

ANALYSING THE OVERRIDING EFFECT OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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The Insolvency and Bankruptcy Code, 2016 ('IBC, 2016') brought in a paradigm shift from the 'debtor-in-possession' regime to a 'creditor-in-control' regime. In order to accomplish this transformation and ensure the smooth functioning of the IBC, 2016, the legislature provided for a non-obstante clause under §238 of the IBC, 2016. The non-obstante clause has an overriding effect on any law for the time being in force which is inconsistent with the provisions of the IBC, 2016. However, this tool must be used cautiously and should be utilised only when the test of inconsistency, which has evolved through various case laws, gives positive results. This article discusses the scope and applicability of §238 of the IBC, 2016 and its effect on other statutes. It analyses the position of the IBC, 2016 vis-à-vis seven statutes including, the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, Companies Act, 2013, Securities and Exchange Board of India Act, 1992, Advocates Act, 1961, Prevention of Money- Laundering Act, 2002, Arbitration and Conciliation Act, 1996, Real Estate (Regulatory and Development) Act, 2016 and Electricity Act, 2003.

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I. INTRODUCTION

The enforcement of the Insolvency and Bankruptcy Code, 2016 ('IBC, 2016' or 'Code') marked the commencement of a new era of insolvency regulation in India. The Code brought in a paradigm shift from the 'debtor-in-possession' regime to a 'creditor-in-control' regime.¹ In order to accomplish this transformation, the IBC, 2016 repealed the erstwhile Presidency-Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920.² Although the Sick Industrial Companies (Special Provisions) Repeal Act was enacted in 2003, it was enforced only on December 1, 2016 i.e., after the Code came into force.³ Apart from this, the Code made substantial amendments in various legislations including *inter alia* the Companies Act, 2013,⁴ Indian Partnership Act, 1932,⁵ Recovery of Debts Due to Banks and Financial Institutions Act, 1993⁶, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002⁷ etc.

In order to ensure its smooth functioning, the IBC, 2016 is accorded primacy over all other laws for the time being in force.⁸ In other words, the Code has a unique feature, enshrined in §238, which provides an overriding effect over laws that are *inconsistent* with its provisions. The aspect of inconsistency assumes significance in determining whether the provisions of the Code would prevail or not.⁹ Thus, only if provisions of other statutes are inconsistent or derogatory to the Code, it would have an overriding effect over them. In other words, determining whether the overriding effect is within the contours of law, the test of inconsistency has to be adopted.

This article discusses the scope and applicability of §238 of the IBC, 2016 and its effect on other statutes. It is divided into three parts. Part II examines the non-obstante clause under §238 and focuses on the general rules of interpretation that govern such clauses. Part III provides a detailed analysis of the position of the IBC vis-à-vis other statutes including the Companies Act, 2013, Securities and Exchange Board of India Act, 1992 ('SEBI, 1992'), Advocates Act, 1961, Prevention of Money-Laundering Act, 2002, Arbitration and Conciliation Act, 1996, Electricity Act, 2003, Real Estate (Regulatory and Development) Act, 2016 and the Maharashtra Relief Undertakings (Special Provisions) Act, 1958. Lastly, Part IV presents the conclusion of this article.

¹ Chitra Sharma v. Union of India, (2018) 18 SCC 575 , ¶26.

² Insolvency and Bankruptcy Code, 2016, §243.

³ Bar & Bench, *Government Finally Repeals SICA 13 Years after Repeal Act Was Passed*, November 30, 2016, available at <https://barandbench.com/sica-repealed-bifr-no-13-years-repeal-act-passed/> (Last visited on June 10, 2019).

⁴ Insolvency and Bankruptcy Code, 2016, §255.

⁵ *Id.*, §245.

⁶ *Id.*, §249.

⁷ *Id.*, §251.

⁸ JYOTI SINGH & VISHNU SHRIRAM, *INSOLVENCY AND BANKRUPTCY CODE, 2016: CONCEPTS AND PROCEDURES* 72 (2017).

⁹ SUMANT BATRA, *CORPORATE INSOLVENCY: LAW AND PRACTICE* 244 (2017).

II. EXAMINING THE NON-OBSTANTE CLAUSE: SECTION 238, INSOLVENCY AND BANKRUPTCY CODE, 2016

The insertion of a non-obstante clause in a statute has the effect of rendering any other statute ineffective, or of no consequence, in case of any inconsistency or departure.¹⁰ In *Union of India v. G.M. Kokil*, it was stated to be a ‘legislative device’ used to preclude the operation and effect of all contrary provisions.¹¹

It is a well-established legal principle that the non-obstante or notwithstanding clause should be given a restrictive meaning in order to ensure a harmonious interpretation of both statutes.¹² Such an interpretation is in accordance with the presumption against a “repeal by implication”.¹³

This presumption is supported by two significant assertions. Firstly, it is believed that as the legislature has complete knowledge of the existing laws, it would not deliberately make a conflicting law without repealing the existing law. Thus, if the legislature does not expressly provide for a repealing provision, the intention is clearly not to repeal the existing law. Secondly, when the new legislation specifically provides for a repealing section, the principle of *est exclusio alterius* (the express intention of one person or thing is the exclusion of another) applies, implying that there exists an intention to exclude the repeal of the remaining existing laws.¹⁴ At this juncture, it is imperative to note that the Code provides for a repeal provision under §243 wherein the Presidency-Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 were expressly repealed.¹⁵ Therefore, any other legislation should be harmoniously interpreted as it was not explicitly repealed by the Code.

Thus, a non-obstante clause should be used judiciously and in accordance with the legislative intent behind both the statutes, having regard to the principles of determining implied repeal of statutes. In order to do so, the Supreme Court in *Deep Chand v. State of U.P.* (‘Deep Chand’)¹⁶ laid down a test in order to determine whether an inconsistency or repugnancy exists between two statutes. In the said case, the constitutional validity of the Uttar Pradesh Transport Service (Development) Act, 1955 (‘Transport Service Act’) and the notifications issued under it were challenged. The appellants were involved in the business of

¹⁰ KAFALTIYA A.B., INTERPRETATION OF STATUTES 150 (2008).

¹¹ *Union of India v. G.M. Kokil*, 1984 Supp SCC 196, ¶11.

¹² SANDEEP BHALLA, PRINCIPLES OF INTERPRETATION IN INDIA WITH LEGAL MAXIMS 121 (2006).

¹³ See SANDEEP BHALLA, PRINCIPLES OF INTERPRETATION IN INDIA WITH LEGAL MAXIMS 121 (2006) (Repeal by implication is a concept wherein a provision or legislation becomes ineffective owing to the non-obstante clause of some other provision or legislation, even though the legislature has not expressly repealed the same).

¹⁴ *Kishorebhai Khamanchand Goyal v. State of Gujarat*, (2003) 12 SCC 274.

¹⁵ Insolvency and Bankruptcy Code, 2016, §243.

¹⁶ *Deep Chand v. State of U.P.*, AIR 1959 SC 648, ¶39.

plying buses on different routes in Uttar Pradesh. The U.P. Government issued a notification under the Transport Service Act stating that the said routes would exclusively be used by the State buses. Thereafter, an amendment was made in the Motor Vehicles Act, 1988, which provided for the nationalisation of the transport services. The appellants contended that the said amendment had rendered the Transport Service Act void owing to the direct contradiction between the two.

The Supreme Court followed the following test to determine whether there existed repugnancy between statutes:

- (i) whether the provisions are in direct conflict with each other;¹⁷
- (ii) whether the legislative intent was to lay down an exhaustive code on the subject matter and thereby replace the previous law;¹⁸
- (iii) whether the two legislations operate in the same field.¹⁹

Following this test, the Supreme Court concluded that even though both the statutes operated in the same field and on the same subject matter, the invalidity of the Transport Service Act would only be to the extent it contradicts the schemes formed under the amendment. As the amendment did not have retrospective effect, the similarity in subject matter would only be with respect to schemes promulgated after the amendment.²⁰

A similar position was reiterated in *Municipal Council, Palai v. T.J. Joseph*.²¹ In this case, the Municipal Council, Palai in exercise of its powers under §§ 286 and 287 of the Travancore District Municipalities Act, 1941 ('Municipalities Act') prohibited usage of any public place, street, halting place as a bus stand within a specific radius from the Municipal bus stand.²² The respondents in the case challenged this resolution and the demand notices issued thereunder, contending that the enactment of the Travancore-Cochin Motor Vehicles Act, 1125 ('Travancore MV Act') had led to the implied repeal of §§286 and 287 of the Municipalities Act. §72 of the Travancore MV Act empowered the Government to specify places at which motor vehicles would be allowed to stand. The respondents argued that this provision is the complete law on the matter pertaining to specifying parking places for motor vehicles and as §§286 and 287 of the Municipalities Act were in conflict with it, they were inoperative as being repealed by implication.²³ On the basis of the factors laid down in *Deep Chand*, the Supreme Court determined that the

¹⁷ *Id.*, ¶39; *Saverbhai Amaldas v. State of Bombay*, ¶8.

¹⁸ *See Tika Ramji v. State of U.P.*, AIR 1956 SC 676; *Deep Chand v. State of U.P.*, AIR 1959 SC 648, ¶28.

¹⁹ *Rishikesh v. Salma Begum*, (1995)4 SCC 718; *Deep Chand v. State of U.P.*, AIR 1959 SC 648, ¶28.

²⁰ *Deep Chand v. State of U.P.*, AIR 1959 SC 648, ¶31.

²¹ *Municipal Council, Palai v. T.J. Joseph*, AIR 1963 SC 1561 :(1964) 2 SCR 87.

²² *Id.*, ¶1.

²³ *Id.*, ¶11.

legislative intent was to allow the provisions of both these statutes to ‘co-exist’ because they are both enabling in nature.²⁴ In such a scenario, an inconsistency could not be said to exist as the intention of the legislature was not to replace the provisions of the Municipalities Act with the Travancore MV Act. In fact, the latter was said to be in continuity with the former.

Even in the foremost Supreme Court judgment on the IBC, 2016 i.e., *Innoventive Industries Ltd. v. ICICI Bank* (‘Innoventive Industries’), the Court reiterated these principles and emphasised that the inconsistency must be clear, direct and irreconcilable.²⁵ The judgment and its implications have been elaborated in detail in the next section. Moreover, the inconsistency should be of such a magnitude that the legislations appear to be in ‘direct collision’ with each other and it is impossible to obey both of them simultaneously.²⁶ Thus, the principles laid down by the Hon’ble Supreme Court through various case laws have served as a guiding light in interpreting the non-obstante clause under §238 of the IBC, 2016.

III. THE POSITION OF THE INSOLVENCY AND BANKRUPTCY CODE VIS-À-VIS OTHER STATUTES

As mentioned earlier, the Code would have an overriding effect only on those provisions of other statutes which are inconsistent with it. The National Company Law Tribunal (‘NCLT’), the National Company Law Appellate Tribunal (‘NCLAT’) and the Supreme Court have applied the test of determining inconsistency to determine the applicability of §238 on several occasions. This section analyses the position of law with respect to seven legislations namely, the Maharashtra Relief Undertakings (Special Provisions) Act, 1958, Companies Act, 2013, Securities and Exchange Board of India Act, 1992, Advocates Act, 1961, Prevention of Money-Laundering Act, 2002, Arbitration and Conciliation Act, 1996, Real Estate (Regulatory and Development) Act, 2016 and Electricity Act, 2003. Although the preceding statutes have no substantial commonality, the question of their position vis-à-vis the IBC, 2016 has come to light time and again. A clash with the Companies Act, 2013 and the Securities and Exchange Board of India Act, 1992 is inevitable as both these statutes directly govern the corporate law framework of the country, like Part II of the Code. In the other statutes, alleged inconsistencies arise with respect to specific provisions, for instance, the effect of moratorium on payment of electricity bills, whether arbitration proceedings constitute dispute under the Code etc. Thus, by analysing the legal position with respect to each of these statutes, a general trend of the judiciary while interpreting §238 of the Code can be carved out.

²⁴ *Id.*, ¶15.

²⁵ *See* M. Karunanidhi v. Union of India, (1979) 3 SCC 431, ¶35.

²⁶ *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, ¶51.6.

A. *MAHARASHTRA RELIEF UNDERTAKINGS (SPECIAL PROVISIONS) ACT, 1958*

The Maharashtra Relief Undertakings (Special Provisions) Act, 1958 ('MRU Act, 1958') is a state legislation enacted by the Government of Maharashtra, with the aim of granting financial assistance in the form of loans, guarantees or otherwise to industrial undertakings in order to prevent unemployment.²⁷ The scope of this statute is restricted to those industrial undertakings that are started, acquired or otherwise taken over by the Maharashtra State Government, and carried on or proposed to be carried on by itself or under its authority, or to which any loan, guarantee or other financial assistance has been provided by the State Government.²⁸ Under the MRU Act, 1958 the Maharashtra State Government may, by notification in the Official Gazette, declare an industrial undertaking to serve as a 'relief undertaking' responsible for preventing unemployment or providing unemployment relief.²⁹

A significant provision of this legislation is that it imposes a moratorium on any remedy for the enforcement of any right, privilege, obligation or liability accrued or incurred before the undertaking was declared a relief undertaking.³⁰ In other words, it bars any enforcement proceedings against the relief undertaking, including an insolvency proceeding filed by a financial or operational creditor under the IBC, 2016. Therefore, the position of the Code considering this moratorium clause in the MRU Act, 1958 became a significant question for determination.

In the landmark judgment of *Innoventive Industries*,³¹ the Hon'ble Supreme Court held that the Code would be given primacy over the MRU Act, 1958. The Court analysed the existing jurisprudence regarding the repugnancy in case of a Parliamentary law and a State law under Article 254 of the Constitution and outlined *inter alia* the following propositions:

- (i) The question of determining repugnancy will arise under Article 254 only when both the Parliamentary law and the State law emanate from the Concurrent List of the Constitution;³²
- (ii) In order to ascertain the same, the Court shall apply the doctrine of pith and substance and only when both statutes *as a whole* fall within the Concurrent List, the doctrine of repugnancy shall be applied;³³

²⁷ The Maharashtra Relief Undertakings (Special Provisions) Act, 1958, Statement of Objects and Reasons.

²⁸ Maharashtra Relief Undertakings (Special Provisions) Act, 1958, §3(1).

²⁹ *Id.*, §3(1).

³⁰ *Id.*, §4(1)(iv).

³¹ *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, ¶49.

³² *See Id.*, ¶34(i).

³³ *See Tika Ramji v. State of U.P.*, AIR 1956 SC 676, 7-10.

- (iii) However, it is not necessary that both the legislations originate from the same entry in List III of Schedule VII of the Constitution;³⁴
- (iv) The repugnancy must exist in fact and should not depend upon a mere possibility;³⁵
- (v) Most importantly, the inconsistency must be clear and direct such that not only are the two legislations in direct conflict with each other, but it is impossible to obey both simultaneously;³⁶
- (vi) In case there is no such direct conflict and the Parliamentary law is intended to be a complete and exhaustive code, the State law will be rendered inoperative;
- (vii) The repugnant legislation would be void only to the extent of its repugnancy with the other legislation.³⁷

Based on these propositions, the Supreme Court opined that the doctrine of repugnancy will be applicable as both statutes are referable to List III of Schedule VII or the Concurrent List of the Constitution. While the MRU Act, 1958 is clearly referable to Entry 23 (Social security and social insurance; employment and unemployment), the IBC, 2016 is referable to Entry 9 (Bankruptcy and Insolvency) of the List.³⁸ The Court also observed that the Code and the MRU Act, 1958 are in direct collision with each other as §4 imposes a temporary moratorium similar to the moratorium imposed in the Code under §13 and §14. Thus, owing to the State Act, the Parliamentary Act i.e. the Code will be “hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process”.³⁹

The Court stated that in accordance with §238, the Code would prevail owing to the inconsistency between the two statutes. It held that §238 contains the non-obstante clause in the widest possible terms to ensure that any right of the corporate debtor in any other existing law does not obstruct the functioning of the Code.⁴⁰ Therefore, for the first time, the Court, in this judgment, highlighted the significance and purpose of the non-obstante clause under the IBC, 2016.

Thus, the position of law with respect to the IBC, 2016 and any other State law, which is inconsistent to it, has been clearly laid down in *Innoventive Industries*. The Code, being a Parliamentary legislation, enacted under the

³⁴ See *Rajiv Sarin v. State of Uttarakhand*, (2011) 8 SCC 708, ¶52.

³⁵ See *Shyamkant Lal v. Rambhajan Singh*, 11939 SCSCC OnLine FC 3 OnLine FC 3, 68-69.

³⁶ *Deep Chand v. State of U.P.*, AIR 1959 SC 648, ¶39.

³⁷ *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407, ¶50.

³⁸ *Id.*, ¶¶51, 53.

³⁹ *Id.*, ¶55.

⁴⁰ *Id.*, ¶56.

Concurrent List and having a notwithstanding clause would have supremacy over any State law enacted under the same List to the extent of any conflict or inconsistency.

Through this judgment, the Supreme Court applied the general jurisprudence on non-obstante clauses in the interpretation of §238 and highlighted the significance of the existence of an ‘inconsistency’ between IBC, 2016 and the other statute for the overriding clause to operate.

B. THE ELECTRICITY ACT, 2003

The primary aim of the Electricity Act, 2003 is *inter alia* to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity.⁴¹ The Electricity Act extensively deals with all matters related to electricity. It establishes the Central Electricity Authority (‘CEA’), the Central Electricity Regulatory Commission (‘CERC’) and the Appellate Tribunal for Electricity (‘Appellate Tribunal’) for the proper enforcement of the provisions of the Act.

The CEA is responsible for advising the Central Government on matters relating to electricity and national electricity policy, and specifying technical requirements and standards for different aspects.⁴² On the other hand the CERC performs the function of regulating tariff of electricity generating companies, regulating and determining the tariff for inter-state transmission of electricity etc.⁴³ The Appellate Tribunal hears appeals against the orders of the adjudicating officer or the CERC.⁴⁴

This is substantially different from the objective of the Code i.e. the resolution of insolvent persons.⁴⁵ Nevertheless, NCLT Ahmedabad in *ICICI Bank Ltd. v. ABG Shipyard Ltd.*,⁴⁶ held that, the IBC, 2016 will have an overriding effect over the Electricity Act, 2003 owing to the existence of an inconsistency in the prevalent circumstances, in view of §238. The Electricity Act empowers a licensee to recover charges for the supply of electricity,⁴⁷ and disconnect the same in case of failure of payment of the electricity charges.⁴⁸ In this case, the electricity company issued a notice for payment wherein it was stated that failure to make payment of

⁴¹ The Electricity Act, 2003, Statement of Objects and Reasons (“An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity...”).

⁴² The Electricity Act, 2003, §73.

⁴³ *Id.*, §79.

⁴⁴ *Id.*, §110.

⁴⁵ Statement of Objects and Reasons of the Insolvency and Bankruptcy Code, 2016 (“An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals”).

⁴⁶ *ICICI Bank Ltd. v. ABG Shipyard Ltd.*, 2017 SCC OnLine NCLT 12031, ¶2.2. 2017 SCC OnLine NCLT

⁴⁷ The Electricity Act, 2003, §45.

⁴⁸ *Id.*, §56.

the electricity charges within fifteen days from the date of receipt of the notice would result in a disconnection without further notice.⁴⁹

Aggrieved by the said notice, the corporate debtor through the resolution professional approached the adjudicating authority i.e. NCLT Ahmedabad. They contended that firstly, according to §14, supply of essential goods or services to the corporate debtor cannot be terminated or suspended or interrupted during the moratorium period⁵⁰ and secondly, that electricity is an ‘essential service’ in accordance with Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.⁵¹ In other words, even if the corporate debtor was unable to pay the electricity charges, electricity being an essential service, its supply could not be discontinued. This was in direct conflict with §56 of the Electricity Act which granted power to the electricity company to disconnect supply of electricity in case of non-payment of electricity charges.

The NCLT looked into the object of both the central legislations and remarked that their subject matters and purpose were different, yet there existed a repugnancy between §14 of the Insolvency and Bankruptcy Code, 2016 and §56 of the Electricity Act, 2003.⁵² The NCLT reasoned that in case essential services such as electricity, water etc. are interrupted, it would be impossible to keep the corporate debtor ‘a going concern’, thereby defeating the entire purpose of §14(2) of the Code. Considering that the Code was a latter enactment with a non-obstante clause, it would have an overriding effect to the extent of any inconsistency.

The Tribunal thus gave significance to the object of the IBC, 2016 and followed the well-established doctrine wherein the latter legislation prevails over the former in case of an inconsistency due to the presumption that at the time of enacting the latter legislation, the legislature was aware about the former.⁵³ In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*,⁵⁴ the Supreme Court held the same stating that in case of any inconsistency between two special statutes both containing a non-obstante clause, the latter must prevail. In this case, a Special Court constituted under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (‘Special Court Act, 1992’) had awarded a decree against the appellant to repay his debt owed to the respondent at a particular rate of interest. The appellant filed an appeal before the Supreme Court against the decision of the Special Court and during the pendency of the appeal, the appellant was declared sick in accordance with the Sick Industrial Companies (Special Provisions) Act, 1985 (‘SICA, 1985’). Thus, one of the contentions of the appellant was that owing to the application of SICA, 1985 no proceedings should have

⁴⁹ ICICI Bank Ltd. v. ABG Shipyard Ltd., 2017 SCC OnLine NCLT 12031, ¶2.2.

⁵⁰ The Insolvency and Bankruptcy Code, 2016, §14(2).

⁵¹ ICICI Bank Ltd. v. ABG Shipyard Ltd., 2017 SCC OnLine NCLT, ¶2.2.

⁵² ICICI Bank Ltd. v. ABG Shipyard Ltd., 2017 SCC OnLine NCLT 12031, ¶12.

⁵³ Central Bank of India v. State of Kerala, (2009) 4 SCC 94.

⁵⁴ *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*, (2001) 3 SCC 71.

continued under the Special Court Act, 1992. Considering that both the statutes i.e. the Special Court Act, 1992 and SICA, 1985 are special in nature and contain a non-obstante clause,⁵⁵ the Supreme Court concluded that the latter statute will prevail over the former relying on the doctrine of *est exclusio alterius*.

In the case at hand also, both the IBC, 2016 and Electricity Act, 2003 are special statutes and contain non-obstante clauses — the Code under §238 and the Electricity Act under §174. Thus, the Code being the latter statute would prevail over the Electricity Act, 2003.

The consequence of this judgment was that the electricity company could not interrupt the supply of electricity to the corporate debtor on the ground of non-payment of electricity charges during the moratorium period.⁵⁶

As mentioned earlier, in order to prove inconsistency, three factors are considered — firstly whether there exists direct conflict between two statutes, secondly, whether the intention of the legislature was to formulate a complete code on a particular subject matter and lastly, whether the two statutes operate within the same field.⁵⁷ It is imperative to note that this decision of the NCLT is a departure from the general rule where even when the two statutes did not operate within the same field, they were held to be inconsistent with each other. In a similar scenario, the NCLT Mumbai in *Shobha Ltd. v. Pancard Clubs Ltd.*,⁵⁸ followed the general rule and held that the Code and SEBI Act, 1992 are not inconsistent with each other as they operate in different fields. This case has been discussed in detail in Section III(D) of this article.

However, in *ICICI Bank Ltd. v. ABG Shipyard Ltd.*, the Tribunal acknowledged their operation in different fields, but nevertheless opined that the Code would have an overriding effect in order to further its objectives. The NCLT Ahmedabad reasoned that while §56 of the Electricity Act, 2003 has universal applicability, the application of the moratorium period is restricted only to corporate debtors undergoing the corporate insolvency resolution process.⁵⁹ Moreover, the corporate debtor is not in any manner absolved from fulfilling his liabilities as the electricity company can claim the power consumption charges as an operational creditor from the assets of the corporate debtor.⁶⁰ Therefore, the decision taken by the Tribunal was based on the viewpoint that corporate debtors must be provided with a protectionist environment for the entire insolvency resolution process to be successful.

⁵⁵ Sick Industrial Companies (Special Provisions) Act, 1985, §32 and Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, §13.

⁵⁶ *ICICI Bank Ltd. v. ABG Shipyard Ltd.*, 2017 SCC OnLine NCLT 554, ¶13.

⁵⁷ *Rishikesh v. Salma Begum*, (1995)4 SCC 718; *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407.

⁵⁸ *Shobha Ltd. v. Pancard Clubs Ltd.*, 2017 SCC OnLine NCLT 7486.

⁵⁹ *ICICI Bank Ltd. v. ABG Shipyard Ltd.*, 2017 SCC OnLine NCLT 12031 ¶13.1.

⁶⁰ *Id.*, ¶13.2.

C. THE COMPANIES ACT, 2013

The Companies Act, 2013 is an all-encompassing legislation with 470 provisions that seeks to amend and consolidate the law relating to companies.⁶¹ The Companies Act, 2013, Part II of the Code (Insolvency Resolution and Liquidation for Corporates) and in case of listed companies, the SEBI Act, 1992 and the Regulations, together constitute the major regulatory framework applicable to companies. Therefore, it is significant to understand the relation between all these three legislations as companies are expected to simultaneously comply with all of them.

Since the enactment of the IBC, 2016 the Courts in various cases have been called upon to consider whether there exists any inconsistency between the Companies Act, 2013 and the IBC, 2016 with respect to winding up proceedings and schemes of arrangements for reconstruction.

1. Proceedings for winding up

§255 of the IBC, 2016 brought in certain amendments to the Companies Act, 2013 which have been specified in the Eleventh Schedule of the Code as well.⁶² On December 7, 2016 the Central Government notified the Companies (Transfer of Pending Proceedings) Rules, 2016 ('Transfer Rules, 2016') which *inter alia* provided for the transfer of winding up petitions from the High Court to the NCLT.

According to Rule 5(1) of the Transfer Rules, 2016 all petitions related to winding up under §433(e) of the Companies Act, 2013, i.e., due to inability of the company to pay its debts, and where the petition has not been served on the respondent, shall be transferred to the respective NCLT. Such applications shall be treated as applications under §7, if they were filed by a financial creditor and applications under §8 and §9, if they were filed by an operational creditor. Therefore, by operation of this rule, those petitions pending before the High Court that had not been served upon the corporate debtor were to be transferred to the NCLT to be continued as per the provisions of the IBC, 2016.

In the landmark judgment of *Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd.*,⁶³ the Supreme Court clarified that the application of this rule did not provide for automatic transfer of winding up proceedings from the Bombay High Court to the NCLT. In other words, all proceedings pending before the High Court under the SICA, 1985 were to remain

⁶¹ The Companies Act, 2013, Statement of Objects and Reasons ("An Act to consolidate and amend the law relating to companies").

⁶² The Insolvency and Bankruptcy Code, 2016, §255.

⁶³ *Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd.*, (2019) 4 SCC 227.

with the High Court until a party files an application before the High Court for transfer of such proceedings to NCLT.⁶⁴ Therefore, only when a conscious attempt to transfer proceedings was made by filing an application, would the matter be dealt with by the NCLT. This position is a little problematic as it provides an option to the parties to either continue with the High Court or transfer to the NCLT, which might lead to unnecessary forum shopping. Forum shopping is often considered an undesirable practice as it results in lack of uniformity and inefficiencies owing to unpredictability and uncertainty in the law.⁶⁵ As a result, cases with similar facts and issues might end up being decided differently, depending upon the forum chosen by a party. Moreover, there is no purpose being served by providing this option to the parties.

For some time, there existed an ambiguity in the law whether the non-obstante clause in the IBC, 2016 would have an overriding effect over the Companies Act, 2013 insofar as winding up proceedings are concerned. In *Ashok Commercial Enterprises v. Parekh Aluminex Ltd.*, the Bombay High Court held that §238 would not apply as there is no inconsistency in the provisions of the two statutes.⁶⁶ Interpreting Rule 5 of the Transfer Rules, 2016 the Court held that it was the legislative intent that two sets of winding up proceedings be heard by two different fora i.e. one by NCLT and another by the High Court depending upon the date of service of petition.⁶⁷

However, a contrary view was taken in *Jotun India (P) Ltd. v. PSL Ltd.* wherein the Bombay High Court held that the IBC, 2016 had supremacy over the Companies Act, 2013 and that proceedings can be initiated under the IBC regardless of the pending winding up petitions.⁶⁸

Thus, there existed a conflict in the law which aggravated the uncertainty on the relation between these two major statutes that govern the winding up of corporate bodies. This was highly problematic as it was threatening the fulfilment of one of the major objectives behind implementation of the IBC, 2016, i.e. bringing certainty in the insolvency regime.⁶⁹

Ultimately, this ambiguity was finally put to rest by the Supreme Court in *Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd.*, wherein the Court held that proceedings under the IBC, 2016

⁶⁴ Singh & Associates, *No Automatic Transfer of Winding up Proceeding under SICA to NCLT*, January 30, 2019, available at [http://www.mondaq.com/india/x/771280/Insolvency Bankruptcy/ Bankruptcy Code Public Announcements](http://www.mondaq.com/india/x/771280/Insolvency+Bankruptcy/Bankruptcy+Code+Public+Announcements) (Last visited on June 10, 2019).

⁶⁵ Daniel J. Dorward, *The Forum Non Conveniens Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. (1998).

⁶⁶ *Ashok Commercial Enterprises v. Parekh Aluminex Ltd.*, 2017 SCC OnLineBom 421 :(2017) 3 AIR Bom R 520.

⁶⁷ *Id.*, ¶62.

⁶⁸ *Jotun India (P) Ltd. v. PSL Ltd.*, 2018 SCC OnLineBom 36 :(2018) 2 AIR Bom R 350.

⁶⁹ BANKRUPTCY LAW REFORMS COMMITTEE, *The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, 27 (November, 2015).

are independent proceedings and any person can file an application before the NCLT for initiation of corporate insolvency resolution process before a winding-up order is passed.⁷⁰ A similar position was also taken by the Supreme Court in *Bank of New York v. Zenith Infotech Ltd.* wherein it held that even when a winding order has been passed, “it is open to such a company, whose reference was deemed to be pending with BIFR, to seek remedies under IBC before NCLT.”⁷¹

At last, the matter was further clarified by the landmark judgment of *Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd.*,⁷² wherein the Supreme Court stated that if a person is deprived of an opportunity for filing an application under the IBC, 2016 owing to pendency of an application before the High Court, it would “amount to treating IBC as if it did not exist on the statute book and would deprive persons of the benefit of the new legislation.”

Therefore, at present, the position is absolutely clear owing to the various Supreme Court judgments on the matter. Attaching significance to the non-obstante clause and the objects of the IBC, 2016 it has been decided that it shall be open to any eligible person to proceed under the IBC, 2016 irrespective of any pending application before the High Court. Although, they do clarify the position of law, but there still exist two fora for resolving insolvency matters for the proceedings pending in the transition period. Thus, there will be situations where matters instituted on the same day may be heard at different fora.

2. Schemes of arrangement under the Companies Act, 2013

Under §230 of the Companies Act, companies can make compromises and arrangements by proposing plans for the internal reconstruction of the company.⁷³ It is pertinent to note that a resolution plan submitted under the Code also has similar objectives. However, one of the many differences between the two is that in the former, there are no restrictions with respect to the person who can propose the scheme of arrangement, but, in the latter, §29A prohibits certain persons from submitting a resolution plan.

The problem arises when a person prevented from submitting a resolution plan under §29A, proposes a scheme of arrangement under the Companies Act, 2013 after a liquidation order has been passed under the Code. On this matter, the NCLAT in *Arun Kumar Jagatramka v. Gujarat NRE Coke Ltd.*, held that a liquidation order passed by the NCLT under the Code will not prevent it from passing an appropriate order in accordance with law on the petition filed under §230 of the Companies Act, 2013 which should not be in conflicted with the provisions

⁷⁰ Jaipur Metals and Electricals Employees Organization v. Jaipur Metals and Electricals Ltd., (2019) 4 SCC 227.

⁷¹ Bank of New York v. Zenith Infotech Ltd., (2017) 5 SCC 1, ¶19.

⁷² Forech India Ltd. v. Edelweiss Assets Reconstruction Co. Ltd., 2019 SCC OnLine SC 87, ¶19.

⁷³ Companies Act, 2013, §230.

of the Code.⁷⁴ In the said case, the promoter of the corporate debtor, Arun Kumar Jagatramka, proposed a scheme of arrangement under §230 after an order of liquidation of the corporate debtor had been passed under the Code. Even though Jagatramka was ineligible under §29A of the Code, his proposal under §230 was not barred.⁷⁵

Although in this case, the NCLAT did not cite §238 of the Code, it clearly stated that there is no conflict between the provisions of the Code and §230 of the Companies Act, 2013.⁷⁶ The judgment in the said case is troublesome because it is permitting a ‘back-door entry’ route for the defaulting promoters by allowing them to circumvent §29A of the Code.⁷⁷ In my opinion, this might be misused in future and render §29A meaningless.

These case laws highlight the further development of the jurisprudence of §238 wherein at several junctures, it was acknowledged there exists no inconsistency between the Companies Act, 2013 and the Code, and therefore the provision would not be applicable.

D. SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

The Securities and Exchange Board of India Act, 1992 (‘SEBI, 1992’) was enacted with the objective of protecting the interests of investors in securities, promoting development and regulating the securities market.⁷⁸ The public listed corporate debtors have to strictly comply with both the provisions of the SEBI, 1992 and the IBC, 2016.

The interesting question of the applicability of §238 of the IBC, 2016 to the SEBI, 1992 arose in *Shobha Ltd. v. Pancard Clubs Ltd.*⁷⁹ In this case, the corporate debtor, Pancard Clubs Ltd., was engaged in the business of owning, developing and operating clubs, hotels and resorts in India since 1997 as well as offering different holiday options since 2002.⁸⁰ Based on the nature of the transactions entered into by the corporate debtor and its group companies, SEBI passed an order stating that they had violated Regulation 3 of the SEBI (Collective Investment Schemes) Regulations, 1999. It held that the corporate debtor was

⁷⁴ Arun Kumar Jagatramka v. Gujarat NRE Coke Ltd., 2018 SCC OnLine NCLAT 911.

⁷⁵ *Id.*, ¶6.

⁷⁶ *Id.*, ¶6.

⁷⁷ Dipak Mondal, *Defaulting Promoters Getting ‘Backdoor’ Entry to Regain Companies under IBC*, April 19, 2019 available at <https://www.businesstoday.in/current/economy-politics/defaulting-promoters-getting-backdoor-entry-to-regain-companies-under-ibc/story/338638.html> (Last visited on November 3, 2019).

⁷⁸ The SEBI Act, 1992, Statement of Objects and Reasons (“An Act to...protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto”).

⁷⁹ *Shobha Ltd. v. Pancard Clubs Ltd.*, 2017 SCC OnLine NCLT 7486.

⁸⁰ *Pancard Clubs Ltd. v. SEBI*, 2015 SCC OnLine SAT 94.

liable to be registered under the said regulations and failure to do so resulted in clear contravention of the same.⁸¹

Thus, in exercise of the powers of SEBI conferred to it under §11(1), §11B, §11(4) and §19 of the SEBI, 1992 and Regulation 65 of the SEBI (Collective Investment Schemes) Regulations, 1999, SEBI imposed a series of restrictions on the corporate debtor and its directors. According to the order, they were *inter alia* prohibited from collecting money from investors, alienating the assets of the company (except for making refunds to investors), accessing the securities market etc.⁸² This order was approved by the Securities Appellate Tribunal as well in *Pancard Clubs Ltd. v. SEBI*.⁸³

Thereafter, the operational creditor of the corporate debtor, filed an application of initiation of corporate insolvency resolution process under §9 of the IBC, 2016. Thus, the issue for determination before the tribunal was whether the petition under §9 of the IBC, 2016 could be admitted given the order passed by SEBI.

Analysing the jurisprudence on inconsistency between two statutes, the tribunal opined that §238 of the IBC, 2016 would not have application owing to the following reasons:

- (a) The SEBI, 1992 deals with investor protection, while the IBC, 2016 deals with creditor issues.⁸⁴
- (b) While the SEBI, 1992 governs the relationship between the investors and the company, the IBC, 2016 regulates the jural relationship between the creditor and debtor.⁸⁵
- (c) In the absence of repeal of the existing provision or express mention of the provision upon which overriding effect is given, the doctrine of inconsistency shall not apply.⁸⁶
- (d) As the two legislations operate in different fields, it cannot be presumed that the IBC, 2016 has come into force to replace the SEBI, 1992.⁸⁷

Thus, the NCLT held that owing to the difference in subject matter, §238 of the IBC, 2016 would not have operation in the instant case. It also realised

⁸¹ *Id.*, ¶7.

⁸² *Id.*, ¶34.

⁸³ *Id.*

⁸⁴ *Shobha Ltd. v. Pancard Clubs Ltd.*, 2017 SCC OnLine NCLT 7486 ¶18.

⁸⁵ *Id.*, ¶18.

⁸⁶ *Id.*, ¶19.

⁸⁷ *Id.*, ¶21.

that there was a possibility that the IBC, 2016 might be used as a tool to “take out the company as well as the investment already frozen from the claws of SEBI”.⁸⁸

Therefore, the current position of law stands that the SEBI, 1992 would not be overridden by the IBC, 2016 as there does not exist any inconsistency between the two statutes. Thus, these case laws conform to the general rules of interpretation of non-obstante clauses discussed in Part II of this article. They reinforce the indispensability of an inconsistency between two statutes for non-obstante clauses to operate.

E. THE PREVENTION OF MONEY-LAUNDERING ACT, 2002

The primary objective of the Prevention of Money-Laundering Act, 2002 (‘PMLA, 2002’) is, as the name suggests, to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering.⁸⁹ The act of money-laundering is an offence for which the punishment is rigorous imprisonment for a term of three years but which may extend to seven years along with fine.⁹⁰ Thus, it is a penal legislation which criminalises the commission of money laundering. However, the proceedings for §5 and §8 of PMLA concerning attachment of property involved in money laundering are civil in nature and not criminal.⁹¹

At present, the law regarding the applicability of §238 of the IBC, 2016 to the PMLA, 2002 is quite ambiguous. This uncertainty results from conflicting decisions of the matter- one given by the Delhi High Court, one given by the PMLA Appellate Authority and the other two given by the NCLAT. While the former advocates for a harmonious construction between PMLA, 2002 and IBC, 2016 the latter disregards the jurisdiction of PMLA, 2002 during the moratorium period by applying §238 of the IBC, 2016.⁹²

In *Directorate of Enforcement v. Axis Bank* (‘Axis Bank judgment’), the Delhi High Court decided upon the issue of whether the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (‘SARFEASI’) and the IBC, 2016 would prevail over the PMLA, 2002 owing to presence of non-obstante clauses in each of them. In the context of inconsistency with the IBC, 2016 the Court answered the question in the negative owing to two reasons. Firstly,

⁸⁸ *Id.*, ¶12.

⁸⁹ The Prevention of Money-Laundering Act, 2002, Statement of Objects and Reasons (‘An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.’).

⁹⁰ The Prevention of Money-Laundering Act, 2002, §4.

⁹¹ *Bank of India v. Directorate of Enforcement*, MANU/ML/0040/2018, ¶¶43, 44.

⁹² Prabhakar Yadav, *Conundrum Surrounding Applicability of Moratorium under IBC to Attachment Proceedings under PMLA*, INDIA LAW JOURNAL (2019).

it stated that there existed no inconsistency between the PMLA, 2002 and the IBC, 2016 as the object, purpose, text and the context of both these legislations is different from each other.⁹³ While the object and purpose of the PMLA, 2002 is to eliminate the practice of money laundering, the IBC, 2016 aims at resolving the insolvency of persons. Moreover, while PMLA, 2002 is a penal statute, the IBC, 2016 is certainly not. Thus, in the absence of any inconsistency, the non-obstante clause under §238 of IBC, 2016 cannot operate.

Secondly, the Court observed that application of moratorium would lead to a situation wherein the Code could be used as an escape route by the offenders. It opined that a person indulging in the offence of money laundering cannot use the proceeds of crime in order to repay his debts to his respective creditors. If the same is allowed to happen, the assets which do not belong to him lawfully would then be used to discharge his civil legal liability- which cannot be allowed.⁹⁴

The Court took a harmonious interpretation of the two statutes and stated that if a secured creditor has initiated action for the enforcement of its interest in the property prior to the order of attachment under the PMLA, 2002 both proceedings would be operative.⁹⁵ In order for them to co-exist, the PMLA proceedings would take a 'back seat' and the secured creditor would be allowed to enforce its claim and the remaining property (if any) would be used for the purposes of the PMLA.⁹⁶

A similar view was taken by the PMLA, 2002 Appellate Authority in the recent case of *PMT Machines Ltd. v. Directorate of Enforcement*, wherein the Court cited the Axis Bank judgment and allowed the resolution professional to utilise the property attached under PMLA for recovery of money. The PMLA Appellate Authority clarified that the order was only with respect to the proceeds purchased and mortgaged to the secured creditors prior to the alleged crime.⁹⁷ Moreover, such a decision was made in public interest as bank money is public in nature and should not be blocked unnecessarily.⁹⁸

On the other hand, NCLT Mumbai in *SREI Infrastructure Finance Ltd. v. Sterling SEZ and Infrastructure Ltd.*, while referring to the NCLAT decisions in *Bank of India v. Directorate of Enforcement*,⁹⁹ and *Punjab National Bank v. Directorate of Enforcement*¹⁰⁰ held that in both cases it has been held that the Adjudicating Authority under the PMLA, 2002 could not have continued with

⁹³ Directorate of Enforcement v. Axis Bank, 2019 SCC OnLine Del 7854, ¶147.

⁹⁴ *Id.*, ¶146.

⁹⁵ *Id.*, ¶165.

⁹⁶ *Id.*, ¶165.

⁹⁷ PMT Machines Ltd. v. Directorate of Enforcement, 2019SCC OnLine ATPMLA 43, ¶32.

⁹⁸ *Id.*, ¶33.

⁹⁹ Bank of India v. Directorate of Enforcement, MANU/ML/0040/2018.

¹⁰⁰ Punjab National Bank v. Directorate of Enforcement, (NCLAT, 2018) (Unreported).

the attachment after declaration of moratorium due to application of §63¹⁰¹ read with §238 of the Code.¹⁰² Although even §71 of the PMLA, 2002 contains a non-obstante clause, like §238 of the IBC, 2016, the latter will prevail as it was enacted at a later date.

The NCLT held that the criminal proceedings under the PMLA would take a long time as compared to the time-bound process of the IBC, 2016 which would result in the erosion in the value of the assets.¹⁰³ Thus, considering the economic aspect of the case as well, the IBC, 2016 should be given precedence.

Thus, the position of law is unclear with respect to the applicability of the IBC, 2016 over the PMLA, 2002. The arguments put forth by both the authorities are forceful. However, it is always desirable to harmoniously interpret statutes and follow the doctrine of harmonious construction.¹⁰⁴ According to the doctrine, even when it is impossible to reconcile differences in two provisions or statutes, the Court should interpret them in such a way so as to give effect to both the provisions or statutes as much as possible.¹⁰⁵ In the words of Justice Krishna Iyer, “legislative futility is to be ruled out as long as interpretative possibility permits”.¹⁰⁶ In *Raj Krushna Bose v. Binod Kanungo*, the Supreme Court explained that the intention of the legislature cannot be to render one provision or legislation useless.¹⁰⁷

By interpreting two statutes harmoniously, it would be possible to give effect to the objectives of both the legislations. In the instant case, if the Code is utilised by the corporate debtor as a means of escaping the PMLA, 2002 its purpose would be defeated which would be highly detrimental to the interests of the public. Money laundering has been a cause of major concern in the international community since a long time and in response to it, the Financial Action Task Force on Money Laundering (‘FATF’) was formulated in 1989.¹⁰⁸ The FATF formulated the ‘40+9’ recommendations that set the international standards on anti-money laundering measures and combating the financing of terrorism acts.¹⁰⁹ These rec-

¹⁰¹ See Insolvency and Bankruptcy Code, 2016, §63 (provides that no Civil Court or Authority shall have jurisdiction to entertain any suit or proceeding in respect of any matter on which NCLT or NCLAT has jurisdiction under the IBC, 2016).

¹⁰² *SREI Infrastructure Finance Ltd. v. Sterling SEZ and Infrastructure Ltd.*, MA No. 1280 of 2018 in CP No. 405 of 2018, order dated 12-2-2019 (NCLT Mumbai) (Unreported).

¹⁰³ *Id.*, ¶8.

¹⁰⁴ Ishani Acharya & Rahul Das, *The Doctrine of Harmonious Construction in the Interpretation of Statutes*, INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES (2014).

¹⁰⁵ *Sultana Begum v. Prem Chand Jain*, (1997) 1 SCC 373 : AIR 1997 SC 1006 ¶¶3,4; *CIT v. Hindustan Bulk Carriers*, (2003) 3 SCC 57 ¶¶17.

¹⁰⁶ *Busching Schmitz (P) Ltd. v. P.T. Menghani*, (1977) 2 SCC 835, ¶11.

¹⁰⁷ *Raj Krushna Bose v. Binod Kanungo*, AIR 1954 SC 202, ¶2.

¹⁰⁸ Financial Action Task Force, About-FATF, available at <https://www.fatf-gafi.org/about/> (Last visited on August 18, 2019).

¹⁰⁹ *Id.*

ommendations are to be implemented by the members and the same is subject to review by the FATF.

Considering the adversities caused due to money laundering and the fight against it being conducted at an international level, an interpretation that furthers the objectives of both the IBC, 2016 and the PMLA should be undertaken. Such an interpretation would also be in consonance with the jurisprudence of non-obstante clause and the rules of interpreting statutes.

F. THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996 ('Arbitration Act, 1996') was enacted with the objective of consolidating the law concerning arbitration and defining the law relating to conciliation.¹¹⁰ Today, most contracts contain arbitration clauses and companies have increasingly started using arbitration as a method of resolving disputes.

The issue regarding the overriding effect of the Code over the Arbitration Act, 1996 was considered by the Supreme Court in *K. Kishan v. Vijay Nirman Co.(P). Ltd.* In this judgment, the Supreme Court reversed the decision of the NCLT and NCLAT who had both held that §238 of the IBC, 2016 would cause an overriding effect over the Arbitration Act.¹¹¹

In the said case, the corporate debtor, KCPL and the respondent, Vijay Nirman Company entered into a sub-contract for construction and widening of a highway lane. However, disputes arose between the parties and the matter was referred to an arbitral tribunal which passed an award January, 2017. The award passed by the arbitral tribunal, *inter alia*, provided that a sum of INR 1,71,98,302 was to be paid by the corporate debtor to the respondent. Owing to non-payment of the amount, the respondent filed an application for initiation of insolvency under §8 of the IBC, 2016 in February, 2017. However, in April, 2017, KCPL challenged the arbitral award under §34 of the Arbitration Act, 1996 and thereafter, challenged the application filed by the respondent before the NCLT owing to an existence of a dispute.¹¹²

The NCLT decided the matter in favour of the respondent by stating that the pendency of an application under §34 of the Arbitration Act, 1996 would not be bar on application of §8 of the IBC, 2016 because there was no stay on the arbitral award by any court of law.¹¹³ The NCLT also stated that the award of the

¹¹⁰ Arbitration and Conciliation Act, 1996, Statement of Objects and Reasons ("An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration...").

¹¹¹ *K. Kishan v. Vijay Nirman Co.(P) Ltd.*, (2018) 17 SCC 662, 668-671.

¹¹² *Id.*

¹¹³ *Vijay Nirman Co.(P) Ltd. v. Ksheeraabad Constructions (P)Ltd.*, 2017 SCC OnLine NCLT 8473.

arbitral tribunal on the matter was deemed to be final and thus, there was a valid operational debt.¹¹⁴

The NCLAT concurred with the decision of the NCLT and gave two reasons for its finding- firstly, it relied on §238 to observe that the IBC, 2016 would have an overriding effect on the Arbitration Act and secondly, it relied on Form V of Part 5 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 wherein the particulars of operational debt have to be filled. The NCLAT observed that the said form requires particulars of an order of an arbitral panel adjudicating on the default and interpreted the same to mean that an award would mean “a record of an operational debt”.¹¹⁵

However, the Supreme Court took an opposing stance. Delving into the interpretation of ‘inconsistency’, the Court stated that in the case at hand, there is no inconsistency between the adjudication and enforcement process under the Arbitration Act and the application of §8 and §9 of the IBC, 2016. On the contrary, the award passed by the arbitral tribunal in accordance with the Arbitration Act along with the steps taken for its challenge would clarify whether the operational debt is a dispute within the meaning of §8 of the IBC, 2016 or not.¹¹⁶ This, in turn, would assist the NCLT in deciding whether the application filed by the operational creditor should be admitted or not.¹¹⁷ In *Mobilox Innovations (P) Ltd. v. Kirusa Software (P)Ltd.*, the Supreme Court expressly stated that in case of an existence of a dispute, the NCLT is obliged to dismiss the application.¹¹⁸ Therefore, at present, owing to no inconsistency between the Arbitration Act and the IBC, 2016, there would be no application of §238 of the IBC, 2016 and the latter would not override the former.

This landmark judgment by the Supreme Court not only put to rest the ambiguity in law regarding the relation between the Arbitration Act and the IBC, 2016, but also furthered the doctrine of harmonious construction. Indeed, the determination under §34 of the Arbitration Act would impact the entire case and if at a later point, it is decreed that there exists no operational debt, any step taken toward the resolution process would be futile. This might result in a huge wastage of time, money and effort.

Such an interpretation of §238 of the IBC, 2016 highlights that the usage of this overriding clause should be done as an exception and not as a rule. Only when all efforts for resolving a departure between statutes are unsuccessful and without overriding the other legislation, the objective of the IBC, 2016 would be defeated, the tool of non-obstante clause should be used.

¹¹⁴ *Id.*, ¶15.

¹¹⁵ *Ksheeraabad Constructions (P) Ltd. v. Vijay Nirman Co.(P) Ltd.*, 2017 SCC OnLine NCLAT 309, ¶16.

¹¹⁶ *K. Kishan v. Vijay Nirman Co.(P) Ltd.*, (2018) 17 SCC 662 :2018 SCC OnLine SC 1013, ¶22.

¹¹⁷ The Insolvency and Bankruptcy Code, 2016, §9.

¹¹⁸ *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*, (2018) 1 SCC 353, ¶23.

G. THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

The Real Estate (Regulation and Development) Act, 2016 ('RERA, 2016') was enacted with the objective of regulating and promoting the real estate sector and ensuring that the interests of the consumers are protected.¹¹⁹ Owing to the recent amendment in the IBC, 2016, wherein home buyers have been given the status of financial creditors, the overlap between the two statutes has become extremely significant and relevant.¹²⁰

The constitutional validity of the said amendment was challenged by over 150 real estate developers before the Hon'ble Supreme Court in the landmark judgment of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*. The Supreme Court dealt extensively on the relation between RERA and the Code while upholding the constitutional validity of the said amendment.¹²¹

The appellants contended that the RERA, 2016 being a special legislation dealing with real estate matters, it should have precedence over the Code, which is a general legislation. According to them, RERA already provided a series of remedies to the allottees or home buyers and thus, the powers given to them through the amendment were "excessive, disproportionate and violative of Articles 14 and 19(1)(g) of the Constitution".¹²²

The Supreme Court stated that both RERA, 2016 and the Code are special statutes and operate in completely different spheres. They provide the home buyers with parallel remedies- while they can choose RERA if they are interested in getting their flat constructed or claiming compensation for the same, recourse to the IBC, 2016 can be taken if they wish to replace the management of the corporate debtor.¹²³ Further, the Court observed that as the explanation to §5(8)(f) explicitly mentions RERA, 2016 and relies on the same for interpreting the definition of 'allottee' and 'real estate project', it is evident that the legislature had complete knowledge of the existence of RERA, 2016 and the various remedies available under it.¹²⁴ Therefore, it was the objective of the legislature to provide the allottees with two alternate forums.

Given that the IBC, 2016 is a later enactment containing a non-obstante clause, the Supreme Court explicitly stated that in the event of an inconsistency, the provisions of the IBC, 2016 would prevail. However, attempts should

¹¹⁹ The Real Estate (Regulation and Development) Act, 2016, Statement of Objects and Reasons ("An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector...").

¹²⁰ Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

¹²¹ *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416.

¹²² *Id.*, ¶5.

¹²³ *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416, ¶29.

¹²⁴ *Id.*, ¶24.

always be made to interpret the two harmoniously so that they can peacefully co-exist.¹²⁵

This judgment is another example (apart from the *ABG Shipyard v. ICICI Bank* judgment under the Electricity Act)¹²⁶ where the general rule of interpreting the non-obstante clause, discussed in Part II of this article, was not judiciously followed. This is because even though the Supreme Court expressly mentions that the two legislations operate in completely different spheres, they rule that in case of an inconsistency, RERA will give way to the provisions of the IBC, 2016.

Although the Court does not discuss any inconsistency between the two statutes, it lays a precedent for cases in future. In my opinion, the ratio of this judgment is general in nature and it merely reiterates the effect of §238 of the Code. Nevertheless, it will be useful in dealing with potential inconsistencies between RERA and the Code.

H. THE ADVOCATES ACT, 1961

The Advocates Act, 1961 ('Advocates Act, 1961') was enacted with the purpose of consolidating the law relating to legal practitioners and constitute the Bar Councils in India.¹²⁷ At the outset, it can be observed that its objective is strikingly different from the IBC, 2016. While the IBC, 2016 is a commercial legislation regulating insolvent persons, the Advocates Act is unrelated to the field of business but instead focusses on maintaining uniformity in regulation of the legal profession.¹²⁸

The Supreme Court in the judgment of *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.* further confirmed this position by stating that there exists "no clear disharmony between the two parliamentary statutes which cannot be resolved by harmonious interpretation".¹²⁹ The issue for determination before the Court was whether an advocate or lawyer can issue a notice on behalf of the operational creditor in order to satisfy the statutory requirement of §8 of the IBC, 2016. The NCLAT decided the issue in the negative and thereby dismissed the application of the operational creditor.¹³⁰ The operational creditor then appealed before the Supreme Court. The Supreme Court interpreted the wordings of §8 and emphasised that the operational creditor is required to 'deliver' the notice and not 'issue' it and 'delivery' can be made by an authorised agent.¹³¹ In order to substan-

¹²⁵ *Id.*, ¶24.

¹²⁶ See sub-part B of Part III of this Article.

¹²⁷ The Advocates Act, 1961, ("An Act to amend and consolidate the law relating to legal practitioners...").

¹²⁸ SANDEEP BHALLA, ADVOCATES ACT, 1961 & PROFESSIONAL ETHICS IN INDIA: A COMMENTARY 76 (2012).

¹²⁹ *Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.*, (2018) 2 SCC 674, ¶36.

¹³⁰ *Macquarie Bank Ltd. v. Uttam Galva Metallics Ltd.*, 2017 SCC OnLine NCLAT 409.

¹³¹ *Id.*, ¶33.

tiate its contention, it relied on §30 of the Advocates Act, 1961 which provides for the right of advocates to practise. Interpreting the term 'practise' the Court said that it comprises all preparatory steps prior to the filing of an application and therefore, would include delivering notice as well.¹³²

Therefore, through a harmonious interpretation of §30 of the Advocates Act, 1961, §8 and §9 of the IBC, 2016 and the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Court held that issue of notice by an advocate on behalf of the operational creditor would satisfy the statutory requirements of the IBC, 2016.¹³³ In this case, §238 of the IBC, 2016 would not override the Advocates Act as there is no inconsistency between the IBC, 2016 and the Advocates Act, 1961.

Thus, this judgment reinforces the fact that only in case of an inconsistency with the provisions of the IBC, 2016, §238 will be applicable. In all other circumstances, a harmonious interpretation between the statutes should be undertaken.

IV. CONCLUSION

The IBC, 2016 is a recent legislation that has altered the insolvency landscape of our country. It is a dynamic legislation which was enacted with the objective of eradicating the uncertainty in the law relating to insolvency and eliminating the unnecessary delay which was a prominent feature of the previous regime. In order to achieve the latter, the IBC, 2016 provides for a time-bound process wherein the control of the corporate debtor is in the hands of the creditor instead of the debtor.

In order to effectuate this transformation, the IBC, 2016 provides for a widely worded non-obstante clause which would override any other statute to the extent of its inconsistency. However, this tool has to be used with caution and wherever possible the courts should follow the doctrine of harmonious construction and give effect to the provisions of both statutes.

In this article, with the help of various case laws, the scope and applicability of §238 of the IBC, 2016 was discussed. While in some cases like the Electricity Act, 2003, §238 of the IBC, 2016 was utilised to override its provisions, in other cases, like the SEBI, 1992, its usage was held to be unjustified. The aforementioned case laws bring out three significant rules that have been used for interpreting the non-obstante provision. Firstly, the overriding effect would take place only when there is a clear inconsistency between the two statutes which cannot be resolved. Secondly, foremost efforts should be used to harmoniously interpret the

¹³² Harish Uppal v. Union of India, (2003) 2 SCC 45, ¶27.

¹³³ Macquarie Bank Ltd. v. Uttam Galva Metallics Ltd., 2017 SCC OnLine NCLAT 409, ¶33.

other statute. Thirdly, the weapon under this Section should only be used as a last resort. Therefore, even though there is a notwithstanding clause, primacy should not always be given to the IBC, 2016.

In the years to follow, there might be various other provisions or statutes that might be considered to be inconsistent with the IBC, 2016, but the Courts should continue to follow various tests to determine inconsistency and maintain a balance between the IBC, 2016 and other statutes.