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Vasanth Rajasekaran

The Delhi High Court recently held, in *Rajiv Chakraborty vs Directorate of Enforcement (ED)*, that the ED is empowered under the Prevention of Money Laundering Act, 2002 (PMLA), to attach a corporate debtor's assets that are believed to be "proceeds of crime" until the embargo under Section 32A of the Insolvency and Bankruptcy Code (IBC) is triggered. The decision has brought into focus the never-ending debate over which of the two laws — IBC and PMLA — prevails over the other.

Some argue that the IBC would have an overriding effect by virtue of the *non-obstante* provision in Section 238. Even otherwise, Section 14 of IBC prohibits the institution and continuation of civil proceedings against the corporate debtor once the corporate insolvency resolution process (CIRP) has begun.

Similarly, Section 32A of the IBC protects the corporate debtor's assets from attachment once the resolution plan is approved or when a measure towards liquidation is adopted.

The objectives of IBC and PMLA are different. The Supreme Court, in *P Mohanraj (supra)* and *Swiss Ribbons vs Union of India*, held that the IBC is a beneficial code that intends to put a commercially ailing corporate entity back on its feet. The purpose of the IBC is to protect the corporate debtor from corporate death by liquidation. The moratorium is one of the means by which the IBC intends to shield the corporate debtor while it is undergoing insolvency resolution.

PMLA is meant to address the menace of money laundering. The provisional attachment of assets is a pre-emptive measure to prevent the proceeds of crime eroding away, frustrating the ED's investigations.

Proponents of the supremacy of IBC feel that the net effect of the *non-obstante* clause and the moratorium under Section 14, coupled with Section 32A, is that the ED would not be empowered to attach the corporate debtor's assets during pendency of insolvency proceedings.

Others, however, feel that insolvency proceedings would not affect the ED's powers to attach tain-

● IRRESOLUTION

To attach or not

LAW VS LAW. The tussle between insolvency proceedings and the ED's powers to seize assets of corporate debtors continues



TURF WAR. Experts warn that resolution proceedings should not be used as an 'amnesty route' by those accused of money laundering ISTOCK.COM

ted assets of the corporate debtor. In the *Rajiv Chakraborty* case, the ED argued that 'proceeds of crime' stood on a different pedestal compared with other laws.

The attachment and confiscation-related actions of ED are aimed at taking away from a person or entity what was secured illegitimately. Some experts feel that IBC should not be allowed to be used as an "amnesty route" for those accused under PMLA.

As regards the bar under Section 32A, the ED, in the *Rajiv Chakraborty* case, submitted before the Delhi High Court that the embargo would trigger only on the approval of a resolution plan or enforcement of liquidation.

JUDICIAL TRENDS

In *Varrasana Ispat Ltd vs Deputy Director of Enforcement*, on the in-

terplay between IBC and PMLA, the National Company Law Appellate Tribunal (NCLAT) opined that PMLA related to proceeds of crime and offence of money laundering. Thus, Section 14 of the IBC would not apply to proceedings initiated under PMLA. Similarly, in *Andhra Bank vs Sterling Biotech Ltd*, the NCLAT observed that it is always open to ED to seize the assets of the corporate debtor if they are proceeds of crime.

The decision in *Sterling Biotech* was reiterated in *Rotomac Global vs Deputy Director of Enforcement*. The only decision supporting the supremacy of IBC was in *Directorate of Enforcement vs Manoj Kumar Agarwal*, which held any attachment under PMLA impermissible after the moratorium under Section 14 came into effect.

To settle the controversy, a larger bench of NCLAT, in *Kiran Shah vs ED*, while rendering a decision diametrically opposite to that in the *Manoj Kumar Agarwal* case, held that Section 14 of the IBC does not hinder ED officials from exercising their powers under PMLA.

As for Section 32A, the Delhi High Court, in the *Rajiv Chakraborty* case, observed that it has the effect of shutting out PMLA proceedings only in two trigger cases. First, when the resolution plan is approved; and second, when a measure in aid of liquidation is adopted.

The Delhi High Court further observed that the power of attachment had sufficient checks and balances under PMLA. Even otherwise, the attachment of the corporate debtor's assets only enables the ED to restrain any further

transactions or private alienation of such assets. Attachment, thus, is not to be viewed as a removal of rights that may exist in respect of the corporate debtor's assets.

ISSUE BEFORE APEX COURT

The debate over the effect of insolvency proceedings on the powers of the ED to attach assets of corporate debtors appears to have no closure yet. The Supreme Court recently issued notice in a matter related to the *Ashok Kumar Sarawagi vs ED* case, which seeks to challenge the decision of the NCLAT in the *Varrasana Ispat* and *Kiran Shah* cases. Hence, it remains to be seen how the apex court brings the matter to rest and crystallises the legal position.

The writer is founder and head of Trinity Chambers, Delhi