INSOLVENCY AND BANKRUPTCY (ORDINANCE), 2019: A GLARING EXAMPLE OF COLORABLE EXERCISE OF POWER

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ABSTRACT

"When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested, the court calls it a colorable exercise of power and is undeceived by illusion."

- Justice V R Krishna Iyer[3]

The idea pulsating behind the power of framing ordinances can be traced since time immemorial, i.e. from The Government of India Act, 1935, which gave the authority to the Governor General to promulgate Ordinances. Section 42 and 43 of the said act dealt with Ordinance making power of the Governor General which states that, *'If circumstances exist which render it necessary for him to take immediate action'*, then only he can use this power. It would be pertinent to mention here that the legislative intent behind inculcating this Article was to empower the President to exercise legislative powers in cases which require "immediate action". It was also recommended in the Constituent Assembly to modify the Chapter to read "*Extraordinary Powers of the President*" instead of the current "Legislative Powers of the President" to make it clear that the powers "are extraordinary; that is to say, they are not to be employed in normal times"[4] and are also reasonably under surveillance.

That on 28th December, 2019, His Excellency, the President of India promulgated, *The Insolvency & Bankruptcy Code (Amendment) Ordinance, 2019* whereby certain amendments have been introduced in the IBC ***inter alia*** section 7 which is primarily the subject matter behind construction of this Article. To provide a backdrop, it is to be noted that the Parliament passed the Insolvency and Bankruptcy Code, 2016 (**"Code"**), first in the House of People on 05.05.2016 and then in the Counsel 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.

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[4] *Constituent Assembly Debates*, p. 201

This was done to organize the laws relating to insolvency and bankruptcy which where earlier unorganized. That the status of Homebuyers/Allottees always went through the confusion whether they fall under the category of "Financial Creditors" and whether or not they can set off insolvency proceedings at all.

Amid all confusions and in order to clarify the position once for all, the Parliament passed the Insolvency and Bankruptcy Code (Amendment) Act, 2018 with an aim to provide Legislative clarity stating that the Home Buyers/Allottees were also to be treated as "***Financial Creditors***" as under the Code. That to challenge the constitutional validity of the Insolvency and Bankruptcy Code (Amendment) Act, 2018 various Petitions were filled by Builders/Real Estate Companies in the Hon'ble Supreme Court and in ***Pioneer Urban Land and Infrastructure Ltd. and Ors. vs. Union of India and Ors.***[5], the Hon'ble Supreme Court was pleased to uphold the validity of Insolvency and Bankruptcy Code (Amendment) Act, 2018. That with the baleful motive of overturning the Judgment of the Hon'ble Apex Court the Insolvency and Bankruptcy (Amendment) Ordinance, 2019 has been brought in. That section 3 of the Ordinance not only amends but creates and embargo in as much as there is an additional provision in section 7 of IBC which clearly states 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 or cannot file at all. That the said Ordinance amounts to violation of Article 14 of the Constitution of India, 1950 which creates a class within a class and suffers from manifest arbitrariness. Also, it goes against the spirit of the Hon'ble Supreme Court in its ***Pioneer Urban Land Judgment.***

That in the case of ***Ramesh Thapar vs. State of Madras (1950 SCR 594)***, the Apex Court opined that, "***Where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."*** From perusing the above noted judgment, it is apparently clear that, by way of passing the ordinance of 2019, the government has snatched right of the Home Buyer by imposing certain conditions in the form of barriers. Not only this, the new amendment of section 7 is

[5] (2019) 8 SCC 416

absolutely unconstitutional because the same is preventing the Home Buyers from availing the remedy available under the IBC. It would not be out of place to mention here that there is no embargo as such on the operational creditor who is also at the same footing which renders the amendment discriminatory and smells of favoritism and hence is liable to be struck down.

That it is a settled law that equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. The action of the central government disrupts the entire genesis of the fundamental rights of the Home Buyers and hence is required to be looked into. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14, and if it affects any matter relating to trade, it is also violative of Article 21. Articles 14 and 21 strikes at arbitrariness in State action and ensure reasonable restrictions and equality of treatment. That the Constitution does not allow unreasonable restrictions to be imposed and in this scenario, if the classification fails to satisfy the requirements of Article 14 and Article 21, it will be ***ultra vires*** not only the Constitution but also the statute under which it is undertaken.

That the action of the government is ***ex-facie*** illegal and perverse and deserves to be thwarted away in as much as the same appears to be concocted game plan in order to deprive the individual Home Buyers from the basic constitutional right and hence deserves to be nullified. This action of the government is ***de hors*** the constitutional rights which cannot be allowed to be perpetuated and hence deserves rejection. That the law becomes void not ***in toto*** or for all purposes or for all times or for all persons but only "**to the extent of such inconsistency**", that is to say, **to the extent it becomes inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens**. The instant action of the government is bereft of any base, is restrictive in nature and takes away the fundamental right of the individual home buyers and act as a restraint to initiate legal proceedings which is ex-facie perverse.

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violative of Article 14. In *D.C. Wadhwa v. State of Bihar*[6], *Justice PN Bhagwati observed that: "The power to make an ordinance is to meet an extraordinary situation and it should not be made to meet political ends of an individual. Though it is contrary to democratic norm for an executive to make a law but this power is given to the President to meet emergencies so it should be limited in some point of time."*

That the present issue is a glaring example of unreasonable classification as well as colorable exercise of the legislative power used through the President under Article 123 of the Constitution of India, 1950. The Hon'ble Supreme Court has considered the aspect of the unreasonable classification in the case of ***P.P. Enterprises vs. Union of India***[7] wherein it was observed as follows: "*Also, to justify a restriction as reasonable, the restriction must be in relation to the object to which the law is seeking attainment and it should not be in excessive nature."*

Also, in ***P. Vajravelu Mudaliar v Special Deputy Collector***[8], it was held that such an abuse of the power by the executive in a covert and indirect manner would be colorable legislation. If a constitutional authority does an act which is not expressly permitted by the constitution, it would amount to fraud on the constitution.

That the Hon'ble Supreme Court in ***Sansar Chand Atri vs. State of Punjab and Ors.***[9] quashed a notification that created a class within a class and held that Military pensioners already formed a class within the broader definition of "pensioners" and further sub-classifying them would be unconstitutional. That it is a trite law that the classification which is permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis.

That any law which is inconsistent or in derogation of the fundamental rights shall be deemed to be void. At the time of issuing ordinance, basic rules with respect to equality, reasonable classification etc. were not considered and accordingly, has snatched the right of the Home Buyers and is de hors the Constituion of India, 1950. That the Hon'ble Supreme

[6] AIR 1987 SC 579
[7] AIR 1982 SC 1016
[8] [1965] 1 SCR 614
[9] (2002) 4 SCC 154

Court in the case of ***E. V. Chinnaiah vs. State of Andhra Pradesh and Ors.***[10] denied 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 of India, 1950.

That the Ordinance holds the main objective to aid Corporate Debtor with funding and to prevent action that arises against them, has no reasonable nexus with the amendments made in section 7 of the IBC. That this Ordinance creates confusion with respect to position which is already clear prior to the amendment by the judgment given by the Hon'ble Supreme Court in the case of ***Pioneer case.*** That the ordinance is also against the principle of legislative accountability in as much as the legislature is morally as well as legally accountable to the common people. Any act which is detrimental to the rights of the citizen is liable to be quashed and set aside it being unreasonable as the ordinance.

That there is always a presumption that the legislature does not exceed its jurisdiction and is contained in the maxim, "***ut res magis, valet quam parret***". Though a bare perusal of the ordinance clarifies that the act of amending the present law is nothing but a tool to overreach the process and restrict the exercising the right of the individual which is per se perverse and deserves to be declared ultra vires. Although, the Apex Court on various occasions has refused to review the issue pertaining to limit the power of promulgation of Ordinances by the President. While the ordinance is amenable to judicial scrutiny, the court would not look into the preconditions of necessity.[11] Moreover, even the concept of mala fide would not apply as legislative intentions are out of judicial reach.[12] Further, it is for the petitioner to prove that necessary circumstances could not have existed. [13] Though, the law being dynamic the day is not too far when the Hon'ble Supreme Court and the High Courts will have to rethink and set parameters in order to curb the misuse of such power in the hands of council of ministers who are the real men behind such Ordinances.

That the Hon'ble Supreme Court in ***Chitra Sharma and Ors. v/s Union of India and Ors.***[14], has recognized that the fundamental Right to housing is also available to Home Buyers/Allottees and the ordinance is in predominant violation of the right of the Home

[10] (2005) 1 SCC 394
[11] *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271
[12] *T. Venkata Reddy* v. *State of A.P.*, (1985) 3 SCC 198
[13] *Gyanendra Kumar* v. *Union of India*, 1996 SCC OnLine Del 367
[14] (2017) 143 SCL 680 (SC)

Buyer and thousands alike and deserves to be thwarted away in its entirety. That whereas the Operational Creditors have an Advantage to avail the benefits unlike any other creditor. The biasness is done only with Financial Creditors wherein they are barred to take advantage of the benefits allotted to them under the code.

That the Home Buyers/Allottees consider to approach NCLT as the last option as they do not hold sound financial background unlike Builders and seek to avoid risk of investing their money or decision of buying a home. That the action of the government seems to be irrational, a haste and transpires denial of the right to chose forum which is ***per se*** perverse and deserves to be thwarted away. That the Ordinance is also violative of Article 21 of the Constitution of India in as much as the law that is not just, fair or reasonable is no law under the Constitution. Hon'ble Justice DY Chandrachud, J., in ***K.S. Puttaswamy v. Union of India***[15], has held that:

"….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 connection with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well…"

That the ordinance has been passed by using the powers under Article 123 of the Constitution of India, 1950 which enables the promulgation of ordinances only in instances requiring "***immediate action***". The absence of emergent reasons negates any invocation of the provision and Ordinance is against the spirit of Article 123 and ultra vires of the Constitution of India, 1950. That the ordinance is on the face of is irrational and is colorable legislation and Court must look to the substance of the ordinance, as distinguished from its form or the label which the legislature has given it and must not allow this to be acted upon.

Arguendo, it is understandable that the shell life of the Ordinance is six months only, still one of the biggest factors adding to the potential for misuse is the fact that ordinances can go

[15] (2017) 10 SCC 1

without adequate legislative review for more than half a year at a time. Not only this, even in a situation when the ordinance lapses or is repealed by the Legislative Assembly, even that would not render the ordinance as ***void ab initio*** and any act undertaken during that epoch shall continue to remain valid. Thus, even if the democratic institutions are to approve or disapprove of the acts later, the fact remains that the caprice, if any proved at a later point of time cannot be undone. Unfettered rights without any restriction would render the very concept of democracy ***ultra vires*** and bereft of the constitution pillars.

That the instant Amendment seeks to take away the right per se apart from over-turning the well reasoned judgment of the Hon'ble Supreme Court. Not only this, firstly the amendment was being carried out by the Legislature itself and hence, this act of counter blasting their own act seems to be marred by some extraneous conditions which can be seen only if the curtains are raised. It is now to be seen as to how the Hon'ble Supreme Court shall take it further in as much as the same has been taken cognizance by the Court in a petition filed[16] challenging the Ordinance and an interim order has been passed staying the application of the provisions of the ordinance.

[16] Manish Kumar vs. Union of India & Anr. WP (civil) No. 26/2020