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PMLA vs. IBC

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THE Prevention of Money Laundering Act, 2005 (hereinafter referred as **PMLA**) is a key tool to protect the interest of revenue of the government whereby the Enforcement Directorate i.e. the investigating agency (hereinafter referred as the **ED**) has power to investigate money laundering offences in relation to the scheduled offences ¹. Further, the Hon'ble Supreme Court in **P. Chidambaram v. Directorate of Enforcement** ² has elaborated on the powers of ED has observed that ED has power to attach the tainted properties of the accused arising directly or indirectly from the proceeds of crime.

On a separate subject, the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as **IBC**) has been enacted with a vision to balance between the protection of the company as going concern and safeguarding the interests of creditors by approving the corporate insolvency resolution plans by the learned Adjudicating Authority i.e. National Company Law Tribunal (NCLT) ³. The Hon'ble Supreme Court in **Innoventive Industries Ltd. v. ICICI Bank** ⁴ has observed that IBC has unified all the insolvency laws with an objective of fast-track resolution of insolvency process. The Hon'ble Supreme Court in **Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.** ⁵ has reiterated the statement of object and reason (SOR) and opined in regard to the same as that the IBC provide implementation of insolvency resolution process in a time-bound manner for maximum maximisation of value of assets in order to balance the interests of all stakeholders

WILL IBC PREVAIL OVER PMLA?

Both the legislation, PMLA and IBC are special legislations in their own spheres, which govern different aspects. However, if the corporate debtor and its erstwhile management is involved in scheduled offences as prescribed under PMLA and proceedings have been initiated in terms of PMLA and simultaneously corporate insolvency resolution process (CIRP) has been initiated in accordance of IBC, then both the proceedings shall create friction. It is interesting to note that PMLA and IBC, both have non-obstante clause.

Also, it is quintessential to understand that the status of the ED under the PMLA Act while attaching the tainted properties or initiating criminal proceedings, is not similar to the taxation authorities (like income tax or GST) wherein the assessee/accused has unpaid tax dues. Resultantly, placing reliance on Section 238 of IBC and the rulings of the

various constitutional courts stating that provision of IBC shall override other legislations by virtue of Section 238 of IBC shall be incorrect to resolve the conundrum between PMLA and IBC.

The issue of interplay of PMLA and IBC has been placed before courts and tribunals on multiple occasion, unfortunately, the issue remains *res integra* on account of diverging opinions. The Hon'ble Delhi High Court in ***Directorate of Enforcement v. Axis Bank***⁶ has examined the prevalence and held that since both legislations govern different aspects as evident from their objectives. Further, the Hon'ble Court held that the IBC shall not prevail over PMLA, thereby, it is shall be beneficial to employ the harmonious rule of interpretation and if any third party rights have been vested in the attached property, such disputes should be resolved by the special courts.

INSERTION OF SECTION 32A OF IBC - "CLEAN SLATE DOCTRINE"

Recently, the Parliament has promulgated the Insolvency and Bankruptcy Code (Amendment) Act, 2020 and inserted a new provision which provides immunity to the corporate debtor (including the assets) and the new management or control from the prosecution initiated on account of the offences committed prior to the approval of the resolution place by the NCLT. The provision lays down stringent conditions to ensure that the new management or control of the corporate debtor is unrelated to the erstwhile management or control of corporate debtor. The Hon'ble Supreme Court in ***Manish Kumar v. Union of India***⁷ has uphold the constitutional validity of Section 32A of IBC and also held that the creation or cessation of an offense is ultimately an issue of legislative policy. Thereby, by virtue of Section 32A of IBC, the Parliament upon due consideration deemed it appropriate and expedient to infuse the *clean slate doctrine* keeping in mind the larger economic realities of today.

The Hon'ble Delhi High Court, after insertion of Section 32A of IBC has again dealt with the interplay of PMLA and IBC in ***Nitin Jain Liquidator PSL Limited v. Enforcement Directorate***⁸ has held that in regard to the reconciliation between PMLA and IBC, the Courts play a vital role "to discern the legislative scheme and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations to the extent that the same does not impinge or encroach upon a facet which stands reserved and legislatively mandated to be exclusively controlled and governed by one of the competing statutes". However, in light of the recent amendment, the Hon'ble Court held that from the date of approval of corporate insolvency resolution plan (CIRP) of the corporate debtor as a going concern by the NCLT, the cessation as contemplated under Section 32A did and would be deemed to have come into effect.

CONCLUSION

In view of the aforesaid discussion, it is apparent that both the legislations shall be construed in harmonious manner to not frustrate the intent and objects of the two distinct legislations. However, the protection prescribed under the newly inserted provision is with regard to the new management of the corporate debtor and the assets of the corporate

debtor only to the extent of compliance of Section 32A of IBC. Thereby, it is quintessential to strike a balance between the two different legislations, otherwise, persons involved in proceeds of crime shall abuse the law relating to insolvency and bankruptcy to escape from the liability which would severely affect the interest of revenue.

[The views expressed are strictly personal.]

¹ Defined under Section 2(1)(y) of PMLA.

² (2019) 9 SCC 24 - **2019-TIOLCORP-04-SC-PMLA-LB**

³ Section 5(1) of IBC

⁴ (2018) 1 SCC 407 - **2017-TIOLCORP-11-SC-IBC**

⁵ (2021) 9 SCC 657 - **2021-TIOLCORP-23-SC-IBC-LB**

⁶ 2019 SCC Online Del 7854 - **2019-TIOLCORP-02-HC-DEL-PMLA**

⁷ (2021) 5 SCC 1 - **2021-TIOLCORP-03-SC-IBC-LB**

⁸ 2021 SCC Online Del 5281