Highlights:

Corporate Brief

- *Companies (Audit and Auditors) Second Amendment Rules, 2021;*
- *Companies (Accounts) Second Amendment Rules, 2021;*
- *Clarification on Spending of CSR Funds for Setting Up Makeshifts Hospitals and Temporary COVID Care Facilities;*
- *Notification for Minimum Amount of Default under Insolvency and Bankruptcy Code, 2016;*
- *Key Highlights of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021; and*
- *Key Highlights of the Insolvency and Bankruptcy (Pre-Packaged Insolvency Resolution Process) Rules, 2021.*

RERA Brief

- *Maharashtra RERA Order regarding promoter's disclosure of sold/booked inventory (building-wise) in the project;*
- *Bihar RERA Order regarding submission of completion certificate, occupancy certificate, formation of association , execution of conveyance deed in respect of projects which have been completed;*
- *Bihar RERA Direction regarding submission of accounts for F.Y 2019-20 of real estate projects duly audited by Chartered Accountants;*
- *Kerala RERA Circular on quarterly updates and forms to be uploaded on the online web portal;*

NCLT Brief

- *Laxmi Pat Surana Vs. Union bank of India & Ors. [CIVIL APPEAL NO. 2734 OF 2020]*

Litigation Brief

- *Whether the State enactment of West Bengal Housing Industry Regulation Act, 2017 in the name of cooperative federalism, pursuant to the Central enactment of Real Estate Regulation and Development Act, 2016 constitutionally permissible?*

Corporate Brief

➲ Companies (Audit and Auditors) Second Amendment Rules, 2021:

- By virtue of the notification dated 01.04.2021 published by the Ministry of Corporate Affairs, in exercise of the powers conferred by Sections 139, 143, 147 and 148 read with Section 469(1) and 469(2) of the Companies Act, 2013, the Central Government further amended the Companies (Audit and Auditors) Rules, 2014.
- These Rules are referred to as the Companies (Audit and Auditors) Second Amendment Rules, 2021.
- The Rule 11 of the Companies (Audit and Auditors) Rules, 2014, was amended to provide that whether the company, in respect of financial years commencing on or after the 1st April, 2022, has used such accounting software for maintaining its books of account which has a feature of recording audit trail (edit log) facility and the same has been operated throughout the year for all transactions recorded in the software and the audit trail feature has not been tampered with and the audit trail has been preserved by the company as per the statutory requirements for record retention.
- The said Companies (Audit and Auditors) Second Amendment Rules, 2021 have come into effect from 01.04.2021.

➲ Amendment of Companies (Accounts) Second Amendment Rules, 2021:

- By virtue of the notification dated 01.04.2021 published by the Ministry of Corporate Affairs, in exercise of the powers conferred by Sections 134 read with Section 469 of the Companies Act, 2013, the Central Government further amended the Companies (Accounts) Rules, 2014.
- These Rules are referred to as the Companies (Accounts) Second Amendment Rules, 2021.
- The proviso of Rule 3(1) of the Companies (Accounts) Rules, 2014, was amended to provide that for the financial year commencing on or day after 01.04.2022, every company which uses accounting software for maintaining its books of account, shall use only such accounting software which has a feature of recording audit trail of each and every transaction, creating an edit log of each change made on books of account along with the date when such changes were made and ensuring that the audit trail cannot be disabled.
- The said Companies (Accounts) Second Amendment Rules, 2021 have come into effect from 01.04.2021.

➲ Notification for Minimum Amount of Default under Insolvency and Bankruptcy Code, 2016:

- The Ministry of Corporate Affairs vide its Notification dated 09.04.2021 by virtue of which the Central Government, in exercise of powers conferred by the second proviso to Section 4 of the Insolvency and Bankruptcy Code, 2016 ("the Code") and as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, specified that the minimum amount of default for matters relating to the pre-packaged insolvency resolution process of corporate debtor under Chapter – III – A of the Code shall be Rs. 10,00,000 (Rupees Ten Lakhs).

➲ Clarification on Spending of CSR Funds for Setting Up Makeshifts Hospitals and Temporary COVID Care Facilities:

- The Ministry of Corporate Affairs, in continuation of its General Circular No. 10/2020 dated 23.03.2020 wherein it clarified that spending of CSR Funds for COVID -19 is eligible as a CSR activity, the Ministry of Corporate Affairs issued another General Circular No. 05/2021 dated

22.04.2021, by virtue of which it further clarified that spending of CSR Funds for 'setting up makeshift hospitals and temporary COVID Care Facilities' is an eligible CSR activity under items nos. (i) and (xii) of Schedule VII of the Companies Act, 2013, relating to promotion of health care, including preventive health care and disaster management.

- The companies may undertake the aforesaid activities in consultation with the State Government subject to fulfilment of Companies (CSR Policy) Rules, 2014 and the circulars related to CSR issued by the Ministry from time to time.

➲ Key Highlights of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021:

The major amendments proposed to be brought in by virtue of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 is encapsulated hereunder:

i. Object of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021: The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 introduces a pre-packaged insolvency resolution process for corporate persons classified as micro, small and medium enterprises.

ii. Amendment of Section 4 of the Code: Section 4 of the Code has been amended and a new proviso has been inserted giving power to the Central Government to specify a different minimum amount of default for initiation of the pre-packaged insolvency resolution process subject to a maximum of Rs. 1 Crore.

iii. Amendment of Section 5 of the Code: Section 5 of the Code has been amended to make changes to various definitions and insertion of new definitions for the pre-packaged insolvency resolution process. A few definitions have been briefly mentioned hereinbelow:

- Section 5(23B): "*pre-packaged insolvency date*" shall mean the date of admission of an application for initiating the pre-packaged insolvency resolution process by the Adjudicating Authority under Section 54(4)(a);
- Section 5(23C): "*pre-packaged insolvency resolution process cost*" shall mean (a) the amount of any interim finance and the costs incurred in raising such finance; (b) fee payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process; (c) costs incurred by the resolution professional in running the business of the corporate debtor; (d) costs incurred at the expense of the Government to facilitate the pre-packaged insolvency resolution process; (e) any other costs.
- Section 5(23D): "*pre-packaged insolvency resolution process period*" shall mean the period beginning from the pre-packaged insolvency commencement date and ending on the date on which an order under Section 54L(1) or Section 54N or Section 54-O(2), as the case may be.

iv. Amendment of Section 11 of the Code: Section 11 of the Code has been amended to make changes pursuant to the inclusion of Chapter IIIA to disentitle certain persons from filing an application for initiating corporate insolvency resolution process including but not limited to (a) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process or (b) a corporate debtor in respect of whom a resolution plan has been approved under Chapter – III-A, twelve months preceding the date of making the application.

v. Insertion of Section 11A of the Code: Section 11 A has been inserted to provide the manner of disposal of simultaneous applications for initiation of pre-packaged insolvency resolution process and corporate insolvency resolution process, pending against the same corporate debtor.

vi. Section 54A of the Code: The insolvency professional to be appointed as the resolution professional shall be proposed and approved by unrelated financial creditors. The management of corporate debtors shall issue a declaration for initiating pre-packaged insolvency resolution process and the members or partners shall pass an appropriate resolution to that effect. The unrelated financial creditors by vote of not less than sixty-six per cent in value of the financial debt due to them, shall approve initiation of this process and the corporate debtor shall share a base resolution plan with such creditors at this stage.

vii. Section 54B of the Code: The insolvency professional will perform the required duties, which will commence from the date on which his name is proposed in the declaration and approved by the unrelated financial creditors.

viii. Section 54D of the Code: The pre-packaged insolvency resolution process will be completed within 120 (one hundred and twenty) days' out of which 90 (ninety) days' time has been given to the resolution professional to file the resolution plan with the Adjudicating Authority and 30 (thirty) days' time has been given to the Adjudicating Authority to approve the resolution plan. If no resolution plan is approved by the committee of creditors, then the resolution professional shall apply to the Adjudicating Authority to terminate the pre-packaged insolvency resolution process.

ix. Amendment of Section 61 of the Code: Section 61 of the Code has been amended to provide for appeal against the

liquidation order and the order for initiation of corporate insolvency resolution process passed during pre-packaged insolvency resolution process under Chapter IIIA.

x. Amendment of Section 65 of the Code: Section 65 of the Code has been amended to provide for a penalty for fraudulent or malicious initiation of pre-packaged insolvency resolution process.

➲ **Key Highlights of the Insolvency and Bankruptcy (Pre-Packaged Insolvency Resolution Process) Rules, 2021:**

The Ministry of Corporate Affairs vide its Notification No. G.S.R. 256(E) dated 09.04.2021, in exercise of the powers conferred by Section 239 read with Section 54C(2) of the Code, framed the Insolvency and Bankruptcy (Pre-Packaged Insolvency Resolution Process) Rules, 2021 ("**the Rules, 2021**"). The brief of the same is as encapsulated hereunder:

i. The Rules, 2021 shall come into force on the date of their publication in the Official Gazette.
ii. The Rules, 2021 apply to the matters relating to the pre-packaged insolvency resolution process.
iii. For the purposes of initiating the pre-packaged insolvency resolution process, the corporate debtor shall make an application under Section 54(C)(1) of the Code in Form 1, accompanied with affidavit, documents or records referred in Annexures therein, in an electronic form, along with a fee of Rs. 15,000 (Rupees Fifteen Thousand). Further, in an event such electronic facility is not available for filing such application, the application and the accompanying documents may be filed in physical form.
iv. The corporate applicant shall serve a copy of the application to the Board by registered post or speed post or by hand or by electronic means, before filing it with the Adjudicating Authority.
v. The application shall be filed before the Adjudicating Authority in accordance with rules 20, 21, 22, 23, 24 and 26 of the National Company Law Tribunal Rules, 2016.
vi. The corporate applicant shall inform the Adjudicating Authority about the filing of any winding up petition against the corporate debtor after becoming aware about such filing.

RERA Brief

MAHARASHTRA

➲ Vide Circular No. MahaRERA/Secyi File No.27/44/2021, dated 09.04.2021, Maharashtra Real Estate Regulatory Authority ("**Authority**"):

It was decided that:

The standard format of '*Disclosure Of Sold/Booked Inventory (Building Wise) In The Project*' maintained by the promoters as required under the Maharashtra Real Estate (Regulation & Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 ("**Rules**") needed amendments for the reasons of (i) providing more clarity and transparency to the allottees/purchasers; and (ii) to avoid multiple transactions of flats/plots, at the time of conclusion of sale/booking of the flats/plots by the promoters.

The amendments in the standard format of disclosures were brought in by the Authority, taking into consideration that the Rules casted mandatory duties on the promoters to disclose the number of apartments sold/allotted to the allottees and further disclose the size of the apartment based on the carpet area, even if such apartments are sold earlier on any other basis (such as the super area, super built up area etc.). In case of plotted development, the promoters are required to disclose the area of the plots sold to the allottees including extent of share of common areas and amenities etc., under the said Rules. To ensure simplicity and clarity in presentation of the details and particulars, the standard form has been amended by the Authority and the promoters of the registered projects are required to update the disclosure under the amended format of disclosure on the official website of the Authority.

BIHAR

➲ Vide Direction No. 3/2021, dated 05.04.2021, Real Estate Regulatory Authority, Bihar ("**Authority**"):

On observing the non-compliance of the provisions laid under Section 11 (*Functions and Duties of Promoter)* of the Real Estate (Regulation & Development) Act, 2016 ("**RERA**") committed by majority of the promoters/developers whose projects have been completed or whose completion date has expired as provided in the registration certificate issued by the Authority, it was decided that such promoters/developers were required to submit the following documents with the Authority latest by April 30, 2021 post which, the penalties shall be imposed on such promoters/developers as per the provisions of RERA.

1. Copy of Completion Certificate (CC) and Occupancy Certificate (OC). In case, the competent authority is yet to issue OC/CC to such promoter/developer, then an application made for the request of issue of OC/CC to the competent authority shall be furnished by such promoter/developer to the Authority.
2. Copy of the registered conveyance deed of completed apartments/flats. Such deed shall be furnished within 3(three) months of issue of OC as required under Section 17 (*Transfer of Title*) of RERA.
3. A copy of formation of association of allottees/flat owners of project and registered conveyance deed of the common

areas of the project in favour of such association, provided that such association shall be formed in accordance with Section 11(4)(e) (*Functions and Duties of Promoter*) of RERA in case nothing has been provided under the local laws.

4. Information regarding the handover of necessary documents, insurance papers, sanctioned plans including common areas allotted to association of allottees/flat owners. Such process shall be undertaken within 30 (thirty) days of receipt of CC/OC of the project as required under Section 16 (*Obligations of promoter regarding insurance of real estate project*) and Section 17 (*Transfer of Title*) of RERA.
5. In case, the project has not been completed by such promoter/developer within the date specified under the registration certificate, then such promoter/developer shall furnish a copy of application for extension furnished with the Authority for seeking the grant of extension of registration of the project as required under Section 6 (*Extension of Registration*) of RERA.

➲ Vide Direction No. 2/2021 dated 05.04.2021, Real Estate Regulatory Authority, Bihar ("**Authority**"):

It was decided that:

1. All promoters/developers whose projects have been registered or have applied for registration with Authority but have failed to submit the statement of accounts for their projects for F.Y 2019-20 duly audited by a recognised chartered accountant by March 31, 2021, such defaulter promoter(s)/developer(s) would be liable to pay a late fee of INR 1,000/- (Indian Rupees One Thousand) per day as a penalty for the delay in submission of the audited statement with the Authority. Such defaulter promoter(s)/developer(s) while submitting the statement of accounts should ensure that the chartered accountant so appointed for the audit thereof, should enclose a verification report to confirm that the amounts collected for a particular project were kept in a designated separate bank account as required under Section 4(2)(l)(D) (*Application for registration of real estate projects)* of RERA and the funds for the project were utilized from the said separate bank account and withdrawal of the funds from the said separate bank account were in compliance with the proportion of the percentage of completion of the project.

2. All promoters/developers of a real estate project who had either registered their projects or applied for registration with the Authority and had failed to submit annual accounts (Profit Loss Account, Balance Sheet cashflow, notes to accounts with all schedules) of the company / partnership firm / individual / organization for F.Y 2019-20 duly audited by a recognised chartered accountant by March 31, 2021 would be liable to pay a late fee of INR 5,000/- (Indian Rupees Five Thousand Only) per week as a penalty for delay in submission of annual account statement.

The sanctions were imposed by the Authority on observing the non-compliance of the provisions of Section 4(2)(l)(D) (*Application for registration of real estate projects*) by the promoters/developers wherein the provisions mandates promoters/developers under RERA to maintain a separate bank account for the project and submit audited annual accounts and statement of account of projects with the Authority.

KERALA

➲ Vide Public Notice No. K-RERA/T3/102/2020 dated 16.04.2021, Kerala Real Estate Regulatory Authority ("**Authority**"):

In consideration with Public Notice viz. dated 03.08.2020, 24.02.2021 and 25.03.2021, the promoters were directed to upload the details of the project on the official website of the Authority as per applications furnished physically by the promoters at the office of the Authority. In respect of the same, it was decided by the Authority that without any further extension, all promoters were directed to upload project details at the website of the Authority by April 25, 2021 and henceforth, following directions were issued:

1. **Quarterly Updates:**
   As required under Section 11(1) (*Functions and Duties of Promoter*) of RERA, the promoter shall quarterly update details of project on the official website of the Authority.

   In accordance with the Kerala Real Estate (Regulation & Development) Rules, 2018 ("**KRERA Rules**") a promoter shall submit the quarterly update of project details within 7 (seven) days from the expiry of a quarter. Nevertheless, the due date of submission of Q4 update (January, February and March) for F.Y 2020-21 had been extended up to April 30, 2021 from April 7, 2021 for all promoters.

2. **Uploading of forms required for withdrawal of money from designated account:**
   Form No. 2 (Architect's Certificate), Form No. 3 (Engineer's Certificate) and Form No. 4 (Chartered Accountant's Certificate) provided under the Kerala Real Estate Regulatory Authority (General) Regulations, 2020 ("**KRERA Regulations**") were required to be uploaded on the official website of the Authority by the concerned promoters on or before April 30, 2021.

3. **Annual Report:**
   The annual report on statement of accounts for year 2019-20, which was earlier required to be submitted by October 31, 2020, is now required to be uploaded on the official website of the Authority by the concerned promoters on or before June 30, 2021 under Form No. 5 (Annual Report on Statement of Accounts) provided under KRERA Rules.

4. **Completion Certificate for Projects:**
   For all registered ongoing projects completed in all respects, as represented by the promoter to the allottees, the concerned promoter shall upload a certificate from a recognized architect under Form No. 6 (Architect's Certificate) as required under Regulation No. 5(4) of the KRERA Regulations, on the official website of the Authority.

5. **Penalties:**
   In case any promoter fails to comply with the above directions or provides any information/data/document which is found to be false/incorrect/deficient in any manner, the same shall, be treated as a non-compliance under the provisions of RERA.

NCLT Brief

➲ Laxmi Pat Surana **Vs.** Union bank of India & Ors. [CIVIL APPEAL NO. 2734 OF 2020]

The captioned Civil Appeal was filed before the Hon'ble Supreme Court against the Judgment dated 19.03.2020 of the National Company Law Appellate Tribunal ("NCLAT") in Company Appeal (AT) (Ins) No. 77 of 2020, which addressed two primary issues, as follows:

i) Whether an application can be filed by a financial creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 ("the Code") against a corporate person who is a guarantor to a loan secured by the principal borrower, who had committed a default under the Code, and is not a corporate person as per the Code?

ii) Whether an application under Section 7 of the Code can be filed after the lapse of three years from the date of declaration of the loan account as Non-Performing Asset ("NPA"), i.e., date of default?

I. BRIEF FACTS:

Union Bank of India ("Financial Creditor"), Respondent No. 1, had extended loan facilities to Ms/ Mahaveer Construction ("Principal Borrower"), a proprietorship firm, amounting to Rs. 9,60,00,000/- (Rupees Nine Crore Sixty Lakh Only) and Rs. 2,45,00,000 (Rupees Two Crore Forty Five Lakh Only) (hereinafter collectively referred as "Loan Accounts") vide two separate loan agreements in the year 2007 and 2008, respectively. With regard to the said Loan Accounts, Surana Metals Limited ("Corporate Debtor") had provided guarantee to the Financial Creditor. However, on account of non-repayment, the said Loan Accounts were declared as NPA on 30.01.2010.

Subsequently, the Financial Creditor had filed an application under Section 19 of the Recovery of Debt Due to Bank and Financial Institutions Act, 1993 against the Principal Borrower before the Debt Recovery Tribunal, Kolkata ("DRT"). During the pendency of the proceedings before the DRT, repeated assurances were provided by the Principal Borrower for re-payment of the Loan Accounts. Subsequently, vide Notice dated 03.12.2018, the Financial Creditor demanded repayment of the amount due from the Loan Accounts from the Corporate Debtor; however, the Corporate Debtor stated that it was not the principal borrower, nor did it owe any financial debt to the Financial Creditor.

II. PROCEEDINGS BEFORE THE NATIONAL COMPANY LAW TRIBUNAL:

The Financial Creditor then filed an application under Section 7 of the Code before the National Company Law Tribunal, Kolkata ("NCLT") on 13.02.2019 against the Corporate Debtor basis the default occasioned on account of non-prepayment of the Loan Accounts. Firstly, the Corporate Debtor resisted the said application on the ground that the Principal Debtor was not a corporate person; thus, an application under Section 7 was not maintainable. Secondly, it was objected on the ground that the said application was barred by limitation as the date of default was 30.01.2020 while the application was filed on 13.02.2019, which according to the Corporate Debtor was outside the prescribed limitation period of three years. However, the NCLT rejected the contentions of the Corporate Debtor vide Judgment and Order dated 06.12.2019.

III. PROCEEDINGS BEFORE THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL:

Aggrieved by the Order dated 06.12.2019, the Appellant, who is the Promoter/Director of the Corporate Debtor, approached the NCLAT for recourse by way of Company Appeal (AT)(Ins) No. 77 of 2020. The objections presented before the NCLT were again reiterated before the NCLAT by the Appellant. The said appeal was dismissed by the NCLAT vide Judgment and Order dated 19.03.2020, while affirming the decision of the NCLT.

IV. PROCEEDINGS BEFORE THE HONBL'E SUPREME COURT OF INDIA:

The Appellant aggrieved by the Order dated 19.03.2020 approached the Hon'ble Supreme Court vide Civil Appeal No.

2734 of 2020 reiterating the objections as elaborated herein under:

1. **First Issue:** Whether the application could have been filed by the Financial Creditor under Section 7 of the Code against the Corporate Debtor who is a guarantor to a loan secured by the Principal Borrower, who had committed a default under the Code, and is not a corporate person as per the Code?

1.1 Observations of the Hon'ble Supreme Court on the First Issue:

- The Hon'ble Supreme Court held that the term 'debt' defined under Section 3(11) of the Code is wide enough to include liability of a corporate person arising on account of guarantee given by it on behalf of any person, who may not be a corporate person, in the event that a default is committed by the latter.
- The Court further dwelled upon the term 'corporate guarantee' and stated that the said term is not defined under the Code; however, it was observed that the term 'corporate guarantor' has been defined under Section 5(5A) of the Code. Thus, it was stated that if the intention of the legislature was to exclude a corporate person from the ambit of a 'corporate debtor' provided under Section 7 of the Code, the legislature would have specifically done so when the Section 5(5A) of the Code was inserted and the term 'corporate guarantor' was defined. It was also stated that Section 7 could have been suitably amended and the term 'corporate debtor' provided under Section 3(8) of the Code could have also been altered.
- It was further observed that the terms, i.e., 'financial debt', 'claim', 'debt' and, 'default' provided under Section 5(8), 3(6), 3(11) and 3(12) of the Code, respectively, could have also been amended to show the aforementioned exclusion. However, there was no alteration in the Code in this regard.
- The Court observed that the liability of a guarantor is coextensive with that of a principal borrower. It was also stated that the remedy under Section 7 of the Code is not for recovery of the amount, but for reorganisation and insolvency resolution of the corporate debtor who is not in a position to pay its debt and commits default in that regard.
- The Court while reiterating the law with regard to the guarantor had stated that the status of the guarantor metamorphoses into a corporate debtor, who is a corporate person, the moment the principal borrower commits a default in payment of his debt which has become due and payable; thus, making the corporate debtor susceptible to an action under Section 7 of the Code.
- In light of the above, the first issue was rendered in favour of the Respondent and against the Appellant.

2. **Second Issue:** Whether an application under Section 7 of the Code can be filed after the lapse of three years from the date of declaration of the loan account as NPA, i.e., date of default?

2.1 Observations of the Hon'ble Supreme Court on the Second Issue:

- Ordinarily, upon declaration of the loan account as NPA, that date can be reckoned as the date of default to enable the financial creditor to initiate action under Section 7 of the Code. However, Section 7 of the Code consciously uses the expression "default" for initiating the process provided under the said Section, and not the date of classification of the loan account as NPA.
- Moreover, as per Section 3(12) of the Code a default would be triggered when whole or any part of the instalment of the amount of debt which has become due and payable is not paid by the debtor or the corporate debtor, as the case may be. Hence, in the case where a corporate person has provided a guarantee to a loan transaction, the right of the financial creditor to initiate action against such corporate debtor, a guarantor, would be triggered the moment the principal borrower commits a default on account of non-payment of debt.
- With regard to Section 18 of the Limitation Act, 1963 ("**Limitation Act**") which talks about fresh period of limitation, it was stated that when the principal borrower and/or the corporate guarantor admits and acknowledges their liability after declaration of NPA, but before expiration of three years including the fresh period of limitation due to successive acknowledgements of their liability, it was not possible to extricate them from the renewed limitation accruing due to the effect of the said Section. In other words, the said Section 18 would come into play every time when the principal borrower and/or the guarantor (corporate debtor), as the case may be, acknowledge their liability to pay the debt.
- The Court further stated that Section 18 of the Limitation Act gets attracted the moment acknowledgment in writing is signed by the party against whom such right to initiate the resolution process provided under Section 7 of the Code ensues. Such acknowledgment; however, must be

before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgment of the debt, from time to time, for institution of the proceedings under Section 7 of the Code. Further, the acknowledgment must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the Code.

- In the present case, acknowledgments by the Principal Borrower as well as the Corporate Debtor subsequent to the declaration of the NPA were undertaken on numerous occasions, and lastly on 08.12.2018. It was further stated that even if the acknowledgment was solely undertaken by the principal borrower, which was carried out within the limitation period, it would not be absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. As under Section 128 of the Contract Act, the liability of the guarantor being coextensive with the principal borrower, it triggers the moment the principal borrower commits default in paying the acknowledged debt. Such liability of the guarantor would flow from the guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.
- Thus, the Court while affirming the view taken by the NCLT and the NCLAT held that the application under Section 7 of the Code which was filed on 13.02.2019 was within limitation as a fresh period of limitation had commenced from the last acknowledgement which is showcased in the communication dated 08.12.2018 sent by the Corporate Debtor to the Financial Creditor

- **As both of the issues were decided against the Appellant, the captioned Appeal was disposed of vide Judgment dated 26.03.2021.**

Litigation Brief

➲ *Whether the State enactment of West Bengal Housing Industry Regulation Act, 2017 in the name of cooperative federalism, pursuant to the Central enactment of Real Estate Regulation and Development Act, 2016 constitutionally permissible?*

IN THE MATTER OF: Forum for People's Collective Efforts (FPCE) & Anr. Vs. The State of West Bengal & Anr. (Decided by Hon'ble Supreme Court of India on 04.05.2021)

Issues:

- Both West Bengal Housing Industry Regulation Act, 2017 ("**WB-HIRA**" or the "**State enactment**") and the Real Estate (Regulation and Development) Act, 2016 ("**RERA**" or the "**Central enactment**") are relatable to the legislative subjects contained in Entries 6 and 7 of the Concurrent List ('List III') of the Seventh Schedule to the Constitution;
- WB-HIRA has neither been reserved for nor has it received Presidential assent under Article 254(2);
- The State enactment contains certain provisions which are either: a. Directly inconsistent with the corresponding provisions of the Central enactment; or b. A virtual replica of the Central enactment; and
- Parliament having legislated on a field covered by the Concurrent List, it is constitutionally impermissible for the State Legislature to enact a law over the same subject matter by setting up a parallel legislation.

Facts:

The constitutional validity of the WB-HIRA was challenged in a Petition under Article 32 of the Constitution of India ("**the Constitution**") before the Hon'ble Supreme Court.

Court's Observations:

- The Ld. Counsels for the Petitioners submitted that WB-HIRA covers the identical field of regulating the contractual behavior of promoters and buyers in real-estate projects, which is a 'copy-and paste' replica of the central legislation (except for certain provisions which are inconsistent with RERA) and covers the field which is occupied by the central enactment. WB-HIRA entrenches on an occupied field and is hence repugnant and void under Article 254(2) of the Constitution. Furthermore, WB-HIRA was not reserved for the assent of the President and is hence not protected by Article 254(2) nor would the state enactment be protected by Article 255 which applies only to a situation where a 'recommendation' or 'previous sanction' is required to be given by the Governor or the President. The Counsels for the Petitioner pressed that Sections 88 and 89 do not prohibit the enactment of laws by Parliament or the state legislatures in future. However, in the case of a future state law covering the same field, its validity has to be tested only on the touchstone of Article 254 without reference to Sections 88 or 89.

- The Counsel appearing for the Union of India submitted that repugnancy of a statute enacted by the state legislature with a central statute on a subject in the concurrent list may arise in any one or more of the following modes: *1.* There may be an inconsistency or conflict in the actual terms of competing statutes; *2.* Though there is no direct conflict between a State and Central statute, the latter may be intended to be an exhaustive code in which event it occupies the whole field, excluding the operation of the state law on the subject in

the concurrent list; and *3.* Even in the absence of an actual conflict, repugnancy may arise when both the State and Central statutes seek to exercise power over the same subject matter. In the present matter, there is a direct inconsistency between several provisions of the RERA and WB-HIRA. Furthermore, the entire subject of WB-HIRA is the same as RERA as a result of which the state law is repugnant to the central legislation. While the failure of the first test would only require WB-HIRA to yield to RERA to the extent of the repugnancy, since the State enactment in the present case completely obstructs and hinders the Parliamentary law, the repugnancy is, according to the submission, absolute and complete.

- In the Counter Affidavit filed by the State of West Bengal it was contended that the State enactment falls under Entry 24 of List II, as it deals with the housing industry. This contention is not correct and was not being pressed. The submission of the State of West Bengal were four-fold: firstly, though there is a substantial overlap between the State and the Central enactments and both of them govern the same subject matter and field, there is no constitutional prohibition on the State legislature enacting legislation on a subject in the Concurrent List which is virtually identical to central legislation in the same list; *secondly*, Section 88 of the RERA contains an expression that its provisions shall be in addition to, and not in derogation of any other law for the time in force; this being an indicator that Parliament contemplated that the RERA can co-exist with analogous State legislation; *thirdly*, the inconsistencies between WB-HIRA and RERA are of a minor nature and wherever the State enactment contains provisions at variance with the Central law, the former will have to yield to the latter, and *fourthly*, the provisions of Section 92 of the RERA demonstrate that where Parliament intended to repeal a specific State legislation – Maharashtra Act No II of 2014 - only that legislation was repealed. The Counsel appearing for the State of West Bengal submitted that RERA does not cover the whole field and is not exhaustive. The provisions of Sections 88 and 89 of RERA indicate that the central legislation is not a complete or exhaustive code on the subject matter legislated upon by Parliament. WB-HIRA follows the principle of cooperative federalism.

- This Hon'ble Court observed that the constitutional challenge in the present case is on the basis that both the central legislation – RERA, and the state legislation – WB-HIRA, fall within the subjects mentioned in Entries 6 and 7 of List III of the Seventh Schedule. In essence, WB-HIRA has enacted a parallel mechanism and parallel regime as that which has been entailed under the RERA. The overlap between the provisions of WB-HIRA and the RERA is so significant that the test of repugnancy based on an identity of subject matter is clearly established. The repugnancy ensues not because there is a conflict between the provisions of the two Acts but because once the Parliament has enacted a law, it is not open to do so, and in this case, bodily lift the provisions of the central law and enact them verbatim as a state law. The Court further observed that the Section 88 of the RERA is an indicator that Parliament did not wish to oust the legislative power of the State legislature to enact legislation on cognate or allied subjects. However, what the State legislature in the present case has done is not to enact cognate or allied legislation but legislation which, insofar as the statutory overlaps is concerned is identical to and bodily lifted from the Parliamentary law. The State legislature has encroached upon the legislative authority of Parliament which has supremacy within the ambit of the subjects falling within the Concurrent List of the Seventh Schedule. The exercise conducted by the State legislature of doing so, is plainly unconstitutional. The Hon'ble Court further added that the State of West Bengal would have had to seek the assent of the President before enacting WB-HIRA, where its specific repugnancy with respect to RERA and its reasons for enactment would have had to be specified. Evidently, this was not done.

- While striking down the provisions of WB-HIRA as unconstitutional in view of the RERA, in order to prevent any chaos in the real estate industry in the state, the Court in exercise of its powers under Article 142, clarified that all sanctions and registrations previously granted under the HIRA prior to the date of this judgement shall continue to prevail.