

# PSP LEGAL Advocates & Solicitors



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# Real Estate Sector and The Real Estate (Regulation & Development Act, 2016 ("RERA"))

# INTRODUCTION

- **The Real Estate (Regulation and Development) Act, 2016** is an Act of the Parliament of India which seeks to protect home-buyers as well as help boost investments in the real estate industry.
- The bill was passed by the Rajya Sabha on 10<sup>th</sup> March, 2016
- By the Lok Sabha on 15 March 2016.
- The Act came into force from 1 May 2016 with 69 of 92 sections notified.
- The Central and state governments are liable to notify the Rules under the Act within a statutory period of six months.
- State Government **MUST** setup Real Estate Regulatory Authority and Appellate Authority within Time of 1 year from act coming into force given to State Governments
- Applicable to whole of India except Jammu and Kashmir
- Real estate regulatory authority (RERA) is the governing authority.
- The law is not Retrospective.

# NEED FOR THE ACT

- Indian Real Estate Sector has been facing slumps since. This is due to factors like Unemployment, Inventory pile-up, Recession, Low Rental Yield, Unclear Taxes and Arbitration.
- Property prices are not stabilized resulting in decrease in demand for property. This reduced demand is causing a slowdown in recovery of investment for builders.
- Lack of Transparency in Projects.
- Less to no information regarding the Builder, Project and other aspects involved.
- Lack of affective remedy available to the Buyers

**Hence, an Act to establish a Real Estate Regulatory Authority for regulation and promotion of the Real Estate Sector was necessary.**

# SALIENT FEATURES

- The Act is promulgated purely to defend the **legitimate rights** of the buyers and also to enforce and ensure **transparent dealings** by the builders.
- The purpose of the Act is to:
  - (a) protect the buyers' interest
  - (b) quality of construction
  - (c) adherence to rules and regulations by both the builders and also the customers
- Both the builders and also the purchasers have legal recourse for any issue arising out of the construction project. Whoever is the defaulter, they will be punished.
- The sole aim of the act is to ensure genuineness of the dealings at both ends.
- This act makes it mandatory that whatever be the nature of construction whether residential or commercial, **if the land is over 500 square meters or eight apartments and more are constructed**, such projects are to be necessarily registered under RERA.
- **Noncompliance is a punishable offence and would be sternly dealt with.**

# SCOPE OF THE ACT

- The Act applies to Under-construction as well as New Projects.
- The Act applies to both, Residential and Commercial Projects.
- The Act covers all parties to a Real Estate transaction including Real Estate Agents or Brokers.
- The Act requires all states in India to set up an Appellate Tribunal to address homebuyer's grievances
- The Act requires all builders to register their Project with the Tribunal before initiation
- The Act mandates the builders to set aside 70% of the initial funds in escrow account for construction of the Project.

# IMPACT OF THE ACT

NEW PROJECTS	ON-GOING PROJECTS
<ul style="list-style-type: none"><li>• Any new project with 8 (Eight) Apartments or size of over 500 sq. mt. is required to be registered under RERA.</li><li>• The Developers have to register each stage of construction independently with the state Tribunal.</li><li>• Under RERA, a Builder cannot take more than 10% as initial deposit</li><li>• Advertising a Project without registering it first is banned.</li></ul>	<ul style="list-style-type: none"><li>• Under the Act, all the ongoing Projects have to now register first with the Regulatory Authority before moving further in completing the Project.</li><li>• The Builders are prohibited from advertising or promoting the Project before registration.</li><li>• RERA mandates builders to issues occupation or completion certificate before handing over possession to the Buyer.</li></ul>

## BUILDERS

- Under RERA builders are mandated to register critical information regarding the project. This includes
  - Layout
  - Promoter details
  - Land title status
  - Statutory approval status
  - Agreements
  - Details of the brokers
  - Architects and contractors
- Builders are bound by a 5(Five) year agreement with the Buyer for quality assurance.
- Builders have to ensure formation for Residents' Welfare Association with 3 months of project completion.
- Builder have to disclose the exact size (Carpet Area) of the property.

## BUYERS

- In order to increase transparency, regarding Project Completion Status, the Act mandates Developers to disclose the construction status on the Authority Website.
- In case of any misdoing by the Builder, the Buyer can file a complaint with the Authority.
- The Complaints are mandated to be resolved within 120 days.
- Builders cannot change any aspect of the structure without prior approval of all the Buyers.



# ADVANTAGES & DISADVANTAGES

ADVANTAGES OF RERA	DISADVANTAGES OF RERA
<ul style="list-style-type: none"><li>• Timely delivery of Flats/Units</li><li>• Furnishing of accurate project details</li><li>• Specifying carpet area</li><li>• All clearances are mandatory before beginning a project</li><li>• Each project should have a separate bank account</li><li>• After sale service</li></ul>	<ul style="list-style-type: none"><li>• Past Real Estate projects not included in the Act ( Projects which have been completed or stuck due to clearance or financial issues)</li><li>• Delay from Government Agencies</li><li>• No compulsory regulation for Projects less than 1000 sq. mtrs.</li><li>• New project launches expected to be delayed.</li></ul>

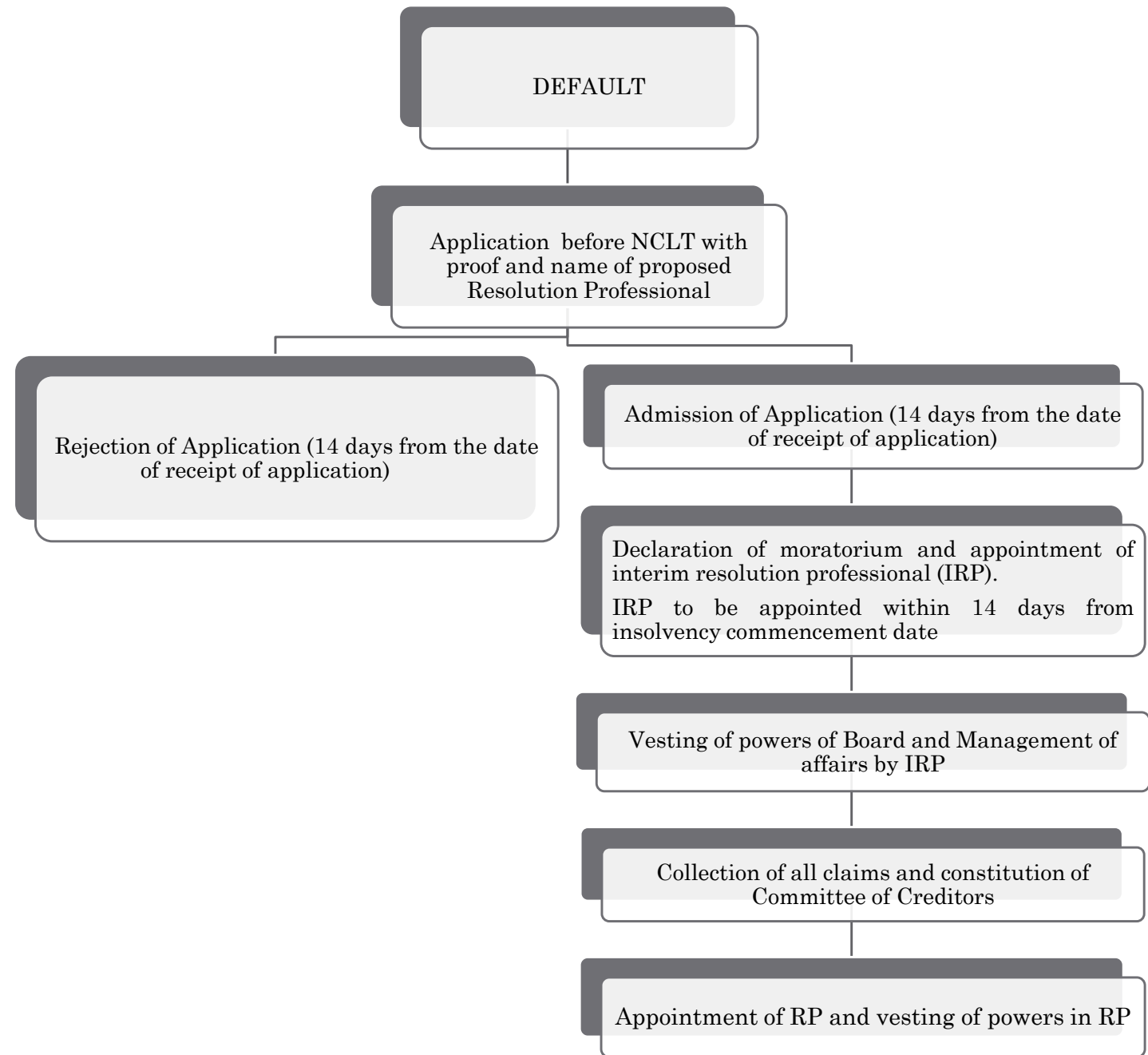
Any and All Questions/ Clarifications will be welcomed

# Real Estate Sector and The Insolvency And Bankruptcy Code, 2016 ("IBC")

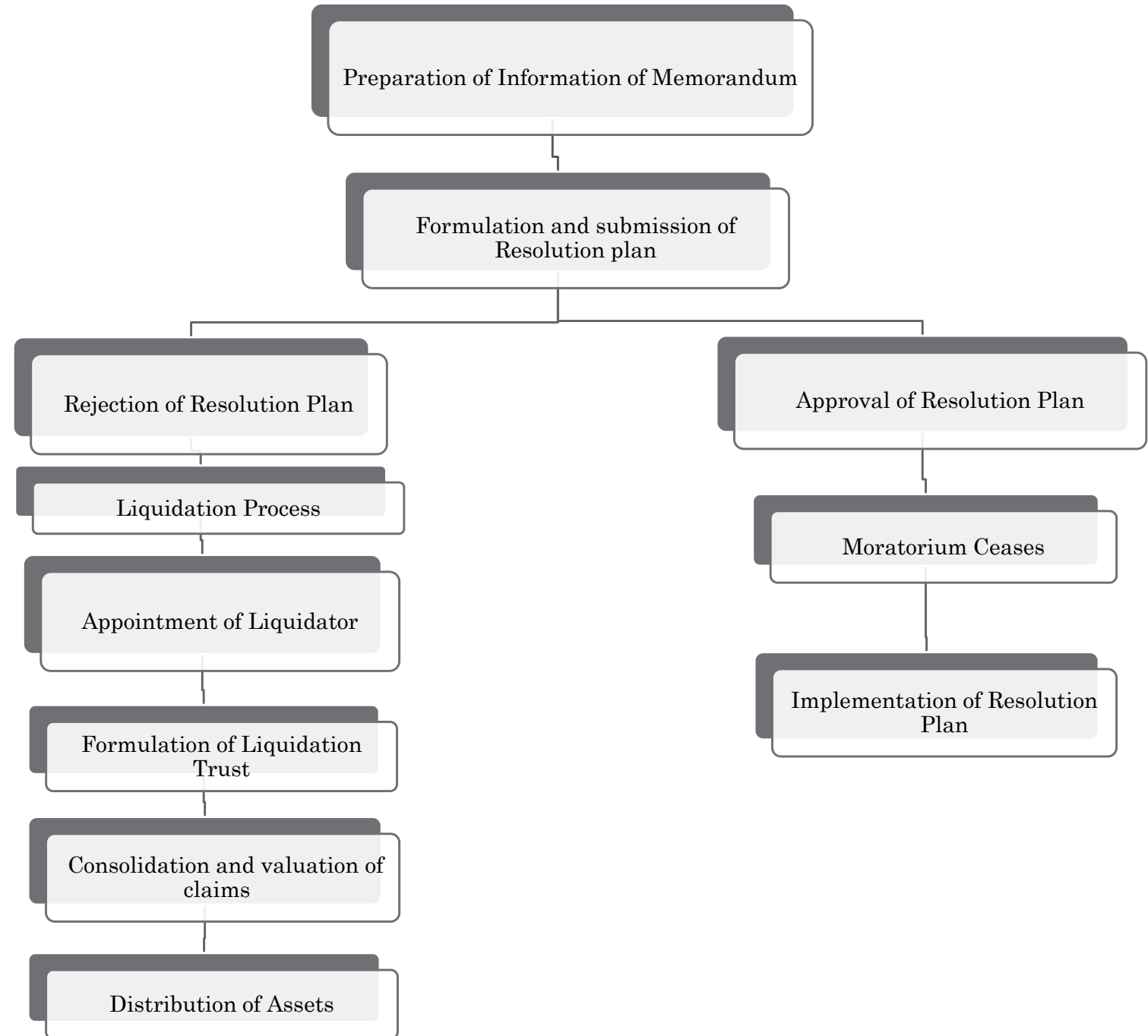
# INTRODUCTION

- The Insolvency and Bankruptcy Code, 2016 was enacted to provide a time-bound process to resolve insolvency among companies and individuals.
- The Bankruptcy Code is an effort at a comprehensive reform of the fragmented regime of corporate insolvency framework, in order to allow credit to flow more freely in India and instilling faith in investors for speedy disposal of their claims.
- The Code consolidates existing laws relating to insolvency of corporate entities and individuals into a single legislation.
- The Code has unified the law relating to enforcement of statutory rights of creditors and streamlined the manner in which a debtor company can be revived to sustain its debt without extinguishing the rights of creditors.
- In June 2018, the government promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 amending certain provisions of the Code.

# PROCESS FLOW CHART FOR INSOLVENCY



# PROCESS FLOW CHART FOR INSOLVENCY RESOLUTION



# Definition: Claim

Section 3 (6) defines "claim" as—

- *(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;*
- *(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;*

# Definition: Creditor

Section 3 (10) defines "creditor" as-

*“ any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decreeholder”*

# Definition: Debt

Section 3 (11) defines "debt" to mean-

*“ a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt”*

# Definition: Default

Section 3 (12) defines "default" to mean-

*“ non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be”*

# Definition: Secured Creditor

Section 3 (30) defines "secured creditor" as-

*“ a creditor in favour of whom security interest is created”*



# NEED FOR AN AMENDMENT

- In November 2017, the Insolvency Law Committee was set up to review the Code, identify issues in its implementation, and suggest changes.
- The Committee submitted its report March 2018. It made several recommendations, such as but not limited to treating allottees under a real estate project as financial creditors; exempting micro, small and medium enterprises from certain provisions of the Code, reducing voting thresholds of the committee of creditors
- Subsequently, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, was promulgated on June 6, 2018, incorporating these recommendations.

# CHANGES WITH RESPECT TO REAL ESTATE ALLOTES

Section 5 (8) (f) of the IBC 2016:

*“(8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes--*

*(a) money borrowed against the payment of interest;*

*(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;*

*(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*

*(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

*(e) receivables sold or discounted other than any receivables sold on non-recourse basis;*

*(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;”*

- The Code defines a financial creditor as anyone who has extended any kind of loan or financial credit to the debtor.
- The Amendment brought the following change: Section 3 of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (second amendment Act) has inserted two explanations in Clause (8) (f) of Section 5 of the Code.
  - Pursuant to the first explanation, any amount raised from an 'allottee' of a 'real estate project' i.e. a homebuyer shall be deemed to be an amount having the commercial effect of borrowing, and resultantly he is a financial creditor under the section 7 of the IBC. **(Which allows financial creditor(s) to file an application in NCLT for initiating corporate insolvency resolution process against a defaulting company).**
  - The amendment has further allowed the homebuyers being financial creditors to have representation in the Committee of Creditors through an authorised representative and also have voting rights.

# INADEQUACIES IN THE AMENDMENT

## Concept of Default

- When is the ‘default’ said to have been committed by the Developer and when the ‘debt’ becomes due remains a grey area.
- Relying on the definition of ‘default’ [Section 3 (12)], only once the refund is demanded by the homebuyer, it can be said that the amount of debt has become due.
- In the situations of delay in the delivery of possession which is largely the substratum of the dispute between the homebuyer and the developer, in the absence of termination of the agreement, there remains lack of clarity as to when the ‘debt’ has become due and the ‘default’ has been committed.

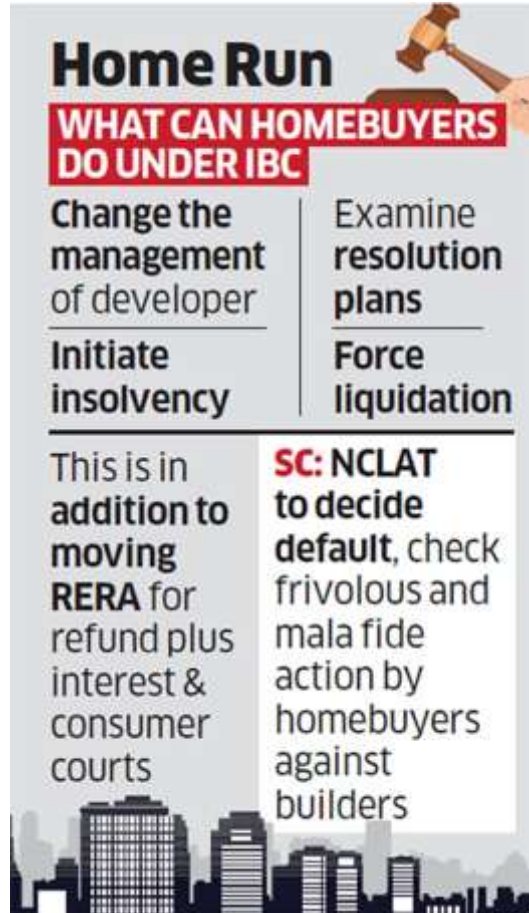
# Debt

- The Amendment is based on a premise that the developer/builder is always a defaulter and presupposes a situation in which the projects are not completed on time.
- At times, the default can also be committed by the flat buyers due to delay in paying the instalments or final consideration amount.
- This amendment has actually conferred such status to the homebuyers that they are entitled to sustain their claim irrespective of a disputed debt.
- The question that arise is whether the insolvency forum being a forum of summary adjudication is an apt forum to adjudicate upon a disputed debt which involves a mixed question of fact and law.
- Whilst it true that the avid of IBC has resultant into an enormous pressure being created on the developers for the timely delivery of Flats but at the same time if the developer/builder is not at default and the claim is disputed, IBC proceedings turn into an abuse of process of law.

# SECURED OR UNSECURED CREDITORS

- Under IBC, the difference between secured financial creditors and unsecured financial creditors mostly has an implication on the priority of payments upon liquidation.
- The amended law grants homebuyers the status of financial creditors but stops short of stating whether they are secured or unsecured creditors.
- The homebuyer will have to prove which category of creditor he is qualified to be as per the agreement with the real estate company.
- If the developer company gets into liquidation, and the homebuyer is an unsecured creditor as per the agreement, he is actually even worse off.

# Pioneer Urban Land and Infrastructure Ltd. & Anr v. Union of India & Ors. W.P. (C) No. 43 of 2019



- In 2018, Section 5 (8)(f) of IBC was amended by putting an explanation to include home buyers as financial creditors.
- Pioneer Urban Land and infrastructure had initiated a plea in the Supreme Court challenging the validity of Section 5 (8)(f) of IBC.
- Subsequently, around more than 200 developers filed a writ petition.
- Dismissing the pleas of the developers, the SC has upheld the status of home buyers as financial creditors.

Any and All Questions/ Clarifications will be welcomed



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