

SUPREME COURT UPHOLDS SECTION 3, 4 AND 10 OF THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2020

FACTS

The Insolvency and Bankruptcy Code (Amendment) Act, 2020 (“Amendment”), inter alia, inserted certain provisions in the Insolvency and Bankruptcy Code, 2016 (“Code”), including proviso to Section 7(1) and explanations to Section 11 and Section 32 of the Code. Various writ petitions were filed by the petitioners, mostly allottees under real estate projects, under Article 32 of the Constitution of India alleging that the Amendment is in contravention of the fundamental rights provided under Articles 14, 19 (1) (g) & 21 of the Constitution of India.

POINT OF CONTENTION

- Provisos to Section 7 (1) of the Code: Threshold for filling of application by allottees i.e. either 100 allottees or 1/10th of the total number of allottees of the particular project, whichever is lower.
- Explanation II to Section 11 of the Code: Rights of a corporate debtor against another company.
- Section 32 A of the Code: Discharge of liability of corporate debtor committed prior to commencement of corporate insolvency resolution process (“CIRP”).

ARGUMENTS AND COURT’S OBSERVATIONS

Provisos to Section 7 (1) of the Code

The Petitioners argued that the Amendment is arbitrary being in the teeth of the principles laid down in Pioneer Urban Land and Infrastructure Ltd. and Anr. V. Union of India and Ors. [(2019) 8 SCC 416]. It was contended that the object of the law would stand defeated and the Amendment also violates the fundamental rights of the petitioner as the same resulted in a hostile discrimination between the petitioners and the other financial creditors, lacking any intelligible differentia.

It was also argued that there existed no platform for the exchange and availability of information with details pertaining to the allottees. If the aforesaid proviso is upheld, the petitioners would for all practical purposes fall outside the purview of a financial creditor and their status would be worse than that of an operational creditor.

The petitioners’ major contention was that there is already a threshold limit of amount of default of INR 1 Crore, and in such situation, any further threshold would be discriminatory for the real estate creditors, without any intelligible differentia.



Responding to petitioner's contentions, the Supreme Court stated that what distinguishes the real-estate creditors from other financial creditors is numerosity, heterogeneity and individuality in decision making. Thus, acknowledging the possibility of individual allottees crowding the Adjudicating Authority, and hence becoming a peril for the law, the Amendment was thought fit in view of the numerosity.

Further, given that the real-estate creditors are not completely denied the right to recourse under the Code, the additional threshold could not be considered as being discriminatory. This is not a case where there is no intelligible differentia. The law under scrutiny is an economic measure. As laid down by this Court, in dealing with the challenge on the anvil of Article 14, the Court will not adopt a doctrinaire approach.

It was also stated by the Court that 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.

Explanation II to Section 11 of the Code

It was contended by the petitioner that an explanation cannot alter or modify the main provision to which it is an explanation as it amounts to arbitrary and irrational exercise of power. Section 11(a) and Section 11(b) unequivocally bar a corporate debtor from filing a CIRP application qua another Corporate Debtor under Section 7 and Section 9 of the Code.

Responding to petitioner's contentions, the Apex Court analyzed the limbs of

Section 11 of the Code and Explanation I. With respect to Explanation II, it was opined that the intention of the Legislature was always to target the corporate debtor only insofar as it purported to prohibit application by the corporate debtor against itself, to prevent abuse of the provisions of the Code. It could never had been the intention of the Legislature to create an obstacle in the path of the corporate debtor, in any of the circumstances contained in Section 11, from maximizing its assets by trying to recover the liabilities due to it from others.

Section 32A of the Code

The petitioners contended that immunity granted to the corporate debtors and its assets acquired from the proceeds of crimes and any criminal liability arising from the offences of the erstwhile management for the offences committed prior to initiation of CIRP and approval of the resolution plan by the adjudicating authority further jeopardizes the interest of the allottees/creditors.

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



CONCLUSION

Although, the Supreme Court's judgment in the present case will lead to blockade against frivolous applications filed by opportunistic litigators, at the same time, it has curtailed the remedy available with the genuine homebuyers, mostly individuals and small groups of homebuyers who otherwise meet the monetary threshold under the Code.

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