

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. /2020

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

MANISH KUMAR

...PETITIONER

VERSUS

UNION OF INDIA

...RESPONDENT

PAPER BOOK

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ADVOCATE FOR THE PETITIONERS: VAIBHAV MANU SRIVASTAVA

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PERFORMA FOR FIRST LISTING

The case pertains to (Please tick / check the correct box):

- Central Act: Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019
- Section (s): 3
- Central Rule: N/A
- Rule No: N/A
- State Act: N/A
- Section (s): N/A
- State Rule: N/A
- Rule No: N/A
- Impugned Interim Order: N/A
- Impugned Final Order / Decree: N/A
- High Court: N/A
- Name of Judges: N/A
- Tribunal / Authority Name : N/A

-
1. Nature of Matter: Civil
 2. (a) Petitioner / Appellant: MANISH KUMAR
 3. (b) Email ID:
(c) Phone No:
3. (a) Respondent: Union of India
(b) Email ID: N/A
(c) Phone No: N/A
 4. (a) Main Category:
(b) Sub Category:

5. Not to be listed before: N/A
 6. Similar / Pending matter: N/A
 7. Criminal Matters:
 - (a) Whether accused / convicted has surrendered: N/A
 - (b) FIR / Complaint No: N/A
 - (c) Police Station: N/A
 - (d) Sentence Awarded: N/A
 - (e) Period of Sentence Undergone including period of detention/custody under gone: N/A
 8. Land Acquisition Matters:
 - (a) Date of Section 4 Notification: N/A
 - (b) Date of Section 6 Notification: N/A
 - (c) Date of Section 17 Notification
 9. Tax Matters: State the Tax Effect: N/A
 10. Special Category: N/A
 11. Vehicle No in case of motor accident claim matters): N/A
 12. Decided Cases with Citation: N/A
- Date: .01.2020

ADVOCATE FOR THE PETITIONER

(VAIBHAV MANU SRIVASTAV)
Advocate-on-Record
e-mail:
Ph: +91 –

SYNOPSIS

The instant Writ Petition under Article 32 of the Constitution of India, 1950 ("**the Petition**") is being preferred by the Petitioner to challenge the constitutional *vires* of the section 3 of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 ("**Ordinance**"). In particular, the challenge has been laid, but not limited to, section 3 of the Ordinance which adds provisos in section 7 of the IBC and set out new condition for real estate allottee to approach NCLT as being in violation of Article (s) 14 and 21 of the Constitution of India ("**Constitution**").

At the outset, it is submitted that the present Writ Petition is maintainable because the Petitioner is a Home Buyer and has approached the NCLT under section 7 of the IBC. After coming into effect the aforesaid amendment in Section 7, there is a likelihood that Petitioner case will be withdrawn, if he fails to comply with the new requirement given in section 7 of the IBC. Further, the challenge is against the Union of India which is a State within the meaning of Art. 12 of the Constitution.

The aforesaid section 3 of the Ordinance is *ultra vires* the Constitution and ought to be struck down for the following reasons:

Firstly, it is submitted that Financial Creditors already form a "class" within Creditors under the Insolvency and Bankruptcy Code, 2016 ("**Code**") and debt owed to them forms a "class" u/s 5 (8) of the Code. It is also submitted that the Code is a beneficial piece of Legislation. This has already been recognized by the Hon'ble Supreme Court in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (2019) 8**

SCC 416. The Ordinance dissects Financial Creditor further and imposes a condition on that newly created class. This condition hinders them from reaping the benefits available to others under the Code. This amounts to creation of a “class within a class” and is unconstitutional and manifestly arbitrary, violating Art. 14 of the Constitution.

The Hon’ble Supreme Court in the case of **State of U.P and Ors. v/s Committee of Management, Mata Tapeswari Saraswathi Vidya Mandir and Ors. (2010) 1 SCC 639** held that creation of a class within a class was unconstitutional and arbitrary, thus making it *ultra vires* the Constitution. The Hon’ble Supreme Court quashed a law that allowed a class of Junior High Schools to receive grant-in-aid and prohibited them from availing benefits.

Similar views were also expressed in the case of **Sansar Chand Atri v/s State of Punjab and Ors. (2002) 4 SCC 154** wherein this Hon’ble Court quashed a notification that created a class within the already existing class of defence pensioners. The notification further classified defence Pensioners by denying pensionary benefits to those army personnel who retired voluntarily. This Hon’ble Court held it to be a class within a class and hence, the said notification was declared unconstitutional.

Secondly, in light of the submission made hereinabove, the object of the Ordinance ought to be made clearer. It appears that the present Ordinance may have been brought to prevent home buyers from misusing the Code. The said object has already been answered by this Hon’ble Court while dealing with the Constitutional validity of section 5 (8) (f) of the Code in the

case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)** in the following words:

"The Code is thus a beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees.

...

Thus, applying the Shayara Bano v. Union of India MANU/SC/1031/2017 : (2017) 9 SCC 1 test, it cannot be said that a square peg has been forcibly fixed into a round hole so as to render Section 5(8)(f) manifestly arbitrary i.e. excessive, disproportionate or without adequate determining principle.

Hence, the case having already been made out by this Hon'ble Court, not only is the Ordinance hollow, but it also goes against the aforesaid Judgement of this Hon'ble Court.

Thirdly, the present Ordinance is manifestly arbitrary in light of the test laid down by this Hon'ble Court in the Judgement of **Shayara Bano v/s Union of India (2017) 9 SCC 1** which is as follows:

"The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14.

Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also,

when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."

Fourthly, having a well-established principle of law laid down by means of an observation by this Hon'ble Court quoted hereinabove, the Ordinance having been brought in such a hurried manner, there appears to be a sinister move to over-turn a law laid down by this Hon'ble Court.

Fifthly, creation of a separate class of Financial Creditors only insofar as Home Buyers are concerned u/s 5 (8) (f). There appears to be no intelligible differentia in this Ordinance and no reasonable nexus with the object sought to be achieved, more so, in light of the Judgement of this Hon'ble Court in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**. Hence, this classification is not reasonable and amounts to Class Legislation within the meaning of "Arbitrariness" and the same is prohibited by Art. 14 of the Constitution.

Sixthly, a home for a family is a basic human yearning. In diverse contexts, it has been held by the Hon'ble Supreme Court in the case of **M/s Shantistar builders v/s Narayan Khimalal Totame (1990) 1 SCC 520** that the same is part of right to life, as a fundamental constitutional guarantee. This has also been recognized by this Hon'ble Court in para 25, page 16 in the case of **Chitra Sharma and Ors. v/s Union of India and Ors. (2017) 144 SCL 1 (SC)**. Hence, the present Ordinance when denies Home Buyers their right of approaching NCLT, actually denies them accessing their Fundamental Rights.

Seventhly, it is submitted that the present Ordinance is vague and would only serve to exacerbate the confusion, if any. While it posits that Home Buyers have to constitute 10% of the total allottees or be 100 in number, it remains silent on what ought to be done when some of the allottees settle or withdraw. Unlike the section 244 of the Companies Act, 2013 or the Consumer Protection Act, 1986 which clearly delineate class litigation and the procedures governing the same, nothing in that regard has been made herein. In the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)** this Hon'ble Court had equated home buyers with unsecured debenture holders and fixed deposit holders of the Company but after coming this amendment in section 7 through section 3 of the ordinance, this right of the homebuyers has been negated. A debenture holder or fixed deposit holder who has claim of more than one lakh against real estate company can approach the NCLT under section 7 of the IBC but a home buyer irrespective of his claim amount, will have to unnecessarily comply with the condition given in section 7 i.e. to bring 100 real estate allottees or 10% of the total allottees under a real estate project in order to approach NCLT.

Eighthly and finally, the Petitioner submits that the Ordinance has been given retrospective effect. This would severely affect the existing Allottees who have not only lost their money and home approached the Hon'ble NCLT but paid 25000 as court fee. Even those whose cases are listed for the final arguments before the NCLT, will have to comply with this condition within one month or else their cases will be considered as withdrawn.

Hence, for the reasons stated hereinabove and for the detailed Grounds stated herein below in the present Petition, the Petitioner pray that the section 3 of the Ordinance which amends and add provisos in section 7 of the IBC be declared unconstitutional and *ultra vires* Art. (s) 14 and 21 of the Constitution of India and in violation of a well-established Judgement of this Hon'ble Court viz., **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**.

LIST OF DATES

28.05.2016	Parliament passes the Insolvency and Bankruptcy Code, 2016 to consolidate all the existing laws, rules, and regulations regarding insolvency and bankruptcy laws in India.
06.08.2018	Pursuant to a number of Judgements of this Hon'ble Court and the Report of the Insolvency Law Committee, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was brought about to the effect that Home Buyers/Allottees were also to be treated as "Financial Creditors" under the Code.
17.08.2018	The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 passed both the Houses of the Parliament and received the assent of the President, now called the Insolvency and Bankruptcy Code (Amendment) Act, 2018 and thus, became a law.

2018	Various Writ Petitions were filed by Builder companies challenging the Constitutional <i>vires</i> of the Insolvency and Bankruptcy Code (Amendment) Act, 2018.
09.08.2019	The Hon'ble Supreme Court was pleased to uphold the Insolvency and Bankruptcy Code (Amendment) Act, 2018 by its Judgement dated 09.08.2019 in the case of Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (2019) 8 SCC 416. It is pertinent to mention that the Hon'ble Court had held that the Amendment is neither arbitrary nor contradictory to the objective of the Code.
28.12.2019	With the sole objective and a sinister motive of overturning the Judgement of this Hon'ble Court in the case of Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (2019) 8 SCC 416 , the present Ordinance was brought in. It is pertinent to mention that the section 3 of the Ordinance violates Art. (s) 14 and 21 of the Constitution and ends up creating a class within a class. Further, the object that the Ordinance seeks to achieve has no reasonable nexus with the law itself.
.01.2020	Hence, the Petitioner prefer the present Writ Petition under Art. 32 of the Constitution of India, 1949.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. /2020

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA, 1950)

IN THE MATTER OF:

MANISH KUMAR
S/O SHRI HARI KISHAN
AGE ABOUT 37 YEARS
R/O 59A, Una Enclave
Mayur Vihar Phase-1
New Delhi-110091

...PETITIONER

-VERSUS-

UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF CORPORAE AFFAIRS
HAVING OFFICE AT:
SHASHTRI BHAWAN,
DISTRICT: NEW DELHI

...RESPONDENT No. 1

UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF LAW & JUSTICE
HAVING OFFICE AT:
SHASHTRI BHAWAN,
DISTRICT: NEW DELHI

...RESPONDENT No. 2

WRIT PETITION ON BEHALF OF THE PETITIONER UNDER ARTICLE

32 OF THE CONSTITUTION OF INDIA, 1949.

TO,
THE HON'BLE CHIEF JUSTICE
& LORDSHIP'S COMPANION JUSTICES
OF HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER

MOST RESPECTFULLY SHOWETH:

1. The Petitioner is filing the present Writ Petition under Article 32 of the Constitution of India, 1949 to challenge the Constitutional *vires* of section 3 of the IBC Ordinance, 2019 as being in violation of Article (s) 14 and 21 of the Constitution.
2. The Petitioner is a Home Buyer/Allottee hailing from a middle-class family who has been duped by the Builder into construction of a Home and subsequently filed case against the builder before the NCLT under section 7 of the IBC. Petitioner case is still pending for the adjudication before the NCLT and now after the aforesaid retrospective amendment in section 7 of the IBC, Petitioner has to fulfill this additional requirement which was not in the act initially when he had filed the case or else his case will be deemed to be withdrawn before its admission.
3. The Fundamental Rights of the Petitioner has been violated under Art. (s) 14 and 21 of the Constitution since he now is a class within a class as a result of the said Ordinance, which is unconstitutional and his right to a home will be affected through aforesaid section 3 of the ordinance.
4. The Petitioner has not filed any other Petition either in this Hon'ble Court or in any other High Court seeking same and similar directions as prayed for in this Petition.

The facts which give rise to the present cause of action culminating into the present Writ Petition are as follows:

5. That in order to standardize the laws relating to insolvency and bankruptcy which were hitherto fragmented and unorganized, the Parliament passed the Insolvency and Bankruptcy Code, 2016 ("**Code**"), first in the House of People on 05.05.2016 and then in the Council of States on 11.05.2016. The Code received the assent of the President on 28.05.2016 and on the same day was notified in the Gazette.
6. However, there persisted a confusion vis-à-vis the status of Home Buyers/real estate Allottees as to whether they would fall within the category of "Financial Creditors" and whether they can trigger insolvency proceedings at all.
7. However, pursuant to a number of Judgments, particularly, **Chitra Sharma and Ors. v/s Union of India and Ors. (2017) 144 SCL 1 (SC)** and **Bikramjit Chatterji and Ors. v/s Union of India (2019) 9 SCALE 588**, there was judicial unanimity and clarity insofar as the factum of protection of home buyers are concerned.
8. In order to give Legislative clarity, the Parliament passed the Insolvency and Bankruptcy Code (Amendment) Act, 2018. This

effectively brought about to the effect that Home Buyers/Allottees were also to be treated as "Financial Creditors" as under the Code.

9. Various Writ Petitions were filed in the Hon'ble Supreme Court by Builder/Real Estate Companies challenging the Constitutional *vires* of the Insolvency and Bankruptcy Code (Amendment) Act, 2018.
10. The Hon'ble Supreme Court was pleased to uphold the Insolvency and Bankruptcy Code (Amendment) Act, 2018 by its Judgment dated 09.08.2019 in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (2019) 8 SCC 416**.
11. However, with the sole objective and sinister motive of over-turning the Judgment of this Hon'ble Court in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**, the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 ("**Ordinance**"), was brought in.

Copy of the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 is annexed herewith as **Annexure – P/1 (from pages to)**.

12. Section 3 of the Ordinance not only amends but add provisos in section 7 of the IBC which clarify that Insolvency Proceedings by those creditors referred to u/s 21 (6A) (a) and (b) can be filed only jointly by 10% of the total creditors or 100 of them whichever is lesser and also

those financial creditors who are Home Buyers/Allottees can file Insolvency proceedings jointly by 10% of the total allottees under a project or 100 in number whichever is lesser or cannot file at all.

Section 3 of the aforesaid ordinance further add a proviso in section 7 of the IBC and clarify that where an application for initiating the corporate insolvency resolution process against a corporate debtor has been filed by a financial creditor referred to in the first and second provisos and has not been admitted by the Adjudicating Authority before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, such application shall be modified to comply with the requirements of the first and second provisos within thirty days of the commencement of the said Act, failing which the application shall be deemed to be withdrawn before its admission.

13. The said Ordinance amounts to violation of Art 14 of the Constitution which creates a class within a class and suffers from manifest arbitrariness. Further, it goes against the spirit of the Hon'ble Supreme Court in its Judgment in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (2019) 8 SCC 416.** There is manifest arbitrariness in the said Ordinance.

14. Hence, the Petitioner has approached this Hon'ble Court by way of the present Writ Petition under Art. 32 of the Constitution.

GROUNDS

Following Grounds is being adverted to by the Petitioner in support of the Writ Petition:

- A. BECAUSE Financial Creditors already form a class of creditors within the meaning of the Code. This was recognized by the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**.
- B. BECAUSE by dissecting the Financial Creditors further in a manner preventing a section of Financial Creditors viz., Home Buyers/Allottees from accessing the benefits available under the Code like any other Creditors, it ends up creating a "class within a class".
- C. BECAUSE the "class within a class" so created by the Ordinance prevents the Home Buyers/Allottees alone from reaping the benefits of the Code fully which is a beneficial piece of Legislation. The Home Buyers/Allottees are forced to find the requisite number and ensure that the said number remain intact until the filing of the Petition and final adjudication of the Petition.
- D. BECAUSE creating a "class within a class" by itself is unconstitutional and further clipping the wings of a sub-class within the main class from reaping the benefits available under a beneficial piece of Legislation, is arbitrary and violates Art. 14 of the Constitution.

E. BECAUSE the Hon'ble Supreme Court in the case of **State of U.P and Ors. v/s Committee of Management, Mata Tapeswari Saraswathi Vidya Mandir and Ors. (supra.)** quashed a notification that created a class within a class of Junior High Schools that would disentitle them from receiving any aid.

F. BECAUSE the Hon'ble Supreme Court in the case of **Sansar Chand Atri v/s State of Punjab and Ors. (supra.)** quashed a notification that created a class within a class of already existing military personnel drawing pension by denying pensionary benefits to those who voluntarily retired. The Hon'ble Supreme Court held that Military pensioners already formed a class within the broader definition of "pensioners" and further sub-classifying them would be unconstitutional.

G. BECAUSE the Hon'ble Supreme Court in the case of **E. V. Chinniah v/s State of Andhra Pradesh and Ors. (2005) 1 SCC 394** refused to create class within the already existing class of Schedule Caste/Scheduled Tribes for the purpose of reservation holding that such a "class within a class" amounts to tinkering with and violation of Article 14 of the Constitution. This Hon'ble Court held as follows:

"If a class within a class of members of the Scheduled Castes is created, the same would amount to tinkering with the List. Such sub-classification would be violative of Article 14 of the Constitution of India."

H. BECAUSE the Hon'ble Supreme Court in the case of **Union of India v/s S.P.S. Vains and Ors. 2008 (12) SCALE 360** quashed a notification that created a class within an already existing class of military pensioners subjecting a certain class of military pensioners to a cut-off date and denying them of the said benefits. The Hon'ble Supreme Court held it to be a "class within a class", thus violating Art. 14 of the Constitution.

I. BECAUSE the object of the Ordinance is to help infuse last mile funding to the corporate debtor, to prevent immunity from prosecution, and to prevent action against successful corporate resolution applicant, has no reasonable nexus with the amendments made in section 7 of the IBC.

J. BECAUSE the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)** held, in the following words:

"A reading of these paragraphs will show these very objects are subserved by treating allottees as financial creditors. The Code is thus a beneficial legislation which can be triggered to put the corporate debtor back on its feet in the interest of unsecured creditors like allottees, who are vitally interested in the financial health of the corporate debtor, so

that a replaced management may then carry out the real estate project as originally envisaged and deliver the flat/apartment as soon as possible and/or pay compensation in the event of late delivery, or non-delivery, or refund amounts advanced together with interest. Thus, applying the Shayara Bano v. Union of India MANU/SC/1031/2017 : (2017) 9 SCC 1 test, it cannot be said that a square peg has been forcibly fixed into a round hole so as to render Section 5(8)(f) manifestly arbitrary i.e. excessive, disproportionate or without adequate determining principle. For the same reason, it cannot be said that Article 19(1)(g) has been infringed and not saved by Article 19(6) as the Amendment Act is made in public interest, and it cannot be said to be an unreasonable restriction on the Petitioner's fundamental right Under Article 19(1)(g). Also, there is no infraction of Article 300-A as no person is deprived of its property without authority of a constitutionally valid law."

The above words of this Hon'ble Court make it clear that the object purportedly sought to achieve has already been covered by the earlier Legislation.

K. BECAUSE the Hon'ble Supreme Court in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)** already negated the idea of setting some kind of threshold limit for the real estate allottees before they approach NCLT under section 7 of the IBC. Hon'ble Supreme Court made the following observation in the para no. 56:

56..... According to some of them, before an order admitting a Section 7 application is made, all the financial creditors of the corporate debtor could be called to the NCLT so that the NCLT can then ascertain their views. If the vast majority of them were to state that they would prefer to remain outside the Code, then the Section 7 application filed by a single allottee ought to be dismissed. **Another learned counsel stated that there should be a threshold limit by which at least 25% of the total number of allottees of the project should be reached before they could trigger the Code.** Other learned counsel suggested that at the stage of the Section 7 application, an inquiry be made to see if the corporate debtor is otherwise well-managed and is solvent, in which case the Section 7 application ought to be dismissed. Shri Jayant Bhushan, learned Senior Advocate appearing on behalf of some of the Petitioners, also suggested that allottees ought not to be allowed to trigger the Code at all, but that if the Code is otherwise triggered, they can be members of the Committee of Creditors to take decisions that will be beneficial to them. It was also suggested that, before the Code is triggered by an allottee, there should be a finding of "default" from the authorities under RERA. This is not unknown to law, and this Court has itself stated, in another context, that a jurisdictional finding by the Telecom Regulatory Authority of India must first be obtained before the Competition Commission of India gives a finding on unfair competition in the telecom sector, and the case of **Competition Commission of India v. Bharti Airtel Limited and Ors.** (2019) 2 SCC 521 was relied upon for this purpose. All these arguments were really made based on the presumption that some allottees who may now want to back out of the transaction and get a return of their money owing to factors which may be endemic to them, or owing to the fact that the market may have slumped as a result of which the investment made by them in the flat/apartment would fall flat requiring them to pull out of the transaction, would then be able to trigger the Code mala fide, and a reading down of these provisions would, therefore, obviate such problem. All these arguments have been refuted in detail earlier in this judgment. In a Section 7 application made by an allottee, the NCLT's 'satisfaction' will be with both eyes open – the NCLT will not turn a Nelson's eye to legitimate defences by a real estate developer, as outlined by us hereinabove. There is, therefore, no necessity to read into or read down any of these provisions

- L. BECAUSE the position prior to this Amendment is already clear by way of the Judgment of this Hon'ble Court in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**. This Ordinance only serves to create chaos.

M. BECAUSE the case having already been made out by this Hon'ble Court, not only is the Ordinance hollow, but it also goes against the Judgement of this Hon'ble Court in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**.

N. BECAUSE the present Ordinance is manifestly arbitrary in light of the test laid down by this Hon'ble Court in the Judgement of **Shayara Bano v/s Union of India (supra.)** which is as follows:

"The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14.

Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."

O. BECAUSE as per the test laid down by this Hon'ble Court in the case of **Shayara Bano v/s Union of India (supra.)**, the present Ordinance is capricious, irrational and without adequate determining principle.

P. BECAUSE as per the test laid down by this Hon'ble Court in the case of **Shayara Bano v/s Union of India (supra.)**, the present Ordinance is excessive and disproportionate as it severely limits the rights of

Home Buyers/Allottees and therefore is against Article 14 and 21 of the Constitution of India.

Q. BECAUSE having a well-established principle of law laid down by means of an observation by this Hon'ble Court quoted hereinabove, the Ordinance having been brought so hurriedly, there appears to be a sinister move to over-turn a law laid down by this Hon'ble Court in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**.

R. BECAUSE unlike other amendments to the Code, no Committee was ever constituted to study if such an Amendment is need of the hour.

S. BECAUSE no quantifiable data has been placed on record or study been conducted to show whether cases filed against the Builders are genuine/false. The whimsical way in which the Ordinance was brought about only goes on to show that the Respondents have bowed down to pressure and hence, the Ordinance is arbitrary and hit by Art. 14 of the Constitution.

T. BECAUSE by creating a separate class insofar as Home Buyers/Allottees are concerned, there appears to be no intelligible differentia in this Ordinance and no reasonable nexus with the object sought to be achieved, more so, in light of the Judgement of this Hon'ble Court in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**. Hence, this classification is not

reasonable and amounts to Class Legislation within the meaning of "Arbitrariness" and the same is prohibited by Art. 14 of the Constitution.

U. BECAUSE a home for a family is a basic human yearning. In diverse contexts, it has been held by the Hon'ble Supreme Court in the case of **M/s Shantistar builders v/s Narayan Khimalal Totame (supra.)** that the same is part of right to life, as a fundamental constitutional guarantee.

V. BECAUSE in para 25, page 16 in the case of **Chitra Sharma and Ors. v/s Union of India and Ors. (supra.)**, this Hon'ble Court had recognized that the Fundamental Right to housing as interpreted by this Hon'ble Court in **M/s Shantistar builders v/s Narayan Khimalal Totame (supra.)** is also available to Home Buyers/Allottees.

W. BECAUSE the Ordinance only serves to further tweak and reduce that Fundamental Rights of the Home Buyers/Allottees further and hence the same ought to be set aside.

X. BECAUSE it is submitted that the present Ordinance is vague and would only serve to exacerbate the confusion, if any. While it posits that Home Buyers have to constitute 10% of the total allottees or be 100 in number, it remains silent on what ought to be done when some of the allottees settle or withdraw.

- Y. BECAUSE giving retrospective effect to the Ordinance would severely affect the existing Allottees who have lost their money and have approached the Hon'ble NCLT and some of their cases are listed for the final adjudication before the NCLT.
- Z. BECAUSE Home Buyers/Allottees hail from middle-class families are unlike Builders who are influential and powerful. It is not easy and possible for Home buyers/Allottees to form an association and remain in continuity throughout the entirety of the proceedings.
- AA. BECAUSE the Ordinance is vague and does not state what would be the position in case one of the Home Buyers/Allottees settle or withdraws, thus bringing down the number.
- BB. BECAUSE the rights of Home Buyers/Allottees are supreme and theirs is a special case that needs protection. Judicial unanimity in this respect is evident from 2 cases of this Hon'ble Court viz., **Chitra Sharma and Ors. v/s Union of India and Ors. (2017) 144 SCL 1 (SC)** and **Bikramjit Chatterji and Ors. v/s Union of India (2019) 9 SCALE 588.**
- CC. BECAUSE sole objective of this Ordinance is to over-turn a well-established Judgement of this Hon'ble Court in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra).**

DD. BECAUSE this Ordinance goes against the spirit of the Hon'ble Supreme Court in its Judgment in **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (supra.)**.

EE. BECAUSE Home Buyers/Allottees, being middle-class buyers would not want to go to the Hon'ble NCLT and risk jeopardizing their money or their dream of buying a home. It would be a last resort only if no other option is available.

FF. BECAUSE the Ordinance violates Art. 14 of the Constitution as it imposes unreasonable condition of 10% on Home Buyers/Allottees alone while imposing no such condition on other Financial Creditors like debenture holders and fixed deposit holders.

GG. BECAUSE even Operational Creditors do not have such conditions attached to them to the effect this Ordinance imposes on Home Buyers/Allottees, who are Financial Creditors.

HH. BECAUSE this Ordinance ends up creating a separate class within the already existing without any intelligible differential and reasonable nexus. Hence, this amounts to Class Legislation. Class Legislation stands in violation of Art. 14 of the Constitution.

II. BECAUSE the Petitioner is a concerned Home Buyer/Allottee and his Fundamental Rights have been violated. Further, the present case is

against the Respondents who is a "State" within the meaning of Art. 12 of the Constitution. Hence, the present Writ Petition is maintainable.

JJ. BECAUSE for the reasons mentioned hereinabove, the present Ordinance is Arbitrary and constitutes a Class Legislation, thus liable to be set aside under Art. 14 of the Constitution.

KK. BECAUSE the Fundamental Rights of Home Buyers/Allottees across the country having been violated, this Hon'ble Court has the jurisdiction to try the same. That the impugned ordinance and particular this section applies across the country and thus has national ramifications. The Ordinance has introduced a new arbitrary and discriminatory condition for the real estate allottees if they want to approach NCLT under section 7 of the IBC. Further, adjudication of the legality of the Ordinance by a plurality of High Courts under Article 226 would mean multiplicity of litigation over the same cause of action. Hence this is fit case for interference of this Hon'ble Court under Article 32 of the Constitution of India.

LL. Because Adjudication of the legality of this section of the ordinance deserves the consideration of this Hon'ble Court especially considering this Hon'ble Court's recent pronouncement in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India**

and Ors. (2019) 8 SCC 416. Incidentally, the said decision was also rendered in exercise of jurisdiction under Article 32.

MM. Because Article 32 is itself a fundamental right and the jurisdiction of the Hon'ble Court is mandatory. This Hon'ble Court observed in ***Romesh Thappar v. State of Madras, AIR 1950 SC 124:***

"Article 32 provides a "guaranteed" remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights...."

NN. Because there is plethora of the judgments which explain Manifest arbitrariness, according to one of those judgments of this Hon'ble Court Manifest arbitrariness must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation is manifestly arbitrary". Applying this very test to the impugned section 3 of the Ordinance, it is submitted that the aforesaid section is unconstitutional under Article 14 as it is manifestly arbitrary.

OO. Because Petitioner's knowledge there is no informed assessment or study that forms basis for the Central Government to have created this category within Financial Creditors.

PP. Because There is no reasonableness or constitutional logic for making this condition of minimum 100 allottees or 10% of the total number of allottees under any real estate project for filing case a before the NCLT under section 7 of the IBC and such proviso cannot withstand the test of Article 14 of the Constitution.

QQ. Because Section 3 of the aforesaid Ordinance is capricious, irrational, without adequate determining principle, excessive and disproportionate and hence, manifestly arbitrary. It deserves to be struck down under Article 14 and 21 of the Constitution.

RR. Because aforesaid section of the Ordinance is also violating article 21 of the Constitution. The law that is not just, fair or reasonable is no law under the Constitution. The leading opinion of DY Chandrachud, J., in *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 holds *inter alia*:

"... Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The interrelationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well..." (see para 294).

SS. Because Article 123 enables the promulgation of ordinances only in instances requiring "immediate action". The absence of emergent

reasons negates any invocation of the provision. Reference may be made to *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 and other judgments. Hence the promulgation of impugned Ordinance is against the spirit of Article 123 and a fraud on the Constitution.

PRAYER

IN LIGHT OF THE FACTS OF THE CASE, CASE LAWS CITED, AND THE LEGAL SUBMISSIONS MADE HEREINABOVE, THE PETITIONERS PRAY BEFORE THIS HON'BLE COURT THAT:

- i. Issue a Writ/necessary direction and declare section 3 of the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 which intends to amend section 7 of the IBC and restrict right of an allottee to approach NCLT as being *ultra vires* Article (s) 14 and 21, 123 of the Constitution of India, 1950 and unconstitutional;
- ii. Alternatively, without prejudice to the arguments and prayer made above, in case this Hon'ble Court finds section 3 of the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 constitutionally valid then read down the aforesaid section and declare the aforesaid section as prospective and not retrospective in nature;
- iii. Alternatively, without prejudice to the arguments and prayer made above, in case this Hon'ble Court finds aforesaid section constitutionally valid, issue a Writ of Mandamus directing Respondent No. 1 to return

the Court Fee paid as Rs. 25000 at the time of filing the Petitions under section 7 to all those persons whose cases therein filed before coming to this ordinance and will be withdrawn because of the new provisos inserted in section 7 of the IBC; and/or

- iv. Pass any other and further order (s) and direction (s) that this Hon'ble Court may deem fit and proper in light of facts and circumstances of the case and in the interest of justice.

DRAWN BY:

FILED BY:

AKASH VAJPAI
ADVOCATE

VAIBHAV MANU SRIVASTAV
ADVOCATE FOR PETITIONER

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. /2020

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

MANISH KUMAR

...PETITIONER

VERSUS

UNION OF INDIA

...RESPONDENT

APPLICATION ON BEHALF OF THE PETITIONER/APPLICANT

HEREIN FOR STAY OF THE OPERATION OF THE INSOLVENCY AND

BANKRUPTCY (AMENDMENT) ORDINANCE, 2019.

TO,
THE HON'BLE CHIEF JUSTICE
& LORDSHIP'S COMPANION JUSTICES
OF HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONERS

MOST RESPECTFULLY SHOWETH:

1. The Petitioner/Applicant herein is filing the present Writ Petition under Article 32 of the Constitution of India to challenge the Constitutional *vires* of section 3 of the Ordinance as being in violation of Article (s) 14 and 21 of the Constitution.

2. The Petitioner/Applicant herein is a Home Buyer/Allottee hailing from a middle-class family who has been duped by the Builders into construction of a Home.
3. The Fundamental Rights of the Petitioner/Applicant herein has been violated under Art. (s) 14 and 21 of the Constitution since he now is a class within a class as a result of the said Ordinance, which is unconstitutional and his right to a home will be affected.
4. That the contents of the Writ Petition are not being repeated herein for the sake of brevity and to avoid prolixity and same may be referred to.
5. That the Ordinance has been brought with a sinister motive of slyly by-passing the Judgment of this Hon'ble Court in the case of **Pioneer Urban Land and Infrastructure Ltd. and Ors. v/s Union of India and Ors. (2019) 8 SCC 416** wherein it has been clarified that the amendment introduced therein does not suffer from any manifest arbitrariness.
6. That far from by-passing the Judgment of the Hon'ble Supreme Court, the present Ordinance violates Art 14 of the Constitution in as much as that it attempts to create a "class within a class".
7. Further, the classification done by the Respondents is far from reasonable and amounts to "Class Legislation".

8. Hence, from the very face of it, the Ordinance is unconstitutional, capricious, and arbitrary.
9. Further, if the Ordinance is brought into operation, the same being retrospective in nature, it would severely hamper the rights of existing Home Buyers/Allottees.
10. That there is no evidence on record to show that all the cases filed by Home Buyers/Allottees against the Builders are false and in many cases, it is at the final stage of the hearing.
11. Not staying the present Ordinance would severely hamper the cases filed against the Builders and the same would cause grave confusion and prejudice and plus if Petitioner fails to bring remaining allottees on board to file the case, his case will be deemed to be withdrawn before the admission.
12. That the Petitioner/Applicant herein has a strong case on merits and same ought not to be defeated by continued operation of the Ordinance.
13. That the balance of convenience lies in favour of the Petitioner/Applicant herein.
14. That granting of stay would benefit the Petitioner/Applicant herein, but not granting the stay would not affect the Respondent in any way.

15. That the Application is filed *bona fide* and nothing material is concealed herefrom.

PRAYER

IN LIGHT OF THE SUBMISSIONS MADE HEREINABOVE IN THE APPLICATION, IT IS PRAYED THAT THIS HON'BLE COURT MAY BE PLEASED TO:

- i. Grant *ex-parte* and *ad-interim* stay against the operation of the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 pending adjudication of the main Writ Petition; and/or
- ii. Pass any other order (s) and direction (s) that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case and in the interest of justice.

DRAWN BY:

FILED BY:

AKASH VAJPAI
ADVOCATE

VAIBHAV MANU SRIVASTAV
ADVOCATE FOR PETITIONER