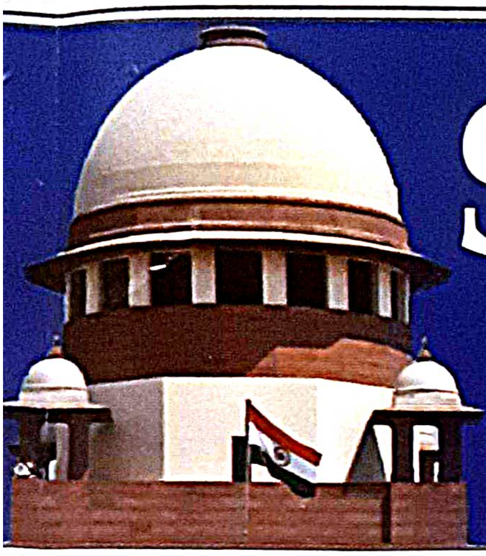
2023 Vol-I June 20 2023 Part -VI

Annual Subs: ₹1200
Single Copy: ₹150
Monthly



(ACJ) SUPREME COURT JUDGMENTS

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The Current Legal Landscape : Conflict between the Prevention of Money Laundering Act, 2002 and Insolvency and Bankruptcy Code, 2016

Introduction

The Prevention of Money Laundering Act (PMLA), 2002[1] and the Insolvency and Bankruptcy Code (IBC), 2016[2] are two important laws in India that aim to tackle different issues related to finance and commerce. The PMLA is a law enacted by the Indian government in 2002 to prevent and combat money laundering, which is the process of hiding the proceeds of illegal activities through legitimate financial channels. The act defines money laundering as a criminal offence and provides for stringent penalties and punishment for offenders.

The IBC, on the other hand, is a law enacted in 2016 to provide a comprehensive framework for resolving insolvency and bankruptcy cases in India. The law aims to promote entrepreneurship and protect the interests of stakeholders by providing a time-bound process for the resolution of distressed assets. Under the IBC, a debtor can be declared insolvent and undergo a resolution process to either restructure the debt or sell the assets to repay creditors. The law also establishes specialized courts and tribunals to handle insolvency cases and provides for a fast-track process for certain cases.

Both the PMLA and the IBC are important laws in India's financial and commercial landscape, with the former focused on preventing money laundering and the latter focused on resolving insolvency cases in a timely and efficient manner.

Prevention of Money Laundering Act, 2002 & Insolvency and Bankruptcy Code, 2016: Issue of Primacy

The Prevention of Money Laundering Act (PMLA) and the Insolvency and Bankruptcy Code (IBC) are special statutes in India, with provisions that can override other enactments in cases of inconsistency. Specifically, both statutes contain a *non-obstante clause* - Section 71 of the PMLA and Section 238 of the IBC - which gives an overriding effect to their provisions over other enactments that may be in conflict.

However, when two statutes contain a non-obstante clause and there is a conflict of provisions, the year in which each statute came into effect becomes important. This is because the later statute is presumed to prevail over the earlier statute, as the legislative intent is presumed to have evolved over time and the later statute is considered to be the more recent and updated expression of that intent.

For example, if a situation arises where the provisions of the PMLA and the IBC are in conflict, the provisions of the IBC would be considered to prevail over the provisions of the PMLA, as the IBC was enacted in 2016, while the PMLA was enacted in 2002. Therefore, in case of any inconsistency between the two, the IBC would have an overriding effect over the PMLA.

It is important to note, however, that the interpretation of non-obstante clauses and their impact on conflicting provisions is a complex and evolving area of law, and there may be exceptions to the general rule based on the specific facts and circumstances of each case. Ultimately, the resolution of conflicts between the provisions of different statutes will depend on the interpretation and application of the law by the courts.

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1. Act No. 15 of 2003
2. Act No. 31 of 2016

The case of ***Solidaire India Ltd. Vs. Fair Growth Financial Services Ltd. & Ors***[1]. dealt with a situation where there was a conflict between two special statutes, the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act (SARFAESI) and the Sick Industrial Companies (Special Provisions) Act (SICA), which were enacted in 2002 and 1985, respectively. Both statutes contained non-obstante clauses, which gave overriding effect to their provisions over other enactments.

The question before the Supreme Court was which statute should prevail in case of a conflict between the two. The court held that where two special statutes contain a non-obstante clause, the statute that was enacted later in point of time would prevail over the earlier statute. The court reasoned that the later statute would be presumed to reflect the latest expression of legislative intent and therefore would override the earlier statute.

The interplay between the provisions of the IBC and PMLA and whether primacy could be accorded to one of the two enactments directly fell for consideration before Delhi High Court in ***Directorate of Enforcement*** v. ***Axis Bank***[2]. The Court in that matter was dealing with appeals brought by the Enforcement Directorate against the decision delivered by the Appellate Tribunal under the PMLA which had held that the rights of banks and financial institutions as recognised under SARFESI, RDB or the IBC would rank superior and that the PMLA would have to take a back seat. The Hon'ble Delhi High Court considering this issue stated in paragraph 147 of the Judgment -

"*To sum up on the issue, the objective of the legislation in PMLA being distinct from the purposes of the three other enactments viz. RDBA, SARFAESI Act and Insolvency Code, the latter cannot prevail over the former. There is no inconsistency. The purpose, the text and context are different. This court thus rejects the argument of prevalence of the said laws over PMLA.*"

Thus, the powers of ED and the ambit of PMLA has beenclarified by the judiciary, in the above case, [3] as it made the court to deal with the issue of primacy with IBC as both the statutes employ non obstante clauses on their overriding effect over any other law in force[4].

Insertion of Section 32A in the Insolvency and Bankruptcy Code, 2016

Article 32A was inserted in the Insolvency and Bankruptcy Code (IBC)[5] by way of an amendment. It provides that a corporate debtor cannot be prosecuted for any offences committed prior to the commencement of the insolvency resolution process (IRP), if the offence is related to the company's assets or management.

The rationale behind the introduction of Article 32A was to provide a measure of protection to corporate debtors undergoing insolvency proceedings, and to ensure that the resolution process is not disrupted by ongoing criminal proceedings. The amendment was intended to encourage resolution applicants to come forward and participate in the resolution process, without the fear of being saddled with criminal liability for offences committed by the previous management.

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1. (2001) 3 SCC 71
2. 2019 SCC OnLine Del 7854
3. Supra Note 4
4. "*Enforcement directorate under PMLA can no longer attach assets once liquidation process has been initiated under IBC*"written by Ankoosh Mehta, Bishwajit Dubey, Monark Gahlot, Kriti Srivastava and Shubhangi Agarwal available athttps://www.cyrilshroff.com/blogs/ (Uploaded on January 25, 2022).
5. Ins. by Act No. 1 of 2020, sec.10 (w.e.f. 28-12-2019)

In the case of ***Manish Kumar v. Union of India***[1], the Supreme Court upheld the constitutional validity of Section 32A while emphasizing the importance of maximizing the value of assets of the corporate debtor under the Insolvency and Bankruptcy Code (IBC). The court recognized that imposing unspecified liabilities for the prior acts of the corporate debtor on the successful resolution applicant would jeopardize this principle objective. Therefore, the introduction of Section 32A aims to address these concerns and assure the resolution applicant that, once their offer is accepted, the corporate debtor can be taken over with a clean slate. Additionally, this provision also insulates the resolution applicant from potential prosecution for prior offences.

The court further noted that the legislature, through Section 32A, seeks to protect the corporate debtor and its properties against offences committed prior to the commencement of the Corporate Insolvency Resolution Process (CIRP).

The Apex Court also in the case of ***Nitin Jain Liquidator PSL Limited v. Directorate of Enforcement***[2] reiterated in Paragraph 97 that-

"This Court is of the opinion that the answer to determining when the bar under Section 32A would come into play must be answered bearing in mind the ethos of Section 32A and upon an interpretation of the provisions of the IBC and the Regulations framed thereunder. As is evident from a careful reading of Section 32A(2), the Legislature in its wisdom has provided that no action shall be taken against the properties of the corporate debtor in respect of an offense committed prior to the commencement of the CIRP and once either a resolution plan comes to be approved or when a sale of liquidation assets takes place. The objective underlying the introduction of this provision has been eloquently explained by the Supreme Court in Manish Kumar (Supra)."

Conclusion

The long-debated issue of whether the Enforcement Directorate's order for the provisional attachment of a corporate debtor's assets after the initiation of the Corporate Insolvency Resolution Process (CIRP) is again raised in the ***Ashok Kumar Sarawagi vs. Enforcement Directorate and Anr.***[3] case before the Supreme Court.

The Supreme Court has issued a notice to the Enforcement Directorate and, in the meantime, allowed the CIRP to continue in accordance with the Insolvency and Bankruptcy Code (IBC) on an "as is whereas is basis" and "whatever there is basis". The Supreme Court has clarified that the approval of the resolution plan by the National Company Law Tribunal (NCLT) will be subject to its orders.

The decision in *Ashok Kumar case*is expected to provide much-needed clarity on the interaction between the two special statutes (Insolvency and Bankruptcy Code, 2016 and Prevention of Money Laundering Act, 2002). It is hoped that the judgment will clarify the hierarchy of the two statutes and provide guidance on the extent to which the PMLA can be used to attach the assets of a corporate debtor during the CIRP process. The outcome of this case will have a significant impact on the resolution process of distressed assets in the country and the rights of stakeholders involved in the process.

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1. (2021) 5 SCC 1
2. 2021 SCC OnLine Del 5281
3. Special Leave Petition (Civil) Diary No(s). 30092/2022