SYNOPSIS & LIST OF DATES

That the present Writ Petition is being preferred under Article 32 of the Constitution of India, *inter alia*, challenging the vires of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("**Impugned Act**") since Sections 3 & 10 of the Impugned Act are manifestly arbitrary and violative of Article 14 of the Constitution of India.

That the Association of Karvy Investors (**"Petitioner / Petitioner Association"**), is a registered society under Karnataka Societies Registration Act, 1960, bearing Reg. No. DRB3/SOR/281/2019-2020, having its office at Flat No. 111, 3rd Block, Richfield Apartments, Outer Ring Road, Marathahalli Bangalore-560037.

The Petitioner Association comprises of such members that have made several investments on the aid and advice of Karvy Group of Companies, in various types of investment schemes, that were floated by Private Companies. All the Members of the Petitioner Association are Financial Creditors as per the definition provided under Section 5(7) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").Individual members of the Petitioner Association have preferred petitions under Section 7 of the IBC before different benches of the National Company Law Tribunal in India, in light of the

default as committed by the Private Companies in repayment of their dues as owed in favour of the Members.

The Respondent vide Section 3 of the Impugned Act has imposed a stringent and onerous condition on the right of an individual financial creditor to file an application to initiate corporate insolvency resolution process under Section 7 of the IBC. The said condition, which is applicable only on Creditors which are referred to in Sub-section 6A of Section 21 of the IBC and Allottees of Real Estate Projects, provides that the Hon'ble NCLT shall allow an application under Section 7 of the IBC only if 100 members of such a class of individual investors or a group of individual investors that represent 10% of such a class have jointly preferred the said Application. And additionally, it has also been stated that the application of Section 3 of the Impugned Act shall be retrospective, thereby directly prejudicing the members of the Petitioner Association.

The Respondent vide the Impugned Act has differentiated between Financial Creditors, solely on the basis of sub-section 6A of Section 21 of IBC. The said provision merely provides a mechanism for representation of those Financial Creditors in the Committee of Creditor, who were not already covered by Sub-section 6 of Section 21 of IBC. The Statement of Objects and Reasons of the Insolvency

and Bankruptcy Code, (Second Amendment) Act, 2018, vide which Sub-section 6A was inserted in the Code, states that the said clause was being inserted to provide a mechanism to allow participation of certain categories of Financial Creditor which exceed a certain number, in the meeting of Committee of Creditors through an Authorised Representative. Since Sub-section (6) of the Act already provided a mechanism for representation of Financial Creditors, who extended the financial debt, as a part of a consortium or syndicated facility, sub-section 6A was inserted to provide a mechanism for other class of creditors. The sole purpose of Sub-section 6 and Sub-section 6A of Section 21 is to further a smooth functioning of a Committee of Creditor which consists of large number of Financial Creditors. Since it is impractical for all the Financial Creditors to be present in the meeting of Committee of Creditors, the aforesaid clauses provide for a representative, who is nothing but a point of contact between the Committee of Creditor and the Financial Creditor whom he/she is representing. It is pertinent to note that other than providing different mechanism for representation of different classes of Financial Creditor, no other purpose is served by the said provisions in the larger scheme of the IBC.

That a conjoint reading of the Section 3 of the Impugned Act along with the other provisions of the IBC makes it clear that even though

no difference exists between different classes of Financial Creditors under the IBC, the Impugned Act, seeks to differentiate between the Creditors as referred to under Sub Section 6A and those referred to under Sub Section 6, without any substantial difference existing in law. As a consequence thereof Section 3 of the Impugned Act is violative of Article 14 of the Constitution of India and is liable to be struck down.

Furthermore the classification as made by the Impugned Act has no rational nexus with the object sought to be achieved by the IBC. this Hon'ble Court in the case of **Pioneer Urban Land and Infrastructure Ltd. V. Union of India reported in (2019) 8 SCC 416,** was posed with the question of abuse of the provisions of IBC. The Hon'ble Court while adjudicating upon the said question has held that the IBC itself provides a defence mechanism to a Corporate Debtor. Furthermore this Hon'ble Court vide the said judgment laid down certain defences as will be available to a Corporate Debtor in order to showcase that a default has not been committed by it. It is pertinent to note that a suggestion was made by the Petitioners in the aforesaid case to provide for a threshold limit for triggering the Code, for allottees of Housing Projects. However this Hon'ble Court did not accede to the said suggestions, holding that in a Section 7 Petition, the Adjudicating Authority's "satisfaction" will be with both eyes open

and it will not turn a Nelson's eye to legitimate defences, as available to the Corporate Debtor. Therefore this Hon'ble Court has already held that the IBC, along with the defences as provided by this Hon'ble Court, sufficiently safeguard the interest of a Corporate Debtor from any potential abuse. In light of a judicial pronouncement being made by this Hon'ble Court, there is no justification for bringing in the amended provision.

Upon reading the Impugned Act along with the Statement of Objects and Reasons of the IBC and the other provisions of the Code, it is clear that the differentiation as sought to be created has no rational nexus with the object as sought to be achieved by the Act. Rather than strengthening the IBC it acts contrary to the objective behind enactment of the same, since it weakens the rights of every lender other than financial institutions and banks. Therefore by no stretch of imagination can it be said that the Differential as sought to be brought into effect by the Impugned Act, has any rational nexus with the object sought to be achieved by the Act. In light of the aforesaid it is humbly submitted that the Impugned Act does not satisfy the test of reasonable classification and therefore is violative of Article 14 of the Constitution of India.

The Impugned Act by imposing the condition of an Application under Section 7 to be filed jointly, only upon the creditors as referred to in

Sub-Section 6A of the Act and allottees of a Real Estate Project, is specifically targeting Individual Creditors vis-à-vis Financial institutions. The import of the Impugned Act is that even if the nature of Loan as advanced by the Individual is identical to the loan as advanced by a Bank or Financial Institution, he/she cannot trigger Section 7 of the IBC on his own, solely on the ground of him/her being an individual and falling under Sub-Section 6A of Section 21 of the IBC.

Furthermore Section 3 of the Impugned Act is unreasonable since the same is contrary to the objects and purpose behind enactment of the Insolvency and Bankruptcy Code. The Bankruptcy Law Reforms Committee in its report of November 2015, had observed that the Control of a Company is not a divine right. When a firm defaults on its debts, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. It is because of the aforesaid reason that the IBC provided for transfer of the control of the company to a Committee of Creditors.

That the effect of the Impugned Act is that in cases wherein the Corporate Debtor has availed loans only from individuals, till the time the Creditors do not prefer an Application jointly against the

Corporate Debtors, the management of the defaulting company continues to be in control, even after repeated defaults, which is completely contrary to the object of the IBC. The Respondent has failed to appreciate that the individual investors of a Company are not necessarily localised and are spread out across the Country. Furthermore the contact details of the investors of the Company are not available publicly. Most of such investments are made through an intermediary, which itself is hand in gloves with the defaulting Corporate Debtor. In the absence of the contact details being available with the Investor about other similar investors in the Company, it is not possible for them to contact each other and arrive at a consensus to prefer an Application against the Corporate Debtor. Because of this logistical nightmare, the Impugned Act effectively diminishes the right of individual Financial Creditors to prefer an Application under Section 7 of IBC.

List of Dates

04.11.2015	Bankruptcy Law Reforms Committee, constituted by the Ministry of Finance, under the Chairmanship of Dr. T.K. Vishwanathan, was set up with the objective of examining the bankruptcy framework, as existed in the Country and to suggest a uniform framework that would cover matters of insolvency

	and bankruptcy of all legal entities and individuals. That the Committee, accordingly submitted its report dated 04.11.2015, wherein several key observations were made with respect to the weak nature of rights that the individual investors have and the requirement to transfer the management of a Defaulting Company to the Creditors.
28.05.2015	Insolvency and Bankruptcy Code, 2016 was enacted.
26.03.2018	Due to widespread default by Real Estate Companies in completion of group housing projects and the confusion surrounding the inclusion of a Real Estate allottee within the definition of “Financial-Creditor”, the Insolvency Law Committee was setup by Respondent, under the Chairmanship of Shri Injeti Srinivas. The objective of the said Committee was to conduct a detailed review of the IBC, in consulation with key stakeholders.. The Committee in its report observed that the definition of “Financial Debt” as provided under the Act is sufficient to include the amounts raised from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors

under the Code. The Committee further recommended that owing to the logistical problems, as will emanate from large Committee of Creditors consisting of several individuals, a mechanism is required to be provided under the Act for representation of such Investors in the Committee of Creditors.

May 2019 One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Mirador Constructions Pvt. Ltd., in May 2019 before the Ld. National Company Law Tribunal, Mumbai Bench. The said Petition was heard by the Ld. Tribunal and reserved for orders on 16.07.2019.

One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Mirador Dwellers Pvt. Ltd., before the Ld. National Company Law Tribunal, Mumbai Bench. The said Petition is pending adjudication before the Ld. Tribunal.

The 2018, Amendment was challenged before this Hon'ble Court by several Real Estate Companies, with the lead petitioner being Pioneer Urban Land

and Infrastructure Pvt. Ltd. Out of the several grounds on which the challenge was made to the said amendment, the primary ground was that the said provision is amenable to abuse by speculative investors. The Union of India during the course of argument strongly opposed the said contention. This Hon'ble Court dismissed the challenge as made to the said provision. This Hon'ble Court vide its judgment in Pioneer Urban Land and Infrastructure Limited and Anr. V. Union of India and Ors. Reported in (2019) 8 SCC 416, held that the definition of Financial Creditor already covered allottees of Real Estate Projects and the amendment is a mere clarification.

One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Greens Farm Tech Pvt. Ltd., before the Bengaluru Bench. The Ld. Tribunal heard the parties and reserved the matter for orders.

One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Sai Shraddha Vivek Projects Developers Pvt. Ltd., before the Ld. National

	Company Law Tribunal, Mumbai Bench. The said Petition is pending adjudication before the Ld. Tribunal.
12.12.2019	Respondent introduced, the Insolvency and Bankruptcy (Second Amendment) Act, 2019, Bill (“Bill”) before the Lok Sabha on 12.12.2019.
23.12.2019	The Hon’ble Speaker of the Lok Sabha referred the Bill to the Standing Committee of Finance for review.
28.12.2019	The Respondent promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2019.
13.01.2020	The Petitioner herein challenged the Ordinance vide Writ Petition (C) No. 27 of 2020. This Hon’ble Court was pleased to issue notice in the said petition and directed status quo, as on date, with respect to pending applications to be maintained.
13.03.2020	The Respondent enacted the Insolvency and Bankruptcy Code (Amendment) Act, 2020, repealing the Insolvency and Bankruptcy (Amendment) Ordinance, 2019.
16.03.2020	Hence the present Petition.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. OF 2020

[***under Article 32 of the Constitution of India***]

IN THE MATTER OF:

1 Association of Karvy Investors (a society registered under the Karnataka Societies Registration Act, 1960), through its President, having its office at Flat No. 111, 3rd Block, Richfield Apartments, Outer Ring Road, Marathahalli Bangalore-560037. .... Petitioner

Vrs.

1. Union of India, through its Secretary, Ministry of Law & Justice, Shastri Bhawan, New Delhi 110001

2. Union of India, through its Secretary, Ministry of Finance, Nirman Bhawan, New Delhi 110001

3. Union of India, through its Secretary, Ministry of Corporate Affairs, A Wing, Shastri Bhawan, Rajendra Prasad Road, New Delhi- 110 001 .....Respondents

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

To

The Hon'ble Chief Justice of India and His Lordship's Companion Justices of the Supreme Court of India.

The Humble Petition of the Petitioner above named
MOST RESPECTFULLY SHOWETH :

1. That the present Writ Petition is being preferred under Article 32 of the Constitution of India, *inter alia*, challenging the vires of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 ("**Impugned Act**") because Sections 3 & 10 of the Impugned Act are manifestly arbitrary and violative of Article 14 of the Constitution of India.

2. That the Association of Karvy Investors (**"Petitioner / Petitioner Association"**), is a registered society under Karnataka Societies Registration Act, 1960, bearing Reg. No. DRB3/SOR/281/2019-2020, having its office at Flat No. 111, 3rd Block, Richfield Apartments, Outer Ring Road, Marathahalli Bangalore-560037. The PAN of the Petitioner Association is AAJAA6003F. That the present petition is a Private Writ Petition

since the Impugned Act affects the rights of the Members of the Petitioner Association.

3. The Petitioner Association comprises of such members that have made several investments on the aid and advice of Karvy Group of Companies, in various types of investment schemes, that were floated by Private Companies. All the Members of the Petitioner Association are Financial Creditors as per the definition provided under Section 5(7) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Individual members of the Petitioner Association have preferred petitions under Section 7 of the IBC before different benches of the National Company Law Tribunal in India, in light of the default as committed by the Private Companies in repayment of their dues as owed in favor of the Members. The details of the petitions as preferred by the members of the Petitioner Association are as follows:

Sl. No.	Name of the Company	Adjudicating Authority	Status
1.	C & C Construction Pvt. Ltd.	NCLT, Chandigarh	Admitted and claims filed before the IRP
2.	Mirador Constructions Pvt. Ltd.	NCLT, Mumbai	Order Reserved in July 2019
3.	Mirador Dwellers Pvt. Ltd.	NCLT, Mumbai	Pending
4.	Greens Farmtech Pvt. Ltd.	NCLT, Bengalore	Order Reserved on 03.12.2019

5.	Said Shraddha Vivek Realties Ltd.	NCLT Mumbai	Pending
6.	Shubhi Agro Pvt. Ltd.	NCLT Mumbai	Admitted
7.	Kasata Hometech Pvt. Ltd.	NCLT, Mumbai	Admitted and settled with one member

4. That Respondent No. 1 is the Union of India, through its Secretary, Ministry of Law and Justice, which formulated the Impugned Act. Respondent No. 2, is Union of India, through its Secretary, Ministry of Finance. Respondent No. 3, is Union of India, through its Secretary, Ministry of Corporate Affairs.

5. That the Respondent vide Section 3 of the Impugned Act has imposed a stringent and onerous condition on the right of an individual financial creditor to file an application to initiate corporate insolvency resolution process under Section 7 of the IBC. The said condition, which is applicable only on Creditors which are referred to in Sub-section 6A of Section 21 of the IBC and Allottees of Real Estate Projects, provides that the Hon'ble NCLT shall allow an application under Section 7 of the IBC only if 100 members of such a class of individual investors or a group of individual investors that represent 10% of such a class have jointly preferred the said Application. And additionally, it has also been stated that the application of Section 3 of the

Impugned Act shall be retrospective, thereby directly prejudicing the members of the Petitioner Association.

6. That before raising specific grounds, detailed specifically herein below, challenging the vires of the Impugned Act, it is pertinent to note the factual background leading to the filing of the instant writ petition.

BRIEF STATEMENT OF FACTS:

I. The Bankruptcy Law Reforms Committee, constituted by the Ministry of Finance, under the Chairmanship of Dr. T.K. Vishwanathan, was set up with the objective of examining the bankruptcy framework, as existed in the Country and to suggest a uniform framework that would cover matters of insolvency and bankruptcy of all legal entities and individuals. That the Committee, accordingly submitted its report dated 04.11.2015, wherein several key observations were made with respect to the weak nature of rights that the individual investors have and the requirement to transfer the management of a Defaulting Company to the Creditors. The observations as made in the said report are as follows :-

> **"…***For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into*

place: to a limited extent, banks are able to repossess fixed assets which were pledged with them.
While the existing framework for secured credit has given rights to banks, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds….
…..
When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend.
……
Control of a company is not divine right- When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanism for achieving this, management teams and shareholders retain control after default."

II. In furtherance of the Report as submitted by the Bankruptcy Law Reforms Committee, IBC was enacted on 28.05.2016. The preamble of the IBC states as follows:

"*An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance of interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."*

III. Due to widespread default by Real Estate Companies in completion of group housing projects and the confusion surrounding the inclusion of a Real Estate allottee within the definition of “Financial-Creditor”, the Insolvency Law Committee was setup by Respondent, under the Chairmanship of Shri Injeti Srinivas. The objective of the said Committee was to conduct a detailed review of the IBC, in consultation with key stakeholders. The Committee in its report observed that the definition of “Financial Debt” as provided under the Act is sufficient to include the amounts raised from home buyers/allottees under a real estate project, and hence, they are to be treated as financial creditors under the Code. The Committee further recommended that owing to the logistical problems, as will emanate from large Committee of Creditors consisting of several individuals, a mechanism is required to be provided under the Act for representation of such Investors in the Committee of Creditors.

IV. The Respondent amended the IBC vide Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, (“2018, Amendment”) on 17.08.2018, whereby a clarification was inserted in Section 5(8)(f) of IBC. The said clarification stated that any amount raised from an

allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing. Furthermore vide the said Act, Section 6A was inserted in Section 21 of the IBC, providing a mechanism for representation of Individual Investors in the Committee of Creditors.

V. One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Mirador Constructions Pvt. Ltd., in May 2019 before the Ld. National Company Law Tribunal, Mumbai Bench. The said Petition was heard by the Ld. Tribunal and reserved for orders on 16.07.2019.

VI. One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Mirador Dwellers Pvt. Ltd., before the Ld. National Company Law Tribunal, Mumbai Bench. The said Petition is pending adjudication before the Ld. Tribunal.

VII. The 2018, Amendment was challenged before this Hon'ble Court by several Real Estate Companies, with the lead petitioner being Pioneer Urban Land and Infrastructure Pvt. Ltd. Out of the several grounds on which the challenge was made to the said amendment,

the primary ground was that the said provision is amenable to abuse by speculative investors. The Union of India during the course of argument strongly opposed the said contention. This Hon'ble Court dismissed the challenge as made to the said provision. This Hon'ble Court vide its judgment in Pioneer Urban Land and Infrastructure Limited and Anr. V. Union of India and Ors. Reported in (2019) 8 SCC 416, held that the definition of Financial Creditor already covered allottees of Real Estate Projects and the amendment is a mere clarification.

One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Greens Farm Tech Pvt. Ltd., before the Bengaluru Bench. The Ld. Tribunal heard the parties and reserved the matter for orders.

VIII. One of the Members of the Petitioner Association preferred a Petition under Section 7 of the IBC, against M/s Sai Shraddha Vivek Projects Developers Pvt. Ltd., before the Ld. National Company Law Tribunal, Mumbai Bench. The said Petition is pending adjudication before the Ld. Tribunal.

IX. The Respondent introduced, the Insolvency and Bankruptcy (Second Amendment) Act, 2019, Bill ("Bill") before the Lok Sabha on 12.12.2019. The Statement of Objects and Reasons of the said Bill stated as follows:

> *"…2. A need was felt to give the highest priority in repayment to last mile funding to corporate debtors to prevent insolvency, in case the company goes into corporate insolvency resolution process or liquidation,* ***to prevent potential abuse of the Code by certain classes of financial creditors****, to provide immunity against prosecution of the corporate debtor and action against the property of the corporate debtor and the successful resolution applicant subject to fulfilment of certain conditions, and in order to fill the critical gaps in the corporate insolvency framework, it has become necessary to amend certain provisions of the Insolvency and Bankruptcy Code, 2016."*

True Copy of Insolvency and Bankruptcy (Second Amendment) Bill, 2019 dated nil is annexed herewith and marked as **Annexure P-1 (page)**

X. The Respondent promulgated the Insolvency and Bankruptcy (Amendment) Ordinance, 2019. True Copy of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 dated 28.12.2019 is annexed herewith and marked as **Annexure P-2 (page).**

XI. The Petitioner herein challenged the 2019, Ordinance vide Writ Petition (C) No. 27 of 2020. This Hon'ble Court vide its order dated 13.01.2020, was pleased to issue

notice in the petition and directed the Status Quo, as on date, to be maintained with respect to pending applications.

XII. True Copy of the Order Dated 13.01.2020 passed by this Hon'ble Court in Writ Petition (C) No. 27 of 2020 is annexed herewith and marked as **Annexure P-3 (page).**

XIII. The Respondent enacted the Insolvency and Bankruptcy Code (Amendment) Act, 2020, repealing the Insolvency and Bankruptcy (Amendment) Ordinance, 2019. True Copy of the Insolvency and Bankruptcy Code (Amendment) Act, 2020 dated 13.03.2020 is annexed herewith and marked as **Annexure P-4 (page).**

7. The Petitioner has preferred this Writ Petition on the following amongst other grounds:

GROUNDS

SECTION 3 OF THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2020 IS MANIFESTLY ARBITRARY

A. That Section 3 of the Impugned Act, is *ultra vires* the Constitution of India as it is discriminatory and satisfies the

doctrine of manifest arbitrariness for being irrational, capricious and without a determining principle. This Hon'ble Court in a catena of judgments has held that Article 14 and the equal protection doctrine is vitiated if any Legislation is found to be manifestly arbitrary and/or discriminatory. This Hon'ble Court in a series of Judgments including ***Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1; Shayara Bano v. Union of India 2017 9 SCC 1; State of A.P. v. McDowell & Co. (1996) 3 SCC 709; Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India (1985) 1 SCC 641*** has held that the test of "manifest arbitrariness" would apply to invalidate a Legislation, and that the thread of reasonableness runs through the entire fundamental rights chapter. The averments of the Petitioner establishing severe infirmities that are present writ large in the Impugned Act, are detailed more specifically herein below.

SECTION 3 OF THE IMPUGNED ACT IS DISCRIMINATORY

B. That Section 3 of the Impugned Act does not satisfy the permissible classification test as laid down by this Hon'ble Court in ***Union of India v. N.S. Rathnam and Sons reported in (2015) 10 SCC 681 and Hirala P. Harsora and Ors. v. Kusum Narottamdas Harsora and Ors. reported in (2016) 10 SCC 165***. That the two conditions of permissible classification as explained in N.S. Rathnam is reproduced hereinbelow:

“14. What follows from the above is that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that, that differential must have a rational relation to the object sought to be achieved by the statute in question.”

NO INTELLIGIBLE DIFFERENTIA BETWEEN FINANCIAL CREDITORS REFERRED TO IN SECTION 6A OF THE CODE AND THOSE REFERRED TO IN SECTION 6 OF THE CODE.

C. That Section 3 of the Impugned Act has inserted a proviso in Section 7 of the IBC, whereby an additional requirement has been imposed on Financial Creditors referred to in clauses (a) and (b) of sub-section (6A) of Section 21 of the IBC. The Financial Creditors as referred to in the said sub-section cannot prefer an Application under Section 7 of IBC on their own, but are required to prefer a joint application along with not less than one hundred such creditors in the same class or not less than 10 percent, of the total number of such creditors in the same class. As a consequence of the Impugned Act, within the class of Financial Creditors itself, two sub-classes of Creditors have been created, i.e. the ones which are referred to in Sub-section

6 of Section 21 and those who are referred to in Sub-section 6A of Section 21 of the Code.

D. That the classification as sought to be made vide the Impugned Act is without any intelligible differential and therefore is ultra vires Article 14 of the Constitution of India.

E. That the Hon'ble Supreme Court of India in ***Roop Chand Adlakha v. DDA (1989) Supp (1) SCC 116*** has held that the process of classification is in itself productive of inequality and in that sense antithetical of equality. The process would be constitutionally valid if it recognises a pre-existing inequality and acts in aid of amelioration of the effects of such pre-existent inequality. But the process cannot in itself generate or aggravate the inequality. The process cannot merely blow up or magnify insubstantial or microscopic differences on merely meretricious or plausible differences. The overemphasis on the doctrine of classification or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the article of its precious content and end in replacing doctrine of equality by the doctrine of classification.

F. That this Hon'ble Court in the case of State of **Jammu and Kashmir v. Shri Triloki Nath Khosa and Ors. reported in (1974) 1 SCC 19** has held that classification is fraught with the danger that it may produce artificial inequalities and therefore,

the right to classify is hedged in with salient restraints. Classification must be truly founded on substantial differences which distinguish person grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved.

G. That Section 5(7) of the IBC, defines a Financial Creditor as any person to whom a financial debt is owed. The term “person” in turn has been defined under Section 3(23) to include, an individual, a company, a trust etc. Therefore the definition of the term “Financial Creditor” is not person specific but debt specific. Any person who is owed a debt which falls within the definition of “financial debt”, as provided under section 5(8) of the IBC, is a Financial Creditor for the purposes of the Act. Section 7 of the IBC, gives right to every Financial Creditor, to prefer an Application for initiation of Corporate Insolvency Resolution Process, either singularly or jointly with other Financial Creditors, in case a default has been committed by a Corporate Debtor. Section 3(12) of the Act defines “default” as non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and has not been paid by the Corporate Debtor. Therefore if a Financial Debt is owed and has not been paid by the Debtor, than the Financial Creditor has the right to prefer an Application under Section 7 of the IBC before the Adjudicating Authority. Furthermore even

under Section 21 of the Code, each Financial Creditor, irrespective of the nature of the person i.e. whether its an individual or a company, is a member of the Committee of Creditors. The vote share of the Financial Creditor is also decided on the basis of the amount as claimed by them from the Corporate Debtor and not on the basis of the form of the Financial Creditor. Therefore if the scheme of the IBC is seen as a whole than there is no difference between different categories of Financial Creditor, and irrespective of their form, every Financial Creditor is one and the same for the purposes of the Act.

H. That the Respondent vide the Impugned Act has differentiated between Financial Creditors, solely on the basis of sub-section 6A of Section 21 of IBC. The said provision merely provides a mechanism for representation of those Financial Creditors in the Committee of Creditor, who were not already covered by Sub-section 6 of Section 21 of IBC. The Statement of Objects and Reasons of the Insolvency and Bankruptcy Code, (Second Amendment) Act, 2018, vide which Sub-section 6A was inserted in the Code, states that the said clause was being inserted to provide a mechanism to allow participation of certain categories of Financial Creditor which exceed a certain number, in the meeting of Committee of Creditors through an Authorised Representative. Since Sub-section (6) of the Act already provided a mechanism for representation of Financial Creditors,

who extended the financial debt, as a part of a consortium or syndicated facility, sub-section 6A was inserted to provide a mechanism for other class of creditors. The sole purpose of Sub-section 6 and Sub-section 6A of Section 21 is to further a smooth functioning of a Committee of Creditor which consists of large number of Financial Creditors. Since it is impractical for all the Financial Creditors to be present in the meeting of Committee of Creditors, the aforesaid clauses provide for a representative, who is nothing but a point of contact between the Committee of Creditor and the Financial Creditor whom he/she is representing. It is pertinent to note that other than providing different mechanism for representation of different classes of Financial Creditor, no other purpose is served by the said provisions in the larger scheme of the IBC.

I. That this Hon'ble Court in **Swiss Ribbons (P) Ltd. V. Union of India reported in (2019) 4 SCC 17,** discussed the inclusion of Sub-section 6A in Section 21, while referring to the report of Insolvency Law Committee, and has held that the said provision was included only to deal with problems posed by certain class of creditors being large in number.

J. That the Insolvency Law Committee, constituted by the Ministry of Finance, in its report submitted in March 2018, extensively dealt with the problems posed by Large Committee of Creditors. It is only to obliviate the said concerns did the

Committee recommend insertion of Sub-section 6A in Section 21 and for no other purpose.

K. That a conjoint reading of the Section 3 of the Impugned Act along with the other provisions of the IBC makes it clear that even though no difference exists between different classes of Financial Creditors under the IBC, the Impugned Act, seeks to differentiate between the Creditors as referred to under Sub Section 6A and those referred to under Sub Section 6, without any substantial difference existing in law. As a consequence thereof Section 3 of the Impugned Act is violative of Article 14 of the Constitution of India and is liable to be struck down.

NO RATIONAL NEXUS OF THE DIFFERENTIAL WITH THE OBJECT SOUGHT TO BE ACHIEVED

L. That this Hon'ble Court in a catena of judgments, such as ***Hiral P. Harsora & Ors. v. Kusum Narottamdas Harsora & Ors. (2016) 10 SCC 165; Shashikant Laxman Kale v. Union of India 1990 4 SCC 366; Harbilas Rai Bansal v. State of Punjab 1996 1 SCC 1*** has held that in order to ascertain whether a classification is valid or not in any given enactment, it is imperative to read the Statement of Objects and Reasons, Preamble and the Provisions of the said enactment as a whole.

M. That in light of the law as laid down by this Hon'ble Court it is submitted that the classification as made by the Impugned Act has no rational nexus with the object sought to be achieved by the IBC. The Preamble of the Act, which contains the Impugned Act , states that, *inter alia,* it is being promulgated to fill in critical gaps in the corporate insolvency framework. The preamble further states that the same is being promulgated in light of the fact that the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 could not be taken up for consideration in the parliament. Therefore the Act is nothing but a stop gap arrangement till the said Bill is taken up by parliament for consideration. The Statement of Objects and Reasons of the said Bill also states that the same is enacted to prevent potential abuse by certain classes of financial creditor.

N. That no explanation is coming forward from the Respondent as to what gaps are sought to be filled by the provisions of the Act or how the existing framework of the code does not act as a sufficient safeguard against the potential abuse by certain classes of Financial Creditors.

O. That this Hon'ble Court in the case of **Pioneer Urban Land and Infrastructure Ltd. V. Union of India reported in (2019) 8 SCC 416,** was posed with the question of abuse of the provisions of IBC. The Hon'ble Court while adjudicating upon the said question has held that the IBC itself provides a defence

mechanism to a Corporate Debtor. Furthermore this Hon'ble Court vide the said judgment laid down certain defences as will be available to a Corporate Debtor in order to showcase that a default has not been committed by it. It is pertinent to note that a suggestion was made by the Petitioners in the aforesaid case to provide for a threshold limit for triggering the Code, for allottees of Housing Projects. However this Hon'ble Court did not accede to the said suggestions, holding that in a Section 7 Petition, the Adjudicating Authority's "satisfaction" will be with both eyes open and it will not turn a Nelson's eye to legitimate defences, as available to the Corporate Debtor. Therefore this Hon'ble Court has already held that the IBC, along with the defences as provided by this Hon'ble Court, sufficiently safeguard the interest of a Corporate Debtor from any potential abuse. In light of a judicial pronouncement being made by this Hon'ble Court, there is no justification for bringing in the amended provision.

P. Since the Impugned Act seeks to amend the IBC, the same must have a nexus with the object as sought to be achieved by the IBC and must also be read along with other provisions of the Act. The Statement of Objects and Reasons of IBC States that the objective of IBC is to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firm and individuals in a time bound

manner for maximisation of value of assets, to promote entrepreneurship, availability of credit and balance of interests of all stakeholders. Furthermore, as has been elaborated hereinabove, the scheme of the Act does not differentiate between the different classes of Financial Creditors and for the purposes of the Act, each Financial Creditor is one and the same.

Q. That this Hon'ble Court in **Innoventive Industries Ltd. V. ICICI Bank reported in (2018) 1 SCC 407**, has discussed in detail the purpose for which the IBC was enacted. While undertaking the said exercise this Hon'ble Court extensively referred to the Report of the Bankruptcy Law Reforms Committee, which led to the enactment of IBC. The committee in its report admitted to the fact that while the framework as existed at the said point of time gave rights to banks for recovery, some of the most important lenders in society are not banks. They are the dispersed mass of households and financial firms who buy corporate bonds. The lack of power in the hands of a bondholder was found to be one of reasons why the corporate bond market has not worked in India. The Committee further observed that when the creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. It is to strengthen the lending market of the Country that the IBC was enacted, which provided sufficient safeguarding mechanisms for an Individual Investor.

R. That upon reading the Impugned Act along with the Statement of Objects and Reasons of the IBC and the other provisions of the Code, it is clear that the differentiation as sought to be created has no rational nexus with the object as sought to be achieved by the Act. Rather than strengthening the IBC it acts contrary to the objective behind enactment of the same, since it weakens the rights of every lender other than financial institutions and banks. Therefore by no stretch of imagination can it be said that the Differential as sought to be brought into effect by the Impugned Act, has any rational nexus with the object sought to be achieved by the Act. In light of the aforesaid it is humbly submitted that the Impugned Act does not satisfy the test of reasonable classification and therefore is violative of Article 14 of the Constitution of India.

IMPSECTION 3 OF THE IMPUGNED ACT IS BIASED AND UNFAIR

S. That as has been stated hereinabove Sub-section 6A was inserted in Section 21 of the IBC, only to deal with the problems emanating from a large committee of creditors, due to several individuals being a part of the same. The Creditors who might also be large in number, but had advanced the loan as a part of a Consortium of Syndicated Facility, were kept out of the said provision, since Sub-Section 6 already existed to provide a mechanism for their representation. Furthermore Sub-Section 6

from its language apparently deals with Financial Institutions. Therefore two different mechanisms were provided for Financial Institutions and Individual Creditors under the Code.

T. The Impugned Act by imposing the condition of an Application under Section 7 to be filed jointly, only upon the creditors as referred to in Sub-Section 6A of the Act and allottees of a Real Estate Project, is specifically targeting Individual Creditors vis-à-vis Financial institutions. The import of the Impugned Act is that even if the nature of Loan as advanced by the Individual is identical to the loan as advanced by a Bank or Financial Institution, he/she cannot trigger Section 7 of the IBC on his own, solely on the ground of him/her being an individual and falling under Sub-Section 6A of Section 21 of the IBC.

U. That even though an Individual Creditor might have advanced an amount as loan which might be larger than the one advanced by a Financial Institution, however the Financial Institution can still trigger the Code on its own, whereas the Individual Creditor is dependent on other individual creditors also desirous of preferring an Application before the Hon'ble Adjudicating Authority.

V. That such an onerous and one sided condition makes it abundantly clear that the Impugned Act reeks of biasness and indifference towards the plight of an Individual Investor. It goes

without saying that the only person who benefits out of the aforesaid amendment are the promoters of the defaulting corporate debtor, since in a case wherein the only Creditors are individuals, till the time joint application is not filed by such Creditors, the promoters of the defaulting company continue to be in control.

SECTION 3 OF THE IMPUGNED ACT IS UNREASONABLE, CAPRICIOUS AND WITHOUT ANY DETERMINING PRINCIPLE.

W. That this Hon'ble Court in the case of **Navtej Singh Johar v. Union of India reported in (2018) 10 SCC 1**, has held that if a statutory provision is not based on any sound or rational principle than the same can be held Violative of Article 14 of the Constitution of India on the ground of the same being manifestly arbitrary. Applying the said legal principle to the facts of the present case, the determining principle for the application of the amended proviso on a Creditor is whether he/she falls under a class as referred to in Sub-Section 6A of Section 21 of the IBC. It is pertinent to note that the identification of a Class for the purposes of Sub-Section 6A of Section 21 itself takes place subsequent to admission of an Application under Section 7 of the IBC and appointment of an Interim Resolution Professional. Regulation 4A of the Insolvency and Bankruptcy

Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, states that upon an examination of books of account and other relevant records of the corporate debtor, the Interim Resolution Professional shall ascertain class(s) of creditors, if any.

X. That the statutory regime as applicable itself recognises that the identification of class can be made by IRP only upon examination of the books of account and other record of a corporate debtor, which becomes available only after initiation of CIRP. At the time of preferring the Application under Section 7, it is not possible for a Financial Creditor to make an assessment of the class, without having access to the financial documents of the Company. Therefore the fact that the application of the proviso, which restricts the right of preferring an Application under Section 7 of IBC, has been made dependent on an event which takes place only subsequent to admission of the Application, establishes that the said provision is without an adequate determining principle and therefore is manifestly arbitrary.

Y. That furthermore Section 3 of the Impugned Act is unreasonable since the same is contrary to the objects and purpose behind enactment of the Insolvency and Bankruptcy Code. The Bankruptcy Law Reforms Committee in its report of

November 2015, had observed that the Control of a Company is not a divine right. When a firm defaults on its debts, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. It is because of the aforesaid reason that the IBC provided for transfer of the control of the company to a Committee of Creditors.

Z. That the effect of the Impugned Act is that in cases wherein the Corporate Debtor has availed loans only from individuals, till the time the Creditors do not prefer an Application jointly against the Corporate Debtors, the management of the defaulting company continues to be in control, even after repeated defaults, which is completely contrary to the object of the IBC. The Respondent has failed to appreciate that the individual investors of a Company are not necessarily localised and are spread out across the Country. Furthermore the contact details of the investors of the Company are not available publicly. Most of such investments are made through an intermediary, which itself is hand in gloves with the defaulting Corporate Debtor. In the absence of the contact details being available with the Investor about other similar investors in the Company, it is not possible for them to contact each other and arrive at a consensus to prefer an Application against the Corporate

Debtor. Because of this logistical nightmare, the Impugned Act effectively diminishes the right of individual Financial Creditors to prefer an Application under Section 7 of IBC.

AA. That the members of the Petitioner Association are faced with a similar predicament since some of the Companies in which they have invested, have availed loans only from Individuals without approaching the banks. All the said investments were made through a common intermediary. The details of the all the investors in the said company are either with the company or with the intermediary. In the absence of details, including the contact details, it is almost impossible for the members to coordinate with other investors and make a concerted effort against the Companies. Even the Petitions as preferred prior to the present Amendment coming into force are getting affected since in the absence of compliance with the Amendment, the same will be dismissed as withdrawn.

BB. That the Impugned Act further leaves a Financial Creditor at a position worse off than an Operational Creditor, thereby contravening the scheme of the Act. As has been held by this Hon'ble Court in **Swiss Ribbons (P) Ltd. V. Union of India reported in (2019) 4 SCC 17,** the IBC recognizes a difference between a Financial Creditor and an Operational Creditor and confers a primacy on Financial Creditors in comparison to an

Operational Creditor. The effect of the Impugned Act, is that if an Operational Creditor satisfies the other requirement under the Act, it can prefer an Application under Section 7 of the Code, on its own, however an Individual Financial Creditor, is restricted from filing such an Application even if the loan as advanced by him/her is 10 times more than the dues of an Operational Creditor. Therefore the Impugned Act is contrary to the scheme of the Act which it seeks to amend. As a consequence thereof the Impugned Act is unreasonable and manifestly arbitrary.

THE INCLUSION OF SECTION 10 IN ADDITION TO SECTION 3 IN THE ACT HAS LEFT THE INDIVIDUAL INVESTORS REMEDILESS.

CC. That the Respondent vide Section 10 of the Act has inserted Section 32A in the IBC, whereby the liability of a Corporate Debtor, will cease to exist on the date a Resolution Plan is approved and new management takes over the Corporate Debtor. It is respectfully submitted that not only has the Respondent curtailed the rights of the Individual Investors under the IBC, the Impugned Act has affected the right of the Creditor, under other Statues, thereby rendering it remediless.

DD. That the Respondent has failed to appreciate that approval of a Resolution Plan and appointment of a New Management, does

not necessarily means that the interests of all the Creditors have been taken care off. As per Section 30(4) of the IBC, for a Resolution Plan to get approved it only requires voting share of 66% of the Financial Creditors. The effect of the same is that even if the other 34% Creditors are not in favour, the Resolution Plan will get approved by the Committee of Creditors. The Respondent has failed to appreciate that in several cases banks are the biggest lenders and constitute the majority of the Voting Share. Therefore they can easily outvote the smaller investors if the Resolution Plan is favouring them. In such a scenario, the only option left with an Individual is to pursue the Criminal Remedy as available to it. However by inserting Section 10 in the Impugned Oridnance , the Respondent has closed the doors for the Individuals, thereby rendering them remediless.

8. The petitioner submits that the present writ petition is being filed bonafide and in the interest of justice.

9. The petitioner state that they have no other alternative, equally efficacious remedy except by means of the present petition.

10. The petitioner submit that this Hon'ble Court has the requisite jurisdiction to entertain the present writ petition and adjudicate upon the issues arising there from.

11. The Petitioner has filed Writ Petition (C) No. 27 of 2020, challenging the constitutional validity of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019. However since the Impugned Act, subsumes the said Ordinance and vide Section 14 repeals the 2019 Ordinance, Writ Petition (C) No. 27 of 2020 is rendered infructuous, thereby necessitating the filing of the present Petition.

PRAYER

In the aforesaid facts and circumstances, the petitioner most humbly prays for the following amongst other prayers:

a) Issue an appropriate writ declaring Section 3 and 10 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 being violative of Article 14 of the Constitution of India;

b) *In the Alternative,* without prejudice to the arguments and submissions as made, if this Hon'ble Court holds that Section 3 and 10 of the Insolvency and Bankruptcy Code (Amendment) Act, 2019 are constitutionally valid then read down the said provision and declare that the same will only apply to petitions as preferred after the commencement of the Act i.e. 28.12.2019.

c) Issue Rule nisi in terms of prayers a and b and upon return of the rule to make the said rule absolute.

d) such other order and/or direction, as this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.