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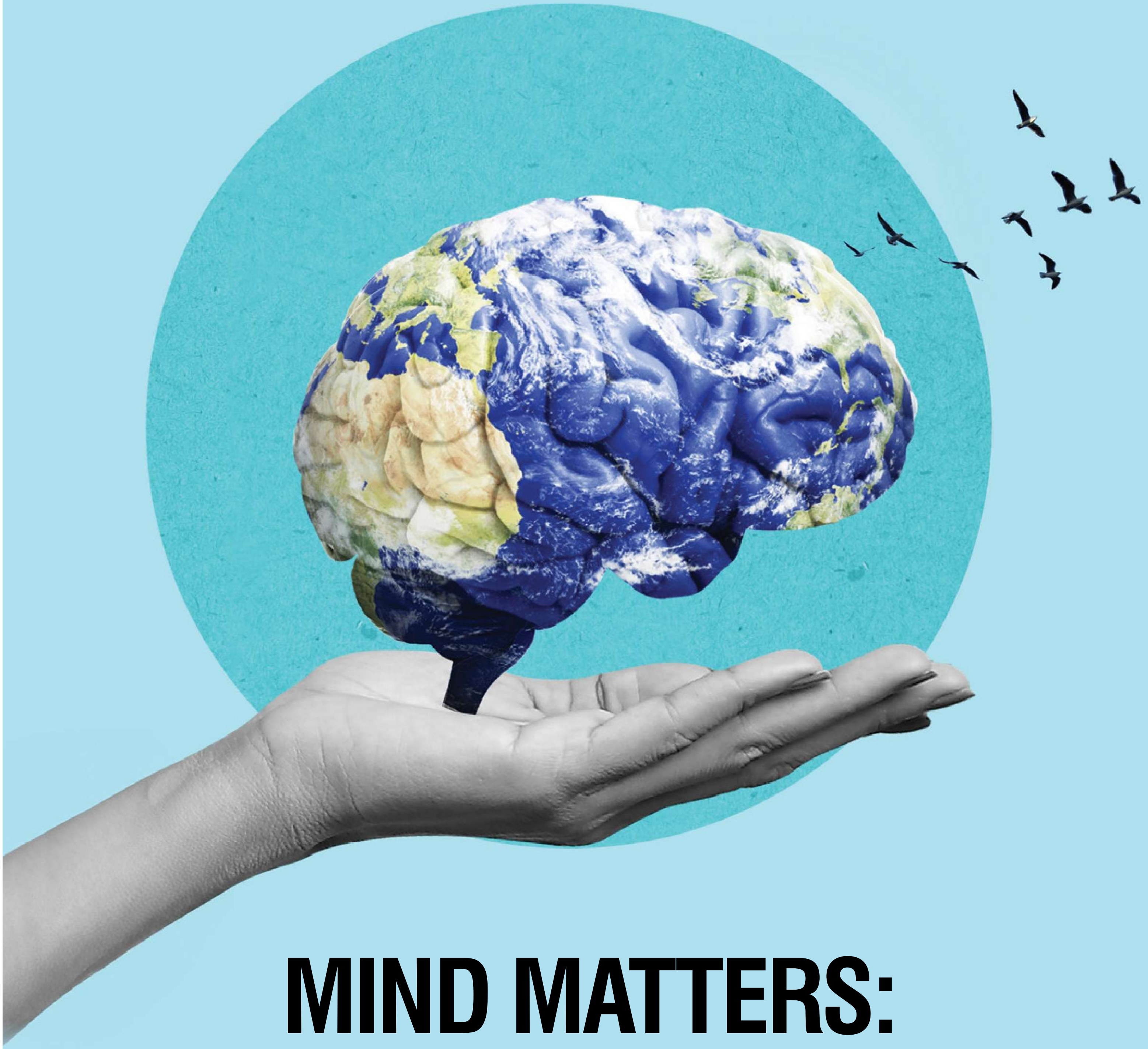

MIND MATTERS:

REVISITING THE MENTAL HEALTHCARE ACT, 2017

Navigating Legal Complexities: The Interplay Between PMLA & IBC

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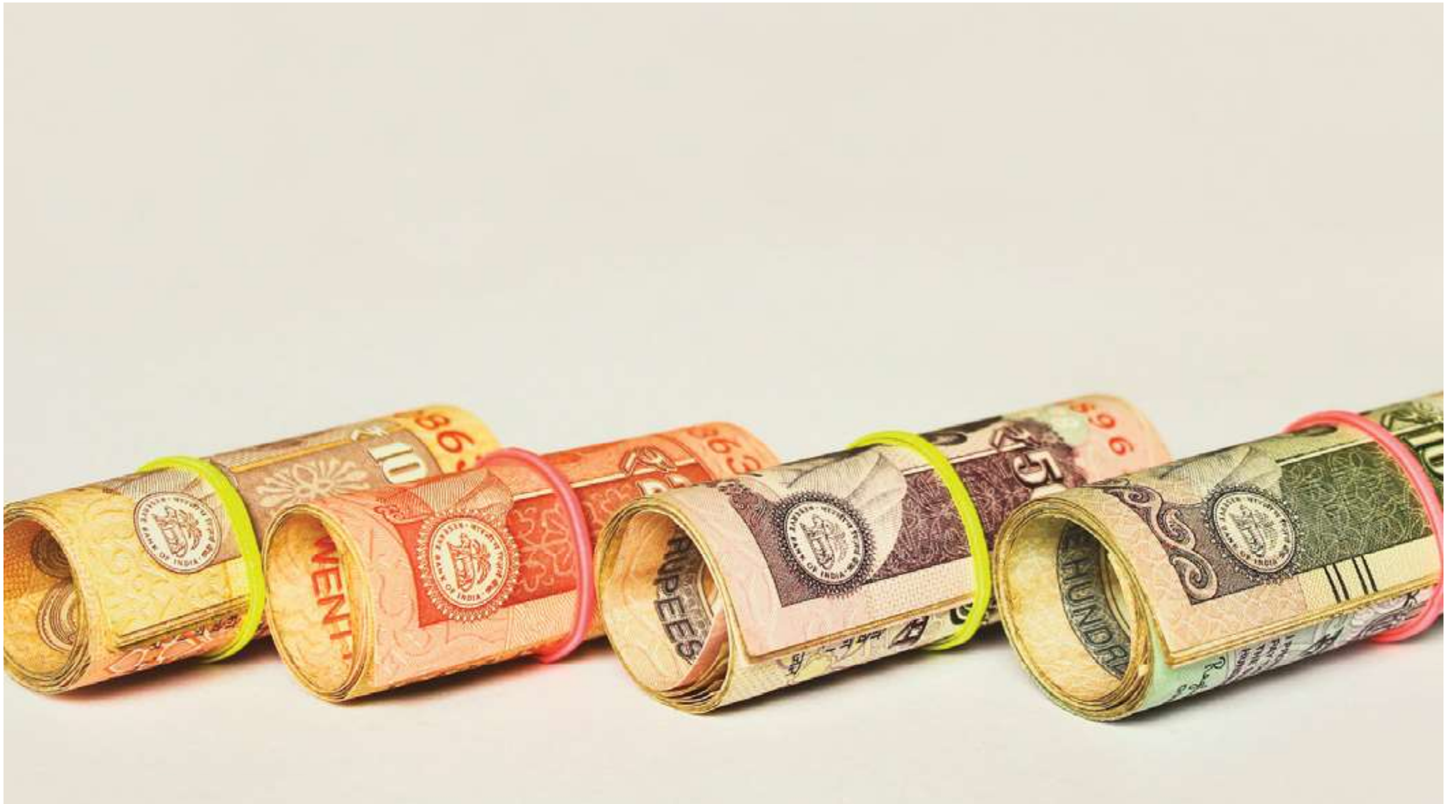
The Prevention of Money Laundering Act, 2002 ("PMLA") and the Insolvency and Bankruptcy Code, 2016 ("Code") represent two fundamental pillars of India's economic regulatory framework. While the PMLA is designed to safeguard the financial integrity of the nation, the Code aims to facilitate the resolution of distressed assets of the Corporate Entities or individuals. However, despite their distinct purposes, their intersection often leads to complications that can impede asset recovery and corporate resolution.

This article aims to dissect this overlap by studying the non-obstante clauses under Section 71 of the PMLA in conjunction with the clean-slate theory and non-obstante clauses outlined in Sections 32A and 238 of the Code.

PRACTICAL CHALLENGES DUE TO ATTACHMENTS DONE BY ED PRIOR TO INITIATION OR DURING CIRP PROCEEDINGS UNDER IBC

The Insolvency and Bankruptcy Code, 2016, marks a paradigm shift from the traditional "debtor-in-possession" to a "creditor-in-control" model. This legislative milestone prioritizes resolution of stressed assets over mere recovery of debt by the creditor, "Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Anr. (2019)." The Code facilitates a time-bound, structured insolvency resolution, fostering an efficient insolvency framework in India.

The conflict between IBC and PMLA emerges when conflicting claims are made over the same assets. This discord becomes evident when secured creditor's lien on the asset of the Corporate Debtor conflicts with the PMLA enforcement actions, especially if assets financed by the lenders are targeted due to alleged offences. Despite moratorium declared under Section 14 of the Code,



assets may still be attached by the Directorate of Enforcement ("ED"), thereby it becomes challenging for Interim Resolution Professional ("IRP") or Resolution Professional ("RP") to take possession and control of the assets of the Corporate Debtor. Additionally, when Resolution Plans are presented before the Adjudicating Authority, inadequate reliefs in terms of Section 32A, undermines the objective of the Code that is the resolution of the stresses assets of the Corporate Debtor. However, various judicial forums have addressed the conflicting provisions between the PMLA and IBC.

Case Law Analysis on Conflicting provisions of special provisions under PMLA and IBC

- Firstly, it is pertinent to refer to the judgment of Hon'ble Supreme Court in the matter of Manish Kumar v. Union of India & Ors. Writ Petition (Civil) No. 26 of 2020 [2], wherein the Hon'ble Supreme Court interpreted Section 32A of the Code, ruling that no action can be taken against the Corporate Debtor's properties once the Resolution Plan is approved by the Ld. Adjudicating Authority, provided the plan encompasses the said property. The Supreme Court further specified two conditions under which such inaction is applicable upon approval of the Resolution Plan:

(i) There must be Resolution Plan, which is approved by the Adjudication Authority under Section 31 of the Code.

(ii) The approved Resolution Plan must result in the change in control of the corporate debtor to a person, who was not –

(a) a promoter;

(b) in the management or control of the corporate debtor or

(c) a related party of the corporate debtor;

(d) a person with regard to whom the investigating authority, had, on the basis of the material, reason to believe that he has abetted or conspired for the commission of the offence and has submitted a Report or a complaint.

Accordingly, once resolution plan is approved by the Ld. Adjudicating Authority, the attachment stands duly released by operation of law.

• Secondly, The Hon'ble NCLAT in the matter of The Directorate of Enforcement v. Sh Manoj Kumar Agarwal, Resolution Professional, in Company Appeal (AT)(Insolvency) No. 575/2019 dated 09.04.2021 [3], held that even if a property, belonging to the Corporate Debtor, has been attached under the PMLA, such property shall be available to fulfil the objectives of the IBC once the CIRP is initiated. Further, the same shall persist on approval of the Resolution Plan by NCLT in terms of Section 32A of the Code and the property stands released.

• Furthermore, it is essential to refer to the recent judgment of Hon'ble Bombay High Court in the matter of Shiv Charan & Ors. v. Adjudicating Authority & Ors.in Writ Petition (L) No. 9943 of 2023 [4], the Hon'ble High Court in the aforesaid judgment held that once a Resolution Plan is approved, no action can be taken against the properties of the Corporate Debtor for an offence committed prior to the initiation of CIRP. The Hon'ble High Court further held that the Adjudicating Authority has all the powers to direct ED to release its attachment once a Resolution Plan has been approved under Section 32A of the Code. In addition, the Hon'ble High Court also affirmed that the ED does not hold the status of a creditor and that no debt is owed to and that upon approval of the Resolution Plan, the properties of the Corporate Debtor shall be beyond the reach of the Enforcement Directorate.

• Additionally, the Hon'ble Delhi High Court in the matter of Rajiv Chakraborty RP of EIEL v. Directorate of Enforcement in Writ Petition (C) 9531 of 2020 [5] held that where two special statutes incorporate non obstante clauses it is the later enactment which would ordinarily prevail. Thus, Section 32A being a later enactment incorporated in the Code via an amendment dated 2020, overrides the non obstante clause mentioned in Section 71 of PMLA.

• In the matter of Vantage Point Asset Pte. Ltd. v. Gaurav Misra, Resolution Professional for Alchemist Infra Realty Limited, Company Appeal (AT) (Insolvency) No. 1495 of 2024, an appeal was duly filed before the Hon'ble NCLAT by the Successful Resolution Applicant ("SRA"). The appeal challenged a specific clause/paragraph in the order of Ld. NCLT approving the Resolution Plan, wherein the Ld. NCLT denied to grant relief to the SRA in terms of Section 32A of the Code pertaining to the release of property of the Corporate Debtor attached by the ED. The Hon'ble NCLAT upon consideration was pleased to allow the appeal and held that "the SRA is entitled to relief of extension of benefit of protection of Section 32-A to lift the attachment by Enforcement Directorate over the assets of the Corporate Debtor."

CONCLUSION

In conclusion, it is evident from the bare perusal of the aforesaid judgments in Manish Kumar Agarwal (supra), Shiv Charan (Supra) & Rajiv Chakraborty (Supra) which reflects the true objective and purpose behind the enactment of Section 32A of the Code. Further, the Hon'ble Adjudicating Authority in terms of Section 32A is empowered to direct the ED to release the properties of the Corporate Debtor for offences committed prior to the initiation of CIRP and appropriate reliefs must be provided to the Resolution Applicant in terms of Section 32A of the Code, to fulfil the object of the Code and achieve an amicable Resolution of the stress assets of the Corporate Debtor.

Varsha Banerjee is a litigation Partner with the firm having more than fifteen years of experience. Her main area of practice includes corporate advisory, debt restructuring and resolution of commercial dispute in corporate restructuring, insolvency, mergers, and banking. She regularly appears and represents clients in before various Courts and Tribunals. Varsha is an active member of INSOL India and IWIRC India.

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