Insolvency and Bankruptcy Board of India
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24th January, 2021

Subject: Judgment[1] dated 19th January, 2021 of the Hon'ble Supreme Court of India in the matter of *Manish Kumar Vs. Union of India and Another [WP(C) No. 26 of 2020 with 40 other writ petitions]*

The Insolvency and Bankruptcy Code (Amendment) Act, 2020, among others, inserted three provisos to section 7(1), an additional explanation to section 11, and section 32A in the Insolvency and Bankruptcy Code, 2016 (Code). These provisions were challenged in these writ petitions under Article 32 of the Constitution of India. The Hon'ble Supreme Court, in its 465-page judgment, while upholding these amendments, made important findings and observations, and issued directions as under:

Sl.	Issue / Challenge	Findings, Observations and Directions	Para/ Page No.
		General	
1	Freedom of legislature to experiment in economic laws.	The working of a statute may produce further issues, all of which may not be fully perceived or wholly foreseen by the law giver. The freedom to experiment must be conceded to the legislature, particularly, in economic laws. If problems emerge in the working of a law, which requires legislative intervention, the court cannot be oblivious to the power of the legislative to respond by stepping in with necessary amendment.	121/148
2	Basis for court ruling on constitutionality of any law.	There is nothing like a perfect law and as with all human institutions, there are bound to be imperfections. What is significant is, however, for the court ruling on constitutionality, the law must present a clear departure from constitutional limits. The law under scrutiny is an economic measure. In dealing with the challenge on the anvil of Article 14, the Court will not adopt a	121/148 199/249

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			doctrinaire approach. In economic matters, the wider latitude given to the law giver is based on sound principle and tested logic over time.	
3	Imperative need for the Code.		The Code was an imperative need for the nation to try and catch up with the rest of the world, be it in the matter of ease of doing business, elevating the rate of recovery of loans, maximization of the assets of ailing concerns, and the balancing the interests of all stakeholders.	194/238
Second proviso to section 7 of the Code				
4	Malice	The law was created by way of pandering to the real estate lobby and succumbing to their pressure or by way of placating their vested interests.	Such an argument is nothing but a thinly disguised attempt at questioning the law of the legislature based on malice. While malice may furnish a ground in an appropriate case to veto administrative action it is trite that malice does not furnish a ground to attack a plenary law.	52/62
5	Estoppel	Having regard to the stand taken by the Union of India in Pioneer Urban Land and Infrastructure Ltd. and another Vs. Union of India and others (Pioneer), the legislature is estopped by the principle of promissory estoppel from enacting the impugned enactment.	A supreme legislature cannot be cribbed, cabined, or confined by the doctrine of promissory estoppel or estoppel. It is incontestable that promissory estoppel serves as an effective deterrent to prevent injustice from a Government or its agencies which seek to resile from a representation made by them, without just cause.	54/64
6	The provisions are not unworkable.	The 'allottee' is to be understood in the sense it has been defined in the RERA. In that case, the amendment is inflicted with the vice of vagueness and it is arbitrary.	The 'allotment' means allotment in the sense of documented booking as mentioned in section 11(1)(b) of the RERA. A person to whom allotment of a plot, apartment, or a building has been made is an allottee. The allottee would also include a person who acquires the allotment either through sale, transfer or otherwise. A mere charge of either under inclusiveness or over inclusiveness hardly suffices to persuade the court to strike down a law. The examination cannot be extended to find out whether there is mathematical precision or wooden equality established.	120/144 121/148

			What is required is allotment qua apartments, and not promised flats as per a brochure. It is also not the total constructed units. It is the number of units allotted.	123/150
7		10% of allotted units, even it is assumed to be qua letter of allotment, is a dynamic figure and keeps changing. What is 1/10 in the morning may fall short by night if more allotment is made, rendering the filing of application impossible.	The mere difficulties in given cases to comply with a law can hardly furnish a ground to strike it down. The provisions of the Companies Act, 1913 (sections 153-C) section 399 of the Companies act, 1956 and section 244 of the Companies Act, 2013 contain similar provisions.	124/151
8		The date of default of various home buyers may be different. Therefore, to forge a common complaint impelling a group of home buyers to come together is impracticable and not workable.	To successfully move an application under section 7, there must be a default. Such default need not be qua the applicant or applicants. Any number of applicants, without any amount being due to them, could move an application under section 7, if they are financial creditors (FCs) and there is a default, even if such default is owed to none of the applicants but to any other FC.	135/159
9		Insolvency is a financial malaise, which afflicts the corporate debtor (CD) as a whole. There is no rationale in insisting that the said CD has become insolvent, qua a project. The requirements of allottees to be from same real estate project is irrational.	The rationale behind confining allottees to the same real estate project is to promote the object of the Code. The allottees in one project may not have much of a complaint, while the complaints of allottees in another project may be more serious. In the latter case, it may be easier for the allottees to fulfil the statutory mantra in the impugned provisos, with the junction of likeminded souls. If, however, all projects are considered, the task would be much more cumbersome. The requirement of the allottees, being drawn from the same project, stands to reason and does not suffer from any constitutional blemish.	140/165
10		There is lack of clarity as to whether the application to initiate CIRP needs to conform the numerical strength at the time of filing the application, or till the application is admitted.	There can be no doubt that the requirement of a threshold under the impugned proviso must be fulfilled as on the date of the filing of the application.	141/168
11		There is no clarity as to whether an allotment made to more than one person	It does not matter whether a person has one or more allotments in his name or in the name of his family members. As long as there are independent allotments made to him or his family members, all of	146/175

		will be taken as only one allottee or as many allottees as there are joint allottees.	them would qualify as separate allottees and they would count both in the calculation of the total allotments, as also in reckoning the figure of hundred allottees or one-tenth of the allottees, whichever is less. In the case of a joint allotment of an apartment, plot or a building to more than one person, the allotment will be treated as a single allotment. The objective is to ensure that there is a critical mass of allottees, who agree that the time is ripe to submit to the inexorable processes under the Code, with all its attendant perils. If an apartment is taken in the names of 100 persons, the allottees of that apartment would not represent a critical mass of the allottees of the project.	147/176
12		Unlike the Companies Act, 1956, the Central Government has no power to waive threshold requirement of allottees for filing an application, in just and equitable circumstances.	The role of the Central Government is different under the Code. The scheme of the Code is unique, and its objects are different from those of the Companies Act, 2013. If the legislature felt that threshold requirement representing a critical mass of allottees alone would satisfy the requirement of a valid institution of an application, it cannot be dubbed as either discriminatory or arbitrary.	151/179
13		The proviso is not on similar lines as in Order 1 Rule 8 of the Code of Civil Procedure, where numerical stipulation is not insisted upon. The said Order allows the setting in motion of a civil suit by a single person where there are numerous persons having the same interest, and the resulting decree is binding on all persons for whose benefit the suit is filed by the single person. However, for entirely arbitrary reasons, a most cumbersome and unachievable threshold requirement is thrust upon a class of the FCs alone, by requiring that should an allottee wish to invoke section 7 of the Code, he should	Whether the procedure contemplated in Order I Rule 8 is suitable, more appropriate, and even more fair, is a matter, entirely in the realm of legislative choice and policy. Invalidating a law made by a competent legislature, based on what the court may be induced to conclude, as a better arrangement or a more wise and even fairer system, is constitutionally impermissible. If the impugned provisions are otherwise not infirm, they must pass muster.	157/188

		muster the support of at least 99 other allottees or one-tenth of the total number of allottees, whichever is lower.		
14		The amendments have the effect of setting at nought the directions and decision of the Supreme Court in Pioneer.	The impugned provisos do not set at nought the ruling in Pioneer. Further, the ruling in pioneer cannot detract the law giver from amending the very law on its understanding of the working of the Code at the instance of certain groups of applicants and impact it produces on the economy and the frustration of the sublime goals of the law.	160/195
15		There is no system under which an allottee can obtain information about the persons similarly circumstanced and whose co-operation and support is necessary under the amendment to activise the Code. The information relating to allottees in respect of real estate projects and the debenture holders and security holders is not available, which makes the amendment arbitrary and unworkable.	Section 11(1)(b) of the RERA makes it mandatory for the promoter to make available information regarding the bookings. Regulations require the promoter to open a webpage for the project and post and update information relating to allotments. The law giver has created a mechanism, namely, the association of allottees through which the allottees are expected to gather information about the status of the allotments, including the names and addresses of the allottees. As regards debenture holders and security holders, there is a statutory mechanism, which is comprised section 88(1) of the Companies Act, 2013.	163/197 163/201
16	The classification is arbitrary and discriminatory.	A sub-class cannot be created within a class. It is not permissible to have classes among FCs.	The law does not interdict the creation of a class within a class absolutely. Should there be a rational basis for creating a sub-class within a class, it is not impermissible. A class within a sub-class is, indeed, not antithetical to the guarantee of equality under Article 14.	188/232
17		There is no intelligible differentia to distinguish the home buyers from the other creditors.	What distinguish allotees from other FCs are numerosity, heterogeneity and the individuality in decision making. There can be hundreds or even thousands of allottees in a real estate project. Different allottees may have a different take of the whole scenario. Some of them may seek remedy under the RERA; some may resort to the Consumer Protection Act and others may use civil suit. In such circumstances, if the legislature distinguishes the allottees from other	192 / 236

			FCs, it is not for the Court to sit in judgment over the wisdom of such a measure.	
18		There is no intelligible differentia bearing a nexus with the object and purpose of the Code.	If a single allottee, as an FC, can move an application under section 7, the interests of all the other allottees may be put in peril. The legislature became alive to the peril of object of the Code, being derailed by permitting the individual players crowding the docket of the Authorities and resultantly, reviving the very situation, which compelled the legislature to script a new dawn in this area of law. Instead, having regard to the numerosity, the legislature thought it fit to adopt a balanced approach by not taking the allottee out of the fold of the FCs altogether. The allottee continues to be an FC. All that is envisaged is the legislative value judgment that a critical mass is indispensable for allottees to be present before the Code, can be activised. The purport of the critical mass of applicants would ensure that a reasonable number of persons similarly circumstanced, form the view that despite the remedies available under the RERA or the Consumer Protection Act or a civil suit, the invoking of the Code is the only way out, in a particular case. The attempt by individual allottees would crowd an already heavy docket; and consequently, slow down the processes under the Code; and defeat the object of the balancing the interests of all stakeholders.	192/236 196/242 197/247
19		There is hostile discrimination between allottees and operational creditors.	If the legislature felt that having regard to the consequences of an application under the Code, when such a large group of persons, pull at each other, an additional threshold be erected for exercising the right under section 7, certainly, it cannot suffer a constitutional veto at the hands of Court exercising judicial review of legislation. It is not a case where the right of the allottee is completely taken away. All that has happened is a half-way house is built between extreme positions, viz., denying the right altogether to the allottee to move the	213/276 214/276

			application under section 7 of the Code and giving an unbridled license to a single person to hold the real estate project and all the stakeholders thereunder hostage to a proceeding under the Code. This proceeding may yield corporate death with the unavoidable consequence of all allottees and not merely the applicant under section 7 being visited with payment out of the liquidation value, the amounts which are only due to the unsecured creditor.	
First proviso to section 7 of the Code				
20	The target of the legislature was the problem created by individual allottees invoking section 7 of the Code. There is no rational basis for imposing a threshold requirement upon debenture holders and other security holders to whom debt is owed by the CD. The principle of absurdity should guide the Court to read down the first proviso. This also suffers from manifest arbitrariness.		The legislative understanding is clear that such creditors bearing the hallmark of large numbers, they need to be treated differently. If not, it would spell chaos and the objects of the Code would not be fulfilled. Insisting on a threshold for these categories of creditors would lead to the halt to indiscriminate litigation which would result in an uncontrollable docket explosion as far as the authorities. The debtor who is apparently stressed is relieved of the last straw on the camel's back, as it were, by halting individual creditors whose views are not shared even by a reasonable number of its peers rushing in with applications. …… The legislative policy reflects an attempt at shielding the CD from what it considers would be either for frivolous or avoidable applications. The amendment is likely to ensure that the filing of an application is preceded by a consensus at least by a minuscule percentage of similarly placed creditors that the time has come for undertaking a legal odyssey which is beset with perils for the applicants themselves apart from others. …….. As regards the percentage of applicants contemplated under the proviso, it cannot be dubbed as an arbitrary or capricious figure. The legislature is not wanting in similar requirements under other laws. The object of speed in deciding CIRP proceedings would also be achieved by applying the threshold to debenture holders and security holders. The Code and object of the Code and the unique features which set apart the creditors involved in this case from the generality of the	220/284 221/287

		creditors, the challenge being to an economic measure and the consequential latitude that is owed to the legislature renders the Principle of Absurdity wholly inapposite.	
Explanation II to section 11 of the Code			
21	Section 11(a) and (b) unequivocally bar a CD from filing a CIRP application *qua* another CD under sections 7 and 9 of the Code. The Explanation has modified the main provision, which is an arbitrary and irrational exercise of power. Further, the amendment cannot be used retrospectively to take away the vested right.	The intention of the legislature was always to target the CD only insofar as it purported to prohibit application by the CD against itself, to prevent abuse of the provisions of the Code. It could never had been the intention to create an obstacle in the path of the CD, in any of the circumstances contained in section 11, from maximizing its assets by trying to recover the liabilities due to it from others. Not only does it go against the basic common-sense view, but it would frustrate the very object of the Code. The impugned Explanation clearly amounts to a clarificatory amendment. Being retrospective in nature, a clarificatory amendment will certainly apply to all pending applications also.	243/312
Section 32A of the Code			
22	The immunity granted to the CD and its assets acquired from the proceeds of crimes and any criminal liability arising from the offences of the erstwhile management for the offences committed prior to initiation of CIRP and approval of the resolution plan by the Adjudicating Authority (AA) further jeopardizes the interest of the allottees/creditors. It will cause huge losses which is sought to be prevented under the provisions of the Prevention of Money Laundering Act, 2002. Section 32-A is therefore arbitrary, ultra vires and violative of Article 300-A and Articles 14, 19 and 21.	No case whatsoever is made out to seek invalidation of section 32-A. The boundaries of the court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the experience of its working, the interests of all stakeholders, including most importantly the imperative need to attract resolution applicants, who would not shy away from offering reasonable and fair value as part of the resolution plan, if the legislature thought that immunity be granted to the CD as also its property, it hardly furnishes a ground for this the court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the CD is apparently important to the new management to make a clean break with the past and start on a clean slate.	257/337

		The immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the CD. The new management cannot be the disguised avatar of the old management. It cannot even be the related party of the CD. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence. These ingredients are also insisted upon for claiming exemption of the bar from actions against the property. Significantly every person who was associated with the CD in any manner and who was directly or indirectly involved in the commission of the offence continues to be liable to be prosecuted and punished for the offence committed by the CD. The CD and its property in the context of the code constitute a distinct subject matter justifying the special treatment. Creation of a criminal offence as also abolishing criminal liability must ordinarily be left to the judgement of the legislature. Attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgement and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some, it cannot, unless it strikingly ill squares with some constitutional mandate, suffer invalidation. There is no basis at all to impugn the section on the ground that it violates Articles 19, 21 or 300A.	258/338 258/340 259/341
Third proviso to section 7 of the Code			
23	The home buyers have been conferred the substantive right to invoke the Code by moving an application under section 7. This right cannot be taken away by providing for a procedure, and what is more, which is impossible to attain.	The third proviso is a one-time affair. It is intended that the threshold requirement would apply to all those applications, which were filed prior to 28th December, 2019, but not admitted.	261/342

	It makes a clear incursion into a vested right. When an application is filed, the applicant gets the right to continue with the proceeding unimpaired and unhindered by the new threshold requirement. The statutory time limit to decide an application is 14 days. However, the applications filed by petitioners were pending for more than a year. Requiring such applications to meet the new threshold is arbitrary and irrational. The petitioners have spent substantial sums towards court fee, legal and other expenses, in addition to considerable time. There is no provision to ameliorate their losses. Withdrawals and fresh filing would derail the insolvency process. All of this is for no fault of the litigant, who at the time when the application was moved, was governed by a different regime which did not contain the harsh and arbitrary provisions.	When an application is filed under the unamended provisions of section 7, it transforms into a vested right. The vested right is to proceed with the action till its logical and legal conclusion. Should a new law shorten the existing period of limitation, it would not operate in regard to the right of action which is vested. Legislature is clothed with competence to make retrospective laws. It is open to the legislature, while making retrospective law, to take away vested rights. If a vested right can be taken away by a retrospective law, there can be no reason why the legislature cannot modify the vested rights. The imposition of a threshold requirement being a mandatory and irreducible minimum constitutes an intrusion into the substantive right of action vested in an individual creditor. Imposing the threshold requirement under the 3rd proviso is not a mere matter of procedure. It impairs vested rights. Prescribing a time limit of 30 days to modify the pending applications to comply with the threshold requirement, cannot be, per se, described as arbitrary, as otherwise, it would be an endless and uncertain procedure. The applications would remain part of the docket and become a Damocles Sword overhanging the CD and the other stakeholders with deleterious consequences.	316/416 332/432 333/432 346/441 346/442 366/457
Reliefs and directions			

24	Impugned amendments upheld, and writ petitions dismissed, with following directions issued under Article 142 of the Constitution of India: (i) If a petitioner moves application in respect of the same default, as covered in its earlier application under unamended section 7, within a period of two months from the date of the order (19th January, 2021), in compliance with either the first or the second *proviso* under section 7(1), it will be exempted from payment of court fees. (ii) If an application under (i) above is accompanied by an application under section 5 of the Limitation Act, 1963, the period of delay shall be condoned for the period, during which the earlier application was pending with the AA. (iii) The time limit of two months is fixed only for conferring the benefits of exemption from court fees and for condonation of the delay, as above. It is always open to the petitioners to file applications, even after the period of two months and seek the benefit of condonation of delay under section 5 of the Limitation Act, 1963 for the period, during which the earlier applications were pending before the AA.	372/464