the constitutional validity of the Acquisition Act, Section 110 of the Land Reforms Act, the notification dated 08.03.1994 issued there under and also sought other consequential reliefs. The writ petition was dismissed by the High Court upholding the validity of the Acquisition Act as well as Section 110 of the Land Reforms Act and the notification issued there under except in relation to the inclusion of certain members in the Board of Directors constituted under the Acquisition Act. Aggrieved by the same the Company filed Civil Appeal No. 6520 of 2003 in the Apex Court.

240. In Part-I the Apex Court examined the validity of Section 110 of the Land Reforms Act and the notification dated 8.3.1994. In paragraph-52 it was held that the first Appellant was prohibited from holding any agricultural land after the commencement of the Act. If the company was holding any land with Linaloe cultivation on the date of the commencement of the Act, the same would have vested in the State Government under Section 79B(3) of the Act and an amount as specified in Section 72 would have been paid.

241. In paragraph-68 it was held that Dr. Roerich and Mrs. Devika had got only the conditional exemption from the provisions of the Land Reforms Act for the lands used for Linaloe cultivation and, they also would have lost ownership and possession of the lands once the exemption had been withdrawn and the land would have vested in the State. The land was purchased by the Company with that statutory condition from Roerichs and, hence, was bound by that condition. The Apex Court rejected the contention that Section 110 is void due to excessive delegation of legislative powers.

242. In paragraph-86, the Apex Court repelled the challenge to the validity of Section 110 of the Karnataka Land Reforms Act as well as the notification dated 8.3.1994 and held that the land used for linaloe cultivation would be governed by the provisions of the Land Reforms Act which is protected under Article 31B of the Constitution having been included in the Schedule IX to the Constitution. The constitutional validity of the Acquisition Act was challenged before the Karnataka High Court on the ground that enactment providing for compulsory acquisition of Titgunni Estate was not for public purpose and the compensation provided there

under was illusory. During the pendency of the writ petition the Act was amended by the Amendment Act 2001, w.e.f. 01.11.96 by inserting a new Section 19A to provide clarity for payment of amount to the owners/interested persons.

243. In part-II, the Apex Court considered the constitutional validity of Acquisition Act. In paragraph-103, the submission on behalf of the respondent that the main object of the Acquisition Act was not "acquisition and requisition of property", Entry 42 of List III-Concurrent List of the VIIth Schedule and the Legislation in pith and substance was in respect of "land" under Entry 18 of List II-State List of the Constitution. In paragraph-111, the Apex Court held that the Acquisition Act primarily falls under Entry 18 List II-State List, since the dominant intention of the legislature was to preserve and protect Roerichs' Estate covered by the provisions of the Land Reforms Act on the State Government withdrawing the exemption in respect of the land used for linaloe cultivation. The Acquisition Act, though primarily falls under Entry 18 List II-State List incidentally also deals with the acquisition of paintings, artefacts and other valuable belongings of Roerichs' and, hence, the Act partly falls under Entry 42 List III-Concurrent List as well.

244. In paragraph-117 it was held that the Acquisition Act was enacted in public interest, to preserve and protect the land used for the linaloe cultivation and its tree growth as part of agrarian reforms which is its dominant purpose. Proposal to preserve the paintings, artefacts, carvings and other valuables and to establish an Art-Gallery-cum-Museum are merely ancillary to the main purpose. The Act is, therefore, saved by the provisions of Article 31A(1)(a) and the Act has obtained assent of the President and hence is protected from the challenge under Articles 14 and 19 of the Constitution of India.

245. In part-III, the Apex Court dealt with Article 300-A of the Constitution and the Acquisition Act. In paragraph-129 it was noted that on behalf of the State Government that the impugned Act had provided Rs. 5 crore to meet various priorities, which cannot be said to be illusory, especially when the Government had withdrawn the exemption granted with respect to the land used for linaloe cultivation. It was pointed out but for impugned Act the Roerich's or the transferors would have got only Rs. 2 lakhs under Section 72 of the Land Reforms Act, if they were in possession and ownership of the land.

246. In paragraph-130 on behalf of the respondent it was submitted that in any view, sale deeds dated 23.03.1991 and 16.02.1992 would show that the company had paid only a total sale consideration of Rs. 1,46,10,000 for purchasing the lands from Roerichs' but the transferees/owners and other claimants, if any, would get more than what they had paid. It was further submitted that Section 19A also provides for principles/machinery for payment of amount to the owners/interested persons and the amount is to be apportioned among owners, transferees and interested persons having regard to value on the appointed day i.e. 18.11.1996. It was further submitted that the company has not perfected their title or possession over the land and litigation is pending in the civil court between the company and the other claimants.

247. In paragraph-208, the Apex Court noted that the impugned Act had got the assent of the President as required under the proviso to Article 31A(1) and hence immune from challenge on the ground of arbitrariness, unreasonableness under Article 14 of the Constitution of India.

248. In paragraph-221, the Apex Court ultimately held that Section 110 of the Land Reforms Act and the notification dated 8.3.1994 are valid and there was no excessive delegation of legislative power on the State

Government. The Acquisition Act is protected by Article 31-A of the Constitution after having obtained the assent of the President and hence immune from challenge under Article 14 or 19 of the Constitution. There is no repugnancy between the provisions of the Land Acquisition Act and the Roerich and Devika Rani Roerich Estate (Acquisition & Transfer) Act, 1996 and hence no assent of the President is warranted under Article 254(2) of the Constitution.

249. In the present case, there is no acquisition and/or requisition of the promoter's property. In my opinion RERA does not fall under Entry 42 in List III - Concurrent List of the Seventh Schedule, namely, Acquisition and requisitioning of property. RERA falls under Entry 6, namely, Transfer of property other than agricultural land; registration of deeds and documents; Entry 7 – Contracts, including partnership, agency, contracts of carriage and other special forms of contracts, but not including contracts relating to agricultural land and Entry 46, namely, Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in List III- Concurrent list of the Seventh Schedule. The decision in K.T. Plantation Private Limited (supra) is, therefore, not applicable to the facts of the present case.

250. The reliance placed by Mr. Kamdar on the decisions in **Rajiv Sarin** (supra), **K.T. Plantation** (supra) and **Cellular Operators Association of India** (supra), therefore, does not advance the case of the petitioners.

251. At the cost of repetition, it has to be reiterated that there is no total prohibition on the promoters carrying on their business. RERA regulates the construction activities in the planning area. I, therefore, do not find that the decisions of **Saghir Ahmad** (supra), **R.C. Cooper** (supra) and **Cellular Operators Association of India** (supra) advance the case of the petitioners in any manner whatsoever.

252. Applying the principles of interpretation of statutes as also the principles culled out from the decisions referred in paragraphs 158 to 179 and in the light of the above discussion, if the provisions of Sections 3, 4, 5, 6, 7 and 8 are construed harmoniously, it cannot be said that these provisions are violative of Articles 14, 19(1)(g), 20 and 300-A of the Constitution of India.

First proviso to Section 3(1), first proviso to Section (6), Section 7(4)(a) and Sections 18, 38, 59, 60, 61, 63 and 64 are penal in nature:

253. The learned Counsel for the petitioners submitted that the first proviso to Section 3(1), Sections 18, 38, 59, 60, 61, 63 and 64 are retrospective/retroactive and are penal in nature. First proviso to Section 6, Section 7(4)(a) and Section 8 are penal in nature. They are violative of Articles 19(1)(g) and 20(1) of the Constitution of India. As against this the learned Counsel for the respondents submitted that first proviso to Section 3(1), Sections 18, 38, 59, 60, 61, 63 and 64 are prospective in nature. They submitted that first proviso to Section 3(1), first proviso to Section 6, Sections 7(4)(a) and Section 8 are not penal in nature.

254. I have already held that Sections 3, 4, 5, 7 and 8 are required to be construed harmoniously. These provisions cannot be said to be violative of Articles 14, 19(1)(g), 20(1) and 300-A of the Constitution of India. These provisions cannot be construed as penal in nature. They impose reasonable restrictions on the promoter in larger public interest. These provisions regulate the construction activities in the planning area.

255. Section 18 provides for refund of amount and compensation on account of - (a) failure of the promoter to complete or his inability to give possession of an apartment, plot or building either 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 revocation or suspension of the registration under the Act or for any other reason. The plain language of Section 18(1)(a) shows that if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein, he would be liable to return the amount received by him together with interest including compensation. In case the allottee does not intend to withdraw from the project, the promoter is liable to pay interest for every month's delay till handing over of possession. The purpose of Section 18(1)(a) is to ameliorate the buyers in real estate sector and balance the rights of all the stake holders. The provisions of RERA seek to protect the allottees and simplify the remedying of wrongs committed by a promoter. The intention of RERA is to bring the complaints of allottees before one Authority and simplify the process. If the interpretation

suggested by the petitioners, namely, that the provision is applicable only after coming into force RERA is accepted, this would result in allottees having to approach different fora for interest prior to RERA and subsequent to RERA. In fact Section 71 of RERA provides that the cases pending before the Consumer Court can be transferred to Authority. Reference to pending cases is obviously a reference to claims for interest and / or compensation pending when the RERA came into force.

256. Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession. The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale. Section 4(2)(l)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(l)(C) he is not absolved of the liability under the agreement for sale.

257. Section 18(1)(b) lays down that if the promoter fails to complete

or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is 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 with interest at such rate as may be prescribed in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money.

258. In paragraph-9 of Alok Shanker Pandey v. Union of India, (2007) 3 SCC 545, the Apex Court has held that “There is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say

10 years ago, but he offers that amount to him today, then he has pocketed the interest of the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B." The object of Section 18 is to recompense an allottee for depriving him of the use of the funds paid by him. The promoter who has received money from the allottee but has failed to adhere to his contractual or statutory obligations, cannot claim that he is entitled to utilize the monies without paying any interest with respect thereto to the allottee.

259. A perusal of Section 18 indicates that payment of interest including compensation or interest, as the case may be, is payable on account of default committed by the promoter. Although this Section does not consider a situation where the promoter is unable to complete or handover possession for no fault of his own, it would be open to him to claim frustration in such a case and return the money to the allotee with interest thereby stopping the interest that is to be paid till handing over possession. The provisions of RERA ensure that the allotees' money is not

misused or unreasonably retained by the promoter.

260. As noted earlier, because of the failure on the part of the promoter in completing the project within a reasonable time and handing over possession to the prospective purchasers, the Parliament has thought it fit to enact RERA so as to ensure completion of project or phase, as the case may be, in a time bound manner. Before RERA coming into force, the provisions of MOFA were applicable. However, the completion of construction of building/project was not envisaged in MOFA. This was a serious lacuna in the law which gave rise to institute suits for specific performance of contracts and/or claiming damages. The object of RERA is that the prospective purchasers can consider booking apartment at the time of launching of the project or when the building is under construction. It is common knowledge that there is substantial difference in price when the apartment is booked at the time of launching of the project or when the building is under construction vis-a-vis when the building is complete in all respects along with Occupation Certificate. Naturally the buyers are interested to book the apartment at the time of launching of the project or when the building is under construction. RERA assures completion of a project in time bound manner. If for any reason the promoter is required to

be replaced under Section 8, the promoter's obligation to complete the project is taken over by the Authority.

261. In my opinion Section 18 is compensatory in nature and not penal. The promoter is in effect constructing the apartments for the allottees. The allottees make payment from time to time. Under the provisions of RERA, 70% amount is to be deposited in a designated bank account which covers the cost of construction and the land cost and has to be utilized only for that purpose. Interest accrued thereon is credited in that account. Under the provisions of RERA, 30% amount paid by the allottees is enjoyed and used by the promoter. It is, therefore, not unreasonable to require the promoter to pay interest to the allottees whose money it is when the project is delayed beyond the contractual agreed period. Even under Section 8 of MOFA on failure of the promoter in giving possession in accordance with the terms of the agreement for sale, he is liable to refund the amount already received by him together with simple interest @ 9% per annum from the date he received the sum till the date the amount and interest thereon is refunded. In other words, the liability under Section 18(1)(a) is not created for the first time by RERA. Section 88 lays down that the provisions of RERA shall be in addition to, and not in derogation of, the

provisions of any other law for the time being in force.

262. As far as interest under Section 18(1)(b) is concerned, it was submitted that under Section 8 the Authority appoints facilitator/agency for carrying out remaining development works. After ouster of the promoter, he cannot be held responsible on account of delay in handing over possession by the facilitator/agency so appointed by the Authority. It was contended that it is quiet possible that the amount of 70% deposited under Section 4(2)(l)(D) may have been utilized by the promoter for carrying out construction. In that event, it will be extremely harsh and unreasonable to direct the promoter to pay interest till handing over possession after his ouster. The provisions of Section 18(1)(b) are, therefore, violative of Articles 14, 19(1)(g) of the Constitution of India. I do not find any merit in this submission. The promoter is liable to pay interest on account of suspension or revocation of the registration under the Act or for any other reason. The basic presumption is that the promoter was unable to complete the construction despite prescribing the time period under Section 4(2)(l)(C). The amount of 70% is already credited in a dedicated bank account under Section 4(2)(l)(D). The promoter has retained 30% paid by the allottee to him. Thus the allottee has parted with entire consideration for purchasing

the apartment and still he is not given possession. The allottee cannot be said to be acting gratuitously. The promoter enjoying the benefit is bound to make compensation to the allottee. In other words though it is a case of unjust enrichment on the part of the promoter, still he is not liable to compensate the allottee by paying interest on the amount retained by him. In view thereof, it cannot be said that Section 18(1)(b) is violative of Articles 14 and 19(1)(b) of the Constitution of India. It also cannot be said to be a penal provision.

263. Insofar as Section 38 is concerned, the Authority is empowered to impose penalty or interest in respect of contravention of obligations cast upon the promoter/allottees under the Act or the Rules and the Regulations made thereunder. Thus, the Authority can also impose penalty or interest on the allottees for contravention of the obligations cast upon them. At the same time, the Authority can impose penalty or interest on the promoter on account of contravention of obligations cast upon him. The legislation has done balancing of rights and liabilities of the promoters and allottees. While exercising the power, the Authority is guided by the principles of natural justice. It, therefore, cannot be said that Section 38 violates Articles 14 and 19(1)(g) of the Constitution of India.

264. Insofar as challenge to Sections 59, 60, 61, 63 and 64 is concerned, these provisions fall in Chapter VIII entitling "Offences, Penalties and Adjudication". A perusal of these provisions shows that these provisions are prospective in nature and on account of contravention of certain provisions of RERA, the Authority is empowered to impose penalty. Section 76(1) lays down that all sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in the Union Territories, shall be credited to the Consolidated Fund of India. Sub-section (2) thereof lays down that all sums realised, by way of penalties, imposed by the Appellate Tribunal or the Authority, in a State, is to be credited to such account as the State Government may specify. Payment of interest and compensation under Sections 12, 14, 18 and 19 is to be adjudicated by the Adjudicating Officer as per Section 71. The amount of interest and compensation is payable by the promoter to the allottee or by the allottee to the promoter [under Section 19(7)]. As against this, under Section 76 the sums realised by way of penalties imposed by the Appellate Tribunal or the Authority in the Union Territories, is to be credited to the Consolidated Funds of India and in a State it shall be credited to such account as the State Government may specify. In short, the penalties imposed by the Appellate

Tribunal or the Authority are not payable to either promoter or the allottee as the case may be but are compulsorily required to be credited either in the Consolidated Funds of India or such account as the State Government may specify. Section 76 does not include determination of Adjudicating Officer under Section 71 of RERA. This is also pointer to indicate that the interest and compensation determined by the Adjudicating Officer under Sections 12, 14, 18 and 19 is not by way of penalty but is essentially compensatory in nature. As the penalties under Sections 59, 60, 61, 63 and 64 are on account of acts of commission or omission on the part of either promoter or the allottee as the case may be and which are prospective in nature, it cannot be said that these provisions are violative of Articles 14 and 19(1)(g) of the Constitution of India and amount to unreasonable restrictions.

265. Mr. Chinoy relied upon following decisions :

(1) **Ritesh Agarwal and another v. Securities and Exchange Board of India and others, (2008) 8 SCC 205**;
(2) **Madras Forgings and Allied Industries (C.B.C.) Ltd. v. Suresh Chandra and another, (1992) 73 Company Cases 385 (Calcutta)**;
(3) **State of Andhra Pradesh and others v. Ch. Gandhi, (2013) 5 SCC 111**;

to contend that Sections 18, 38, 59, 60, 61, 63 and 64 are penal in nature and hence are violative of Article 20(1) of the Constitution of India.

266. Mr. Kamdar relied upon following decisions:

(1) **Shyam Sunder and others v. Ram Kumar and another, (2001) 8 SCC 24**, and in particular paragraphs-22 to 28 and 36;

(2) **K.S. Paripoornan v. State of Kerala and others, (1994) 5 SCC 593**, and in particular paragraphs-64, 66 to 70;

(3) **Hitendra Vishnu Thakur and others v. State of Maharashtra and others, (1994) 4 SCC 602**, and in particular paragraph-26;

(4) **The Commissioner of Income Tax, West Bengal v. Anwar Ali, 1970(2) SCC 185**, and in particular paragraph-4;

(5) **M/s. Net 4 India Ltd. v. Union of India and another, 2016 SCC OnLine Del 4546**, and in particular paragraph-12;

(6) **Pyare Lal Sharma v. Managing Director and others, (1989) 3 SCC 448**, and in particular paragraph-21;

(7) **Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118**, and in particular paragraphs-5 and 6.

(8) **Namit Sharma v. Union of India, (2013) 1 SCC 745**, and in particular paragraphs-10 and 14.

(9) **Shayara Bano v. Union of India, (2017) 9 SCC 1**, and in particular paragraphs-78 and 82;

(10) **Delhi Transport Corporation v. D.T.C. Mazdoor Congress, 1991 Supp (1) SCC 600**, and in particular paragraphs 255 and 332,

to contend that these provisions are retrospective/retroactive in operation and are affecting the substantive rights of the promoters.

267. In paragraph-25 of **Ritesh Agarwal** (supra), the question as to whether the provisions of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 1995 (FUTP Regulations), which came into force for the first time on 25.10.1995 were attracted was examined. It was observed that whether the Regulations will apply in a case where the cause of action arose prior thereto. If commission of fraud was complete prior to the said date (25.10.1995), the question of invoking the penal provisions contained in the said Regulations including Regulations 3 to 6 would not arise.

268. In paragraph-30, the Apex Court did not accept the contention of the respondent that the offence was a continuing one. In my opinion, said decision is not applicable to the present case. As basically the penalties are not imposed retroactively/retrospectively after coming into force of RERA.

269. In the case of **Madras Forgings and Allied Industries (C.B.C.) Ltd.** (supra), two cheques dated 28.1.1989 and 10.2.1989 were issued in favour of the complainant's firm. In due course the cheques were presented and the same were returned with remarks "exceeds arrangement". On 13.3.1989, the complainant intimated the petitioner company regarding

dishonour of the cheques and requested issue of a demand draft for the value of the cheques failing which it was told that the cheques would be presented again before the Bank. Accordingly said cheques were again presented on 29.3.1989 and were dishonored on 13.4.1989. On 27.4.1989, the complainant's firm thereupon issued a notice under-registered post with acknowledgment due to the petitioner-company intimating the dishonour of the cheques and demanding payment within fifteen days of receipt of the said notice. The notice was received by the petitioner on 4.5.1989 but no payment was made within the period of 15 days of receipt of the notice. The complainant, therefore, instituted complaint for commission of offence under Sections 138 read with Section 141 of the Negotiable Instruments Act, 1881 (as amended) on 27.6.1989. The learned Metropolitan Magistrate issued process against the petitioners to appear on 11.8.1989 to answer the charges under Section 141 read with Section 138 of the Negotiable Instruments Act, 1881 as amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. The Amendment Act came into force on 1.4.1989. In paragraph-17 it was observed that the new offence has been created by the Amending Act of 1988 from 1.4.1989. There was no law in force at the time when the accused issued the cheques that if any cheque is issued in discharge of a

debt or liability and is dishonoured by non-payment and the drawer does not pay within 15 days of receipt of the notice of such dishonour, he will be deemed to have committed an offence. The accused is, therefore, entitled to the protection of Article 20(1) of the Constitution. When no such provisions as contained in Sections 138 and 141 were in existence at the relevant time, the accused cannot, therefore, be said to have committed on offence under the said provisions. In other words, the said provisions are not retrospective in operation. The cheques drawn by the Company in discharge of a debt or liability in favour of the complainant's firm were dishonoured for non-payment prior to the said provisions coming into force.

270. In the case of State of **Andhra Pradesh** (supra), the charge-sheet was issued on 14.11.2003 and Rule 9 dealing with major penalties was amended on 6.12.2003. It is in that context, the Apex Court held that Rule 9(vii) prior to amendment read thus:

> Rule 9: Major Penalties:
>
> (vii) reduction to a lower rank in the seniority list or to a lower stage in the timescale of pay or to a lower timescale of pay not being lower than that to which he was directly recruited or to lower grade or post not being lower than that to which he was directly recruited, whether in the same service or in another service, State or Subordinate;

271. After amendment, Rule 9(vii) was bifurcated into Rule 9(vii)(a) and 9(vii)(b). Said Rule reads thus:

> "9. Major Penalties
>
> (vii) (a) save as provided for a in Clause (v)(b), reduction to a lower stage in the timescale of pay for a specified period, with further directions as to whether or not the Government servant will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;
>
> (b) reduction to lower timescale of pay, grade, post or service which shall ordinarily be a bar to the promotion of the Government servant to the timescale of pay, grade, post or service from which he was reduced, with or without further directions, regarding conditions of restoration to the grade or post or service from which the Government servant was reduced and his seniority and pay on such restoration to that grade, post or service;"

272. In paragraph-51 it was observed thus:

> "51. In the case at hand, under the unamended Rule, there were, apart from stoppage of increment with cumulative effect and reduction in rank, grade, post or service, three major punishments, namely, compulsory retirement, removal and dismissal from service by which there was severance of service. The maximum punishment that could have been imposed on an employee after conducting due departmental enquiry was dismissal from service. The rule making authority, by way of amendment, has bifurcated Rule 9(vii) into two parts, namely, Rules 9(vii)(a) and 9(vii)(b). As is evincible, the charge-sheet only referred to the imposition of major penalty or to be dealt

> with under the said Rules relating to major penalty. In this backdrop, it would be difficult to say that the employee had the vested right to be imposed a particular punishment as envisaged under the unamended Rules. Once the charges have been proven, he could have been imposed the punishment of compulsory retirement or removal from service or dismissal from service. The rule making authority thought it apposite to amend the Rules to introduce a different kind of punishment which is lesser than the maximum punishment or, for that matter, lesser punishment than that of compulsory retirement from service. The order of compulsory retirement is a lesser punishment than dismissal or removal as the pension of a compulsorily retired employee, if eligible to get pension under the Pension Rules, is not affected. Rule 9(vii) was only dealing with reduction or reversion but issuance of any other direction was not a part of it. It has come by way of amendment. The same being a lesser punishment than the maximum, in our considered opinion, is imposable and the disciplinary authority has not committed any error by imposing the said punishment, regard being had to the nature of charges. It can be looked from another angle. The rule making authority has split Rule 9(vii) into two parts - one is harsher than the other, but, both are less severe than the other punishments, namely, compulsory retirement, removal from service or dismissal. The reason behind it, as we perceive, is not to let off one with simple reduction but to give a direction about the condition of pay on restoration and also not to impose a harsher punishment which may not be proportionate. In our view, the same really does not affect any vested or accrued right. It also does not violate any constitutional protection."

273. Mr. Kamdar relied upon the decision of **Shyam Sunder** (supra) and in particular paragraphs-22 to 28 and 36 to contend that the provisions of RERA are retrospective and are penal in nature and are, therefore, *ultra vires.* In that case, the question, namely, what is the effect of substituted

Section 15 introduced by the Haryana Amendment Act, 1995 (the Amending Act) in the Punjab Pre-emption Act (the Parent Act) as applicable to the State of Haryana whereby the right of a co-sharer to pre-empt a sale has been taken away during the pendency of an appeal filed against a judgment of the High Court affirming the decree passed by the trial Court in a preemption suit, fell for consideration.

274. In paragraph-47, the Apex Court held that the amending Act being prospective in operation does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the appellate court is not required to take into account or give effect to the substituted Section 15 introduced by the amending Act. I have already held that the provisions of RERA are prospective in nature.

275. In the case of **K.S. Paripoornan** (supra), the question, namely, whether the benefit of sub-section (1-A) of Section 23 of the Land Acquisition Act, 1894 is to be granted only in the proceedings for the acquisition of land referred to in Clauses (a) and (b) of Section 30 (1) of the Land Acquisition (Amendment) Act, 1984, or it is to be granted in all proceedings pending before the Courts on 24th September, 1984, fell for

consideration. In paragraph-117, the majority held that in respect of acquisition proceedings initiated prior to the date of commencement of the Amending Act 68 of 1984, the payment of the additional amount under Section 23(1-A) of the Act will be restricted to matters referred to in Clauses (a) and (b) of Sub-section (1) of Section 30 of the Amending Act. Union of India and Anr. v. Zora Singh and Ors.,(1992) 1 SCC 673 insofar as it holds that the said amount is payable in all cases where the reference was pending before the reference court on September 24, 1984, irrespective of the date of which the award was made by the Collector, does not lay down the correct law.

276. Mr. Kamdar relied upon the decision of **Hitendra Thakur** (supra) and in particular paragraph-26 thereof in support of his submission that the provisions of RERA are retrospective.

277. In the case of **Commissioner of Income Tax** (supra), the question - whether on the facts and in the circumstances of the case, the Income-tax authorities were justified in imposing a penalty on the assessee under Section 28(1)(c) of the Income-tax Act, fell for consideration. In paragraph-4 it was observed that the determination of the question of

burden of proof will depend largely on the penalty proceedings being penal in nature or being merely meant for imposition of an additional tax, the liability to pay such tax having been designated as penalty under Section 28. It was held that the section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest.

278. In the case of **Net 4 India Ltd.** (supra), the Petition was filed challenging the vires of Section 7Q of the Employees Provident Fund Act, 1952 on the ground that it is violative of Articles 14, 19(1) (g) and 265 of the Constitution of India. In paragraph-12 it was held that the orders passed u/s 14B prior to 26th September, 2008 would include the interest element payable under section 7Q. So far as the orders passed under Section 14B on or after 26th September, 2008 would not include the interest element under section 7Q of the Act. Post 26th September, 2008, the damages to impose u/s 14B, would not include the interest payable under Section 7Q. It was further observed that the difference between a "penalty" and "interest" provision is well recognized. The terms represent different concepts. Penalty is ordinarily levied for contumacious or wrong conduct and violation of a provision of a particular statute. Interest is compensatory

when imposed to set off the loss or prejudice caused on account of non-payment.

279. In the case of **Pyare Lal Sharma** (supra), the appellant who, was employed as Chemical Engineer in Jammu & Kashmir Industries Limited, was terminated on 14.6.1983. He absented himself from the duty from Septembers, 1982 and he was asked to explain his absence. Regulation 16.14 of Jammu & Kashmir Industries Employees Service Rules and Regulations was amended on 20.4.1983. In paragraph-21 it was noted that a show cause notice was issued to Sharma on 21.4.1983. The period of absence indicated in the show cause notice was prior to 20.4.1983. The period of absence prior to amendment cannot be taken into consideration. When prior to 20.4.1983, the services of person could not be terminated on the ground of unauthorised absence from duty under Regulation 16.14 then it is wholly illegal to make the absence during that period as a ground for terminating the services of Sharma. It was observed that it is the basic principle of natural justice that no one can be penalised on the ground of a conduct which was not penal on the day when it was committed. In the show cause notice dated 21.4.1983 the unauthorised absence from duty from 20.12.1982 to 20.4.1983 was taken into account. The Apex Court,

therefore, held that the notice served on the appellant was illegal and set aside the order of termination.

280. In the case of **Chintaman Rao** (supra) it was contended that the law in force in the State authorizing it to prohibit the manufacturer of bidis in certain villages including the one wherein the applicants reside is inconsistent with the provisions of Part III of the Constitution and is consequently void.

281. In paragraph-7 it was observed that the object of the Central Provinces and Berar Regulation of Manufacture of Bidis (Agricultural Purposes) Act, LXIV of 1948 is to provide measures for the supply of the adequate labour for agricultural purposes in bidi manufacturing areas of the Province and it could well be achieved by legislation restraining the employment of agricultural labour in the manufacture of bidis during the agricultural season. It was held that even in point of time a restriction may well have been reasonable if it amounted to a regulation of the hours of work in the business. Such legislation though it would limit the field for recruiting persons for the manufacture of bidis and regulate the hours of the working of the industry, would not have amounted to a complete stoppage

of the business of manufacture and might well have been within the ambit of clause (6). The effect of the provisions of the Act, however, has no reasonable relation to the object in view but it is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the statute in excess of the requirements of the case but the language employed prohibits a manufacturer of bidis from employing any person in his business, no matter wherever that person may be residing. In other words, a manufacturer of bidis residing in this area cannot import labour from neighbouring places in the district or province or from outside the province. Such a prohibition on the face of it is of an arbitrary nature inasmuch as it has no relation whatsoever to the object which the legislation seeks to achieve and as such cannot be said to be a reasonable restriction on the exercise of the right. Further the statute seeks to prohibit all persons residing in the notified villages during the agricultural season from engaging themselves in the manufacture of bidis. It cannot be denied that there would be a number of infirm and disabled persons, a number of children, old women and petty shop keepers residing in these villages who are incapable of being used for agricultural labour. All such persons are prohibited by law from engaging themselves in the manufacture of bidis; and are thus being deprived of earning their livelihood. It is a matter of

common knowledge that there are certain classes of persons residing in every village who do not engage in agricultural operations. They and their womenfolk and children in their leisure hours supplement their income by engaging themselves in bidi business. There seems no reason for prohibiting them from carrying on this occupation.

282. In the case of **Namit Sharma** (supra), the petitioner had questioned the constitutional validity of sub-sections (5) and (6) of Section 12 and sub-sections (5) and (6) of Section 15 of the Right to Information Act, 2005. It was contended that keeping in view the powers, functions and jurisdiction that the Chief/State Information Commissioner and/or the Information Commissioners exercise undisputedly, including the penal jurisdiction, there is a certain requirement of legal acumen and expertise for attaining the ends of justice, particularly, under the provisions of the Act. The Apex Court partly allowed the Petition and issued directions in paragraphs-108.2 to 108.13.

283. In the case of **Shayara Bano** (supra), the practice of *triple talaq* was declared in valid.

284. In the case of **Delhi Transport Corporation** (supra), Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment & Service) Regulations, 1952, was challenged. Regulation 9(b) provided that where the termination is made due to reduction of establishment or in circumstances other than those mentioned at (a) above, one month notice or pay in lieu thereof will be given to all categories of employees. B.C. Ray,J., L.M. Sharma,J., P.B. Sawant,J. and K. Ramaswamy, J. in separate concurring judgments, held that Regulation 9(b) is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Article 14 of the Constitution. Sabyasachi Mukharji, C.J. in minority judgment upheld the validity of that Regulation.

285. For the reasons already indicated, aforesaid decisions are not applicable to the facts of the present case. I have already indicated that the provisions of RERA are prospective in nature. The penalty under Sections 18, 38, 59, 60, 61, 63 and 64 is to be levied on account of contravention of provisions of RERA, prospectively and not retrospectively. These provisions, therefore, cannot be said to be violative of Articles 14, 19(1)(g), 20(1) and 300-A of the Constitution of India.

Section 22 and 46(1)(b):

286. My learned brother has dealt with this aspect and I entirely agree with the reasons given by my learned brother. I have nothing to add therein.

PER COURT :

287. We place on record our appreciation of valuable assistance rendered by the learned Senior Counsel Mr. Darius Khambata as *amicus curiae.* Ms. Naira Jejeebhoy and Mr. Pheroze Mehta learned Counsel ably assisted the learned *amicus curiae.*

288. We hold that challenge to constitutional validity of first proviso to Section 3(1), Section 3(2)(a), explanation to Section 3, Section 4(2)(l)(C), Section 4(2)(l)(D), Section 5(3) and the first proviso to Section 6, Sections 7, 8, 18, 22, 38, 40, 59, 60, 61, 63, 64 of the Real Estate (Regulation and Development) Act, 2016 fails. These provisions are held to be constitutional, valid and legal.

However, one of the qualifications for appointment of a Judicial Member prescribed in Section 46(1)(b) as, "**or has been a member of the Indian Legal Service and has held the post of Additional Secretary of that service or any equivalent post**," is severed and struck down.

We hold that two member Bench of the Tribunal shall always consist of a Judicial Member. We hold that in the constitution of the Tribunal, majority of the members shall always be judicial members.

The prayers which are not specifically granted shall be deemed to be rejected.

Writ Petition No. 2708 of 2017 is partly allowed. Rule is made absolute to the extent as mentioned above. No order as to costs.

Writ Petition Nos. 2737/2017, 2711/2017, 2255/2017, 2727/2017, 2256/2017 and 2730/2017 are dismissed. Rule is discharged. No order as to costs.

The Chamber Summons Nos. 223/2017, 224/2017 and Chamber Summons Lodging No. 306/2017 stand disposed of.

(R. G. KETKAR,J.) **(NARESH H. PATIL,J.)**

289. After pronouncement of the judgment, Mr. Kapil Moye, learned counsel i/by Mr. Anil Singh, learned ASG appearing for Union of India, orally prays for staying the operation of the order to the extent of striking down part of the provisions of Section 46(1)(b). In view of striking down of part of the provisions of Section 46(1)(b), as stated above, we do not find any merit in the request made by the learned counsel appearing for UOI. The prayer stands rejected.

(R. G. KETKAR,J.) **(NARESH H. PATIL,J.)**