

Insolvency and Bankruptcy Board of India
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9th August, 2019

Subject: Judgement¹ dated 9th August, 2019 of the Hon'ble Supreme Court of India in the matter of *Pioneer Urban Land and Infrastructure Limited and Anr. Vs. Union of India & Ors. WP (C) No. 43/2019* and other petitions.

While dismissing the various petitions filed by builders and upholding the constitutional validity of status of allottees as financial creditors, the Hon'ble Supreme Court made several important findings and rulings as under:

Sl. No.	Issue/ Theme	Ruling	Para / Page No.
1	Economic Legislation	Legislature must be given free play in the joints when it comes to economic legislation. Apart from the presumption of constitutionality which arises in such cases, the legislative judgment in economic choices must be given a certain degree of deference by the courts.	15 / 38
2	Raison d'être (Most important reason) for the Insolvency Code (Second Amendment) Act of 2018	a. It can be seen that the Insolvency Law Committee found, as a matter of fact, that delay in completion of flats/apartments has become a common phenomenon, and that amounts raised from home buyers contributes significantly to the financing of the construction of such flats/apartments. b. It was important, therefore, to clarify that home buyers are treated as financial creditors so that they can trigger the Code under section 7 and have their rightful place on the Committee of Creditors when it comes to making important decisions as to the future of the building construction company, which is the execution of the real estate project in which such home buyers are ultimately to be housed.	18/45
3	Whether Explanation added to section 5(8)(f) is clarificatory or can enlarge the scope?	a. In real estate projects, money is raised from the allottee, against consideration for the time value of money. b. The amounts raised from allottees under real estate projects is subsumed within section 5(8)(f) even without advertng to the explanation introduced by the Amendment Act. c. The deeming fiction that is used by the explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code. d. The allottees/home buyers were included in the main provision, i.e. section 5(8)(f) with effect from the inception of the Code. The explanation was added in 2018 merely to clarify doubts that had arisen.	40/112 67/161 84/182 86/183

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4	RERA Vs. IBC	<p>a. Under section 88, the provisions of RERA are in addition to and not in derogation of the provisions of any other law for time being in force. No similar provision exists in the Code.</p> <p>b. It is a difficult to accede to arguments that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the explanation to Section 5(8)(f) of the Code which came into force on 6th June, 2018, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted.</p> <p>c. It is clear that both tests (as above) are satisfied, namely, that the Code as amended, must be given precedence over RERA.</p> <p>d. Even by a process of harmonious construction, RERA and the Code must be held to co-exist, and, in the event of a clash, RERA must give way to the Code. RERA, therefore, cannot be held to be a special statute which, in the case of a conflict, would override the general statute, the Code.</p> <p>e. The Code and RERA operate in completely different spheres. The Code deals with a proceeding in rem in which the focus is the rehabilitation of the corporate debtor by means of a resolution plan, so that the corporate debtor may be pulled out of the woods and may continue as a going concern, thus benefitting all stakeholders involved. On the other hand, RERA protects the interests of the individual investor in real estate projects by requiring the promoter to strictly adhere to its provisions.</p>	<p>22/79</p> <p>24/79</p> <p>24/80</p> <p>28/85</p> <p>29/85</p>
5	Remedies for home buyers	<p>a. The remedies under RERA to allottees are additional and not exclusive remedies.</p> <p>b. The allottees of flats/apartments have concurrent remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.</p>	<p>24/80</p> <p>86/184</p>
6	Constitutionality of homebuyers as financial creditors	<p>a. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code.</p> <p>b. The legislature has understood and correctly appreciated the need of its people and that the amendment to the Code is directed to problems made manifest by experience, as pointed out by the Insolvency Law Committee, demonstrates the presumption of constitutionality.</p> <p>c. The objects of the Code are sub-served by treating allottees as financial creditors.</p> <p>d. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.</p>	<p>40/110</p> <p>42/115</p> <p>45/128</p> <p>86/184</p>

7	Trigger-happy allottees igniting the process of removal of the management	After prima facie default is made out on an application under section 7 of the Code, the burden shifts on the promoter/real estate developer to point out that (a) the allottee is himself a defaulter and not entitled to any relief, entailing a dismissal of the application; (b) the insolvency resolution process has been invoked fraudulently, with malicious intent, or for any purpose other than the resolution of insolvency; (c) the allottee who has knocked at the doors of the NCLT is a speculative investor and not a person who is genuinely interested in purchasing a flat/apartment; (d) the allottee does not want to go ahead with its obligation to take possession of the flat/apartment under RERA, but wants to jump ship and really get back, by way of this coercive measure, monies already paid by it. Given the above, it is very difficult to accede that trigger-happy allottees would be able to ignite the process of removal of the management of the real estate project and/or lead the corporate debtor to its death.	50/137-138
8	Directions	<p>a. States/Union Territories shall appoint permanent adjudicating officers, a Real Estate Regulatory Authority and Appellate Tribunal within a period of three months from the date of the judgment, if they have not yet appointed.</p> <p>b. The NCLT and the NCLAT shall be manned with sufficient members to deal with litigation that may arise under the Code generally, and from the real estate sector in particular, by the second week of January, 2020.</p> <p>c. Stay orders granted shall continue until the NCLT takes up each application filed by an allottee/ home buyer to decide the same in light of this judgment</p>	<p>87/184-185</p> <p>88/185</p> <p>89/186</p>