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EDITORIAL NOTE

"*Law reviews have an important function in our legal culture. They provide a place for the incubation of legal thought and for the intellectual exploration of doctrine that judges and practitioners can draw upon.*"

~ Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*

With this vision in mind, the NLIU Law Review proudly presents **Volume XIV Issue II** which seeks to further academic and practical legal discourse by critically engaging with contemporary developments in law. As Justice Scalia observed, law reviews serve as important platforms for thoughtful engagement with evolving legal doctrines and policy frameworks, often influencing both scholarship and jurisprudence.

The current Issue showcases a diverse range of articles that reflect the dynamic contours of Indian and international legal landscapes. Each piece has been selected for its academic thoroughness and relevance offering novel insights and pragmatic solutions to pressing legal questions.

The first article, *Whose Story Is It Anyway: True Crime Tapes and Their Impact on Victims' Rights* explores the legal and ethical dimensions of India's growing true crime documentary genre. It argues for the creation of *sui generis* legislation that balances freedom of expression with the need to protect victims from traumatization and prejudicial media trials.

The authors in *Treatment of RERA Section 4(2)(l)(d) Accounts During Insolvency* analyse the legal uncertainty surrounding homebuyers'

deposits during insolvency proceedings. They critique the absence of a trust structure or security interest in accounts specifically under the Real Estate (Regulation and Development) Act, 2016 and propose adopting a statutory trust model based on Canada's Condominium Act to ensure homebuyers' funds are protected from creditor claims.

The article *Section 32A of the IBC: From Principles to Precedents and What Comes Next* delves into the evolution and critique of the "clean slate" provision in insolvency law. Beginning with the JSW Steel-BPSL case, the article discusses Section 32A's interplay with statutes such as the Prevention of Money Laundering Act, 2002 and Companies Act, 2013 while also exploring its implications for investor confidence, criminal accountability, and legislative coherence.

In *The Corporate World and Its Compliances from an Entrepreneurial Perspective*, the authors examine how corporate regulations influence entrepreneurship. Drawing on frameworks from India, the United Kingdom, and the United States, the article explores how compliance structures particularly corporate social responsibility, director liability, and funding regulations can either stifle or support innovation, ultimately advocating for a regulatory model that enables business growth without compromising accountability.

Piercing the Moratorium: Insolvency Safeguards and Carve-outs for PMLA Enforcement addresses the friction between attachment of asset under the Prevention of Money Laundering Act, 2002 and the provisions of Insolvency and Bankruptcy Code, 2016 relating to moratorium and clean slate. Highlighting the judiciary's current preference for IBC primacy, the article underscores the risk of undermining PMLA objectives and proposes structural reforms informed by practices in the United States, the United Kingdom, and Canada, including inter-agency coordination and a common asset database.

In *Gig Workers in India: Bridging Legal Gaps and Ensuring Sustainability* evaluates the precarious status of platform-based workers. The article discusses judicial and legislative gaps in worker classification, compares international regulatory models, and suggests balanced reforms to secure social protection for gig workers without jeopardising the viability of aggregator platforms.

Finally, in the case comment titled *Tarsem Lal v. Directorate of Enforcement*, the authors assess the evolving jurisprudence on anticipatory bail under the Prevention of Money Laundering Act, 2002. The article contextualises the Supreme Court's judgment within broader questions of personal liberty, presumption of innocence, and the exceptional nature of economic offences.

Our Law Review Team hopes that this Issue proves to be an insightful read for all its readers and marks another step forward in the Law Review's pursuit of excellence in legal scholarship. We would like to thank the authors for their contributions and, as always, welcome any feedback to improve the quality of our journal!

The Editorial Board

WHOSE STORY IS IT ANYWAY: TRUE CRIME TAPES AND THEIR IMPACT ON VICTIMS' RIGHTS

Simone Avinash Vaidya[*] *and Arohi Malpani*[**]

ABSTRACT

This paper explores the complex ethical and legal challenges posed by the true crime genre, particularly in the context of documentaries, and argues for the creation of a legal framework to protect victims' rights. The authors integrate a diverse set of sources, primarily analysing legislations and judicial decisions that highlight loopholes in the existing statutory scheme. It assesses the genre's impact on audiences, identifying instances of exploitation, shaping of public opinion and interference with judicial proceedings. This is further strengthened through a comparative perspective, with the authors juxtaposing American jurisprudence on notoriety-for-profit with the sheer lack of Indian recognition of victims' rights.

This paper follows a four-part structure, closely representing the various acts of a

[*]Simone Avinash Vaidya is a second-year B.A.LL.B. (Hons.) student at the Maharashtra National Law University, Mumbai. The author may be reached at 2023096@mnluumbai.edu.in.

[**]Arohi Malpani is a second-year B.A. LLB. (Hons.) student at the Maharashtra National Law University, Mumbai. The author may be reached at 2023016@mnlumumbai.edu.in.

documentary- the set-up, rising action, crisis and resolution. The Set-Up introduces the true crime genre as a cultural phenomenon, blending factual recounting with dramatization, often commodifying victims' trauma for entertainment. The Rising Action explores the unique challenges posed by true crime documentaries, focusing on the interplay between privacy, publicity rights, and commercial exploitation. It draws on comparative frameworks, demonstrating the need for safeguards that balance the freedom of expression with victims' rights and dignity, while preventing interference with judicial proceedings. The Crisis critiques existing laws that fail to regulate digital and over-the-top (OTT) platforms where true crime thrives. It portrays the inadequacies of current censorship mechanisms and their inability to safeguard victims' rights or prevent the commodification of trauma. Finally, the Resolution advocates for comprehensive, victim-centric legislation tailored to the true crime genre. It puts forth recommendations, seeking to fill the legal gaps showcased throughout the article. Through this structured approach, the authors explore the legal contours of true crime documentaries and argue the need for a sui generis law governing the coverage of crime in the media.

Keywords: *Media Law, Posthumous Rights, Victim Protection, True Crime Documentaries.*

I. ACT 1: THE SET-UP

INTRODUCTION

"*If she is alive, then I take back all the things that I have said. Because then I think she is very manipulative and she is a very, very naughty girl."*[1]

The Buried Truth was released on Netflix in February 2024, revolving around a case that involved the disappearance and alleged murder of Sheena Bora, a twenty-five-year-old woman from Mumbai. The docuseries gives a platform to Indrani Mukherjea, media mogul, mother of the victim and prime accused in the case. Mukherjea expertly manoeuvres this forum to her benefit by coolly dismissing the allegation as "stupid",[2] while the trial continues, thirteen years after Bora's disappearance. While The Buried Truth may be a riveting watch, it reflects a dangerous trend of sensationalisation and dramatisation of real-life crimes for entertainment and commercial purposes.

True crime is a genre of literary, film and podcast media depicting non-fiction narratives of real-life crimes.[3] In recent times, its raging popularity has been characterised as a "cultural phenomenon",[4] and such viewership patterns are prevalent in India as well. An analysis undertaken by Ormax Media indicates that true crime shows constitute

[1]Episode 4, *The Indrani Mukherjea Story: Buried Truth* (2024), Netflix.
[2]ibid at Episode 6.
[3]Whitney Phillips, 'The True Crime Genre is Popular, but is it Ethical?' (journalism.uoregon.edu, 28 August 2023) <journalism.uoregon.edu/news/true-crime-genre-ethics> accessed 19 December 2024.
[4]Joy Wiltenburg, 'True Crime: The Origins of Modern Sensationalism' (2004) 109The American Historical Review 1377.

40%, or the largest genre share of all fifty-two documentaries released across major streaming platforms in India since 2019.[5]

While these shows have the potential to be a force for good, the commodification of victims' stories often blur the line between justice and exploitation. Various legal considerations emerge as regulators and filmmakers alike are compelled to maintain the balance between ethical narration and freedom of expression.[6] True-crime documentaries present a set of distinct challenges that are unaddressed by the present legal framework, leaving no legal recourse for those aggrieved by the depiction of crime and real experiences in these films.

This paper highlights the various deficiencies and lacunae in the enforcement of victims' rights in true-crime storytelling through the lens of a privacy-publicity dilemma, the anatomy of a media trial, and the inherent unconscionability of notoriety-for-profit. Placing the spotlight on true crime documentaries in particular, it identifies the flaws in the existing legal framework, particularly the Cinematograph Act, 1952 and the Information Technology Act, 2000. The authors argue the pressing need for a *sui generis* law regulating the true-crime genre as a whole, concluding with suggestions and recommendations.

II. ACT 2: THE RISING ACTION

UNIQUE CHALLENGES PRESENTED BY TRUE CRIME DOCUMENTARIES

[5]Swayam Kumar & Soumya Vats, 'Bundy to Burari: Adapting True Crime Documentaries to the Indian Context' (ormaxmedia, 31 May 2024) <ormaxmedia.com/insights/stories/bundytoburari.html> accessed 18 December 2024.

[6]Justin Burnworth, 'Making A Constitutional "Son of Sam" Law: Netflix's Booming True Crime Business', (2022) 49 Hastings Const. L.Q. 3, 4.

A. The Privacy-Publicity Dilemma in True Crime Media

True crime media, while captivating, presents complex challenges at the intersection of privacy, publicity rights and the justice system. The *Right to Privacy* has been widely recognised as the 'right to be left alone,' a concept rooted in the seminal works of Justice Louis Brandeis and Samuel D. Warren.[7] Building on this foundation, Dean William L. Prosser delineated privacy into four distinct categories –

1) Intrusion into private affairs;
2) Public disclosure of embarrassing private facts about the plaintiff;
3) False publicity of the plaintiff; and
4) Appropriations for the defendant's advantage of the plaintiff's name or likeness.[8]

While the first three categories deal with protecting individuals from direct invasions into their personal lives, the fourth category of appropriation has evolved into a distinct legal doctrine of the *Right to Publicity*. Introduced in 1954 by Melville B. Nimmer, the right to publicity reflects a shift in focus from safeguarding personal privacy to recognising the commercial value of an individual's identity.[9] Nimmer envisioned this right as a means for individuals to control and benefit from the use of their persona, particularly in commercial contexts.
Nimmer's understanding of the right of publicity was cemented in the U.S. case of *Haelan Laboratories Inc. v. Topps Chewing Gum Inc*,[10] where the Court upheld the plaintiffs' exclusive rights to use players' images, establishing a separate cause of action for publicity rights. In India, the jurisprudence surrounding the right to publicity has gained prominence, especially in Justice Sanjay Kishan Kaul's concurring

[7]Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4(5) Harvard Law Review.193, 207.
[8]William L. Prosser, 'Privacy' (1960) 48 California Law Review. 383, 398-401.
[9]Melville B. Nimmer, 'The Right of Publicity' (1954) 19 Law and Contemporary Problems 203.
[10]*Haelan Laboratories Inc. v Topps Chewing Gum Inc* (1953) 202 F 2d 866.

opinion in the *Puttaswamy*[11] judgement. Justice Kaul emphasised that personal autonomy includes the right to control one's identity and its commercial use, thus bringing the right to publicity under the broader umbrella of privacy rights.

It is pertinent to note that the debate over right to privacy in India reached its conclusion only in 2017. Thus, despite efforts from legal scholars such as Justice Kaul, the right to publicity has not had much development with most precedents stemming from High Courts. The right to publicity, while integral to personal autonomy, operates within a framework of restrictions and exceptions. From the decision in *Selvi J. Jayalalitha v. Penguin Books India*,[12] it can be inferred that consent to the use of one's persona or likeness negates any subsequent claims against such use. However, exceeding the limit of this consent shall restore the right to bring action, as has been noted by the Delhi High Court in the case of *Phoolan Devi v. Shekhar Kumar*.[13] An important facet of obtaining consent for publishing information lies in its availability in the public records. In the famous *Auto Shankar*[14] case it was held that publication without consent is allowed to the extent that it forms part of public records. The Delhi High Court also delivered a seminal verdict expanding the scope of privacy to protect personal intimacies irrespective of celebrity status. It transcends distinctions of fame or public recognition.

While true crime documentaries are increasingly enjoyed as a form of entertainment, they pose a different challenge altogether. True crime documentaries often dramatize horrific events, relying heavily on the names, likenesses, and personal stories of victims without their consent. Further, there exists increasing subjectivity in determining whether one's consent has been exceeded. Right to publicity remains a

[11] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.
[12] *Selvi J. Jayalalitha v Penguin Books India* (2012) SCC OnLine Mad 3263.
[13] *Phoolan Devi v Shekhar Kumar* (1994) SCC OnLine Del 722.
[14] *R. Rajagopal v State of T.N* (1994) 6 SCC 632.

facet of right to privacy, rendering it to be tested factually on a case-to-case basis,[15] creating legal lacunas in determining the ambit of consent. Despite being central to these narratives, victims and their families rarely receive any financial compensation, overlooking their right of control over commercialisation of their identity. The nature and content of true crime media often deals with the right to publicity of a deceased victim. The most recent legislation on posthumous publicity rights was introduced in New York.[16] The law recognized usage of a deceased personality's name, voice, signature, photograph, or likeness on products, merchandise, advertising, or soliciting purchases of products without prior consent from person/s to whom personality rights are transferred, to be liable for damages. Further, in *Martin Luther King v. American Heritage Products Inc.*,[17] it was held that publicity rights survive the death of its owner and are inheritable and devisable.

Unlike the U.S., India suffers from a legal gap in addressing posthumous publicity rights. In the absence of a single conclusive statute, two principles emerge. First, posthumous publicity rights cannot be claimed when the work in question is based on public records and information.[18] Second, the rights of celebrities, safeguarded as intellectual property, can be transferred and licensed under specific laws and may endure beyond the public personality's death. In the absence of a *sui generis* framework for posthumous publicity rights in India, there is an increased risk of exploitation, particularly for victims of true crime documentaries. These portrayals contain sensitive and deeply personal aspects of victims' lives without adequate legal safeguards. This presents the urgent need for a universally recognized

[15]*Gobind v State of M.P.*, (1975) 2 SCC 148.
[16]New York Civil Rights Law, s 50.
[17]*Martin Luther King v American Heritage Products Inc* (11th Cir 1983) 694 F2d 674, 682.
[18]*Makkal Tholai Thodarpu Kuzhumam Ltd. v V. Muthulakshmi* (2007) SCC OnLine Mad 850.

right to publicity, ensuring that victims and their families retain control over the narrative of their depiction in such portrayals.

The presence of facts and information about true crime cases in public records significantly narrows the scope for victims to claim compensation or exercise control over their portrayal. Nevertheless, this is not an entirely perfect defence. In the case of *Zacchini v. Scripps-Howard Broadcasting Co*.,[19] the U.S. Supreme Court recognized that by recording an entire performance of an artist the reporter had infringed his right to commercialise his identity or likeness. Nonetheless, this holding of right to publicity against freedom of speech and expression is narrow and does not necessarily fit the true crime genre. In true crime media, there exists no "performance" to be recorded, instead it is the persona and likeness of a person that is being "recorded" and exploited presenting yet another legal inadequacy.

B. The Shaping of Public Opinion and Judicial Proceedings

True crime documentaries often exploit publicly available narratives without compensating the victims or their families, reducing their identities to mere story elements in pursuit of entertainment and profit. True crime has the power to create its own reality. Within the ecosystem of serial narrative production, crime and violence are perpetually recycled and reinterpreted, with high-profile cases being retold to meet the demands of content creators and highly engaged audiences. This self-sustaining "knowledge space" often intersects with the criminal justice system, as true crime enthusiasts take an active role in analysing cases and proposing solutions. The remarkable success of productions like *Serial*, which fuelled public belief in Adnan Syed's innocence, illustrates this phenomenon. Despite widespread acceptance of Syed's innocence within the true crime community, his

[19] *Zacchini v Scripps-Howard Broadcasting Co*., (1977) SCC OnLine US SC 153.

appeals have been repeatedly denied, and he remains incarcerated.[20] This dynamic creates a troubling rift, as public trust in the criminal justice system erodes as it is increasingly perceived as deficient compared to the narrative satisfaction offered by true crime. The pressure to craft compelling stories often leads to narratives that prioritise entertainment over veracity.

This commodification not only denies victims agency in retelling of their own stories, but also poses significant risk of prejudicial publication affecting an ongoing trial. The systematic implications of such media were exemplified by the podcast *The Teacher's Pet*, which uncovered new evidence that prompted Australian police to arrest and charge a man with murder. However, the defence argued that the podcast had prejudiced potential jurors, undermining the possibility of a fair trial. This led to the Australian government restricting access to the podcast, resulting in significant delays during which crucial witnesses passed away.[21]

The integrity of the judicial system hinges on impartiality of judges, but it is well-documented that media trials risk influencing them subconsciously.[22] A prominent example of this is the discourse surrounding the aftermath of *KM Nanavati v. State of Maharashtra*.[23] The media portrayed Nanavati as a hero defending his family and honour, while casting Ahuja, the deceased, as a villain who betrayed his friend. Through biased reporting, as well as the sensationalisation and commercialisation of the crime, the media heavily influenced the

[20]Anhiti Patnaik & Elana Gomel(eds), *Serial Killers and Serial Spectators: Cultures, Narratives, and Representations* (Brill Academic Pub 2024) 14.
[21]Tiffanie Turnbull, 'Chris Dawson: How The Teacher's Pet Podcast Helped Catch and Jail a Killer' (*BBC News Sydney,* 31 August 2022) <https://www.bbc.com/news/world-australia-62735339> accessed 18 December 2024.
[22]Law Commission of India, *Trial by Media: Free Speech and Fair Trial Under Criminal Procedure Code, 1973* (Law Com No 200, 2006) 46.
[23]*K.M Nanavati v State of Maharashtra* (1962) AIR 605.

jury's decision, which contributed to the end of the jury system in the country.[24]

In *Shalab Kumar Gupta and Ors. v. B.K. Sen and Anr*.,[25] the Supreme Court has held that when a trial by one of the courts of the country is ongoing, a trial by media must be prevented in order to avoid any prejudice towards the accused or the prosecution. The Bombay High Court, in rejecting CBI's plea regarding Netflix's docuseries on the prime suspect in the ongoing Sheena Bora murder case,[26] overlooked the growing influence of true crime media in shaping perception. *Per contra*, in the Sushant Singh Rajput case,[27] the Bombay High Court highlighted the influence of media trials. Despite the fact that the investigation was ongoing, media narratives had already labelled individuals involved, violating the privacy of both the victim and the accused. The High Court issued a series of guidelines to regulate news media's reporting of such cases in the future. While the scope and ambit of the guidelines issued in this particular instance remain relevant for the facts of the case at hand, the directions are exclusively binding on news media. They do not address challenges posed by other forms of media, including the true crime genre as a whole, thereby limiting their long-term applicability.

C. The Proceeds from Crime

In addition to denying victims fair remuneration, true crime media often serves as a commercial incentive for the criminals themselves. Notoriety-for-profit refers to instances where criminals profit from their criminal activities, often through book deals, podcasts, interviews,

[24]James Jaffe 'After Nanavati' (2017) 52(34) (*EPW Engage,* 26 August 2017) <https://www.epw.in/engage/article/after-nanavati> accessed 15 December 2024.
[25]*Shalab Kumar Gupta and Ors. v B.K. Sen and Anr*. (1961) SCR (3) 460.
[26]*CBI v Netflix Entertainment Services,* WP (Cr) 571/2024 Bom HC (05.03.2024).
[27]*Nilesh Navlakha v Union of India,* WP (PIL) 92252/2020 Bom HC (18.01.2021).

documentaries and movies.[28] This has been identified as a significant problem in the United States, leading to the enactment of legislations across multiple states. These laws aim to prevent such contracts and arrangements by seizing the financial remuneration received to compensate the victims of the crime in question. These laws are also referred to as Son of Sam ("**SoS**") statutes.

Named after David Berkowitz, the infamous "Son of Sam", these laws aim to redirect such profits toward victim compensation rather than allowing perpetrators to monetise their infamy.[29] However, their constitutionality faced scrutiny in the case of *Simon & Schuster*,[30] where the United States Supreme Court unanimously invalidated New York's version of the law. In order to justify the restriction on the First Amendment the state must show a compelling state interest and that the regulation is narrowly tailored to achieving its purpose. In the present case, while the Court acknowledged New York's compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims, the law failed the tailoring requirement. Its broad language extended to anyone who admitted to a crime while recounting their life story, regardless of whether they were convicted or even charged. Conclusively, what was lacking was the effective implementation of the state's object.

The SoS laws of California[31] and Nevada[32] also met with the same fate and were rendered unconstitutional by the Supreme Courts of the respective states. However, India has differing constitutional priorities, and this could offer a fertile ground to balance ethical considerations

[28]Justin Burnworth, 'Making A Constitutional "Son of Sam" Law: Netflix's Booming True Crime Business', (2022) 49 Hastings Const. L.Q. 3, 4.
[29]ibid 6.
[30]*Simon & Schuster, Inc. v Members of the N.Y. State Crime Victims Bd*., (1991) 502 U.S. 105, 112.
[31]*Keenan v Super. Ct. of Los Angeles City*., 27 Cal.4th 413 (2002).
[32]*Seres v Lerner*, 102 P. 3d 91, 97 (Nev. 2004).

with the freedom of speech and expression. The American jurisprudential understanding of free speech differs greatly from the Indian position on the same. The latter is less far-reaching and permissive than the former,[33] with the threshold of reasonableness making its way in text of Article 19(2) of the Indian Constitution.[34]

Importantly, SoS laws do not suppress speech; they regulate its commercialisation. Criminals retain the ability to share their narratives, but the profits derived from such expressions are redirected to victims, aligning financial accountability with moral responsibility. This distinction highlights the balance these laws strive to achieve between free expression and the equitable treatment of victims. In *Delhi Domestic Working Women's Forum v. Union of India*,[35] the Supreme Court highlighted the importance of a victim rehabilitation and compensation framework, and an SoS could serve as a step in furtherance of the same.

Additionally, the framework of these laws intersects with the victim's right to publicity, recognising their right to control the narrative that emerges from the trauma they endured. By prioritizing victim compensation over perpetrator gain, these laws elevate the dignity and rights of those harmed while protecting public interest. However, the potential for overreach remains a concern. Without clear limitations, these laws could extend their reach to unintended scenarios. For instance, they could result in the redistribution of profits of a famous historical figure, who recalled stealing a trivial item in their youth in their autobiography.

Thus, true crime documentaries present a nuanced challenge in balancing freedom of expression with the need to protect victims'

[33]Bruce Michael Boyd, 'Film Censorship in India: A "Reasonable Restriction" On Freedom of Speech and Expression' (1972) 14(4) Journal of Indi. Institute, 501, 525.
[34]The Constitution of India, 1950 art 19(2).
[35]*Delhi Domestic Working Women's Forum v Union of India* (1995) SCC (1) 14.

rights. While the genre has evolved as a popular form of entertainment, its reliance on the dramatization of real-life tragedies raises ethical and legal questions that remain inadequately addressed, particularly in India.

III. ACT 3: THE CRISIS

INADEQUACY OF THE EXISTING LEGAL FRAMEWORK

A. The Cinematograph Act, 1952 and Ensuing Challenges

The Cinematograph Act of 1952[36] ("**The 1952 Act**") serves as the governing framework for documentaries that are screened in India as they fall within the definition of "film" delineated under Sec. 2(dd) of the statute.[37] The 1952 Act serves as the cornerstone of film regulation in India, containing provisions for regulation of the film-making and broadcasting process, by issuing certificates on the basis of content. Section 3 establishes the Central Board of Film Certification (**"CBFC"** or **"Board"**), which plays a pivotal role in scrutinising films in order to ensure alignment with societal morality and decency.[38] Such certification is an essential compliance pre-requisite for the screening of documentaries. True-crime documentaries are carefully examined from multiple standpoints, and instances of the CBFC denying clearance are not uncommon.

However, the CBFC suffers from several ailments with respect to its censorship mechanisms, therefore rendering it unsuitable to counter the unique challenges presented by true crime documentaries in India. The Board is infamous[39] for overstating its role as the "bastion of morality"

[36]The Cinematograph Act, 1952 (37 of 1952).
[37]The Cinematograph Act, 1952 (37 of 1952) s 2(dd).
[38]The Cinematograph Act, 1952 (37 of 1952) s 3.
[39]Arpan Banerjee, 'Political Censorship and Indian Cinematograph Laws: A Functionalist-Liberal Analysis', (2010) 2 Drexel L. Rev. 557, 559.

and ruthlessly exercising its power of "pre-censorship" through excisions and modifications under Sec. 4(1)(ii) of the 1952 Act.[40] It is noteworthy that a writ petition seeking the declaration of multiple provisions of the statute as unconstitutional has been listed for hearing before the Supreme Court in January 2025.[41] The petition outlines the varied spectrum of flaws in the CBFC's powers and functions.

Firstly, the 1952 Act does not prescribe any qualifications for membership of the Board, and grants unbridled powers to the Central Government to make appointments in this regard. Politically motivated and partisan appointments are plausible and common, threatening the bedrock and edifice of a democratic structure in the context of the extensive powers of censorship. Currently, at least three board members of the CBFC have political affiliations, exacerbating concerns surrounding the fairness of their decisions.

Secondly, the Board's mandate often results in subjective and arbitrary decisions due to vagueness and imprecision in the rules and guidelines formulated from time to time for this purpose. The lack of standardization has often yielded inconsistent results, such as denying clearance to a Malayalam film on the ground that it "glorified gay relationships",[42] and deleting a signboard of Punjab from a film titled "*Udta Punjab*".[43] Such wide discretion can give way to arbitrariness, which would be counterintuitive to the goal of protecting victims' rights.

The Petitioner also argues that a documentary cannot be construed as a film under Sec 2(dd) of the 1952 Act, and asserts that the provisions of the 1952 Act should be read down so as to exclude documentaries from

[40]The Cinematograph Act, 1952 (37 of 1952) s 4(1)(ii).
[41]W.P. 760/2021, *Amol Palekar* v. *Union of India*, SC.
[42]*WA 2293/2016 Jayan Cherian v. Union of India Ker HC (02.12.2016).*
[43]*Phantom Films Pvt. Ltd. And Anr v Central Board of Certification, AIR 2017 (NOC) 62 (BOM).*

its ambit. However, this contention does not seem to hold ground, since the primary grievance could be remedied by prescribing separate guidelines for the purpose of scrutinising documentary films. While it is true that feature films are distinct from documentaries, it is flawed to assert that the latter would not fall within the purview of "cinematographic films", essentially falling victim to the fallacy of *argumentum ad consequentiam*.

The most significant lacuna with respect to reviewing documentary content lies in the limited scope and applicability of the 1952 Act and consequently, the CBFC's powers. The 1952 Act exclusively governs traditional forms of film and cinema, thereby excluding films released on digital platforms.[44] The 1952 Act is still inadequate even from the sole lens of traditional true crime documentaries, since the CBFC wrongly places emphasis on the "morality" and "appropriateness" of the content, rather than the need to ensure compliance from the lens of securing approvals of subjects and victims. The exclusion of modern forms of documentaries serves as a major pitfall in the modern media landscape, since over-the-top ('OTT') platforms are rapidly gaining ground as consumer preferences shift away from traditional media. In contemporary times, documentaries are *streamed*, rather than *screened.*

B. Deficiencies of the Information Technology Act, 2000

The Broadcasting Services (Regulation) Bill of 2023[45] ('The Bill') defines OTT services as those "available on-demand or live to subscribers or users in India, where a curated catalogue of programmes owned by, licensed to or contracted to be transmitted over the internet or a computer resource, not being a closed network and where additional hardware, software or combination thereof including a set-top-box or dongle and software keys may be required to access content

[44]W.P. 6050/2029, *Padmanabh Shankar v Union of India*, Kar HC (07.08.2019).
[45]The Broadcasting Services (Regulation) Bill, 2023.

on non-smart televisions or viewing devices".[46] Since the Bill has not been passed as of January 2025, the current governing law for OTT media is the Information Technology Act, 2000[47] ('The 2000 Act' or 'The IT Act'), with its provisions outlining a distinct content-review mechanism.

The IT Act primarily governs electronic transactions, cybersecurity and digital content regulations. With respect to reviewing content, Sec. 69A of the statute clearly delineates the Central Government's power to issue directions for blocking public access to information in the interests of the following- the sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States, public order or for preventing the incitement to the commission of any cognizable offence relating to the above.[48] The Ministry of Information & Technology notified the IT Rules 2021[49] ('The Rules'), conclusively bringing OTT platforms under its ambit by defining "online curated content" along similar but less precise lines as the Bill. OTT platforms are recognised as "publishers", and their obligations are delineated under Part III of the Rules. In addition to the conditions prescribed under Sec. 69A of the 2000 Act, the platform is also bound to exercise caution and discretion when featuring the activities, beliefs, practices, or views of any racial or religious group.[50] The publisher is also bound to self-classify the content on the basis of context, theme, tone, impact and target audience.[51]

Similar to the 1952 Act, the IT Act is inadequate to counter the tribulations of true crime documentaries in India. *Firstly*, the 2000 Act and Rules have come under fire in the light of several free speech

[46]The Broadcasting Services (Regulation) Bill, 2023, s 2(y).
[47]The Information Technology Act, 2000.
[48]The Information Technology Act 2000, s 69(A).
[49]The Information Technology Rules 2021.
[50]The Information Technology Rules 2021, appendix, II(A)(c).
[51]The Information Technology Rules 2021, appendix, II(B)(i).

concerns. The Bombay,[52] Madras[53] and Kerala[54] High Courts have issued stay orders against the Rules, and a slew of petitions challenging its Constitutionality have been tagged and presented before the Delhi High Court.[55] The "code of ethics" contains subjective and vague terms such as 'half-truths' and 'decency',[56] which could be interpreted widely and yield inconsistent results as a manifestation of arbitrary censorship. *Secondly,* the wide sweep of powers under Sec. 69A[57] has enabled the Central Government to issue several blocking orders in an indiscriminate form. In *Shreya Singhal* v. *Union of India*,[58] the Supreme Court struck down Sec. 66A[59] after distinguishing between dissent and incitement, holding that only the latter could be a ground to curtail the fundamental right to freedom of speech and expression. In 2023, the emergency powers under Rule 16[60] had been invoked to ban a political-charged BBC documentary, which has also been challenged in a pending petition before a division bench of the Supreme Court.[61] The broad scope for misuse enables content moderation decisions to be influenced by political biases, thereby stifling free speech without reasonable grounds for the same. Therefore, protecting the rights of victims is likely to be low priority in the absence of a *sui generis* law for the same.

[52]*Agij Promotion of Nineteenonea Media Pvt. Ltd. & Ors. v Union of India*, 2024:BHC-AS:4669-DB.
[53]WP 25565/2021 *Indian Broadcasting & Digital Foundation v Ministry of Electronics and Information Technology & Ors* Mad HC (02.12.2021).
[54]*Live Law Media (P) Ltd. v Union of India,* WP (C) 6272/2021 Mad HC (10.03.2021).
[55]*Foundation for Independent Journalism & Ors. v Union of India & Anr.*, WP (C) 3659/2021 pending before Del HC.
[56]The Information Technology Rules 2021, appendix.
[57]The Information Technology Act 2000, s 69(A).
[58]*Shreya Singhal v Union of India* (2015) 5 SCC 1.
[59]The Information Technology Act 2000, s 66(A).
[60]The Information Technology Act 2000 r 16.
[61]*Ram v Union of India*, pending before the Supreme Court, WP (C) 116/2023 *N.*

IV. ACT 4: THE RESOLUTION

EPILOGUE

True crime documentaries have emerged as a cultural phenomenon, captivating audiences with their intricate narratives and dramatic depictions. However, their rise has brought significant legal and ethical dilemmas to the forefront. The commodification of victims' trauma for entertainment showcases the urgent need for reform. As depicted, India's evolving jurisprudence offers a foundation, but it remains fragmented and insufficient in addressing the unique challenges of this genre.

The absence of posthumous publicity rights, coupled with the power of true crime media to shape narratives and construct its own reality, highlights the need for greater scrutiny. As this paper has demonstrated, existing statutes such as the Cinematograph Act, 1952, and the Information Technology Act, 2000, fail to address the nuances of privacy, publicity and compensation in this context. The right to publicity, still in its infancy in India, leaves victims vulnerable to exploitation. Moreover, the lack of a notoriety-for-profit law leaves victims without recourse against the commercialisation of their trauma, exacerbating their exploitation.

The absence of a definitive framework to address these issues has allowed the commodification of trauma to thrive unchecked. However, it is equally vital to ensure that regulatory efforts do not encroach upon freedom of speech and expression. To bridge this gap, several key measures must be implemented.

Firstly, clear and enforceable guidelines must be established to protect victims' publicity rights in true crime media, ensuring that identities are not exploited without consent. Consent itself must be defined in

unequivocal terms to eliminate ambiguity, with detailed contracts outlining rights over the story, remuneration and other essential aspects. Such agreements should involve consultative processes with victims and their families, respecting their perspectives and moral dignity. *Secondly*, India must recognise a posthumous right to publicity to protect the narratives of deceased victims. This would ensure that their identities are not exploited and their stories are treated with respect. *Finally*, a statute akin to the New York Son of Sam law should be introduced, specifically targeting criminals who profit from such narratives. By redirecting these profits towards victim rehabilitation and compensation, the law would balance freedom of speech with the ethical duty to honour victims' dignity and rights.

A *sui generis* law regulating true crime is imperative. Such legislation should reconcile the right to freedom of speech and expression with the rights of victims, providing safeguards for consent, privacy, and fair compensation while ensuring that narratives do not compromise ongoing judicial processes. The legal gaps posed by true crime media demand a comprehensive, victim-centric legal framework. This shift is critical in ensuring that the genre contributes constructively to societal discourse without perpetuating harm or exploitation. A robust legal framework for true crime media is not merely a regulatory necessity but a constitutional imperative to safeguard the dignity, rights and autonomy of victims in the face of commodified narratives.

TREATMENT OF RERA SECTION 4(2)(L)(D) ACCOUNTS DURING INSOLVENCY: CHARACTERIZATION OF HOMEBUYERS' DEPOSITS AS CORPORATE DEBTOR'S ASSETS AND SOLUTIONS TO PROTECT HOMEBUYERS' INTEREST

Vinamra Kumar Bansal[*] *and Harsh Bansal*[**]

ABSTRACT

The introduction of Section 4(2)(l)(D) RERA accounts under the Real Estate (Regulation and Development) Act, 2016 (RERA) has created challenges in insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC). RERA requires developers to maintain three types of accounts—a Master Escrow Account, a Cash Retention Account, and a RERA-Specific Account—to ensure transparency and protect homebuyers' interests by managing funds for project completion. During insolvency, issues arise as the Interim Resolution Professional (IRP) takes control of the developer's assets, leading to

[*]Vinamra Bansal is an Advocate who may be reached at vkbansalandassociates@gmail.com.

[**]Harsh Bansal is fifth-year B.A.LL.B. (Hons.) student at Rajiv Gandhi National University of Law, Patiala. The author may be reached at harshbansal21081@rgnul.ac.in.

uncertainty over whether the funds in the RERA-Specific Account should be considered part of the debtor's assets or returned to the homebuyers who deposited them.

The article highlights that the RERA-Specific account does not sufficiently protect homebuyers' interests during insolvency of the developer. This is due to lack of trust formation and creation of security interest in these accounts. This is exacerbated due to absence of any beneficiary. The deficiencies undermine RERA's protective intent since there is no beneficiary to receive the funds.

To address this problem, the authors suggest adopting statutory trust provisions from Canada's Condominium Act, of 1998. This approach creates a separate statutory trust for homebuyers' deposits, keeping these funds distinct from the developer's assets. By designating homebuyers as beneficiaries under the Canadian Bankruptcy and Insolvency Act, 1985 ensures that their deposits are protected during insolvency. The Condominium Act also provides for a tracing back mechanism to ensure that these funds are not commingled with other assets of the developer and returned to the homebuyers. Adopting these provisions would help safeguard homebuyers' funds from creditor claims, aligning with RERA's intent

and enhancing financial security for homebuyers.

Keywords: *Escrow Accounts, RERA-specific Accounts, Security Interest, Implied Trust, Fiduciary Relationship, Statutory Trust, Condominium Act.*

I. INTRODUCTION

Section 4(2)(l)(D) of the Real Estate (Regulation and Development) Act, 2016 ("RERA") enhances transparency and accountability in the real estate sector.[1] It mandates the opening of three separate accounts: a Master Escrow Account (Collection Account), a Cash Retention Account (Promoter's Free Project Account), and a RERA-Specific Account (RERA-compliant Separate Account). Different states use different names for these accounts. The Master Escrow Account holds 100% (one hundred percent) of the deposits by the homebuyers. Out of which, 70% (seventy percent) are deposited in the RERA-specific account which can only be used for construction and development of the project. The rest of the 30% (thirty percent) goes to the Cash Retention Account which can be utilized for other purposes.[2] The bank releases the funds from the RERA-specific account proportionately to the work completed, based on forms and certificates submitted by the promoters, attested by a chartered accountant, an engineer, and an architect. This provision protects homebuyers' interests by ensuring that funds collected from them are used exclusively for the designated project, reducing the risk of fund diversion. By mandating the

[1]The Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

[2]The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, G.O.(Ms.)No.112, Housing and Urban Development (UD1(2)) Department, 22nd June 2017; Vinay Thyagraj, 'Rera – Bankers Circular on Rera Accounts' (*TaxGuru*, 28 February 2024) <https://taxguru.in/corporate-law/rera-bankers-circular-rera-accounts.html> accessed 7 August 2024.

segregation of funds into a RERA-specific account, it enforces financial discipline on developers, ensuring that resources are allocated appropriately for timely project completion. This improves project completion rates, as developers are less likely to face liquidity issues or delays due to mismanagement of funds. Additionally, it boosts overall transparency in financial transactions, allowing homebuyers to monitor the progress and financial health of the project. In cases of project cancellation or failure, this account safeguards allottees by ensuring that refunds can be provided from the funds specifically allocated for the project, addressing major issues such as financial mismanagement, project delays, and the diversion of funds in the real estate industry.

This transaction closely resembles an escrow arrangement. The Haryana Real Estate Appellate Tribunal in *Raheja Developers Limited v. Manohar Lal Kapur* affirmed that, "*in fact, this separate account, in general, and for all practical purposes, is known and referred to as 'Escrow Account'.*"[3] However, the authors will demonstrate that this characterization falls short of capturing the technicalities and has significant ramifications for homebuyers.

In a traditional escrow arrangement, three parties are involved: the buyer, the seller, and a third party, usually a bank. The bank holds the amount in trust. The bank can only release the funds once the terms and conditions of the escrow agreement are satisfied.[4]

However, the arrangement becomes complicated if the selling party becomes insolvent and the Corporate Insolvency Resolution Process

[3] *Raheja Developers Limited v Manohar Lal Kapur* H-REAT-437-2021.
[4] Maji P, 'What is an Escrow account and who can use it?' (*The Financial Express*, 30 March 2020) <https://www.financialexpress.com/money/what-is-an-escrow-account-and-who-can-use-it/1913875/> accessed 07 August 2024.

("CIRP") is initiated. The Interim Resolution Professional ("IRP") then assumes control of the Corporate Debtor's ("CD") assets, and a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("IBC") prevents anyone from recovering funds in the escrow account.[5] In such situations, it is crucial to determine whether the funds in the escrow account are considered "assets" of the CD. Further, if restructuring fails and liquidation is initiated, it must be determined whether these funds will be included in the liquidation estate under Section 36 of the IBC. Assets created in "trust" for third parties are excluded from the liquidation estate. These excluded assets are not distributed among creditors but are preserved for the intended beneficiaries.

This becomes more complex when the underlying account is a RERA-specific account since its treatment will be different from typical escrow accounts, which involve three parties and create an "implicit trust", whereas RERA accounts primarily involve two parties: the bank and the developer and there is no creation of a trust as will be explained later.

In this essay, the authors will first discuss the nature of escrow accounts and how security interests can be created in such transactions. Secondly, the authors will conceptualize their treatment in insolvency situations. Thirdly, the authors will analyze the creation and treatment of Section 4(2)(l)(D) RERA accounts and explain why they fail to meet the criteria for being characterized as traditional escrow accounts. Fourthly, the authors will highlight the negative impact of this mischaracterization on homebuyers. Fifthly, the authors will draw inspiration from Canadian law on the creation of statutory trusts to safeguard homebuyers' interests and will conclude by underscoring the necessity for similar provisions to ensure the protection of homebuyers.

[5]The Insolvency and Bankruptcy Code, 2016 (31 of 2016).

II. NATURE OF ESCROW ACCOUNTS

Escrow accounts embody a fiduciary relationship wherein one party is a beneficiary and the settlor (usually a bank) holds the amount as a trustee in the beneficiary's interest. In the case of *R.B. Seth Jessaram Fatehchand v Om Narain Tankha & Anr.* ("Jessaram"), the Hon'ble Supreme Court ("SC") noted that the crucial point of differentiation to characterize a deposit as held in trust is whether the person to whom the deposit was made could mix it with his own money and use it for himself. In situations where money can only be used for certain specified purposes, as done in an escrow account, there is an implied creation of trust.[6]

Section 3(31) IBC defines a security interest as, "*right, title or interest or a claim to the property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment, and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person.*"[7] If an agreement specifies that funds in an escrow account are released to a receiving party (e.g., a contractor or creditor) only upon meeting specific conditions, the receiving party acquires a security interest once those conditions are fulfilled. This interest arises from the right to claim the funds upon completion of obligations.

To better understand the creation of a security interest over the funds deposited in an escrow account, let us examine two scenarios: one prior to the introduction of the RERA and another after its implementation. In the pre-RERA scenario, a traditional escrow account would be set

[6]*Seth Jessa Ram Fatehchand v Om Narain Tankha* 1967 SCC OnLine SC 248.
[7]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 3(31).

up based on the terms agreed upon by the parties involved in the transaction. However, in Section 4(2)(l)(D) RERA account, a promoter must deposit 70% (seventy percent) of the funds received from allottees in a separate account, which can only be used for construction and land costs.[8]

A. Pre-RERA – Traditional escrow account

Suppose a company, ABC Developers Pvt. Ltd. secured a loan from XYZ Finance Ltd. for its real estate projects. As security, the ABC Developers executed a deed for hypothecating 40% (forty percent) of all its receivables from the homebuyers (which will be held in a designated escrow account) in favour of XYZ Finance Ltd. In this situation, XYZ Finance Ltd. has a security interest over its proportionate receivables in the escrow account since there was the creation of a charge over the funds in exchange for the loan.

[8]RERA Filing, 'RERA Separate Bank Account Provisions' (*RERA Filing*, 7 January 2025) <https://rerafiling.com/rera-article-detail.php/516/rera-separate-bank-account-provisions> accessed 18 January 2025.

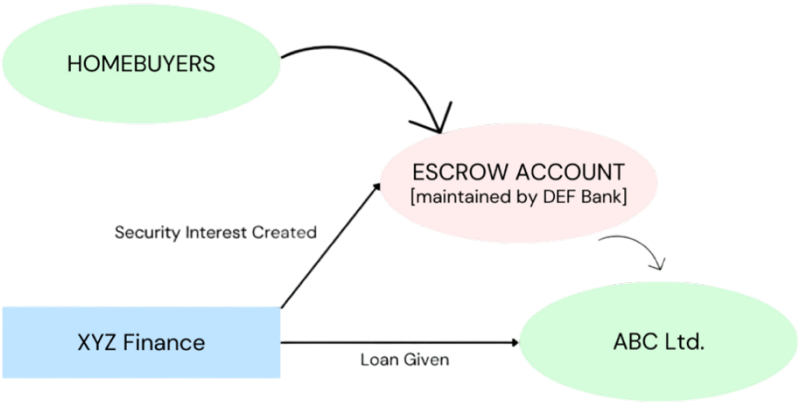

Figure 1: Traditional Escrow Account

B. Post-RERA - Section 4(2)(l)(D) of RERA Account

ABC Ltd. is undertaking a large residential project and takes pre-construction payments from homebuyers to finance the construction. As per Section 4(2)(l)(D) of the RERA, ABC Ltd. is required to open three separate bank accounts for this project. ABC Ltd. opens three separate accounts with DEF Bank as the Escrow Bank: a Master Escrow Account, a Cash Retention Account, and a RERA-Specific Account. The Master Account receives all the funds from homebuyers as instalments for their purchased units. 70% (seventy percent) of these collected funds are transferred to the RERA-Specific Account, ensuring that these funds are used exclusively for construction and land cost purposes, and the rest 30% thirty percent) are transferred to the Cash Retention Account.

DEF Bank, acting as the trustee [escrow bank], ensures that the funds are released only upon verification of the submitted certificates. The bank regularly reports the status of the account to RERA to maintain transparency and compliance. RERA, as the third party, monitors the project's progress through periodic inspections and reports from DEF Bank. If ABC Ltd. fails to comply with the regulations or if there are discrepancies in the construction progress, RERA can take corrective actions, including freezing the funds in the RERA-Specific Account. However, as discussed next, this seemingly straightforward treatment of funds, especially in the Post-RERA scenario, gets complicated when the CIRP is initiated against the builder-developer.

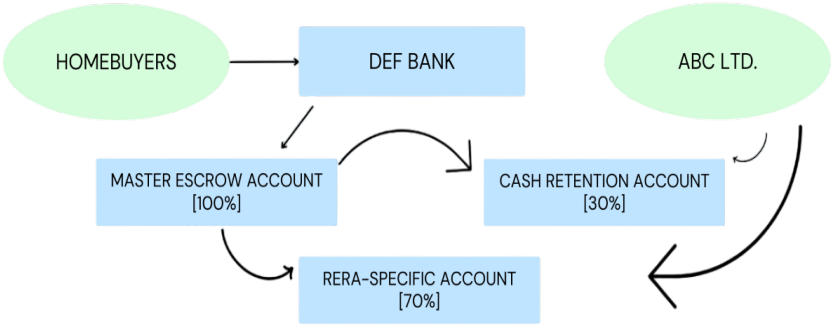

Figure 2: SECTION 4(2)(l)(D) Account

III. SITUATIONS OF INSOLVENCY

A. Treatment of Traditional Escrow Account

The treatment of traditional escrow accounts in insolvency proceedings was comprehensively addressed in *M/s. Asten Realtosrs Private*

Limited by the National Company Law Tribunal (NCLT), Kochi.[9] In this matter, the Corporate Debtor (CD) had secured a ₹55 crore project loan from Piramal Capital and Housing Finance Limited (FC) for its real estate projects "Aurumwoods" and "Campus Court." To secure the loan, the CD hypothecated all receivables to the FC through a Deed of Hypothecation and executed an Escrow Agreement on January 22, 2019, with HDFC Bank as the settlor. This agreement established multiple escrow accounts, including a Master Escrow Account, RERA Escrow Account, Distribution Escrow Account, and Cash Retention Account. Upon initiation of the Corporate Insolvency Resolution Process (CIRP), disputes arose over the use of funds in these accounts, with the Resolution Professional (RP) withdrawing funds for salaries, allowances, payments to head load workers, and CIRP costs, citing Sections 18(d), 18(f), and 22 of the Insolvency and Bankruptcy Code (IBC) to assert control over the funds as assets of the CD.

The NCLT ruled in favor of the FC, holding that the receivables in the escrow accounts, secured under the Deed of Hypothecation and Escrow Agreement, could not be considered assets of the CD. The Tribunal emphasized that pre-CIRP contractual arrangements, particularly those involving security interests, cannot be disregarded simply because CIRP has been initiated. It observed that the FC's lien over the receivables deposited in the escrow accounts precluded their treatment as the CD's assets. This view aligns with Section 18(f) of the IBC, which excludes from the RP's control "*assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment*."

[9] *Piramal Capital and Housing Finance Limited and Ors. v Rajendran P.R. and Ors.* (05.12.2023 - NCLT - Kochi): MANU/NC/6102/2023.

This interpretation is consistent with the NCLT Hyderabad's decision in *Max Infra (I) Limited,*[10] which, citing *Official Liquidator, High Court, Madras v. N. Chandranarayanan*,[11] recognized that funds held in escrow accounts create a fiduciary relationship and are treated as property held in trust, separate from the general assets of the company. Similarly, in *Isolux Corsan India Engineering and Construction Pvt. Ltd., v. TBEA Energy,*[12] the NCLT Chandigarh ruled that once funds are deposited into an escrow account, the CD retains only limited legal title and loses any equitable interest in the property, reaffirming that such funds are not entirely the property of the CD. The Tribunal further clarified that in transactions involving escrow accounts, the ownership of funds is transferred to the secured party as soon as the security interest is created, and the receiving party gains a charge over the money upon fulfilling the stipulated conditions.

Applying these principles, the NCLT Kochi concluded that the FC's lien over the escrow funds meant the CD had no ownership or control over them, and the RP could not treat them as assets of the CD under Section 18(f). This judgment underscores the sanctity of pre-CIRP contractual arrangements and reaffirms the protection of secured creditors' rights, ensuring that funds held in escrow accounts under fiduciary or security arrangements are excluded from the ambit of CIRP.

US case law provides for a similar treatment of escrow funds during insolvency. The U.S. Bankruptcy Court of the District of New Jersey *In Re Arrow Mill Development Corp*. held that the escrow agents [*the escrow bank in our case*] and the grantors [*homebuyers in our case*]

[10]*Max Infra (I) Limited, In re* IA. No. 350 of 2021.
[11]*Official Liquidator, High Court, Madras, representing Manasuba and Co. (P) Ltd. in liquidation v N. Chandranarayanan* 1972 SCC Online Mad 158.
[12]*Isolux Corsan India Engineering and Construction Private Limited through its Liquidator CA Rajeev Bansal v TBEA Energy India Private Limited,* IA (I.B.C) - 1002/2023.

hold equitable interest in the escrow funds till the escrow conditions are fulfilled and in situations of insolvency, pre-fulfilment, the said funds will *not be* treated as Debtor's property under Section 541 of the Bankruptcy Code since the debtor holds only a bare legal title in the funds till the conditions are fulfilled.[13] The Court notes that this is followed in real estate transactions [*accord Zaremba v. Konopka]*.[14]

B. Treatment of Section 4(2)(l)(D) of RERA Account

However, the treatment of Section 4(2)(l)(D) RERA Account will differ during CIRP. To date, no developers have faced insolvency where the IRP claimed the funds in RERA-specific escrow accounts as 'assets' of the CD with other parties asserting rights over these funds.

An examination of the nature of these accounts, alongside the principles governing the creation of security interests and trusts—similar to those in traditional escrow accounts—highlights important concerns. These concerns specifically relate to the treatment of RERA-specific accounts in the context of insolvency proceedings.

a) Creation of Security Interest

Although some states have clarified that no security interest can be held over these accounts, it is important to understand the reasoning behind this decision. In India, the creation of a security interest involves more than just establishing a charge; it also requires 'perfection'. Perfection of security refers to the process of completing legal formalities to ensure that a creditor's claim against a debtor's assets is enforceable and recognized ahead of competing claims in case of insolvency or

[13] *In Re Arrow Mill Development Corp*., 185 BR 190.
[14] *Accord Zaremba v Konopka*, 94 N.J. Super. 300, 228 A.2d 91 (Ch. Div. 1967).

liquidation.[15] Without perfection, recovery becomes challenging. Regulation 21 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 requires at least one of the three compliances for perfection of the charge:[16]

a. Registration with Information Utility as per Section 215(2) of the IBC and Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017.
b. Registration of charge with Registrar of Companies as per Section 77 of the Companies Act, 2013.
c. Registration with Central Registry of Securitisation Asset Reconstruction and Security Interest of India as per Section 26D of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 ("SARFAESI Act")

Meeting any one condition will make the charge legally enforceable. However, failing to fulfil even one condition will render the charge ineffective till the completion of the necessary perfection actions (subject to payment of the penalty, if any).

Registration with any of the three entities requires the existence of a 'security interest'. Under the IBC and SARFAESI Act, security interest encompasses rights, titles, or interests such as mortgages, hypothecation, or assignments.[17] Therefore, we must also analyse if there is the creation of any security interest over these funds.

[15]Maheshwari N, Mairal D and Bansal P, 'Perfection of Security Interest' (*AZB*, 18 October 2021) <https://www.azbpartners.com/bank/perfection-of-security-interest/> accessed 7 August 2024.
[16]Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
[17]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 3(31); The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) s 2(zf).

i. Do homebuyers have a security interest?

Section 18 of RERA grants allottees the right to claim refunds and compensation. Nevertheless, per NCLAT judgments in *Flat Buyers Association Vs. Umang Realtech Pvt. Ltd.*,[18] and *Rajesh Goyal Vs. Babita Gupta*,[19] homebuyers are considered unsecured creditors since they have rights over the flats but not the funds in the escrow account. In contrast, secured creditors such as banks may have rights over the funds, not the flats. Even as per Section 40 of RERA, after the allottees are issued Recovery Certificates ("RCs") for refund and compensation, and then the amount is recovered as per the land revenue codes and not from the escrow accounts.[20] Moreover, as per Section 3(31) of the IBC, the security interest is created in favour of secured creditors, therefore excluding homebuyers from the ambit.

ii. Do developers have a security interest?

Initially, it might seem that developers have a security interest over the funds since these are released from the Section 4(2)(l)(D) Account in proportion to the work completed, similar to a traditional escrow account. However, real estate developers occupy a unique position when it comes to their standing vis-à-vis the homebuyers. In *Pioneer Urban Land and Infrastructure Limited v. Union of India*, the SC clarified that,

[18]*Flat Buyers Association v Umang Realtech Pvt. Ltd* (2020) SCC OnLine NCLAT 1199.
[19]*Rajesh Goyal v . Babita Gupta* (2021) SCC OnLine NCLAT 533.
[20]*Newtech Promoters and Developers (P) Ltd. v State of U.P*. 2021 SCC OnLine All 858.

> "*Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found."*[21]

As per Section 3(31) of the IBC, only creditors can possess security interest against the debtors and not vice-versa. Consequently, the developers cannot hold any security interest over the escrow account funds paid by the homebuyers.[22]

Since neither homebuyers nor developers have a security interest in the escrow account funds, and the RERA authority and the bank act as the monitoring authority and the settlor respectively, there can be no perfection of the charge since there is no security interest. As a result, no party can claim a lien over these funds during insolvency or liquidation.

[21] *Pioneer Urban Land and Infrastructure Ltd. v Union of India* (2019) 8 SCC 416.
[22] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 3(31).

Recently, in a slew of circulars, Maharashtra,[23] Uttar Pradesh,[24] Haryana,[25] Rajasthan,[26] Karnataka[27], and other RERA authorities have also clarified that the separate accounts are 'no-lien' accounts.

b) Creation of a Trust?

Escrow accounts require the existence of a trust arrangement.[28] The Indian Trusts Act, of 1882 ("Trust Act") defines a trust as, "*an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner*."[29]

Trust can be express or implied/constructive.[30] An implied trust does not require an express declaration to the effect but requires the holding of property by one party who is in a fiduciary relationship with the other party.[31]

[23]Discussion Paper in the matter of maintenance and operation of Bank Accounts of registered real estate projects, MahaRERA/Secy/129/2024; MahaRERA, Order No. 56/ 2024.
[24]Real Estate Project (Maintenance and Operation of Project Bank Accounts) Directions, 2020 (November 2023) No. H297/Separate Account/F&A/2023-24.
[25]Direction to the builders/promoters with regard to opening of bank accounts as per provisions of RERA, No. 1/RERA GGM Directions 2019.
[26]The Rajasthan Real Estate Regulatory Authority Regulations, 2024, S.O.576.
[27]The Karnataka RERA Bank Account Directions, 2020, No. RERA/Finance-Section/BAD/02/2020-21.
[28]*Global Trust Bank Ltd. v Kakateya Cement Sugar and Industries Ltd., Hyd.,* (2000) SCC OnLine AP 533.
[29]The Indian Trusts Act, 1882 (2 of 1882).
[30]*Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd* (2021) SCC OnLine SC 253 (India).
[31]*DLF Universal Ltd. v Arjun Singh* (1985) SCC OnLine Del 425.

In *Jessaram*, the SC identified the elements required to characterize a security interest as a trust. These include clear terms indicating a trust relationship or circumstances showing that money was held by a party for a specific purpose. Additionally, it must be agreed, either implicitly or explicitly, that the relationship between the parties is that of trustee and author, not debtor and creditor.

Further, in the case of *Isolux Corolan,* citing the Delhi High Court case of *Deutsche Trustee Company Ltd. Vs. Tulip Telecom Limited*[32] further referring to *Reserve Bank of India v. Bank of Credit and Commerce International, Overseas Ltd.,* the NCLT clarified the creation of implied trusts in escrow accounts:

> "*if an applicant makes a specific deposit with the bank for a specific purpose and the amount is earmarked or segregated in the business of commercial sense of the term though not in the physical sense of the term, the presumed relationship of debtor and creditor is rebutted. It follows that in such cases the bank is the custodian of the amounts entrusted to it in a fiduciary capacity and such amounts are impressed with trust. In such a case, the relationship constituted between the bank and the customer is that of bailor and bailee, trustee and beneficiary.*"[33]

Therefore, *sensu lato*, escrow agreements imply the creation of a trust where the beneficiary has a right over the trust property and the bank is the trustee.

However, the situation is different for Section 4(2)(l)(D) RERA-specific accounts. Although the money is for a specific purpose,

[32]*Deutsche Trustee Company Ltd. v . Tulip Telecom Limited* (2017) SCC Online Del 11012.
[33]*Reserve Bank of India v Bank of Credit and Commerce International Overseas Ltd* (1992) SCC OnLine Bom 528.

namely construction, and land, and the bank acts as a trustee with no claim over the funds in the escrow account, the challenge lies in identifying the 'beneficiary'.

For creation of the trust, there must be a beneficiary with a right over the trust property to complete the transaction. Essentially, the beneficiary must have a security interest over the property and must gain ownership rights over the property to be termed as a 'beneficial interest' as defined under Section 3 of the Trust Act.

The SC in *State Bank of India v. Special Secretary Land & Land Revenue & Reforms & Land & Land Utilisation Deptt. of W.B. and Ors.* clarified that Section 3 of the Trusts Act,[34] requires the beneficiary to have a right to obtain his beneficial interest or interest against the trustee as owner of the trust property.[35]

Further, in the case of *Ahmed Abdulla Ahmed Al Ghurair v. Star Health & Allied Insurance Co. Ltd.*,[36] the SC referring to *Mount Royal/Walsh Inc. v. Jensen Star, The Ship (Mount Royal/Walsh Inc. v. Jensen Star, The Ship,* noted that, "*beneficial owner serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent*."[37] Hence, without an identifiable beneficiary who can step in the shoes of the owner, the essence of the trust is lost.

[34]The Indian Trusts Act, 1882 (2 of 1882) s 3.
[35]*State Bank of India v Special Secretary Land & Land Revenue & Reforms & Land & Land Utilisation Dept. of W.B. and Ors*. (1988) SCC OnLine Cal 85.
[36]*Ahmed Abdulla Ahmed Al Ghurair v Star Health & Allied Insurance Co. Ltd.* (2019) 13 SCC 259.
[37]*Mount Royal/Walsh Inc. v Jensen Star, The Ship [Mount Royal/Walsh Inc. v Jensen Star, The Ship* (1990) 1 FC 199 (Can. FC)].

Contrarily, as explained above, in case of accounts established under Section 4(2)(l)(D), homebuyers have no 'beneficial interest' in the funds held in the escrow account; their interest lies solely in the associated real estate properties. Neither the bank, the developer, nor the RERA authority holds any rights to these funds, as their roles are limited to being the settlor, debtor, and monitoring authority, respectively.

This was also clarified in the case *Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd*. that, "*in case of homebuyers' issue, once homebuyers entered into an agreement with a developer and when their relations entered into turbulence and not in a position to become normal, the relation in between them will become creditor and debtor and the person under obligation shall refund the money of the homebuyers."*[38]

However, it is important to keep in mind that once the CIRP is initiated and the moratorium begins, homebuyers lose the right to a refund as refunds are processed from the RERA-Separate and Cash Retention Account in the same proportion as they were collected.[39]

As explained next, these accounts potentially become assets of the CD, which then fall under the control of the IRP, thereby relinquishing the right to refund.

c) Treatment of Funds

[38]*Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Ltd* 2021 SCC Online SC 25 ¶59.
[39]Haryana RERA circular (n 17) Rule 7(v); Maharashtra RERA discussion paper (n 16) Rule 3(B)(v).

Since Section 4(2)(l)(D) accounts are not true escrow accounts because no trust is created and no third party has a claim over the money, the IRP can exercise control over the funds in these accounts, considering them as 'assets' of the CD.

Although this approach deviates from past precedents, which prioritized the beneficiary's security interest over the rights of the IRP to control the funds and maintain the CD as a going concern, unfortunately, it is justified in light of the principles outlined above. Moreover, since Section 36(4) of the IBC only excludes assets held in trust for third parties, the funds in the escrow account will be included in the liquidation estate and will be distributed as per the waterfall mechanism under Section 53 of the IBC. Therefore, the escrow funds will be classified as assets of the CD.

IV. NEGATIVE RAMIFICATIONS FOR HOMEBUYERS

This seemingly minor issue has serious negative ramifications for homebuyers who are already plagued by regulatory inefficiencies. Before RERA, the real estate sector lacked regulation, leading to widespread exploitation by developers. RERA was introduced to protect buyers and ensure transparency but remains ineffective as it cannot enforce orders or take strict action against developers who violate its directives. The data shows that RCs are rarely enforced.[40] Now, in insolvency situations, homebuyers will face another setback. Under Section 14 of the IBC, a moratorium is imposed, temporarily prohibiting creditors from initiating or continuing legal actions against

[40] 'Has Rera Become Toothless? Requirement of Amendment in Local Land Laws to Execute Recovery Certificates' (*VK Bansal & Associates*, 21 May 2024) <http://www.vkbansalandassociates.com/has-rera-become-toothless-requirement-of-amendment-in-local-land-laws-to-enforce-recovery-certificates/> accessed 7 August 2024.

the CD. Once the moratorium begins, creditors are unable to enforce their RCs, approach consumer forums, or claim refunds, as their deposits are treated as assets of the CD. Without a security interest or trust claim over these escrow accounts, they are left without any claim over their hard-earned money. These funds risk being classified as assets of the CD and subsequently disbursed among financial creditors, leaving homebuyers with no financial recourse. This misalignment not only jeopardizes the right to recovery of homebuyers but also undermines the very purpose of RERA, which is to protect their interests.

V. TAKING CUES FROM ONTARIO SUPERIOR COURT OF JUSTICE

Comprehending Such situations are not unique to India and have arisen in other jurisdictions as well. One such example is Canada, where similar concerns led to the implementation of legislative measures and judicial decisions to address these challenges. Parallels can be drawn to the Indian context, highlighting mechanisms designed to protect vulnerable parties such as homebuyers.

A potential solution can be drawn from a conjunctive reading of Section 67(1)(a) of the Bankruptcy and Insolvency Act of 1985 ("BIA")[41] and Section 81 of the Condominium Act of 1998 ("Condominium Act") provides valuable insights into safeguarding homebuyers' interests in real estate transactions.[42]

[41]The Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) (Canada).
[42]The Condominium Act, 1998 (Canada).

Section 67(1)(a) of the BIA is similar to Section 36(4) of the IBC insofar as it excludes "*property held by the bankrupt in trust for any other person*" from the estate of the bankrupt.

Complementing this protection, Section 81 of the Condominium Act requires developers to hold all payments made by prospective homebuyers in trust. These payments, whether made as deposits, reservations, or part of the purchase price for a proposed unit, must be safeguarded by a trustee or the developer's solicitor. This provision ensures that the financial contributions of homebuyers are protected from the insolvency risks faced by developers and prevents these funds from being included in the developer's general assets.

It mandates that all money received from homebuyers be held in trust by a trustee or the declarant's solicitor. This provision creates a 'statutory trust' ensuring that homebuyers' deposits are segregated and safeguarded, preventing commingling with other assets of the bankrupt. The intent behind this statutory trust is to protect the financial interests of homebuyers in insolvency situations.[43]

Canadian law further protects these deposits through the concept of 'tracing back', which obliges the receiver (akin to the IRP in India) to restore misdirected or commingled funds to the statutory trust, ensuring they are returned to the homebuyers in insolvency situations.[44] This mechanism provides an additional layer of security, guaranteeing that even if funds are mistakenly or fraudulently moved, they can be traced and recovered.

Further, Section 81(4) reads:

[43] *Ward-Price v Mariners Haven Inc* (2001) 57 OR (3d) 410.
[44] ibid 24.

> "*(4) Upon receiving money that is required to be held in trust under subsection (1), a trustee of a prescribed class shall hold the money in trust in a separate account in Ontario designated as a trust account at a bank listed in Schedule I or II to the Bank Act (Canada), a trust corporation, a loan corporation or a credit union."*

Section 81(4) of the legislation requires that these trust monies be held in a separate account, analogous to Section 4(2)(l)(D) of RERA. This ensures that the funds are easily identifiable and accessible, reducing the risk of mismanagement.

The statutory trust created under Section 81 of the Condominium Act resolves the key issue of identifying the beneficiary by explicitly recognizing the purchaser as the beneficiary of funds held in trust. This ensures that homebuyers are not treated merely as unsecured creditors in the event of insolvency but are instead granted the protections afforded to beneficiaries under trust law. The Ontario Court of Appeal in *Ward-Price v. Mariners Haven Inc.* explained that this statutory trust goes beyond a simple debtor-creditor relationship, providing homebuyers with additional remedies available under trust law, including actions for breach of trust.[45]

Most importantly, the Condominium Act endows homebuyers with "*an absolute equitable interest in the purchase money*."[46] In Isolux Corolan, the reason for disallowing the IRP from using escrow account funds was that "*once the fund becomes part of the Escrow Account, any creditor or debtor holds on to the money only to the extent of its legal title and not to the extent of any equitable interest in such property that the said person does not hold*."[47] Therefore, once statutory trusts are made in favour of the homebuyers, the homebuyers have an equitable

[45]ibid (n 32).
[46]ibid (n 21) (n 32).
[47]*Isolux Corsan* (n 10) [19].

interest in the deposits which means that homebuyers have a direct and enforceable right to their deposits, which cannot be overridden by other creditors' claims.

Most recently, the Superior Court of Justice of Ontario, in a cross-motion in the case of *Atrium Mortgage Investment Corporation and Dorr Capital Corporation v. Stateview Homes (Nao Towns II) Inc., 2024*,[48] reaffirmed the application of these relevant provisions and practices. In this case, homebuyers' deposits, which were intended to be held in trust, were commingled by the receiver. The receiver argued that the properties were sold as freehold properties [property where the owner owns the land and the building] and not as Common Elements Condominiums ("CEC") [*akin to flats in India, where flat owners share common rights to areas such as the roof, staircases, and other shared spaces within the property*.], thereby falling outside the scope of the Condominium Act and not requiring the funds to be held in trust, making them available for distribution among secured creditors. However, the Court of Appeal held that the money was used for the development of the projects, thus becoming part of the funds protected under the statutory trust. The Court emphasized that a mere technical contractual clause cannot alter the fundamental nature of the transaction, which involved CEC properties, akin to flats in India, and not just freehold properties. Consequently, the receiver was required to trace back the deposits and withhold the funds from being distributed among other creditors, ensuring they were returned to the homebuyers. The Court of Appeal summarized and reiterated the position that "*if the Homebuyers can establish that a valid trust was established in respect of the Deposit Funds for the purposes of the BIA, then their interest in those*

[48] *Atrium Mortgage Investment Corporation and Dorr Capital Corporation v Stateview Homes (Nao Towns II) Inc.* Court File No. CV-23-00698395-00CL.

funds (and any property they trace into) rank ahead of the interests of the Debtors' secured creditors."[49]

The analysis underscores the importance of recognizing homebuyers' equitable interest in their deposits, which should supersede the claims of secured creditors. The Condominium Act's consumer-oriented focus and the protection it offers can serve as a model for legislative reform in India. By adopting similar statutory trust provisions, RERA can better fulfil its objective to safeguard homebuyers, ensuring their deposits are protected during insolvencies.

Implementing such a statutory trust system under RERA would address the current gaps in the classification of the homebuyer's deposits in RERA-specified account funds as assets of the CD. This would provide a clear legal mechanism for the segregation, management, and recovery of these funds, thereby enhancing homebuyer confidence in the real estate sector.

VI. CONCLUSION

BITs We have analyzed the potential treatment of Section 4(2)(l)(D) RERA accounts in a CIRP. While these accounts resemble a traditional trust account, which is typically excluded from CD's assets and the liquidation estate, a detailed analysis reveals that these accounts do not meet the criteria of being designated as trust accounts. This is primarily because they lack a defined beneficiary with a security interest over the funds, and no charge can be created on these funds. Consequently, these accounts are classified as assets of the CD under the IBC.

With this classification, the IRP, under Sections 17 and 24 of the IBC, can assert control over these funds during insolvency proceedings. This represents a departure from traditional precedents, where escrow

[49]ibid (n 33).

accounts for third-party beneficiaries were excluded from the CD's assets. Such classification disrupts the recovery rights of homebuyers, leaving them with minimal prospects as unsecured creditors during distribution. This shift is significant, as it prioritizes maintaining the CD's assets within the liquidation estate over protecting third-party interests, including those of homebuyers. This unintended misclassification places homebuyers in an especially vulnerable position. As unsecured creditors, they rank lower in the waterfall mechanism and may not recover their dues, despite being the most critical stakeholders in real estate transactions. The situation exacerbates their financial insecurity, undermining the protective intent of RERA.

To address these shortcomings, we propose adopting the statutory trust provisions found in Ontario's Condominium Act of 1998. These provisions establish a statutory trust for homebuyers' deposits, ensuring their segregation and protection from the developer's general assets, especially in situations of insolvency. Additionally, the framework includes a tracing mechanism that allows for the recovery of misdirected funds to the statutory trust. By designating homebuyers as beneficiaries with an equitable interest in these deposits, the Ontario model provides robust safeguards for their funds.

Therefore, while RERA-specific accounts uphold transparency and accountability in real estate transactions, India must strive to emulate Ontario's model. Such reforms are essential to ensure that homebuyers' deposits are adequately protected, aligning with RERA's protective objectives and reinforcing confidence in the real estate sector.

SECTION 32A OF THE IBC: FROM PRINCIPLES TO PRECEDENTS AND WHAT COMES NEXT

Nilay Mishra[*] *and Meghna Pareek*[**]

ABSTRACT

The introduction of Section 32A to the Insolvency and Bankruptcy Code was the legal equivalent of hitting a reset button for corporate debtors. The clean slate theory is not a new concept, and Section 32A reinforces its application by granting immunity from criminal prosecution to corporate debtors post-approval of a resolution plan, provided there is a complete management overhaul. The implementation of this section has faced criticism and raised many questions from critics, scholars and stakeholders about its potential misuse and conflicting nature concerning other legislations, despite this it has been regarded as a bold step by the legislature, displaying an attempt to balance corporate revival and fostering investors' confidence along with ensuring remedy for wrongdoings done by those in the management of corporate debtors. While the Supreme Court upheld the constitutional validity of Section 32A, stressing the need for economic recovery,

[*]Nilay Mishra is a final-year student at Institute of Law, Nirma University, Ahmedabad. The author may be reached at nilaymishra14@gmail.com.
[**]Meghna Pareek is a final-year student at Institute of Law, Nirma University, Ahmedabad. The author may be reached at meghnapareek1@gmail.com.

the critics have raised concerns that it might encourage corporate miscreants. This paper aims to foresee and interpret these ramifications and at the same time suggest some possible solutions. The paper also critiques the established insolvency regime in the country by interpreting the interaction between the Code and legislations such as PMLA, Companies Act, and SEBI Act, having overlapping jurisdiction and how the need for a much clearer interpretation from both the legislative and the judicial perspective awaits.

***Keywords**: Insolvency, Bankruptcy, Immunity & Management.*

I. INTRODUCTION

The introduction of the Insolvency and Bankruptcy Code, 2016 **("IBC")** has been a breath of fresh air in the Indian insolvency regime. Before this, the scenario in India was a bit *house of cards*. It was a highly fragmented and inefficient system with multiple legislations and bodies governing it,[1] characterised by low amount of recovery rates for the investors, which ultimately affected the economy as India moved further into the global economy.[2] This led to the introduction of IBC in the year 2016 within the country, which has led to an easier exit of sick entities through liquidation or insolvency and subsequent revival through takeover of the entity. However, the IBC is still in its nascent

[1]Aaditya Bhatt, 'Historic Evolution of IBC' (*Bhatt and Joshi Associates,* 10 February 2022) <https://bhattandjoshiassociates.com/the-insolvency-and-bankruptcy-code-2016/> accessed 22 July 2024.

[2]Mukesh Chand, 'IBC journey so far' (*Economic Law Practice*, 20 October 2022) <https://elplaw.in/leadership/ibc-journey-so-far/> accessed 22 July 2024.

stage when placed in the grand scheme of the age of legislation.[3] In this short period, IBC has gone through various amendments to keep pace with the dynamic regime of insolvency practice. One of these amendments is Section 32A of the IBC, which was introduced in the year 2020 by way of an amendment to answer some key questions pertaining to corporate debtors and their past criminal liability.[4] The paper aims to answer some of the key questions that raised their heads with the introduction of this provision. The paper delves into the inherent purpose and legislative intent behind a key provision of the IBC, emphasizing its pivotal role in reinforcing the Code's core principles. The discussion extends to examine the provision's validity concerning other legislations, particularly those with overlapping jurisdictions, and its potential implications for consistency and conflict resolution within the legal framework. The analysis is framed by critical questions like does the provision raises Constitutional conflicts, what are the primary challenges in its enforcement, and how can they be addressed effectively? These guiding questions structure the inquiry and offer a focused lens through which the provision is evaluated. In addition, the paper reviews various judicial interpretations that have clarified the meaning and scope of the provision, upheld its Constitutionality, and addressed practical challenges arising during its application. These interpretations provide valuable insights into how the provision is operationalized within the broader legal and economic landscape.

The primary reason that this provision is the focus of the paper is due to its non-obstante nature, especially when read with Section 238 of the Code. The meaning of the term 'non-obstante' was defined by the Hon'ble Supreme Court as *"a non obstante clause is a legislative*

[3]Arnav Maru, 'Section 32A of the IBC: Shredding the Independent Corporate Personality?' (2022) 10 (1) NLIU Law Review <https://nliulawreview.nliu.ac.in/wp-content/uploads/2022/01/Volume-X-Issue-I-17-38.pdf> accessed 13 January 2025.
[4]The Insolvency and Bankruptcy Code (Amendment) Act, 2020 (1 of 2020).

device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."[5]

The provision can have serious ramifications when interpreted in its true letters as it could lead to a potential overlap in the jurisdiction of different legislations and their respective government authorities.[6] Since the introduction of this section, the adjudicating authorities have been continuously evolving laws on this subject, trying to harmonise the implementation of Section 32A. The authors have traced the development of law in this section while also picking up on the questions that still loom large.

II. SECTION 32A OF THE IBC

A. Background of the provision and its scope

The Insolvency Law Committee's report highlighted the need for Section 32A to alleviate the concerns of resolution applicants who might be dissuaded from proposing resolution plans due to the fear of being held liable for past offences committed by the corporate debtor.[7] The Committee recommended that while the corporate debtor should be absolved of past criminal liabilities post-resolution, individuals responsible for the debtor's actions during the commission of the offences should continue to be held accountable.[8] This distinction ensures that new management is not unfairly penalized for the actions

[5] *Union of India v G.M. Kokil,* (1984) Supp SCC 196.
[6] Pratham Kapoor 'Clash of Jurisdiction: Analysing The IBC-PMLA Conundrum' (*Live Law.in*, 22 May 2024) <https://www.livelaw.in/articles/clash-jurisdiction-analysing-the-ibc-pmla-conundrum-258603?fromIpLogin=97748.49757533119> accessed 13 January, 2025.
[7] Ministry of Corporate Affairs, *Report of the Insolvency Committee* (20 February 2020).
[8] ibid 59.

of the previous management, thus facilitating a smoother and more attractive resolution process.

One of the principles incorporated in drafting Section 32A is the clean slate principle as recognized by the Supreme Court **("SC")** in the *Essar Steel case*[9] where it was established that once the adjudicating authority approves a resolution plan, all those claims not included in the plan are extinguished and no proceedings can be initiated or continued for claims that predates the resolution process if they are not part of the plan.[10] The adjudicating authorities have been using this principle even before Section 32A and the principle shows its presence in other provisions of the IBC. There are numerous judgments explaining clean slate principle, primarily aimed at shielding the resolution applicant from all claims against the corporate debtor, thereby enabling a fresh start This increases chances of a successful resolution plan as it provides resolution applicant restitution [11] pending claims[12], unclaimed claims[13], disputed claims, and delayed claims[14],following the Satyam

[9]*Essar Steel India Ltd. (CoC) v Satish Kumar Gupta* (2020) 8 SCC 531.

[10]Yogendra Aldak, Pranav Mundra and Balraaj Singh Chhatwal, 'Clean Slate Doctrine-Wiggle Room for "Uncrystallised Claims"?' (*SCC Online Blog*, 8 May 2024) <https://www.scconline.com/blog/post/2024/05/08/clean-slate-doctrine-wiggle-room-for-uncrystallised-claims/> accessed 11 January 2025.

[11]*Piramal Capital & Housing Finance Ltd. v Dewan Housing Finance Corpn. Ltd.* (2021) SCC OnLine NCLAT 640; See also *S.A. Pharmachem (P) Ltd. v Alok Industries Ltd.* (2020) SCC OnLine NCLAT 554.

[12]*Jaypee Kensington Boulevard Apartments Welfare Assn. v NBCC (India) Ltd.* (2022) 1 SCC 401.

[13]*Anju Industries v Rishi Ganga Power Corpn. Ltd* (2020) SCC OnLine NCLAT 863.

[14]*Commr. v Assam Co. India Ltd*. (2021) SCC OnLine NCLAT 513; Akant Kumar Mittal, 'The Clean Slate Theory: IBC's Version of Hermione's Obliviate Spell' (*SCC Online Blog*, 2 December 2022) <https://www.scconline.com/blog/post/2022/12/02/the-clean-slate-theory-ibcs-version-of-hermiones-obliviate-spell/#fn15> accessed 9 July 2024; *Union of India v Satyam Computer Services Limited and Ors.* (2009) 2 CompLJ 293 (CLB); Shahezad Kazi and Aditi Agarwal, 'IBC: Supreme Court of India Endorses the Fresh Start on a Clean Slate Principle' (*SNR Law*, 2021) 5 <https://www.snrlaw.in/wp-content/uploads/2021/03/SR-Insights-IBC-Supreme-Court-of-India-Endorses-the-Fresh-Start-on-a-Clean-Slate-Principle.pdf> accessed 12 July 2024.

scam, the Company Law Board allowed the induction of Tech Mahindra Limited as a strategic investor and allowed the protections to the nominated directors of Tech Mahindra and exempted them from any civil and criminal liability of the previous board of directors, in order to promote smooth governance and recovery efforts for the company and hence applying the clean slate/ fresh slate theory. This shows that the clean slate theory was in prevalence even before and without the amendment of 2020 to the IBC, by virtue of Section 29A and Section 31 of the IBC, which now have been codified in the form of Section 32A.

Further, the Hon'ble Supreme Court has clarified the scope and applicability of Section 32A. The Court has unequivocally stated that Section 32A provides protection solely to the corporate debtor and not to its signatories, directors, or other associated individuals.[15] This means that while the corporate entity may be shielded from certain liabilities following the approval of a resolution plan, the individuals who oversaw the corporate debtor's business operations remain subject to prosecution for any offences committed before the initiation of the corporate insolvency resolution process **("CIRP")**.

B. A legislative response and subsequent chaos

The primary motivation behind the amendment arose from the NCLAT's judgement in the case of *JSW Steel Ltd v. Mahendra Kumar Khandelwal & Ors.*[16] The case concerns the legality of the attachment of assets by the Directorate of Enforcement **("ED")** when the resolution plan given by JSW had already been approved. NCLAT, while accepting the argument that stakeholders have the right to raise their objections, noted that the same needed to be done before NCLT

[15] *Ajay Kumar Radheyshyam Goenka v Tourism Finance Corpn. of India Ltd* (2023) 10 SCC 545.
[16] *JSW Steel Ltd. v Mahendra Kumar Khandelwal* (2020) SCC OnLine NCLAT 431.

approved of the resolution plan. Once the plan has been approved, no entity, including a government agency, can object to the same. The Tribunal held that the upcoming investors are not and should not be liable for the acts and decisions of the previous management.

However, before the decision of the Hon'ble Supreme Court, the legislative answer to the applicability of Section 32A and its supremacy over other legislations is not clear. Subsequently, the Court has ordered ED to handover the assets of BPSL to JSW on 13th December 2024. The same was implied by the Hon'ble Delhi High Court in the case of *Deputy Director of Enforcement Delhi v. Axis Bank and Others*[17] While noting the interaction between IBC and the Prevention of Money Laundering Act **("PMLA")** the Court held that the latter cannot be said to have precedence over the former. The Court held that the period of moratorium cannot prevent the ED from exercising its statutory authority, including seizure and attachment of property. The Court also sought to protect the rights of a third party and mentioned that in case of an asset not being attached by ED with the motive of not frustrating the PMLA, in such a case the party has the right to seek enforcement and the PMLA provisions would apply to the asset.[18]

C. Dissecting the provision

Section 32A (1) provides for immunity to the corporate debtor in case of the debtor being subjected to CIRP. However, it put two conditions for the same. The first is the fact that the resolution process needs to be approved by the adjudicating authority under Section 31 of the Code.[19] The second is the fact that there needs to be a complete overhaul in the management of the debtor.[20] The term 'management' has not been

[17] *Deputy Director of Enforcement Delhi v Axis Bank* (2019) SCC OnLine Del 7854.
[18] ibid.
[19] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) ss. 32A (1), 31.
[20] ibid.

explained in the Code and, its primary interpretation comes from the Companies Act, 2013.[21] The terms' interpretation was done in the case of *Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Others*.[22] The Hon'ble Supreme Court in the judgement noted that according to the company law the term 'management' refers to the *de-jure* management of the company which includes, the Board of Directors, and would also include the definitions of 'manager', 'managing director' and officer as mentioned under the Companies Act.[23] The provision sets out a disjunctive requirement as to what amounts to change. The Court then further explained the meaning of the term 'control' as mentioned in the Companies Act.[24] The Court ruled that the definition could be divided into two parts namely the *de jure* control and the *de facto* control.[25] The former means the right to appoint the majority of the directors in the company while the latter is to be interpreted as acting in concert to positively influence the management or policy decisions.[26] It either includes the change in management or the change in control but not both.[27]

Furthermore, the second clause of the provision reiterates the condition of approval under Section 31 of the Code as mentioned previously concerning the property of the corporate debtor.[28] The provision bars any action against the property of the Corporate Debtor in relation to any offence committed before the CIRP.[29] The action includes

[21]The Companies Act, 2013 (18 of 2013).
[22]*Arcelor Mittal India Pvt. Ltd. v Satish Kumar Gupta and Others* (2019) 2 SCC 1.
[23]The Companies Act, 2013 (18 of 2013) s 2 (53).
[24]ibid s 2 (27).
[25]*Arcelor Mittal India Pvt. Ltd. v Satish Kumar Gupta and Others* (2019) 2 SCC 1.
[26]ibid.
[27]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 32A (1).
[28]ibid s 32A (2).
[29]IBC laws 'Interpretation of Section 32A in landmark judgment, Manish Kumar v. Union of India and Anr' (2024) <https://ibclaw.in/interpretation-of-section-32a-of-ibc-in-landmark-judgment-manish-kumar-v-union-of-india-and-anr/#:~:text=Sub%2DSection%20(2)%20of%20Section%2032A%20declares%20a

'attachment,' 'seizure,' 'retention' or 'confiscation' of the property.[30] Additionally, the provision extends the protection not only to the owner of the property covered under the resolution plan i.e. the corporate debtor but also to the person who is acquiring the said property through CIRP.[31] The section was the primary reason behind the issue of primacy with the actions of ED in the JSW BPSL case, the same would be discussed later in the following paragraphs.

Lastly, the third clause of the provision mentions the act of assisting investigation for any offence which was committed before the CIRP.[32] This implies that the corporate debtor or person shall cause a hindrance to the investigation process regardless, of immunity being provided to them under the section. Another meaning that could be implied from the text of the section is how it in a discerning manner tries to lift the corporate veil by continuing the investigation on persons especially those present in the management of the corporate debtor could still be liable for the offences which were committed during their tenure.

D. Background of the JSW-BPSL Saga

a) Brief on the initiation of the insolvency proceeding against Bhushan Power and Steel Limited (BPSL)

BPSL was once one the foremost entities in the Steel market of the country. During the period from 2010 to 2014, its profit climbed from 711 crores to 1814 crores.[33] During the said period BPSL also

%20bar%20against%20taking%20any%20action%20against%20property%20of%20the%20corporate%20debtor> accessed 10 January 2025.

[30]ibid expl. (i).

[31]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 32A (2) Expl. (ii).

[32]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 32A (3).

[33]Dep P Samaddar, 'Understanding the Rise, Fall and Revival of Bhushan Power and Steel' (*Insider*, 16 Oct. 2020) <https://insider.finology.in/success-stories/rise-and-fall-of-bhushan-power-and-steel> accessed 25 July 2024.

borrowed huge sums of money from various banks including Punjab National Bank (PNB). The bank was the first entity to report the fraudulent transactions being conducted by the company. A subsequent fraud of loan exposure amounting to over Rs. 3805 crore was discovered by the bank.[34] This and the subsequent non-payment by the company led to the filing of insolvency proceedings against the company.[35] Subsequently, after a tedious and lengthy bidding procedure, Jindal Steel Works (JSW) emerged as the front-runner with its bid of Rs. 19,700 crores being the highest and the same being approved by the creditors.[36] The bid included upfront cash payment, equity infusion and additional cash infusion to support the operations of BPSL.

b) The emergence of challenges after the acceptance

Despite the approval of the Committee of Creditors, the resolution faces several setbacks in the following years. Shortly after the approval of the resolution application by the creditors and subsequently by the adjudicating authority on September 5th, 2019 Enforcement Directorate (ED) attached assets worth Rs.4,025 crores of BPSL relating to a money laundering probe on October 10th, 2019.[37] The case was against the previous promoters of BPSL.[38] The creditors ultimately had to

[34]Saloni Shukla, 'PNB reports over Rs 3,805 crore fraud by Bhushan Power & Steel Ltd' *The Economic Times* (Mumbai, 6 July 2019) 1.

[35] eena Mani, 'PNB & SBI initiate insolvency proceeding against Bhushan Steel, Power' *Business Standard* (New Delhi, 14 July 2017) 1.

[36]Deccan Chronicle, 'JSW Steel likely winner for Bhushan Power' *Deccan Chronicle* (New Delhi, 16 Oct 2018) 1.

[37]ZeeBiz WebTeam, 'Money laundering: Big Setback! Rs 4,025 Cr assets of Bhushan Power and Steel attached – investigation revelations' (*Zee Business*, 13 Oct 2019) <https://www.zeebiz.com/companies/news-money-laundering-big-setback-rs-4025-cr-assets-of-bhushan-power-and-steel-attached-check-investigative-revelations-112378> accessed 26 July 2024.

[38]PTI, 'ED attaches Bhushan Steel's assets worth Rs 4,000 crore in connection with money laundering case' (*The Print* 12 Oct 2019) <https://theprint.in/india/governance/ed-attaches-bhushan-steel-assets-worth-4000-crore-money-laundering-case/305095/> accessed 26 July 2024.

move to the Supreme Court to stay the attachment of assets.[39] This raised serious questions regarding whether now JSW could acquire the assets or not. Furthermore, the threat also loomed over the liability of the JSW in the criminal practices which were done by the previous promoters of BPSL as the Code at the time did not provide for any exemption to the resolution applicant for the conduct of the corporate debtor.[40]

Subsequently, an amendment was made to the Code through the *Insolvency and Bankruptcy Code (Amendment) Act, 2020* that introduced Section 32A. The purpose of the section is to provide immunity to a corporate debtor and its assets from any prosecution, attachment, seizure, or confiscation.[41] The primary motivation for the legislation and its timing very well coincides with the legal issue raised in the matter of JSW's resolution plan for BPSL.

The Hon'ble Supreme Court's judgement in the case of *Manish Kumar v. Union of India and Anr.*[42] ultimately, put an end to the saga of appeal and counter-appeal in the NCLT and NCLAT. The legislation played a big role in ending the legal battle while at the same time, the Hon'ble Supreme Court cleared the nuances of the application of the sectionThe interaction between IBC & PMLA and their non- obstante clauses will be discussed in the latter parts of the paper.

The issues arising in the JSW-BPSL saga underscore the critical need for harmonizing laws across various jurisdictions to ensure consistency

[39]Samanwaya Rautray, 'Apex court stays ED move to attach assets of BPSL' *The Economic Times* (New Delhi, 21 Dec 2019) 1.
[40]Biman Mukherji, 'Despite IBC changes, JSW may go slow on Bhushan Power and Steel buy' (*Mint* 25 Dec 2019) <https://www.livemint.com/companies/news/despite-ibc-ordinance-jsw-may-complete-buy-of-bhushan-power-and-steel-only-by-march-end-11577276529075.html> accessed 26 July 2024.
[41]Insolvency and Bankruptcy Code 2016, s. 32A (India).
[42]*Manish Kumar v Union of India* (2021) 5 SCC 1.

and efficiency in legal processes. This need becomes particularly evident in situations where there is a jurisdictional overlap between the 'non-obstante' clauses of two legislations, each claiming supremacy over the other. Such overlaps create ambiguity, leading to repeated judicial intervention to resolve conflicts—a process that not only delays justice but also undermines the legislative intent behind the enactments. For the IBC, this issue is even more pronounced, as the core objective of the Code is to facilitate the timely resolution of distressed assets. Any delay caused by conflicts between the IBC and other laws, such as the PMLA, directly impacts its efficacy, potentially eroding stakeholder confidence in the insolvency resolution framework. The time-bound resolution, being the essence of the IBC, is jeopardized when legal ambiguities necessitate prolonged litigation. This case further highlights the importance of legislative clarity in preventing such conflicts. A forward-thinking approach is essential to anticipate areas of potential overlap and to ensure that laws are designed to function harmoniously. This includes providing clear guidance on the precedence of one statute over another in specific contexts and addressing procedural conflicts comprehensively. By fostering alignment and coherence between statutes with overlapping or conflicting jurisdictions, legislative clarity can significantly reduce the need for judicial intervention, ensuring smoother implementation of laws and achieving the legislative intent effectively.

III. CONSTITUTIONAL VALIDITY OF SECTION 32A

Along with its dynamic effects, Section 32A sparked many controversies as well. As much as Section 32A was necessary to promote the smooth restructuring process, it cannot be denied that the provision was criticized and challenged for undermining the accountability of promoters and previous management. Thus, validity of Section 32A rests on the fine balance between a robust insolvency process and legal accountability. This is what made the Hon'ble

Supreme Court explore the broader constitutional principles and intent behind Section 32A in *Manish Kumar v. UOI*[43], where the validity of the IBC (Amendment) Act, 2020 was challenged, including Section 10 of the amendment that brought in Section 32A.

The Petitioners in this case argued that Section 32A is problematic as it undermines the interests of creditors, and allottees as by absolving corporate debtors of criminal liabilities, the provision will enable the misappropriation of assets that were acquired through illegal means and they also pointed out the conflict with intent of PMLA. Further, it was contended that Section 32A is unconstitutional as it violated Articles 14, 19 and 300-A of the Indian Constitution by being arbitrary, and ultra vires in nature as it disregards the fundamental rights of creditors and other stakeholders.

In response to the Petitioner's contentions, the Government argued that the rationale and objective behind Section 32A was to safeguard bona fide resolution applicants from penal offences in which they had no involvement. Furthermore, it aimed to incentivize the resolution applicants by ensuring that they are not threatened by the liabilities of the past management's wrongful actions, hence the amendment and the section focuses on value maximization and creditors' recovery.

The Supreme Court dealt with the question of constitutional validity of Section 32A by *firstly*, dealing with the provisions of this section, wherein the Court explained the conditions necessary for absolving liabilities under Section 32A, which include approval of the resolution plan by the adjudicating authority, change in control of the party or replacement of the past management with people not involved in the wrongdoing. Moreover, it was explained that Section 32A (2) bars actions against the property of the corporate debtor covered by a

[43]ibid.

resolution plan which ensures a change in control to a qualified entity.[44] The Court emphasised that these provisions are necessary to protect the welfare and interest of the public and to provide for economic measures for a smooth IBC framework, hence should be preserved and be held valid.

Secondly, the Court noted that the legislative wisdom is not open for judicial review and the practicality of the provision depends on balancing the conflicting interests and prioritizing certain interests over others for the greater economic good as well as preventing abuse, which is a pearl of legislative wisdom, hence highlighting the limited judicial review in economic regulations.

Thirdly, the Court went on to note that the provision ensures the fresh start of the resolution applicant without any burden of past criminal liabilities, and the provision does not let the wrongdoers escape the liability as the immunity was conditional upon the change in control of corporate debtor and does not benefit the management and related parties. The Court accepted the Petitioner's argument that the provision grants immunity to the property acquired through illegal means. However, it was observed that this cannot be a ground to overlook the rationale and intent behind the provision. The Hon'ble SC upheld the constitutional validity of Section 32A by prioritizing the goals of IBC and the need for robust changes.

However, the concern raised by the Petitioner regarding the shield provided to the property acquired through illegal means still looms large as the provision is open to misuse by misappropriation of public

[44]IBC laws 'Interpretation of Section 32A in landmark judgment, Manish Kumar v. Union of India and Anr' (2024) <https://ibclaw.in/interpretation-of-section-32a-of-ibc-in-landmark-judgment-manish-kumar-v-union-of-india-and-anr/#:~:text=Sub%2DSection%20(2)%20of%20Section%2032A%20declares%20a%20bar%20against%20taking%20any%20action%20against%20property%20of%20the%20corporate%20debtor> accessed 10 January 2025.

funds as public money can be diverted by the purchase or creation of assets such as establishing Special Purpose Vehicle ("SPV") and transferring public money into its account, which results in the separation of the source of funds and assets purchased or created, this in turn can undermine the objects of other legislations such as PMLA and may render the victims without remedy.[45]

IV. SECTION 32A *VIS-A-VIS* OTHER LEGISLATIONS

The overriding effect of the IBC has been discussed by the Hon'ble SC in *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*[46] Herein, the Court observed that this amendment to IBC has an overriding effect over other laws, such as those governed by SEBI, by citing Section 238 of the IBC, which ensures its supremacy in case of inconsistencies. Additionally, the successful resolution applicants are indemnified against claims by the government post-approval of the resolution plan and are shielded from criminal proceedings related to the actions of previous promoters. In such a scenario, it becomes important to explore the dynamic interplay between IBC, particularly Section 32A, and various other legislations, shedding light on how courts and tribunals have navigated these legal conflicts.

A. Section 32A and Section 14 of the IBC

The interplay between Sections 14 and 32A of the IBC was considered by the Supreme Court in *P. Mohanraj v. Shah Bros. Ispat (P) Ltd.*[47], wherein it was observed that Section 32A is focused on the extinction

[45]Soyaib Qureshi, 'Section 32A: Unanswered Legal Issues' (*PSL Chambers*, 2024) <https://www.pslchambers.com/article/section-32a-unanswered-legal-issues/> accessed 16 July 2024.
[46]*Ghanashyam Mishra & Sons (P) Ltd. v Edelweiss Asset Reconstruction Co. Ltd.* (2021) 9 SCC 657.
[47]*P. Mohanraj v Shah Bros. Ispat (P) Ltd*. (2021) 6 SCC 258.

of criminal liabilities post CIRP and does not interfere with the moratorium provided under Section 14. A moratorium is established under Section 14 of the IBC while the CIRP is taking place which involves suspension of any legal proceedings whatsoever to create a suitable environment for the corporate debtor's revival while the CIRP is ongoing. It does not clear debts but rather holds off actions till the end of the CIRP.

On the other hand, Section 32A gives permanent relief after the resolution process. The existence of Section 32A does not obliterate the impact of the moratorium under Section 14 as moratorium comes into effect once the CIRP initiation application has been accepted by the adjudicating authority and ceases once the resolution plan is approved by the adjudicating authority, while Section 32A grants immunity against offences committed prior to the commencement of CIRP only to the corporate debtor, not the persons liable, after the plan has been approved.Hence, the criminal proceedings can continue against the persons liable after the approval of resolution plan but not against corporate debtor. Consequently, both provisions must be enforced notwithstanding any clash that may arise between them as such an application ensures that no provision overrides another but that all can coexist harmoniously.

B. Section 32A and Section 29A of the IBC

In the case of *Vikram Puri v. Universal Buildwell (P) Ltd.,*[48] it was contended that the suspended directors of a corporate debtor should be eligible to submit a resolution plan. The Court clarified that Section 32A does not grant any right to suspended directors to submit a resolution plan. The key issue revolves around Section 29A of the IBC, which explicitly disqualifies certain individuals, including suspended

[48] *Vikram Puri v Universal Buildwell (P) Ltd*. 2022 SCC OnLine NCLAT 3585.

directors, from submitting a resolution plan.[49] Section 29A[50] is designed to prevent those who contributed to the debtor's financial distress from regaining control of the company. This disqualification holds regardless of the provisions of Section 32A. It was held that even if Section 32A provides for the cessation of liability for corporate debtor post-approval of a resolution plan, it does not override the disqualifications laid out in Section 29A. Suspended directors are explicitly barred from submitting resolution plans, ensuring that those responsible for the debtor's prior mismanagement cannot regain control.

This interpretation reinforces the separation of corporate debtor liabilities from the accountability of directors and promoters. By upholding the harmonious interpretation, the judgement effectively ensures that the defaulters are not allowed the backdoor entry into the management of the corporate debtor. This approach increases the creditor's confidence and fosters improved standards of corporate governance.

C. Section 32A and PMLA

The tussle between IBC and PMLA emerges from their non-obstante clauses, Section 238[51] and Section 71[52] respectively. Each of these provisions ensures the prevailing nature of respective legislation in case of inconsistency. As discussed earlier, with the introduction of [53]Section 32A, the concerns for misappropriation of illegal funds

[49]Palash Taing and Mayank Kumar, 'Eligibility of Suspended Director To Submit A Resolution Plan: Revisiting Hari Babu Thota' (*Live Law.in*, 18 September 2024) <https://www.livelaw.in/articles/eligibility-suspended-director-submit-resolution-plan-revisiting-hari-babu-thota-269958? > accessed 11 January 2025.
[50]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 29A.
[51]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 238.
[52]The Prevention of Money Laundering Act, 2002 (15 of 2003) s 71.
[53]ibid.

during CIRP looms as money laundering involves shell companies and complex layers to conceal illicit proceeds, often leaving victims remediless.[54] For instance, funds collected from the public could be siphoned off to another company to purchase properties, and victims would have claim only against the original company and not the properties acquired, thus enabling the legitimization of illicit gains through the insolvency process.[55] Therefore, questions have been raised concerning the supremacy of these provisions in such circumstances.

In the case of *Kiran Shah v. Directorate of Enforcement, Kolkata*[56], it has been observed that Section 32A (2) restricts, actions against a corporate debtor undergoing CIRP, and the claims related to the 'attachment of property' by the Government, with a condition precedent that the properties must have been considered and approved in the resolution plan by the adjudicating authority, but this immunity does not cover the properties of guarantors, who can still face actions against their properties. It has been pointed out by the Tribunal that Section 32A (2) can result in undermining the efforts of authorities to dispose of the assets acquired through criminal means as such assets will be legitimized after the completion of the CIRP. Hence, resulting in nullifying the objective of PMLA of penalizing and confiscating the property acquired through criminal means. However, the Tribunal further notes that both IBC and PMLA serve different purposes, and under PMLA the government confiscates proceeds of crime not as a creditor but in the sovereign capacity to enforce the law. The IBC does not grant an all-encompassing power to the NCLT to decide on the matters of facts and law connected with PMLA. Considering this, it

[54]Soayib Qureshi and Parag Rai, 'Section 32A: Unanswered Legal Issues' (*PSL Advocates & Solicitors*, 16 April 2024) <https://www.pslchambers.com/article/section-32a-unanswered-legal-issues/> accessed 11 January 2025.
[55]ibid.
[56]*Kiran Shah v Directorate of Enforcement Kolkata* (2022) SCC OnLine NCLAT 2.

was ruled that PMLA and IBC should be read as serving their respective purpose and not as repugnant to each other.

Recently, the Delhi High Court in *Bhushan Power & Steel Limited*[57] case, quashed criminal proceedings under the PMLA against BPSL in light of Section 32A,[58] and it was held that since BPSL had undergone successful resolution under the IBC, it could not be prosecuted for offences committed prior to the commencement of the CIRP. It was emphasized that Section 32A (1) grants immunity to corporate debtor post-resolution while allowing prosecution of its erstwhile promoters and officers responsible for pre-CIRP offences under Section 32A (2). The Court has clarified that role of BPSL under it former management could still be examined during the trial of its erstwhile promoters and directors.

Further, if the property of the corporate debtor is attached under PMLA and the CIRP process is initiated then the properties can be utilised to fulfil the objects of IBC, till the sale of liquidation assets takes place.[59] This view has been upheld in the Manoj Kumar[60] case as well. However, in such a scenario, the questions concerning siphoning off illegal funds through the creation of shell companies and special purpose acquisition companies in the name of corporate debtors remain unanswered.

[57]*Bhushan Power & Steel Limited v Union of India* W.P. (CRL) 1261/2024.
[58]Sanjana Dadmi 'Delhi High Court Quashes PMLA Proceedings Against BPSL In ₹47,000 Crore Bank Fraud Case Due To Successful CIRP' (*Live Law.in*, 6 February 2025) <https://www.livelaw.in/high-court/delhi-high-court/pmla-proceedings-bpsl-bank-fraud-corporate-debtor-ibc-insolvency-proceedings-283209> accessed 15 February 2025.
[59]*Directorate of Enforcement (ED) v Liquidator of M/s. GS Oils Limited* I.A. (IBC) No. 33 of 2023.
[60]*Directorate of Enforcement v Manoj Kumar Agarwal* Company Appeal (AT) (Insolvency) No. 575/2019.

D. Section 32A and SEBI's power of attachment of properties

The immunity under Section 32A (2) against the attachment of property of the corporate debtor stands in the way of the power of SEBI to attach the properties under Section 28A[61] of the SEBI Act, 1992. Under Section 28A of the SEBI Act, the Recovery Officer has the power to recover amounts in cases a person fails to comply with an order of SEBI to pay a penalty, refund monies, or disgorgement order under Section 11B[62] of the Act. This power to recover amounts allows SEBI to do so by attachment or sale of the person's properties. However, in cases of default by the corporate debtor, this power cannot be exercised by SEBI if the CIRP process has been initiated, and the resolution plan is approved. Further, Section 24[63] of the Act makes it an offence if any person contravenes the provisions of the Act or fails to comply with the orders issued by the SEBI board, in the shadow of Section 32A of the IBC this provision is also rendered toothless if there is a failure to comply with the orders of SEBI or contravention of the provisions of the Act by the corporate debtor or directions issued with respect to the properties of the corporate debtor after approval of resolution plan. One of the key motivations for bringing the SEBI Act into force was to regulate the malpractices in the securities market, reading the two legislations in contrast with each other will render the provision of the Act useless.

Further, the statutory dues can be recovered as an operational creditor,[64] and with regards to the penalties imposed by SEBI, NCLAT in the case of *Maharashtra Seamless Ltd. V. Shri Padmanabhan*

[61]The Securities and Exchange Board of India Act, 1992 (15 of 1992) s 28A.
[62]ibid s 11B.
[63]ibid s 24.
[64]*Pr. Director-General of Income Tax (Admn. & TPS) v Synergies Dooray Automotive Ltd.* Company Appeal (AT) (Insolvency) No. 205 of 2017.

Venkatesh[65], has clarified that the penalties imposed by statutory authorities, as under Section 11B of the Act, can be claimed as an operational debt, however, these are not recoverable during CIRP. Moreover, Section 32A is unclear about whether the bar on proceedings against the properties of corporate debtors is concerning civil or criminal proceedings. If it is in respect of both, then the Recovery Officer will not be able to recover the penalty even after the moratorium period.[66] Hence, in the light of Section 238 of the IBC, through precedents, it has been held that in cases of conflict between Section 14 of the IBC and Section 28A of the Act, the latter will be given preference.[67] Both Section 32A and 14 of the IBC were brought in to increase the effectiveness of the resolution process, and therefore in cases of conflict, the judiciary has been more inclined to give precedence to these IBC provisions over Section 28A of the Act.

E. IBC and the Companies Act

The nature of Section 32A when read with Section 238 of IBC makes it a non-obstante clause as it provides the Code with preferential implementation over other legislations, the intention for the same being cleared by the legislator.[68] A statute is termed non- obstante when it has been given the power to override or supersede any other conflicting

[65]Maharashtra Seamless Ltd. vs. Shri Padmanabhan Venkatesh & Ors Company Appeal (AT) (Insolvency) No. 220 of 2019.
[66]High Level Committee under the Chairmanship of Justice (Retd.) Anil R. Dave, 'Report on the Measures for Strengthening the Enforcement Mechanism of the Board and Incidental Issues' (2020) 424 <https://ourgovdotin.wordpress.com/wp-content/uploads/2020/06/report-of-high-level-committee-under-the-chairmanship-of-justice-retd.-anil-r.-dave-on-the-measures-for-strengthening-the-enforcement-mechanism-of-the-board-and-incidental-issues.pdf> accessed 28 July 2024.
[67]*M/s. Anju Agarwal RP for Shree Bhawani Paper Mills Ltd. v Bombay Stock Exchange & Ors.* (2019) SCC OnLine NCLAT 789.
[68]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 238.

provision of another statute.[69]The issue arises, however, when two more statutes have non-obstante clauses. The implementation of such a non-obstante clause has seen a dramatic rise in statutes enacted in recent times.[70]

However, non-obstante clauses pertaining to Section 32A are not the only point of contention between IBC and other legislations. Certain procedural irregularities are also present between the Code and other legislations. One of the examples of the same is the lack of clarity and scope with Section 271 of the Companies Act.[71] The provision talks about the circumstances under which a company might wind up by the order of the tribunal. Sub-section (a) of the provision talks about the process of a company winding up after the passing of a special resolution mandating the NCLT to wind up the company. At the same time Section 59 of the Code talks about the process of voluntary liquidation.[72] At the surface the issue might look simple as the former should be chosen by the company when it needs the procedure to be guided by the NCLT while, the latter is to be utilized when the company has selected voluntary liquidation and wants minimal tribunal intervention.[73] However, the cracks start to appear fairly quickly between this harmonious construction of the two laws. Firstly, the Code under Section 59 imposes certain conditions as to the eligibility criteria of a company when applying for voluntary liquidation under the Code

[69]Collins English Dictionary, 'Non-obstante' (*Collins Dictionary*, 2024) <https://www.collinsdictionary.com/dictionary/english/non-obstante> accessed on 25 July 2024.
[70]Tarun Jain, 'Circumscribing Non-Obstante Clauses: Tracing the New Jurisprudence' (*SCC Online Blog*, 16 June 2023) <https://www.scconline.com/blog/post/2023/06/16/circumscribing-non-obstante-clauses-tracing-the-new-jurisprudence/> accessed on 27 July 2024.
[71]The Companies Act, 2013 (18 of 2013) s 271.
[72]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 59.
[73]Anirudh Gotety, 'Winding-up under Section 271(a) of the Companies Act and its Impact on the Insolvency and Bankruptcy Code' (*India Corp Law*, 18 Aug 2017) <https://indiacorplaw.in/2017/08/winding-companies-act-impact-insolvency-bankruptcy-code.html> accessed on 27 July 2024.

– the chief among them being the company should not have committed any default.[74] Apart from the mentioned condition, the board of the applicant company have also been given the power to make procedural rules as they deem fit.[75] In case the applicant has committed a default it has the route of Section 271 (a) of the Companies Act to price.[76] However, when the latter is to be utilised the company can do the same only through a special resolution this leaves a very critical issue unanswered which is pertaining to the fact that if the whole legal mind set behind implementing the Code in the year 2016 was to simplify and accelerate the insolvency procedure why is the procedure provided under Section 271 (a) still exist. The position of the law was somewhat clarified by the parliament after the introduction of the Company (Winding Up Rules)[77] While voluntary winding up and winding up on the ground of instability comes within the purview of the IBC, Section 271 talks about winding up by the tribunal.[78] The primary feature of the rules is to provide companies with an alternative which is the tribunal-guided insolvency procedure. However, to reduce the burden on the NCLT the rules talk about the 'summary procedure' with the Government of India (GOI)[79] The summary procedure has already been envisaged under Section 361 of the Companies Act.[80]

The story of such ambiguity however does not end here, another provision of the IBC which seems to be at odds with the Companies Act is Section 29A. The provision mandates that the former promoters and management of the Corporate Debtor are not allowed to submit

[74]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 59 (1).
[75]ibid s 59 (2).
[76]The Companies Act, 2013 (18 of 2013) s 271.
[77]The Companies (Winding Up) Rules 2020 (India).
[78]AZB Partners, 'Companies (Winding Up) Rules, 2020' (*AZB & Partners*, 30 March 2020) <https://www.azbpartners.com/bank/companies-winding-up-rules-2020/> accessed 27 July 2024.
[79]Ruchika Chitravanshi, 'Headless NCLT awaits reforms to speed up resolution of pending cases' *Business Standard* (New Delhi, 25 June 2021) 1.
[80]The Companies Act, 2013 (18 of 2013) s 361.

Resolution Plans. The provision prohibits any possible entry of the previous promoters again into the management of the corporate debtor. However, on the contrary Section 230 of the Companies Act allows for the same.[81] It allows the former management to propose a scheme of arrangement during liquidation under the Act.[82] The position of the law on the issue was finally clarified by the Hon'ble Supreme Court in the case of *Arun Kumar Jagatramka v. Jindal Steel & Power Ltd.*[83] The Apex Court stated that disqualification under Section 230 is also applicable to Section 29A of IBC. This means that when an entity is undergoing insolvency, a person ineligible to submit a resolution plan under IBC is also ineligible to submit a scheme for compromise and arrangement under the Companies Act.

The judgement was welcomed as a landmark ruling in clarifying and resolving the conflict between IBC and the Companies Act. However, it left some glaring gaps in resolving the conflict as it failed to distinguish between the various categories of promoters, and hence prevented promoters of small industries from continuing in the organization. This ultimately defeats the whole purpose of the insolvency law which is to revive and revitalize the organization.[84]

Ultimately, the purpose of IBC is to '*consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment*

[81]ibid s 230.
[82]ibid.
[83]*Arun Kumar Jagatramka v Jindal Steel & Power Ltd* (2021) 7 SCC 474.
[84]Pratik Datta, 'The proper purpose of insolvency law' (*Mint*, 6 May 2018) <https://www.livemint.com/Opinion/sSwYmQLzmnpT4MsHV1lFpM/The-proper-purpose-of-insolvency-law.html> accessed 28 July 2024.

of Government dues.'[85] Section 29A therefore acts as a hindrance for honest former promoters and directors seeking to take control of the company.

There is however one ray of hope present for the promoters introduced through the Insolvency and Bankruptcy Code (Second Amendment), 2018.[86] Section 12A of IBC provides a method for the previous promoters to regain control even after the passing of the insolvency application.[87] The only condition for the same is the fact that the application for withdrawing the insolvency proceeding from the Adjudicating Authority needs to be voted in favour by a minimum of 90% of the members of the Committee of Creditors.[88] Hence, the criteria for withdrawing the resolution plan is much higher than the criteria for approving the same which is only 66%.[89] Further, the insertion of Regulation 30A into the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person), 2018 elaborated on the process of withdrawal.[90] The same made it mandatory that the withdrawal needs to be done before the Expression of Interest under Regulation 36 of the Insolvency Regulations.[91] This means that after the commencement of the bidding procedure under the regulation, an application of withdrawal cannot be made to the Adjudicating Authority.

The introduction of provisions like Section 29A and Section 32A by the legislature aims to enhance the efficiency of insolvency proceedings and promote the overall health of the economy. Section

[85]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) Preamble.
[86]The Insolvency and Bankruptcy Code (Second Amendment) 2018.
[87]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 12A.
[88]ibid.
[89]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 59 (3) (b).
[90]Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations 2016, IBBI/2016-17, reg 30A.
[91]ibid reg 36A.

29A, which bars defaulting promoters from bidding for their own companies during insolvency proceedings, seeks to uphold accountability and deter opportunistic behaviour.[92] Similarly, Section 32A provides immunity to corporate debtors from prosecution for offences committed before the commencement of insolvency resolution, fostering confidence among prospective bidders.[93]

While these provisions serve critical objectives, their application may sometimes yield counter-productive outcomes. The blanket approach of Section 29A, for instance, risks excluding promoters with genuine intentions or those whose defaults were caused by external factors beyond their control. Similarly, while Section 32A is designed to encourage resolution, its scope might inadvertently allow certain forms of misconduct to go unpunished.

To address these concerns, the legislature needs to draw a clear distinction between malfeasance and honest business failure. A nuanced approach that evaluates the intent, circumstances, and actions of stakeholders in each case could strike a balance between accountability and encouraging genuine participation in insolvency resolution.[94] Ultimately, such refinements would help achieve the dual objectives of ensuring justice and fostering economic revival.

V. SUGGESTIONS

While it is necessary to understand the introduction of Section 32A in the IBC as it aids the resolution process and makes it more lucrative for applicants, it would not be entirely wrong to admit that it still has some loose ends. These shortcomings have been recognised by legal scholars and authorities, and attempts have been made to tie these ends. The

[92]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 29A.
[93]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 32A.
[94]Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee, Volume 1: Rationale and Design* (November 2015) 22.

Supreme Court in the case of *Manish Kumar v Union of India*[95] held that there are enough safeguards provided in Section 32A that do not allow the wrongdoer to get away with the liability. Further, the immunity under this section is contingent upon fulfilling the conditions laid out in the section. SEBI released a report[96] in 2020 in which it recommended amending Section 32A to ensure that creditors cannot approve a resolution plan that uses illegally siphoned public funds to resolve the company and pay themselves.[97] It emphasized that the board or enforcement authorities could act in a guardian role to recover the misappropriated funds, as done in Australian courts.[98] Further, the securities regulator recommends the insertion of a new sub-clause or proviso to clarify that Section 32A will not affect the disgorgement or refund actions under securities law to ensure SEBI could give effect to its deterrent provisions.[99] These agencies can leverage provisions under the IBC, such as Sections 43 and 45, to reverse preferential or undervalued transactions and recover misappropriated funds. In cases involving cross-border misappropriation, international treaties like the Mutual Legal Assistance Treaty (MLAT) can facilitate asset recovery.

Now, with regard to the siphoning off illegal funds by way of SPACs or SPVs, the application of the *doctrine of substantial consolidation* in such cases under Section 32A may prove beneficial. This doctrine, followed in the US and UK, allows for the merging of assets and liabilities of inter-connected entities into a single pool for a common

[95] *Manish Kumar v Union of India* (2021) 5 SCC 1.
[96] Securities and Exchange Board of India, 'Report of the High-Level Committee under the Chairmanship of Justice (Retd.) Anil R. Dave on the Measures for Strengthening the Enforcement Mechanism of the Board and Incidental Issues' (SEBI, June 2020) <https://www.sebi.gov.in/reports-and-statistics/reports/jun-2020/report-of-high-level-committee-under-the-chairmanship-of-justice-retd-anil-r-dave-on-the-measures-for-strengthening-the-enforcement-mechanism-of-the-board-and-incidental-issues_46863.html> accessed 28 July 2024.
[97] ibid 407.
[98] ibid.
[99] ibid 424.

CIRP.[100] In the case of *SBI v. Videocon Industries Ltd.*[101], the NCLT consolidated 13 out of a total of 15 Videocon Group Companies and recognised the complex interdependencies and how it would be futile to initiate separate CIRPs. This doctrine ensures that resolution applicants cannot easily separate illegal funds from the purchased assets.

Apart from the enforcement agencies of other legislations, the victims of financial crimes, who do not fall under the definition of operational creditors, also look forward to a legislative recognition of their problem ensuring they have a remedy against the properties acquired through illegal means.[102] This would require an impact assessment involving consultations with stakeholders, including the enforcement agencies. Moreover, if we take a bird's-eye view of Section 32A, it turns out that the Section comes into play once the resolution plan is approved and the conditions set out in the section are met, so the trigger point of Section 32A lies at the approval of the resolution plan. If anything can be done to uphold the sanctity of the Section and harmonious enforcement with other legislations that would be to keep the resolution plan in check, maybe the origin of funds used for acquiring assets could be traced, and on a case-to-case basis involve the concerned authorities, such as ED, Recovery Officer, etc., to work in cooperation in the approval of resolution plan. This would avoid the multiplicity of

[100]Ritisha Gupta, 'SBI V. Videocon Case: Doctrine of Substantial Consolidation' (*SCC Online Blog*, 9 January 2021) <https://www.scconline.com/blog/post/2021/01/09/sbi-v-videocon-case-doctrine-of-substantial-consolidation/> accessed 23 July 2024.

[101]*SBI v Videocon Industries Ltd.* 2018 SCC OnLine NCLT 13182.

[102]Soyaib Qureshi, 'Section 32A: Unanswered Legal Issues' (*PSL Chambers*, 2024) <https://www.pslchambers.com/article/section-32a-unanswered-legal-issues/> accessed 28 July 2024.

proceedings and require more procedural changes than legislative amendments.[103]

VI. CONCLUSION

Among the various provisions of IBC, Section 32A stands out as a pivotal provision, designed to encourage resolution applicants by providing them with a degree of protection against past liabilities of corporate debtors. So far, it has turned out to be an unavoidable yet controversial provision, as critics have argued that absolving corporate debtors of past criminal liabilities could undermine the interest of creditors and other stakeholders, leading to a situation where misappropriated assets can be shielded from recovery efforts. At the same time, the provision has created a conducive environment for the revival of financially distressed companies by incentivising the resolution applicants by removing the fear of being held accountable for the previous management's actions.

While the introduction of Section 32A was necessary, it requires further clarifications to fully achieve its intended purpose. Amendments and judicial pronouncements will be key to ensuring its alignment with other legislations. Striking a balance between facilitating smooth resolutions and protecting stakeholder interests is crucial for enhancing the efficiency of India's insolvency regime.

[103]Dormaan Jamshid Dalal, 'Commencement of Civil Trials and Amendment of Pleadings' (*SCC Times*, 6 June 2022) IBC laws 'Interpretation of Section 32A in landmark judgment, Manish Kumar v. Union of India and Anr (2024) <https://ibclaw.in/interpretation-of-section-32a-of-ibc-in-landmark-judgment-manish-kumar-v-union-of-india-and-anr/#:~:text=Sub%2DSection%20(2)%20of%20Section%2032A%20declares%20a%20bar%20against%20taking%20any%20action%20against%20property%20of%20the%20corporate%20debtor> accessed 10 January 2025.

To enhance the impact of Section 32A, clearer guidelines on liability protection and mechanisms to prevent misuse must be explored. Targeted amendments and consistent judicial interpretation can address ambiguities while safeguarding creditor's rights. Additionally, fostering collaboration between policymakers, judicial bodies, and industry stakeholders can catalyse meaningful reforms.

As the Indian insolvency landscape continues to evolve, some crucial questions still await a response from the judicial authorities; ongoing dialogue and collaboration among stakeholders will be crucial in shaping a legal framework for an efficient, harmonious, and inclusive insolvency process. The lessons learned from the implementation of Section 32A of the IBC surely demand a more informed approach and further developments in this area.

THE CORPORATE WORLD AND ITS COMPLIANCES FROM AN ENTREPRENEURIAL PERSPECTIVE

Arzoo Kedia[*] *and Hemendra Vaishnav*[**]

ABSTRACT

This article explores the intricate relationship between the corporate world and entrepreneurship, analysing how corporate regulations can act as catalysts and constraints for business development, using examples from the USA, the UK, and India. The paper delves into key aspects of corporate governance, including funding initiatives, the role of independent directors, auditor responsibilities, and consumer protection measures. It highlights that while stringent regulations aim to ensure ethical business practices, they can sometimes hinder entrepreneurial innovation and growth. Conversely, well-designed corporate laws can foster a conducive environment for startups and established businesses alike. The article emphasizes the need for a balanced approach in corporate

[*]Arzoo Kedia is a second-year B.A. LL.B. (Hons.) student at Hidayatullah National Law University, Raipur. The author may be reached at arzoo.232891@hnlu.ac.in.
[**]Hemendra Vaishnav is a second-year B.A. LLB. (Hons.) student at Hidayatullah National Law University, Raipur. The author may be reached at hemendra232912@hnlu.ac.in.

governance that promotes transparency and accountability without stifling business creativity. It also explores recent developments in corporate social responsibility (CSR) and their impact on entrepreneurship. The study argues that while CSR obligations can be challenging for startups, they present opportunities for building credibility and attracting socially conscious investors. Furthermore, it discusses how funding initiatives can support entrepreneurial ventures and the significant role independent directors and auditors play in maintaining corporate integrity. The manuscript concludes by proposing ways to improve corporate governance frameworks. These include developing tailored regulatory approaches, enhancing clarity on directors' liabilities, promoting flexible corporate structures, and streamlining compliance procedures. The authors stress the importance of striking a balance between regulatory oversight and entrepreneurial freedom to foster a thriving business ecosystem. Ultimately, the paper calls for a nuanced and adaptable approach to corporate governance that can support both innovation and ethical business conduct, ensuring long-term sustainability and growth in the entrepreneurial landscape.

***Keywords**: Corporate Governance, Entrepreneurship, Regulatory Framework, Business Development, Corporate Social*

Responsibility, Consumer Protection, Compliance, Business Ethics.

I. INTRODUCTION

In recent years, there has been a significant focus on the impact of corporate governance on the business's environment and entrepreneurial activity due to the remarkable expansion of businesses. "Corporate governance deals with laws, procedures, practices and implicit rules that determine a company's ability to make informed managerial decisions vis-à-vis its claimants – in particular, its shareholders, creditors, customers, the State, and employees".[1] This article aims to elucidate the intricate relationship between Corporate Governance standards and their interaction with the entrepreneurial sphere. Effective corporate governance involves accountability, transparent policy formulation, and taking into account the views of business owners and entrepreneurs, who are directly impacted by the formulation of corporate laws.[2] These factors are crucial for fostering economic growth and nurturing business innovation. The first section of our article addresses this requirement. We commence by analysing how India's corporate laws address the fundamental legal requirements for corporations, given their critical importance to entrepreneurs. Subsequently, we explore whether these corporate laws act as a deterrent or a catalyst for the growth of emerging firms by conducting a jurisdictional analysis of common law countries. Corporate legislation is not uniform throughout the world, they are endogenous to

[1]Smita Jain, 'Corporate Governance- National and International Scenario' (icsi.edu) <https://www.icsi.edu/media/webmodules/programmes/33nc/33souvearticle-smitajain.pdf > accessed 1 January 2024.

[2]James Chen, 'Corporate Governance: Definition, Principles, Models, and Examples' *(Investopedia*, 24 September 2024) <https://www.investopedia.com/terms/c/cforporategovernance.asp> accessed 1 January 2024.

different regions and countries, as it is inherently shaped by the unique characteristics and dynamics of each country.

Our findings indicate that corporate laws must be designed to accommodate the specific needs of their jurisdictions, as the impact varies across different nations. Additionally, the evolution of corporate laws over time, as exemplified by the United Kingdom (UK), underscores the necessity for these laws to remain adaptable to contemporary changes. In recent years, significant developments have occurred in the realm of corporate governance, particularly in India. These developments have not only influenced business practices but have also impacted the moral and ethical dimension within which businesses and entrepreneurs operate.

Our next section explores the approach of state actors towards corporate's adherence to these standards. Through the help of some notable cases, we observe that the approach of government and judiciary in recent years against non-compliance of companies to legal standards has been rather strict. This has helped in improving accountability and protecting shareholder interest; however, enforcement and public awareness still remain a challenge.

In the subsequent analysis, we delve into recent developments within the entrepreneurship landscape, exploring the dynamic interplay between corporate norms and state actors. A prevailing conclusion drawn from these observations is the necessity for a balanced approach that harmonizes regulatory oversight with entrepreneurial autonomy. The following section elucidates the ethical shortcomings within the corporate world, examines governmental responses to these issues, and outlines the existing regulatory framework designed to address such challenges. Entrepreneurs and corporate organizations have a social responsibility and obligations towards society, including upholding corporate social responsibility and safeguarding consumers from unfair

trade practices. In response to the failure of corporate organizations and entrepreneurs to meet the ethical standards of businesses, the government has introduced various regulatory frameworks to ensure their compliance with corporate laws and regulations. In India, "the Security Exchange Board of India[3] (SEBI) and the "Ministry of Corporate Affairs" (MCA) play a crucial role in the governance of corporate organizations and also ensure that the rights of consumers are protected. The protection of consumers is one of the crucial elements in the thriving economy. Corporate laws and regulations not only serve as deterrents for business organizations and entrepreneurs but also facilitate their growth and expansion.

The ultimate question this article tries to answer is "How does Corporate Law influence entrepreneurial growth and innovation?" The common conclusion we derive is that corporate laws can either act as a catalyst or a constraint for entrepreneurial growth depending on their design and implementation. Effective corporate laws can foster a conducive environment for entrepreneurs by providing necessary protections and frameworks, while overly stringent or poorly designed laws can hinder entrepreneurial activities. The impact of corporate laws is thus highly dependent on the specific legal and regulatory context of each jurisdiction. This article will further explore this narrative by examining recent developments and relevant case laws.

II. SYNERGIES BETWEEN CORPORATE LAWS AND ENTREPRENEURIAL DYNAMICS

Corporate laws and entrepreneurial dynamics are deeply interconnected, creating confluences that can significantly impact economic growth and innovation. Primarily, there are five basic legal characteristics provided by scholars that must be fulfilled by the

[3]The Security and Exchange Board of India Act, 1992 (15 of 1992).

corporate law of a country. These traits include having a distinct legal identity, protection from personal liability, the ability to buy and sell shares, management overseen by a board, and ownership by investors.[4] For instances, Section 34 of the Companies Act of 1956 fulfils the characteristics of legal personality by granting the companies the status of an artificial person with perpetual existence who can sue and get sued.[5] However, the personal liability of the directors extend beyond the Companies Act, encompassing statutes like the Negotiable Instruments Act, 1881[6] and Income Tax Act, 1961.[7] Directors can protect themselves from personal liability by incorporating an indemnification clause in the company agreement, expressing and making sure their dissent is heard in company meetings against any threat, and staying informed about the appropriate provisions.

Additionally, it facilitates investor ownership. Itis a form in which ownership rights are granted for capital contributions in the firm. Nonetheless, corporate law's default regulations are typically created with investor ownership in mind, so breaking from this pattern can be uncomfortable.

Furthermore, Corporate regulation of businesses broadly falls into four broad categories: bureaucratic regulation, taxes, employee relations, and international trade. Businesses are directly affected by the taxation policies of the government. Raising the corporate taxes, which primarily affects the target profit of the businesses, could potentially elevate the operating cost of the businesses and also the cost of living. A value-added tax (VAT) is an indirect tax that is applied incrementally at each stage of production and distribution of goods and services. It is usually borne by the end consumer, but collected at different stages by

[4]Henry Hansmann, Reinier Kraakman, 'What is Corporate Law' in The Anatomy of Corporate Law: A Comparative and Functional Approach (OUP 2004).
[5]The Companies Act, 1956, s 34.
[6]The Negotiable Instruments Act, 1881 (26 of 1881) s 141.
[7]The Income Tax Act, 1961 (43 of 1961) s 179.

businesses, making it a significant policy for many enterprises.[8] VAT policy, in most of the countries, affects the business's profits, it tends to primarily impact growing businesses and entrepreneurs, often impeding their progress and growth. Recently India's tax department has demanded around one hundred fifty million dollars from dream11 (a fantasy gaming platform) for tax evasion between 2017 and 2019. The tax dispute revolves around determining the appropriate taxation levels for gaming platforms such as dream11. Dream11 argues that it should pay tax only on the fees it charges from its customers, while government authorities were insisting on a 28 % tax on the total revenue generated from players.[9] However, in a recent development poised to significantly benefit entrepreneurs, the sunset date (specific expiration date for a law, rule or tax benefit) for the reduced tax rate of 15% for manufacturing companies according to section 115BAB of the Income Tax Act, 1961 was extended to 31st March 2024. This section was inserted in the act through the Taxation Law (Amendment) Ordinance, 2019 to encourage manufacturing start-ups. The concessional corporate tax rate of 15% is available to manufacturing companies established on or after October 1, 2019, that begin production by March 31, 2024.[10] The development of entrepreneurs is significantly impacted by the legal environment in which they operate. Compliance with corporate governance norms highly influences the entrepreneur's dynamics, impacting both the establishment of the new

[8]Lea D. Uradu, 'What is Value-Added Tax (VAT)' (*Investopedia*, 12 June 2024) <https://www.investopedia.com/terms/v/valueaddedtax.asp> accessed 20 January 2025.

[9]Varun Krishan, 'Why Dream11 Filed a Suit Challenging India's Tax Demands?' (*The Hindu*, 12 October 2023) <https://www.thehindu.com/sci-tech/technology/why-dream11-filed-a-suit-challenging-indias-tax-demands-explained/article67410721.ece> accessed 27 July 2024.

[10]Naveen Aggarwal, 'Budget 2024: How extending concessional corporate tax rate can boost India's manufacturing ecosystem' (*Economic Times*, 28 January 2024) <https://m.economictimes.com/news/economy/policy/budget-2024-how-extending-concessional-corporate-tax-rate-can-boost-for-indias-manufacturing-ecosystem/articleshow/107204113.cms> accessed 6 August 2024.

business venture and the operation of the existing business enterprises in multiple ways, some of the legislations were designed to foster the growth of entrepreneurs, while other regulations were made for their regulation or for regulatory oversight.

III. THE IMPACT OF CORPORATE LAWS ON ENTREPRENEURIAL GROWTH A CATALYST OR CONSTRAINT: A JURISDICTIONAL ANALYSIS OF COMMON LAW COUNTRIES

Corporate laws comprise rules and regulations that govern the relationships and interactions among businesses, individuals, and government entities.[11] It has significantly shaped the entrepreneurial dynamics; it is crucial for the well-functioning of the economy with their impact varying widely across the jurisdiction. It is usually endogenous to a region and tends to evolve alongside its culture and economy. This characteristic has traditionally posed challenges in identifying its impacts. Different countries have diverse corporate laws and policies, which have varying impacts on entrepreneurs in unique ways:

In the United States of America (USA), the American Bar Association has created a prototype legal act (i.e., a model) that is a model Business Corporation Act (MCBA) 1950[12]. Model acts are the consolidation of the best practices of corporate law that legislative bodies such as cities or states, can replicate or modify as a foundation when formulating their own legal frameworks. In the United States, they are widely used and considered as noteworthy guidance for state and municipal

[11]Llyod Law College, 'What is Corporate Law – A Complete Guide' (*Lloyd Law College,* 30 December 2023) < https://www.lloydlawcollege.edu.in/blog/what-is-corporate-law.html> accessed 20 January 2025.
[12]The Model Business Corporation Act, 1950.

legislative improvements. It has been observed over the years implementation of the MCBA Act has a direct and positive impact on the level of local corporations across U.S. states. On average 26% of the local corporation have increased. Approximately 40% of the increase was observed from the replacement of other corporate structures, while the remaining were net new firms.[13]

In the UK, thirty years ago, a committee chaired by Sir Adrian Cadbury, focusing on financial aspects of corporate governance, developed the Cadbury Code of Best Practice in 1992, commonly known as the Cadbury Code.[14] The Cadbury Code has been instrumental in influencing the present UK corporate governance framework. It not only laid the groundwork for UK corporate governance but also established the precedent for the adoption of similar codes in nearly 100 countries worldwide. The code follows a 'comply-or-explain' principle, requiring listed companies to either follow its guidelines or explain any deviations. The code has grown substantially over the years. Thereby, companies required to adhere to the code experience a heightened obligation to disclose information. Also, expenses companies bear because of the code now far exceed any benefits it offers. In recent years, the code has adequately addressed issues concerning non-shareholder corporate stakeholders, which are crucial and can have significant societal implications. Additionally, the institutional drawbacks of the code add weight to arguments favouring its abolition. As Cally Jordan has said:

"The voluntary code provides a tempting alternative to grappling with and resolving the more contentious issues of corporate governance ….

[13]Lisa M. Fairfax, 'The Model Business Corporation Act at Sixty: Shareholders and Their Influence' (2011) 74 (1) *Law and Contemporary Problems*. < https://scholarship.law.duke.edu/lcp/vol74/iss1/3> *accessed 27 July 2024.*
[14]The Cadbury Code of 1992.

The aspirational nature of the Code on long-debated issues … continues to thwart resolution and momentum. There is smoke but little fire".[15]

The code's tendency to encourage policymakers to delay making difficult governance decisions adds weight to arguments supporting its abolition.

In India, pre-1991 government policies were inward-looking and aimed at achieving self-sufficiency. During this period, entrepreneurial activities were restrained, and there was a lack of capital. Additionally, society was very reluctant to take risks, and individuals primarily sought employment stability. In 1991, the government brought Liberalization , Privatisation , and Globalisation (LPG) policies to liberalize the Indian economy, as a result, the competitive environment underwent a transformation.[16] Following liberalization, there was a substantial rise in business prospects. Many entrepreneurs capitalized on these opportunities, moving from being small-scale contractors to becoming notable real estate developers, and from acting soely as distributors to establishing themselves as manufacturers. Today, as a result of the LPG policy, businesses can obtain venture and growth capital, contingent upon the viability of their business models. Essentially, employing robust corporate governance practices alongside transparent ownership structures and professional decision-making can lead to advantages for all involved parties.[17] This will enable entrepreneurs to establish larger enterprises.

Corporate laws impact entrepreneurial growth differently across jurisdictions. In the USA, the MCBA has fostered local corporate

[15]B Cheffins and B Reddy, 'Thirty years and done - time to abolish the UK Corporate Governance Code' (2022) 22 (2) JCLS < https://doi.org/10.1080/14735970.2022.2140496> accessed 27 July 2024.
[16]Dr. Anuj Garg, 'LPG Policy and Growth of Indian Economy' (2020) 8 (4) IJCRT < https://www.ijcrt.org/papers/IJCRT2004624.pdf> accessed 27 July 2024.
[17]*James Chen* (n 2).

growth, acting as a catalyst. In contrast, the UK's Cadbury Code, despite its influence, imposes constraints due to its compliance costs and voluntary nature. In India, the LPG policies have greatly enhanced entrepreneurial activities, demonstrating how corporate law reforms can stimulate growth. Therefore, corporate laws can either facilitate or hinder entrepreneurship, depending on their specific design and implementation in various regions. Also, it is essential for entrepreneurs to comply with the laws and regulations of their country without attempting to circumvent them, because the laws and regulations acting as a catalyst will help in the growth of the businesses, and in this government plays a proactive role in ensuring that businesses adhere to these norms.

IV. ENTREPRENEURIAL ADHERENCE TO CORPORATE LEGAL STANDARDS

The government now plays a more active role in ensuring the welfare of the populace rather than operating as a laissez-faire state. Legislators are now primarily concerned with the use and abuse of corporate power due to this altered position. The states changed from being "catalysts of economic growth" to becoming "guardians of corporate governance and integrity". The most significant query is still whether state authority was adequate to restrain companies' ravenous appetites and entrepreneurial nature. These strict actions taken by the government and judiciary can be said to have a positive response on corporations adhering to legal standards.

A. Corporate Legal Standards and Regulatory Response

The regulatory responses against corporate crimes can be said to have been very positive in the last few years. The apex court said in "Sahara Case" "economic offences in India… have to be treated with an iron

hand…"[18] The introduction of various reforms after the Nirav Modi scam, enhancement of monitoring and governance of non-banking financial companies (NBFCs) after the IL&FS Financial Scandal, and imposition of Rs 11 crore fine by SEBI on RPIL are few examples of the positive steps being taken to impose strong corporate criminal liability in India.[19] Although these actions can be considered a deterrent for entrepreneurial firms contemplating corporate legal crimes, they still receive relatively less attention from the media compared to more 'common' crimes. Corporate crime is a serious problem and causes substantial harm to society at large, yet company directors and corporations have often escaped being convicted.

Moreover, In June 2023, SEBI brought some critical changes by amending Listing Obligation and Disclosure Requirement (LODR) regulation with the aim of bringing more transparency to disclosure by listed entities. These changes ensure more consistent, clear, and timely information, enabling investors and stakeholders to make informed decisions promptly. Additionally, mandating extra disclosures, including those related to agreements binding listed entities, provides a comprehensive view of the company's obligations and commitments, further improving the transparency and understanding of its operations and financial health.[20] SEBI has overhauled the disclosure framework by (i) implementing a quantitative threshold to determine the significance of an event or information, which was the key departure from the previous method that relied on subjective evaluation for events listed in Part B of Schedule III; (ii) shortening the timeline for

[18]*Sahara India Real Estate Corp. Ltd. & Ors v Securities & Exchange Board of India* (2012) 10 SCC 603.

[19]Prateek Jain, 'Regulatory Actions against Corporate Irregularities in India: Analyzing the Stock Market Impact' (2022) 10 (1) Cogent Eco & Fin 2122187 <https://doi.org/10.1080/23322039.2022.2122187> accessed 27 July 2024.

[20] Anand Jayachandarn and Supriya Aukulu, 'SEBI Amendments to the LODR- An Overview of Key Challenges' (*CAM,* 4 July 2023) <https://corporate.cyrilamarchandblogs.com/2023/07/sebi-amendments-to-the-lodr-an-overview-of-key-changes/> accessed 27 July 2024.

making disclosures; and (iii) requiring extra disclosures, including those related to agreements binding listed entities.

B. Labour Law Compliance

Some of the most basic legal requirements for corporations are labour law regulations, Intellectual Property Rights (IPR), competition law, Tax law, and data privacy and cyber security laws. When it comes to violations of labour regulations in India, there are not only options for remedies or compensation; there are also punitive penalties. It stipulates that if an employer violates any of the labour regulations in India, they may face a jail term or fines. In reality, labour rules in India are dispersed throughout several laws rather than being contained in a single statute. In every piece of legislation, such as the Prevention of sexual harassment (POSH) Act, of 2013[21] and the Maternity Benefit Act, of 1961[22] Employers are required to adhere to government regulations. These laws stipulate that employers must meet certain obligations, such as ensuring minimum wage standards,[23] offering insurance coverage,[24] providing maternity benefits,[25] complying with POSH regulations,[26] following overtime payment guidelines,[27] ensuring equal pay for equal work,[28] and fulfilling other related responsibilities.

C. Applicability Intellectual Property Protection and IT Compliance

[21]The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (14 of 2013).
[22]The Maternity Benefit Act, 1961 (53 of 1961).
[23]The Minimum Wages Act, 1948 (11 of 1948).
[24]Employee's State Insurance Act, 1948 (34 of 1948).
[25]*Maternity Benefit Act* (n 22).
[26]*Sexual Harassment Act* (n 21).
[27]The Factories Act, 1948 (63 of 1948).
[28]The Equal Remuneration Act, 1976 (25 of 1976).

Beyond adhering to labour laws and other statutory obligations, an organization should also focus on safeguarding their Intellectual Property Rights (IPR). It plays a critical role in safeguarding a company's innovation and maintaining its competitive edge. IPR laws protect assets like patents, designs, trade secrets, trademarks, copyrights, and so on, which are vital for entrepreneurial firms.[29] Ensuring adherence to IPR laws not only prevents unauthorized use but also aligns organizations with legal and ethical standards. By incorporating IPR protection into their broader compliance framework, businesses can foster innovation and establish trust with stakeholders, furthering the objective of corporate governance. In parallel, the rapid evolution of digital technology has made IT laws and data privacy regulations crucial for compliance.[30] As startups emerge across diverse sectors, adhering to these legal frameworks becomes vital for sustainable growth and ethical governance.

Despite the endeavours made in strengthening corporate governance and legal adherence, a critical gap remains in ensuring ethical compliance across numerous sectors. While complying with the bare minimum of legal requirements, many enterprises often continue to fall short of broader ethical standards, prioritizing profit over principles. These have led to numerous instances where corporations, through negligence or deliberate misconduct, have caused harm to stakeholders, damaged public trust, and undermined the broader societal good.[31] This underscores the need for a discussion on regulatory responses to corporate failures becomes imperative, as such failure highlights the

[29]Onileowo Temitope Teniola, Muharam Farrah Merlinda, 'Evaluation of Intellectual Property Rights (IPR) Significance in Promoting Innovation and Entrepreneurship' (2024) IJRPR 5.
[30]The Information Technology Act, 2000 (21 of 2000).
[31]Princewill Bayo, Ebikebena Emotongha, 'Ethical Compliance and Corporate Reputation: A theoretical Review' [2021] 1 IJAAR 10.

critical importance of robust oversight and accountability mechanisms to address ethical lapses effectively.

V. REGULATORY RESPONSES TO CORPORATE FAILURES IN MEETING ETHICAL STANDARDS

The term Corporate Failure entails the collapse or downfall of a company due to its inability to meet ethical standards or legal requirements.[32] It often arises from unethical practices such as financial misreporting, fraud, negligence, compliance issues, and other actions that involve a violation of law and regulations. These failures can have severe consequences, including financial losses, damaged reputations, and loss of stakeholder trust. Over the last few years, there have been disappointingly high cases of corporations' failure to comply with legal standards like Anderson, Martha Stewart, Putnam, Xerox, Swiss Air, etc.[33]. Many of these companies exhibited notable corporate governance problems, including conflicts of interest, inexperienced directors, excessive compensation, and disparities in share voting rights. Additionally, other failures stemmed from deceptive accounting practices and unlawful operations. A large portion of this activity is attributed to the actions of the U.S. Sentencing Commission in 1991 which introduced the Guidelines for Organizational Defendants,[34] It recommends lesser sentences and fines for businesses that have implemented measures. Numerous American companies have integrated legal compliance mechanisms into formal documents to

[32]Rabel Cole, Sofia Johan and Denis Schweizer, 'Corporate Failures: Declines, Collapses, and Scandals' (2020) 67 JCFF <https://doi.org/10.1016/j.jcorpfin.2020.101872> accessed 27 July 2024.
[33]Surendra Arjoon, 'Corporate Governance: An Ethical Perspective' (2005) 61(4) Journal of Business Ethics < https://www.jstor.org/stable/25123630> accessed 27 July 2024.
[34]Federal Sentencing Guidelines for Organizational Defendants, 1991.

address ethics and conduct issues.[35] From an ethical perspective, the main concerns of corporate governance are fundamentally related to developing trust and relationships, both outside and within the corporation. Several recent developments that have made ethical standards a topic of discussion including improvements in technology, AI, globalization, and competition. On January 25, 2024, the Federal Trade Commission (FTC) filed a lawsuit to prevent Novant Health, Inc. from acquiring two hospitals in North Carolina from Community Health Systems, Inc. for three hundred twenty million dollars.[36] The FTC contended that this merger could result in increased healthcare costs for patients and diminish incentives for quality and innovation in care.[37] They argued that if the acquisition proceeded, Novant Health, one of the largest hospital systems in the southeastern U.S., would control nearly 65% of the market for inpatient general acute care services in the Eastern Lake Norman Area. This could potentially enable Novant Health to charge higher service rates. To stop this transaction, the FTC is seeking a temporary restraining order and a preliminary injunction. This development raises the question of the ethical standards that are being practiced in the medical sector of the USA. The Fourth Circuit Court of Appeal has rightly granted an emergency injunction to the Federal Trade Commission while preventing Novant Health from acquiring two hospitals in North Carolina from Community Health Systems.[38]

[35]Vallabh, G. and Dadhich, G. (2016) Corporate Governance and Ethical Compliance—Deriving Values from Indian Mythology. *Theoretical Economics Letters*, **6**, 1128-1144. doi: 10.4236/tel.2016.65108.
[36]Federal Trade Commission, 'FTC Sues to Block Novant Health's Acquisition of Two Hospitals from Community Health Systems' (25 January 2024) < https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-sues-block-novant-healths-acquisition-two-hospitals-community-health-systems> accessed 27 July 2024.
[37]ibid.
[38]ibid.

In India, two major institutions regulate corporations, (i) the Securities Exchange Board of India (SEBI), and (ii) the Ministry of Corporate Affairs (MCA). MCA primarily deals with the incorporation of the Companies Act, 2013, the Companies Act 1956 the Limited Liabilities Partnership Act 2008[39] & other corporate laws. The Companies Act, 2013 has introduced many provisions to ensure good corporate governance like Training and Evaluation of Directors, Admission of women and independent directors, compliance centres, etc. A few provisions are:

Section 134[40] Requires the Board of Directors to include a report with all the relevant facts, including the statement outlining each director's responsibilities, with every financial statement.

Section 177[41] Mandates the creation of an Audit Committee by the Board of Directors of each listed business and any other type of committee. It also specifies how the committee is to be put together.
Section 184[42] Mandates the Director to disclose their stake in any company, corporate body, firm, or other organization of individuals at the first meeting in which they participate. If the director's interest changes, it must be disclosed at the first board meeting following the change.

Whereas SEBI's primary function is to protect the investor's interest, most of the corporate governance matters fall under the jurisdiction of SEBI because they are listed companies. Regulatory actions of SEBI have a higher deterrence impact on companies as they reduce stock prices of the firm, as compared to that of MCA.[43] Charges of fraud or cheating, non-payment of dues, or aberrant returns have a more

[39]The Limited Liability Partnership Act, 2008 (6 of 2008).
[40]The Companies Act, 2013 (18 of 2013), s 134.
[41]*CA 2013* (n 40) s 177.
[42]*CA 2013* (n 40) s 184.
[43]*Prateek Jain* (n 19).

negative impact than allegations of failing to disclose information or other non-compliance-related abnormalities. As a result, the intensity of regulatory charges against a company strongly correlates with the degree of harm to its stock price. According to a multivariate regression analysis, the notification of regulatory actions appears to cause a greater (more negative) stock price reaction among younger and less profitable companies and was amended to introduce the option of e-voting of the Listing Agreement.[44] The amended clause 49 of the Listing Agreement by SEBI vide circular dated October 30th, 2004, prevents independent directors from being eligible to receive any type of stock options.[45] The updated provision includes a whistleblower policy that allows directors and employees to report instances of unethical behaviour, fraud, or violations of the company's code of conduct. The modification also strengthens the Audit Committee, which will now evaluate the risk management system, oversee internal financial controls, and monitor loans and investments between companies. The amendment requires each company to develop a policy, to be published online, for determining whether subsidiaries are considered "material". The goal of corporate governance, according to the SEBI committee, is to maximize shareholder wealth while simultaneously safeguarding the interests of other shareholders. There have been several critical developments in this area, which have significant impacts on entrepreneurs.

VI. RECENT DEVELOPMENTS IN THE CORPORATE WORLD WITH REGARD TO ENTREPRENEURSHIP

Due to global market shifts, power dynamics, economic growth, and climate concerns corporate landscape is undergoing a transformative

[44]ibid.
[45]SEBI 'Corporate Governance in listed Companies- Clause 49 of the Listing Agreement' (2004).

change in the India and world. Various developments are taking place in the corporate world specifically in India.

A. Funding initiatives

The state has recently undertaken various initiatives to support early-stage funding for startups. The draft of the National Deep Tech Start-up Policy (NDTSP) has received approval from the Empowered Technology Group (ETG), led by the Principal Scientific Advisor.[46] This policy is designed to promote early-stage technologies and their commercialization. Additionally, the Department for Promotion of Industry and Internal Trade (DPIIT) is working on a hundred-day action plan to facilitate funding and reduce the compliance burden on businesses[47]. Furthermore, efforts are being made to ease compliance requirements through the second edition of the Jan Vishwas (Amendment of Provisions) Bill, which passed last year and streamlined or eliminated over forty thousand compliances.[48] The second edition of this bill aims to further reduce the criminalization associated with many laws.

B. Independent director and corporate governance

The concept of independent directors plays a crucial role in maintaining corporate governance and stability. As per section 149 (6) of the Companies Act, 2013,[49] independent director means "any director other than a managing director or whole-time director or a nominee director". Its actual implementation frequently fails to meet expectations. The definition of the independent director, as per SEBI's

[46]National Deep Tech Start-up Policy (NDTSP) 2024.
[47]Kirtika Suneja, '100-Day action Plan: DPIIT to start-up funding & spur manufacturing push' *The Economic Times* (India, 17 June 2024).
[48]The Jan Vishwas (Amendment of Provisions) Bill, 2023.
[49]*CA 2013* (n 40) s 149 (6).

act of 1992 clause 49,[50] is "a non-executive director of the company who does not have any material transaction with the company other than the remuneration, is not related to promoters or managers at or one level below board level, has not been an executive director of the company in the preceding three years, is not a supplier, service provider, customer or a major shareholder of the company". This definition is perceived as insufficient in ensuring independence. Cases such as the *Enron scandal*, where even the dean of Stanford Business School overlooked the irregularities,[51] and the *Satyam fraud*, which exposed the significant weakness in governance, emphasize the pressing need for reform in this area.[52] Incidences of the *Nagarjuna finances* case, where the former independent directors of the company were arrested, raise concern for the statutory protection from arrest for independent directors.[53] Entrepreneurs often need to take risks to innovate and grow their businesses. However, unchecked risk-taking can lead to negative consequences for the company and its stakeholders. Independent director contributes to effective risk management by offering diverse ideas and challenging assumptions, thus helping entrepreneurs to make informed decisions while mitigating excessive risks.[54] To increase the effectiveness of independent directors, it is crucial to improve transparency in the selection process, minimize close connections between boards and independent directors, and actively address conflicts of interest.

[50]*SEBI Act 1992* (n 3).
[51]*In re Enron Corporation* Case No. 01-16034-AJG (Southern District of New York) Adversary Nos. 03-3522, 03-3721 (Bankr. S.D. Tex. Dec. 9, 2005).
[52]*Directorate of Enforcement v M/S Satyam Computer Services Limited*, W.P. No. 37487 of 2012.
[53]Samanaya Raut ray, 'Supreme Court upholds jail term for director of Nagarjuna Finance' *The Economic Times* (India, 10 November 2014).
[54]Junmeng Chang, 'The Role of Independent Directors in Ensuring Good Corporate Governance' [2023] 12 Frontiers in Business, Economics and Management 1.

C. Position of Statutory Auditors in Companies

The increasing responsibilities of statutory auditors under the Companies Act, 2013, have brought their role and independence into focus, particularly in the wake of financial irregularities. Statutory auditors are appointed by shareholders under Section 139 of the Act and are tasked with providing an unbiased assessment of a company's financial condition.[55] This independence is critical for ensuring the integrity of financial reporting and maintaining trust among stakeholders.

Statutory provisions under the Companies Act, 2013, further strengthen the independence of auditors by specifying their responsibilities and avoiding potential conflicts of interest. Section 143 requires auditors to follow Indian Accounting Standards (Ind AS) and auditing standards prescribed by the Institute of Chartered Accountants of India (ICAI).[56] Such standards ensure that audits are conducted objectively, without any influence from company management. Moreover, Section 143(12) requires auditors to report fraud directly to the Central Government, further underscoring their accountability to regulatory authorities rather than company executives. The omission of Section 314 from the Companies Act, 2013, clarifies the role of statutory auditors. Earlier provisions regarding the "office of profit" no longer apply, aligning with the principle that auditors operate independently of the company. In cases like Jaya Bachchan v. Union of India[57] and Kanta Kathuria v. Manak Chand Surana,[58] the Supreme Court made it clear that positions of profit involve substantial control or authority. According to this standard, statutory auditors are excluded from this classification since

[55] *CA 2013* (n 40) s 139.
[56] *CA 2013* (n 40) s 143.
[57] *Jaya Bachan v Union of India,* (2006) AIR SCW 2601.
[58] *Kanta Kathura v Manak Chand Surana,* (1970) AIR 694.

their authority is derived not from the company but from shareholders and regulatory frameworks. Amendments such as CARO 2020 have increased the statutory responsibilities of auditors, which include certifications on governance, related-party transactions, and fraud detection.[59] These additional responsibilities increase transparency and accountability but also increase the risks associated with the audit profession. Regulatory safeguards, such as restrictions on non-audit services and mandatory auditor rotation, ensure that auditors remain impartial and free from undue influence.

Whereas statutory auditors have the legislative framework supporting their independence, there is still a long way to go. Increased scrutiny and expanded duties have increased the risks for the auditors with potential penalties under Section 132(4) for professional misconduct. However, emphasizing independence through the strong regulations would ensure that the statutory auditors play a pivotal role in enforcing corporate governance and transparency in financial reports.

In conclusion, the statutory framework under the Companies Act, 2013 supports the independence of auditors as it clearly delimits their duties, enforces compliance with rigorous standards, and reduces conflicts of interest. It ensures that the auditors do not lose impartiality and ensure that stakeholders retain their trust in financial reporting.

D. Supreme Court on the jurisdiction of NCLAT & NCLT

In the case of Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel Ltd.[60], an appeal was filed under section 62 of the Insolvency and Bankruptcy Code (IBC) of 2016[61] against the decision of the National Company Law Appellate Tribunal (NCLAT) dated

[59]Companies (Auditor's Report) Order, 2020.
[60]*Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel Ltd,* AIR 2021 SC 4118.
[61]The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 62.

January 4th, 2021. In the present context, the resolution plan had been duly approved by the necessary majority of the committee of creditors under the provisions of section 30 (4) of the IBC[62] which was challenged by the monitoring committee of Reliance's Infratel Ltd.

In this case, the Supreme Court held that the adjudicating authority National Company Law Tribunal (NCLT), and the appellate authority NCLAT are not empowered to interfere in the business decisions made by the requisite majority of the committee of creditors (COC). Under the Indian insolvency regime, it seems that legislators made a conscious choice not to confer any equity-based jurisdiction on the adjudicating authority other than the statutory mandate outlined in section 30(2) of the IBC[63] "Neither the adjudicating authority nor the appellate authority has an uncharted jurisdiction in equity". The decision by the Supreme Court highlighted the importance of allowing businesses, particularly those undergoing insolvency proceedings, to have autonomy in making crucial decisions related to their restructuring or resolution plans, this autonomy is essential for entrepreneurs as it enables them to devise and execute strategies that they believe are in the best interest of their business' survival and long-term viability.[64]

VII. CORPORATE LEGAL PERSPECTIVES ON CONSUMER PROTECTION

Consumer protection refers to laws and regulations designed to ensure the rights of consumers, fair trade, competition, and accurate information in the marketplace. It aims to prevent businesses from

[62] *The Insolvency and Bankruptcy Code* (n 61) s 30 (4).
[63] *The Insolvency and Bankruptcy Code* (n 61) s 30 (2).
[64] *Pratap Technocrats (P) Ltd. & Ors. v Monitoring Committee of Reliance Infratel Ltd..,* AIR 2021 SC 484.

engaging in fraud or unfair practices that could harm consumers. Consumer protection is one of the crucial elements in any thriving economy. It ensures that individuals are safeguarded against unfair business practices and deceptive activities, thereby ensuring their rights and well-being are protected. In the year 1986, the government passed the Consumer Protection Act of 1986,[65] which was intended to protect customers against various kinds of malpractices and exploitations. It provides easy and fast resolution of consumer grievances. It also empowers consumers to speak against deficiencies and flaws in goods and services. The act was restructured in 2019 and numerous new rights were introduced under the Consumer Protection Amendment Act, 2019.[66] Business enterprises need to follow various relevant laws and regulations to ensure consumer protection and meet their social obligations. This includes following the product safety standards, giving precise information to consumers, and honouring contractual obligations. Beyond legal obligations, businesses also have moral obligations towards consumers and society. One of the most important moral obligations that business enterprises have to follow is corporate social responsibility (CSR).

CSR is a type of moral obligation that creates an obligation on the business enterprise to operate in a manner that contributes positively to society and the environment, in addition to their financial goals. It represents a type of self-regulation that can be demonstrated through various initiatives or strategies aligned with organizational objectives. Business entities commonly adhere to the principle of the "triple bottom line", which underscores the importance of businesses measuring their social and environmental impact, and sustainability endeavours, alongside financial profits. The phrase "profit, people, planet" often referred to as "three p's" succinctly encapsulates the guiding principle of this concept. In India, the scope of CSR is dealt

[65]The Consumer Protection Act, 1986 (68 of 1986).
[66]Consumer Protection Amendment Act, 2019.

with under section 135 of the Companies Act 2013 read with Schedule VII[67], and Companies (Corporate Social Responsibility Policy) Rules 2014[68] are the special provisions under the new company law.

According to the Companies Act 2013, every company has:

- Net profit of Rs Five crores or more or
- Net worth of Rs Five hundred crores or more or
- Turnover of Rs One Thousand crores or more

The figure pertaining to net worth, turnover, and net profit, the determination of corporate social responsibility expenditure shall rely on the company's financial statements from the preceding financial year. [69]Additionally, the company's board must allocate at least two percent of the average net profits from the past three financial years according to the CSR policy. The company should give preference to the local and neighbouring areas where it conducts its operations.
Both the principles of 'consumer protection' and 'corporate social responsibility' prioritize the well-being and contentment of consumers. CSR motivates business enterprises to act beyond mere legal obligation and actively engage in activities that enhance consumer well-being. These include offering safe and top-notch products, ensuring transparent and precise information, maintaining fair pricing, and delivering attentive consumer service. Through prioritizing consumer protection, businesses showcase their commitment to ethical conduct and foster trust among their customers, thereby increasing their reputation and ensuring long-term viability. Various companies have integrated CSR and consumer protection into their business strategies. e.g. Patagonia, a gear company and outdoor clothing brand, they are highly committed to environmental sustainability and fair labour standards. They ensure that their products are crafted from sustainable

[67]*CA 2013* (n 40) s 135.
[68]Corporate Social Responsibility Rules, 2014.
[69]*CA 2013* (n 40) s 135.

resources and advocate for recycling and repair programs to reduce waste.[70]

In FY23, companies listed on the National Stock Exchange's (NSE) main board allocated Rs fifteen thousand five hundred twenty-four crore to CSR activities, marking a 5 % increase from the Rs fourteen thousand eight hundred sixteen crore spent in the previous year. This rise, however, lagged behind the 13 per cent growth in average net profit over the past three years. The Companies Act, of 2013, requires firms to dedicate 2 % of their three-year average net profit to CSR each year. Due to this slower growth, CSR spending as a percentage of net profit dropped to a six-year low of 1.87 % in FY23, compared to 2.02 % and 2.13 % in the preceding two fiscal years, according to Mint. The analysis included companies required to spend on CSR based on their profits. In FY23, one thousand two hundred ninety-six companies were analysed, with one thousand two hundred seventy-one of them spending some amount on CSR, an increase from One thousand one hundred ninety-one in FY22. CSR spending saw the most significant rise in environmental sustainability, increasing by 76 %, followed by education at 41 %, and rural development at 26 %. In contrast, spending on disaster management plummeted by 77 %, slum development by 75 %, and contributions to the PM's relief fund by 59 %. Additionally, spending on hunger, poverty, and healthcare declined from Rs Eight hundred seventy-six crore in FY22 to Rs Eight Hundred Four crore in FY23.[71]

There are regulatory authorities in place to ensure the compliance of CSR in India. However, despite these measures, some companies have found ways to spend less than required or misrepresent their activities.

[70]Fabian Vermum, 'What makes Patagonia A World Leaders in Sustainability' (*Sport and Sustainability*, 29 April 2021) <https://www.sportsustainability.org/news-events/patagonia> accessed 27 July 2024.
[71]Abhijeet Kumar, 'Less corporate responsibility? India Inc's CSR spending slowed down in FY23' *Business Standard* (New Delhi, 17 May 2024).

Still, there are prospects for CSR in India in the future. The possibility of cooperation between businesses, civil society groups, and the government is one opportunity. This can be realised through Public Private Partnership projects, community development programs, research grants, etc. [72]Further, cooperation can improve the impact of CSR initiatives by sharing knowledge and leveraging resources. The potential for CSR to spur innovation and competitiveness presents another chance. Businesses that are dedicated to CSR can stand out from the competition and draw in clients and investors who respect social and environmental responsibilities.

Entrepreneurs have many chances to improve human potential, membership, employment, relationships, and self-worth, among other things. Nonetheless, managers' or owners' desires and voluntary activity are the main drivers of compliance. It may be argued that generating profit—which comes from investing and creating value for stakeholders is the primary factor that determines whether these acts are fulfilled. Startup owners often prioritize building a strong clientele, attracting new business, and finding funding sources over implementing a CSR strategy. However, as social concerns grow, companies must develop a CSR strategy to gain credibility with the public and investors. Startups that care about social issues are setting aside money for social causes in their budgets, understanding that this action is essential for growing business operations and building a positive client perception of their brand.

CSR in entrepreneurship originated with shareholders as the only interest group. State taxes initially discouraged reckless behaviour, but later companies reflected that their goals should include all involved.

[72]Daniel Arenas, Pablo Sanchez and Matthew Murphy, 'Different Paths to Collaboration Between Businesses and Civil Society and the Role of Third Parties' (2013) 115 JBE 4 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319370> accessed 27 July 2024.

Entrepreneurs' ethical reflections on environmental sustainability led to discussions on CSR and the creation of social value, emphasizing the need for organizational techniques. Hence, it may be claimed that the evolution of CSR has gone from a dedication to economic activity to moral standards, laws, and actions, and then, through contemplation, to a crucial commitment to future generations. Keeping up with CSR commitments is not always easy. Finding the correct initiatives that fit the company's mission and fundamental values is one of the biggest problems. To make sure they are significantly advancing social welfare, businesses must carry out due diligence and evaluate the results of their CSR initiatives. Measuring and reporting the impact of CSR initiatives is another difficulty that calls for a strong monitoring and assessment system. Businesses must also guarantee that the communities they support will benefit from their CSR efforts in the long run.

VIII. ANALYSIS

This article outlines all the important features of the corporate governance system which acts as either a boon or a bane for the entrepreneurs in the growth of their businesses. Compliance with corporate legislation in certain countries facilitates the growth and development of entrepreneurs, while in contrast it also serves as a deterrent to their progress. The implementation of the MCB Act in the USA increased on an average of 26 % of the local corporations and acted as a catalyst for the entrepreneurs[73]. Whereas in India, liberalization reforms empowered innovative entrepreneurs to establish companies without the fear of being trampled by external competition. Following liberalization, there was a substantial rise in business prospects in India. When we analyse the impact of the Cadbury Code of 1992 on the UK corporate landscape then we find that initially, its

[73] *LM. Fairfax* (n 13).

compliance furthers the growth of entrepreneurs in the UK when it was implemented. However, due to shift in corporate environment, in recent years, the code has inadequately addressed issues concerning non-shareholder corporate constituencies, commonly known as stakeholders. The code's aspirational approach to long-standing issues has hindered progress and momentum toward resolution as it requires an explanation from the listed companies for non-compliance, this is an unnecessary monitoring practice in today's landscape when companies demand greater autonomy. Also, when we observe the recent developments of corporate governance in India, then we find the ruling of the Supreme Court on the jurisdiction of NCLAT & NCLT, where it held that the adjudicating authority NCLT & NCLAT are not empowered to interfere in the business decisions made by the requisite majority of the COC.[74] The decisions of the Supreme Court highlight the importance of giving autonomy to entrepreneurs in making crucial decisions related to their restructuring or resolution plans. This autonomy empowers the entrepreneurs to implement strategies that serve the best interests of the businesses.

There's a systematic legal framework in place to ensure internal compliance with corporate governance among companies and entrepreneurs. When we take into consideration Section 177 of the Companies Act, 2013[75] read with Rule 6 of Companies (Meetings of Board and its power) Rules, 2014, it mandates the creation of an Audit Committee. The current state of the economy necessitates the formation of this committee. When it comes to inconsistent internal audits, recently established firms encounter several difficulties, including a lack of expertise, resource constraints, evolving processes, and limited regulatory awareness. Section 177 of the Companies Act,

[74]*Pratap Technocrats (P) Ltd. v. Monitoring Committee of Reliance Infratel Ltd.* (2021) SCC OnLine SC 569.
[75]*CA 2013* (n 40) s 177.

2013,[76] and related rules mandate forming Audit committees that address these issues by providing structured guidelines, encouraging expert oversight, and fostering a culture of accountability. This legal framework ensures compliance while empowering firms to establish strong governance foundations, promoting sustainable growth and stability in a competitive economic environment.[77] As per the Companies Act, 2013, the audit committee of a business has the authority to provide the auditors with their viewpoints about the firm's internal control system. Since the audit committee consists of two company members, including the secretary, there is a possibility that this power may be used to misappropriate or skew financial records in the business's favour. They effectively have the authority to weed out any information they do not like before it reaches the investors since they review all of the financial documents of a firm before submitting them to the board. A report is given by the audit committee's board in which, the audit committee makes a few suggestions. The esteemed board members must state in the provided report why they are recommending the rejection of the audit committee suggestion if that is the case. Thus, while challenges and risks do exist, the establishment of an audit committee is a useful measure for guaranteeing corporate governance inside an organization as it establishes a very formal system of checks and balances. Its structured oversight, accountability mechanisms, and compliance promotion outweigh the potential risks, making it indispensable for fostering trust and integrity within organizations.

There are limitations placed on directors to ensure they don't abuse their position. Section 184 of the Companies Act of 2013[78] ensures this by mandating that they must disclose such interest or concern to the

[76]ibid.
[77]Jingwen Nie, 'When Internal Control meets Internal Audit: Conflict or Combine? (2017) 6 OJACCT 2 < https://doi.org/10.4236/ojacct.2017.62004> accessed 27 July 2024.
[78]*CA 2013* (n 40) s 184.

board during the meeting where the contract or arrangement is being discussed. In the 1981 case *Needle Industries (India) Ltd. v. Needle Industries Newey*[79], it was decided that a person cannot be considered an "interested director" just because of a friendship, personal attachment, or ideological concern. There appears to be a loophole, too, given that only director's investments are considered for determining the 2% share shakes in other companies. His family's investments are usually not considered. There are also restrictions in place for loans to directors and penalties charged for non-disclosure of interest. Thus, it can be said that there is a stringent framework in place to ensure that the director works in the best interest of the company.

Also, corporations have ethical responsibilities towards the society. In India, CSR is mandatory for only those companies that have reached a certain threshold of profit, net worth, or turnover. Entrepreneurial firms rarely fall under these classifications and therefore they have the opportunity to redirect the capital that they otherwise would have had to spend on CSR on profit maximization purposes, building a strong clientele, attracting new business, and finding funding sources. Although investing in CSR activities does help new businesses to gain investor and customer legitimacy, it can be said that these could be gradually done at a later stage of business once it has started to grow and the same could be afforded. The voluntariness of CSR helps startups to grow in a better way while spending their profit on the growth of the business. Additionally, the state has amended certain preexisting mandates to facilitate transparency and favourable taxes. The government has extended the 15% reduced tax rate for manufacturing companies under Section 115BAB of the Income Tax Act, 1961, to March 31, 2024.[80] This move, originating from the Taxation Law (Amendment) Ordinance, 2019, aims to support manufacturing start-ups established on or after October 1, 2019, that

[79]*Needle Industries (India) Ltd. v. Needle Industries Newey,* AIR (1981) SC 1298.
[80]*Income Tax Act* (n 7) s 115BAB.

begin production by the new deadline, significantly benefiting entrepreneurs with a favourable tax environment.[81] Additionally, in June 2023, SEBI amended the LODR regulations to improve transparency. The key changes include introducing quantitative thresholds to assess the significance of events or information, reducing the timeline for making disclosures, and mandating additional disclosures related to agreements binding listed entities. These amendments ensure consistent, clear, and timely information, aiding investors and stakeholders in making informed decisions and providing a comprehensive view of a company's obligations and financial health. Along with these legislations, the government of India has also introduced various schemes and programs to fulfill the capital needs of entrepreneurs better. Key initiatives include NDTSP, approved by ETG, which promotes early-stage technologies and their commercialization. Additionally, the DPIIT is implementing a one-hundred-day action plan to enhance funding opportunities and reduce business compliance burdens. The Jan Vishwas (Amendment of Provisions) Bill has streamlined or eliminated over Forty thousand compliances, and its second edition aims to further reduce the criminalization of many laws.[82] These efforts collectively aim to create a more supportive and less restrictive environment for entrepreneurs. Numerous other programs like these are taken up by government to improve the startup scheme of India and although their primary purpose is to increase domestic production and reduce exports, such government schemes subsequently lead to increased corporate governance among entrepreneurs as they now get support from the government and therefore have a moral obligation towards them.

After going through the above points, it can be concluded that although the government needs to have a rigid framework in place to ensure that companies do not deviate from their primary objectives, extreme

[81] The Taxation Law (Amendment) Ordinance, 2019.
[82] *JVB 2023* (n 57).

surveillance may result in unnecessary barriers in the working of corporations which may lead to unsatisfactory results. The same was seen in the case of the UK Cadbury Code which was bought by the UK government to govern entrepreneurs and corporations. Even after such rigid rules they often do not prove to be effective due to various loopholes which are overlooked during the framing of legislation.

IX. WAY FORWARD

A tailored regulatory framework needs to be developed to avoid the clash of entrepreneurs' interests and governments' intentions. This can be achieved by consulting with industry stakeholders to identify pain points and create adaptive regulations. This would help update corporate governance codes to better address stakeholders' concerns, ensuring that non-shareholder constituencies are adequately represented and their issues resolved promptly. Section 34 of the Companies Act gives a distinct identity to companies; however, the directors still remain at high risk of personal liability. Enhancing clarity and enforcement mechanisms regarding the corporate veil's limitations, providing comprehensive guidelines and training for corporate officers to understand and maintain the distinct legal identity of the corporation along with incorporating robust indemnification clauses in company agreements, ensuring directors express dissent in meetings when necessary and remain informed about relevant legal provisions to safeguard themselves as well as regular legal training and updates for directors can mitigate these risks.

Default corporate law regulations favour investor ownership, making it challenging for non-investors like employees to have ownership rights. Ensuring effective board governance can be difficult, given the mandated range of 3 to 15 directors under Section 149(1) of the Companies Act, 2013. Balancing investor interests with those of other stakeholders, such as employees and the community, can also be

complex. To address these issues, developing flexible corporate structures, including employee stock ownership plans (ESOPs) and cooperative ownership models, can be beneficial. Encouraging regulatory frameworks that support alternative ownership structures can enhance inclusivity. Promoting best practices for board governance, such as regular training, transparent selection processes, performance evaluations, and diversity in board composition, can improve board effectiveness. Implementing governance frameworks with stakeholder representation and promoting CSR initiatives can help balance interests. Additionally, adopting integrated reporting can provide a holistic view of a company's impact on all stakeholders.

High corporate taxes and VAT can elevate operating costs and impede growth, especially for startups and entrepreneurs. Advocating for tax reforms that lower the burden on emerging businesses, such as the extended reduced tax rate of 15% for manufacturing companies under Section 115BAB of the Income Tax Act, 1961, can be beneficial. Promoting simplified tax compliance procedures can also help ease the burden on small businesses. Additionally, compliance with diverse corporate governance norms can be burdensome, impacting both new and existing businesses. Streamlining regulatory processes and providing clear, accessible guidelines for compliance can alleviate these challenges. The Indian Parliament commendably undertook a major transformation of the labour law framework by consolidating 29 essential labour laws into four comprehensive Labor Codes in February 2021. However, these codes have not been implemented yet, missing the planned rollout in 2023/24. This delay stemmed from legal and political intricacies, but now that the general elections are over, the government must prioritize this initiative again.

Establishing support systems, such as legal advisory services, can assist businesses in navigating regulatory requirements more effectively. In the realm of corporate governance, the role of independent directors is critical but often falls short of expectations. The current definition and

implementation of independent directors, as outlined in the Companies Act, 2013, and SEBI regulations, sometimes fail to ensure true independence. High-profile failures like the Enron scandal and the Satyam fraud highlight the need for reform. To enhance effectiveness, there should be greater transparency in the selection process of independent directors, reduced close affiliations with boards, and better management of conflicts of interest.

To strengthen the independence of statutory auditors, the regulatory framework should focus on enhancing safeguards against undue influence and expanding support for auditors to manage increased responsibilities. Introducing mechanisms like better-defined accountability frameworks, improved protection for whistleblowers, and balanced risk-reward structures can address the heightened scrutiny and risks faced by auditors. By aligning these measures with evolving corporate governance practices, statutory auditors can continue to uphold transparency, accountability, and trust in financial reporting without reputational risks.

Overall, addressing these challenges requires a multifaceted approach, including policy reforms, enhanced governance structures, and a commitment to ethical practices and transparency.

X. CONCLUSION

The influences of corporate governance on business organizations and entrepreneurs cannot be overstated, as evident from the profound impacts of various legislations across different countries. While laws are often viewed as potential obstacles for business entities, they also catalyse growth and development. Corporate law must strike a delicate balance, not too rigid to stifle innovation, yet not too flexible to compromise ethical standards. The ideal regulatory framework should

encourage compliance among business organizations and entrepreneurs, it will foster a conducive environment for the growth and development of businesses. By recognizing the nuanced needs of both business organizations and entrepreneurs, policymakers can pave the way for a harmonious relationship between regulatory requirements and entrepreneurial endeavours, promoting stability, integrity, and prosperity within the business landscape.

PIERCING THE MORATORIUM: INSOLVENCY SAFEGUARDS AND CARVE-OUTS FOR PMLA ENFORCEMENT

Sohum Sakhuja[*] and Aliza Khatoon[**]

ABSTRACT

The Indian insolvency regime facilitates a market-directed time-bound insolvency resolution process. The Prevention of Money Laundering Act, 2002 (hereinafter "PMLA") on the other hand endeavours to prevent money-laundering and connected activities. This article engages with the lacuna pertaining to the simultaneous application of IBC and PMLA Wherein the ongoing insolvency proceedings are afflicted by PMLA attachment orders over CD's property in light of the moratorium and clean slate under section 32A being enforced. The imposition of a moratorium[1] bars proceedings against the properties of a corporate debtor ("CD").[2] Alternatively, PMLA bestows power for

[*]Sohum Sakhuja is a third-year B.A. LL.B. (Hons.) student at Rajiv Gandhi National University of Law, Patiala. The author may be reached at sohumsakhuja15@gmail.com.
[**]Aliza Khatoon is a third-year B.A. LL.B. (Hons.) student at Rajiv Gandhi National University of Law, Patiala. The author may be reached at Aliza.khatoon.12@gmail.com
[1]The Insolvency and Bankruptcy Code, 2016 s 14.
[2]The Insolvency and Bankruptcy Code, 2016 s 32A.

attachment of property involved in money laundering.[3] The conflict transpires in cases where during the ongoing insolvency proceedings PMLA authorities issue summons and notices for attachment of CD's properties.[4] Such orders directly contradict IBC provisions that forbid action against CD's asset and consequently afflict the proceedings leading to prolonged litigation. The article proceeds by emphasizing that courts have defended the primacy of IBC over PMLA. Further, IBC's provision of a clean slate and moratorium has undermined the legislative intent of PMLA and created a potential escape route for offenders. Thereafter, the article puts forth a suggestive model to be adopted within the insolvency and money laundering framework to rectify the aforementioned discrepancies. These solutions uphold the objectives of PMLA and ensure that there is no blanket precedence of IBC resolution over PMLA driven attachment of assets. These solutions are conceptualized from a cross – jurisdictional analysis of the insolvency and money laundering frameworks of USA, Canada and UK. The suggested model includes an overall structuralist approach, inter – agency co-ordination, a common database of properties ordered to be attached and proposed amendments to the SCN Notice.

[3]The Prevention of Money Laundering Act, 2002 s 5.

[4]*Srei Multiple Assets Investment Trust - Vision India Fund v Enforcement Directorate and Ors* [2024] MANU/NC/2649/2024 (NCLT); *JSW Steel Ltd v Mahedra Kumar Khandelwal* [2020] 2020 SCCOnline NCLAT 431 (NCLAT).

Keywords: *Insolvency and Bankruptcy, Prevention of Money Laundering, Moratorium, Public Interest, Attachment of Assets.*

I. INTRODUCTION

A piquant scenario often emerges where two legislations with conflicting provisions apply simultaneously. The statutory authorities exercising their power under the competing statutes are often at loggerheads. This leads to the potential operational and jurisdictional challenges. The quandary is reflected at the intersection between the Insolvency and Bankruptcy Code 2016 (hereinafter, referred to as IBC) and the Prevention of Money Laundering, 2002 (hereinafter, referred to as PMLA). The article analyzes the concurrent application of both the statutes and highlights the judicial preference of IBC over PMLA. It seeks legislative interventions for harmoniously upholding their objectives and enforce a balanced framework. Before, delving into these conundrums in depth, it is imperative to discern the legislative scheme of the respective statutes and to undertake an exercise of reconciliation enabling the authorities to discharge their obligations.[5]

IBC is a beneficial legislation that puts the corporate debtor back on its feet, not being mere recovery legislation for creditors.[6] The enactment of IBC, is aimed at consolidating the laws relating to reorganization and insolvency of corporate persons in a time-bound manner for maximization of value of assets, promoting entrepreneurship and balancing interests of all stakeholders. On the other hand, PMLA as per

[5]*Binani Industries Limited v Bank of Baroda* (2018) SCC OnLine NCLAT 457 (NCLAT) p 17; Insolvency and Bankruptcy Board of India, *Handbook on IBC* (IBBI, 2020) 1 <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> accessed 10 September 2024

[6]*Glas Trust Co. LLC v Byju Raveendran* (2024) SCC OnLine SC 4064 (SC).

its objective clause,[7] has been enacted to prevent money laundering and provide for confiscation of property derived from, or involved in money laundering. As per the statute itself, it was enacted in furtherance of the Political Declaration adopted by the Special Session of the United Nations General Assembly held from 8th to 10th June, 1998.[8]

A central issue stems from the overlapping authority granted by these statutes, leading to conflicts in their enforcement. PMLA empowers the adjudicating authority through Section 5,[9] to order the attachment of assets of any individual, believed to be in possession of any proceeds of crime[10]. Further, owing to Section 71, the act itself has an overriding effect over any inconsistencies with any other law.[11] Standalone, the provisions of PMLA allow for proceedings to be straightforward in terms of attachment of property that is believed to be proceed of crime. Previously, concerns have arisen in cases where such property that is ordered to be attached, belongs to an insolvent corporate debtor, either about to or already undergoing Corporate Insolvency Resolution Process (CIRP).[12] The IBC entails certain exemptions for Corporate Debtors (hereinafter, referred to as CD) and their properties, once they initiate CIRP through Section 14 and 32A.

Ordinarily, IBC within Section 32A, grants a clean slate to any individual, liable for any offence committed prior to the initiation of the insolvency process.[13] Thus, from the time that the CIRP is initiated to the time the resolution plan is approved or the liquidation order is

[7]The Prevention of Money Laundering Act, 2002.
[8]United Nations General Assembly, 'RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY Political Declaration', UNGA S-20/2 (10 June 1998) A/RES/S-20/2.
[9]The Prevention of Money Laundering Act, 2002 s 5.
[10]*Biswanath Bhattacharya v Union of India* (2014) 4 SCC 392 (SC).
[11]The Insolvency and Bankruptcy Code, 2016 s 71.
[12]*Enforcement Directorate v Axis Bank* (2019) SCC OnLine Del 7854 (DHC).
[13]The Insolvency and Bankruptcy Code, 2016 s 32A.

passed, the CD cannot be prosecuted. Within the same provision, no action can be taken against any property, which is included in the resolution plan.[14] Such *action* includes attachment, seizure, or confiscation. Akin to Section 71, PMLA, IBC, through Section 238, allows for an overriding effect of the act in case of inconsistencies with other acts.[15] Accordingly, the conflict arises in cases where the Enforcement Directorate orders for attachment of assets of an individual who is also an insolvent CD, either undergoing or about to undergo CIRP.

Upon a close scrutiny of court and tribunal's verdicts, it is well observed that courts are inclined to uphold the primacy of IBC over PMLA. This standpoint, consequently, undermines PMLA's objective to prevent money-laundering and confiscation of proceeds of crime. PMLA protects the public interest by ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth as accomplished by the attachment of assets by ED[16]. However, IBC provisions bar the institution of proceedings during insolvency proceedings thus restraining the claims of PMLA authorities and jeopardizing public interest.

To resolve the aforesaid dispute, the article provides an analytical framework to harmonize the public interest substantiated by PMLA and the preservation of CD's assets under IBC. Solutions are devised in a two-fold approach. Firstly, proposal derived from the cross-jurisdictional analysis tailored as per Indian context. The chosen jurisdiction includes the United States of America ('USA'), Canada, and the United Kingdom ('UK') since each of them presents a distinct resemblance with the Indian insolvency regime.

[14] *Manish Kumar v Union of India* (2021) 5 SCC 1 (SC).
[15] The Insolvency and Bankruptcy Code, 2016 s 238.
[16] *R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Limited* (1977) 4 SCC 98.

The author proposes creation of inter-agency coordination mechanisms to resolve the simultaneous application conundrum between IBC and PMLA. It argues firstly, incorporating a structuralist approach for adjudicating the competing claims; secondly, the creation of a comprehensive database of properties undergoing corporate resolution or attachment by ED, which would ensure complete disclosure of all claims over certain properties, at the very first instance; lastly improving procedural efficiency and introducing a standardized format of Show Cause Notice (SCN) issued under section 8 PMLA.

The article proceeds in four parts. The first part underpins the conundrum of intersectionality between IBC and PMLA. It opines that courts have affirmed the primacy of IBC, compromising PMLA. Further court's appreciable attempts for harmonious construction are not synthesized in practical application. Next part establishes that the objective of PMLA is undermined by the reason for the prohibition of proceeding against CD under IBC. Concerns about the possibility of the moratorium turning into an escape route are raised. Following this, recommendations are provided to address the IBC-PMLA dilemma and this suggested model is conceptualized through a cross - jurisdictional analysis of the money laundering and insolvency regimes of UK, USA and Canada.

Part four, advances instituting an inter-agency coordination mechanism that includes a structuralist approach attempting to reconcile claims within competing statutes, creation of a database for properties undergoing a resolution process of attachment by ED for transparency and disclosure of information and standardization of SCN issued by AA under PMLA. Lastly, the paper is concluded with first, a reiteration of the moot question of consideration, issues with the current jurisprudence deciding the tussle between PMLA and IBC, and alternatives and solutions for the same.

II. TRANSPIRING DISCORD: AN IBC AND PMLA INTERSECTION

Exploring the intersectionality between IBC and PMLA, this section undertakes a twofold analysis unraveling conflicting standpoints of courts and tribunals considering the following issues. *Firstly*, primacy between the statutes, and *secondly*, implications of the moratorium imposed under section 14 of IBC and application of section 32A of IBC which incorporates the clean slate theory over the attachment of assets. Establishing upon the aforementioned examination, the author argues that the present legal landscape tilts towards the primacy of IBC over PMLA. Moreover, there prevails a status quo regarding constructive harmonization of both the statutes which requires a reconsideration.

The question of primacy between PMLA and IBC ensues as both the legislations contain a *"non-obstante"* clause. Non – Obstante clause is a legislative tool used to ensure that a specific provision takes precedence over any conflicting provisions, whether within the same law or in a different legislation to avoid the operation and effect of all contrary provisions.[17] Section 71 PMLA provides an overriding effect to the provisions of the PMLA, while Section 238 IBC gives overriding effect to the provisions of the IBC, thereby restricting the operation of one legislation over the other.[18] The Delhi High Court addresses the issue of primacy between PMLA and IBC in *Deputy Director Directorate of Enforcement Delhi v Axis Bank Ors*[19] The appeal concerns the state's sovereign authority to confiscate property acquired by a person through criminal activity as against the lawful claim of a

[17]*Union of India v G.M. Kokil* (1984) Supp SCC 196 (SC).
[18]Naman Mishra, 'Holier than Thou? A Tussle for Primacy Between IBC And PMLA' (*CBCL*, 20 May 2023) <https://cbcl.nliu.ac.in/insolvency-law/holier-than-thou-a-tussle-for-primacy-between-ibc-and-pmla/> accessed 29 March 2025.
[19]*Deputy Director Directorate of Enforcement Delhi v Axis Bank Ors* (2019) SCC OnLine Del 7854 (DHC)

third party. The appellate tribunal (under PMLA) upheld that PMLA provisions will take a back seat and third parties will lay a superior claim. The High Court challenged this reasoning and upheld that PMLA's purpose and context are distinct from RDBA, the SARFAESI Act, and the Insolvency Code.[20] These laws must co-exist, each being construed and enforced in harmony, without one being in derogation of the other.[21]

The concurrent application of PMLA and IBC presents a legislative challenge to reconcile PMLA asset attachment orders and IBC protective provisions. The conflict arises when CD undergoing insolvency proceedings is simultaneously investigated under the PMLA.[22] Section 5 of PMLA [23] empowers adjudicating authorities to order the attachment of assets of any individual that they. believed to have any proceeds of crime. Particularly whenthe actions of such an individual would undermine the confiscation proceedings Such PMLA attachment orders are met with the bar imposed under sections 14 and 32A of IBC that preserve the CD assets by prohibiting the institution or execution of proceedings against CD properties. Section 14 of the IBC effectuating moratorium states that on the date of commencement of insolvency, the Adjudicating Authority shall declare a moratorium for prohibiting the institution of suits.[24] Likewise, Section 32A bars proceedings against the CD from the date the resolution plan has been

[20]'Money Laundering Law Prevails Over Bankruptcy Act, Insolvency Code Rules Delhi High Court' (*Manupatra,* 2 April 2019) <https://updates.manupatra.com/roundup/contentsummary.aspx?iid=20954> accessed 28 March 2025.
[21]ibid.
[22]Shashwat Bhutani and Sristi Nimodia, 'PMLA vs IBC? Analysing the validity of property attachment during the moratorium' (*Taxmann*, 4 August 2023) <https://www.taxmann.com/research/ibc/top-story/10501000000023158/pmla-vs-ibc-analysing-the-validity-of-property-attachment-during-the-moratorium-experts-opinion> accessed 27 July 2024.
[23]The Prevention of Money Laundering Act, 2002 s 5.
[24]The Insolvency and Bankruptcy Code, 2016 s 14.

approved by the Adjudicating Authority.[25] This conjures a paradox for adjudicating PMLA attachment orders and bars against proceedings under IBC. Resolving the conflict divergent standpoints have emerged.

The view that the attachment of property is permissible by the PMLA authorities has been endorsed by NCLAT in *Kiran Shah v. Directorate of Enforcement, Kolkata*[26], and Delhi HC in *Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement*[27].

In *Kiran Shah v. Directorate of Enforcement, Kolkata,* the appellant seeks to quash the PMLA orders attaching properties. In the instant case, neither the resolution plan was approved by the tribunal nor the Liquidation Proceedings had ended in the sale of Liquidation Assets of CD. NCLAT opined that Section 14 IBC 'moratorium' is not a hindrance for the 'Authority' and the Officers under PMLA to deny a person of the tainted 'Proceeds of Crime'[28]. Furthermore, NCLT is not empowered to deal with matters falling under the purview of another authority under PMLA[29]. Likewise, in *Rajiv Chakraborty's case*, the petitioner challenged the attachment order passed by ED in the exercise of powers conferred by the PMLA. The court examines the impact of a moratorium under Section 14 IBC over the powers of ED to enforce an

[25]The Insolvency and Bankruptcy Code, 2016 s 32A.
[26]*Kiran Shah v Directorate of Enforcement, Kolkata* (2022) SCC OnLine NCLAT 2 (NCLAT).
[27]*Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement* [2022] 2022/DHC/004739, [2022] SCC OnLine Del 3703.
[28]'NCLAT: IBC-moratorium cannot prevent property attachment under PMLA; NCLT cannot exercise jurisdiction in money laundering matters' (*Agrud Partners,*) <https://agrudpartners.com/nclat-ibc-moratorium-cannot-prevent-property-attachment-under-pmla-nclt-cannot-exercise-jurisdiction-in-money-laundering-matters/#:~:text=NCLAT%20further%20observed%20that%20Sec.%2014%20of%20IBC%20dealt%20with%20the%20provision%20of%20the%20moratorium%20but%20it%20does%20not%20hinder%20the%20Authority%20and%20Officers%20under%20PMLA%20to%20deny%20a%20person%20of%20"Proceeds%20of%20Crime"> accessed 20 March 2025.
[29]*Kiran Shah v Directorate of Enforcement, Kolkata* (2022) SCC OnLine NCLAT 2 (NCLAT).

attachment under PMLA. The court recognizes that the power to attach under the PMLA would not fall within the ken of Section 14(1)(a) IBC subjected to section 32A restrictions.[30]

Contrastingly, the court took a distinctive standpoint from the aforementioned decisions in *Shiv Charan v Adjudicating Authority*. The question before the Bombay High Court in *Shiv Charan* was to determine whether NCLT had the jurisdiction to direct ED to release the attached properties, invoking Section 32A of IBC, since Section 32A mandates that attachments over properties of CD would cease once the CD resolution plan is approved.[31] The court observed that the NCLT validly exercised its jurisdiction to interpret Section 32A. It also upheld that CD would be discharged from the offences allegedly committed prior to CIRP. Further, the attached properties would become free of attachment from the time the resolution plan is approved, and it is protected under Section 32A. A similar rationale was echoed in the decisions of *Bank of India v. Deputy Director Enforcement Directorate*[32]*, Punjab National Bank v. Deputy Director Directorate of Enforcement, Raipur*[33] that upheld Adjudicating Authority should stay the attachment after the declaration of moratorium. The rationale that underpins the primacy of IBC over PMLA as observed by the Delhi High Court in *Nitin Jain Liquidator PSL Limited v. Directorate of Enforcement*, recognized that while reconciliation between the IBC and the PMLA insofar as the present petition is concerned, needs to be answered solely on the anvil of Section 32A[34].The underlying principle behind the import of section

[30]*Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement* [2022] 2022/DHC/004739, [2022] SCC OnLine Del 3703.
[31]*Shiv Charan v Adjudicating Authority* (2024) SCC OnLine Bom 701 (BHC).
[32]*Bank of India v Deputy Director Enforcement Directorate (*2019) *MP-PMLA-5595/AHD/2019.*
[33]*Punjab National Bank v Deputy Director Directorate of Enforcement, Raipur* FPA-PMLA-2633/RP/2018.
[34]*Nitin Jain Liquidator PSL Limited v Directorate of Enforcement* (2021 SCC) OnLine Del 5281 (DHC)

was to assure the resolution applicant that its offer once accepted would stand sequestered from action for enforcement of outstanding claims against the corporate debtor or from penalties connected with offenses committed prior thereto[35] Thus objectives sought to be achieved at the forefront is maximization of the value of the assets[36].

It has been well observed that the scales of balance between PMLA and IBC are titled in favour of IBC. Primarily for upholding the objective of IBC in terms of timely resolution and promotion of entrepreneurship, courts have squarely held that once the resolution plan is approved, there shall be a blanket exemption on properties of the CD from attachment[37] as well as a clean slate for the CD, in terms of prosecutions for offences committed prior to the resolution process being initiated.[38] Carrying the dicta forward, the courts have further held that even for cases where property is attached to PMLA, but it belongs to the CD, the same must be released.[39] This blanket exemption, while upholding the objectives of IBC, does not place due consideration to the objectives of PMLA, that are undermined in the process.

This standpoint furthermore diminishes the principle of harmonious construction that has been acknowledged by the courts to balance the objective of the statutes.[40] The Delhi High Court in *ED v Axis Bank* affirmed that PMLA and Insolvency Code must co-exist, construed, and enforced in harmony.[41] This notion was refined in *Nitin Jain*

[35]ibid.
[36]*Manish Kumar v Union of India* (2021) 5 SCC 1 (SC).
[37]*Enforcement Directorate v Axis Bank,* (2019) SCC OnLine Del 7854 (DHC).
[38]*Ghanashyam Mishra & Sons (P) Ltd. v Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657
[39]*Kiran Shah v Directorate of Enforcement, Kolkata* (2022) SCC OnLine NCLAT 2 (NCLAT).
[40]*Ashok Kumar Sarawagi v Enforcement of Directorate* (2022) SCC OnLine NCLAT 3453 (NCLAT).
[41]*Enforcement Directorate v Axis Bank* (2019) SCC OnLine Del 7854 (DHC).

Liquidator PSL Limited v Enforcement Directorate[42] where the court purported a purposive interpretation approach. Through discerning the legislative scheme, authorities discharge their obligations without encroaching upon facets reserved to be exclusively governed by one of the competing statutes. Consonantly, in *Rajiv Chakraborty,* it was reiterated that where two special legislations incorporate non-obstante clauses, it is imperative for the Court to discern the true intent and scope of the two legislations.[43]

While these are appreciated attempts to resolve the conundrum nonetheless, they suffer limitations from an enforcement perspective. The context and intent of both statutes are distinct and not subservient to one another. Excessive jurisdictional and operational overlap drives the authorities at loggerheads constraining the application of court's verdict. Furthermore, the absence of a statutory framework or judicial guideline impedes any stark demarcation. The implementation of purposive interpretation requires necessary coordination, interface, and awareness. This underpins the necessity for courts or policymakers to cull out specific non - exhaustive factors/parameters to be considered while adjudicating the interplay between PMLA and IBC for placing a verdict on merits.

III. CHALLENGES ARISING FROM PRIMACY OF IBC OVER PMLA

A. Undermining Legislative Intent Of PMLA

IBC and PMLA, as statutes created with specific legislative intents, operate affecting completely distinct realms of rights and

[42]*Nitin Jain Liquidator PSL Limited v Directorate of Enforcement* (2021) SCC OnLine Del 5281 (DHC).
[43]*Rajiv Chakraborty Resolution Professional of EIEL v Directorate of Enforcement* [2022] 2022/DHC/004739, [2022] SCC OnLine Del 3703.

stakeholders.[44] IBC works to effectuate resolution, impacting corporate debtors and creditors, and as a consequence ease of doing business and promotion of entrepreneurship.[45] PMLA in a contrasting realm, aims to prevent money laundering, not for any individual but for public welfare and society at large.[46] In the instance that these distinctly purposed acts intersect or clash, any interpretation or solution that favours one over the other statute would directly undermine the intent of one, while upholding the other. The two statutes, affecting the rights of varied sections and stakeholders, necessitate a harmonious understanding to balance the interests of all parties involved.

The current jurisprudence, while prioritising the rights of corporate debtors and their bona fide claims over property,[47] completely undermines the socially necessary objective of confiscation of proceeds of crime. While comparing apples and oranges, the courts have prioritised the broader goal of ensuring ease of doing business and promotion of entrepreneurship,[48] over public order, which is ensured by the prevention of money laundering.[49] The rationale of protecting the rights of all stakeholders affected by the resolution process as a priority, does not give due consideration or contemplation to the rights of the society at large, affected by money laundering. While courts themselves have acknowledged the broader need for harmonious construction of the two acts,[50] the application of a blanket exemption,

[44]The Insolvency and Bankruptcy Code, 2016 objective clause; The Prevention of Money Laundering Act 2002, objective cl.
[45]Insolvency and Bankruptcy Board of India, *Handbook on IBC* (IBBI, 2020) 11 <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> accessed 10 September 2024
[46]The Prevention of Money Laundering Act 2002, objective clause.
[47]*Enforcement Directorate v Axis Bank* (2019) SCC OnLine Del 7854 (DHC).
[48]*Ashok Kumar Sarawagi v Enforcement of Directorate* (2022) SCC OnLine NCLAT 3453 (NCLAT).
[49]*Directorate of Enforcement v Manoj Kumar Agarwal* (2021) SCC OnLine NCLAT 121 (NCLAT).
[50]*P. Mohanraj v Shah Bros. Ispat (P) Ltd* (2021) 6 SCC 258 (SC).

without due consideration of the myriads of rights affected by money laundering, reflects a completely contrary approach. While there is sufficient work towards protecting the interests of the individuals potentially foreseeably affected by the resolution process, the rights of innumerable faceless stakeholders within the society, affected by money laundering is not duly considered.[51]

A blanket exemption on the attachment of property and prosecution for offences committed prior to initiation of the resolution process does not provide PMLA with the weightage its globally recognised purpose of combating money laundering requires.[52] Further, the rights of parties can in no way be balanced, when the stakeholders belong to completely different sections of society with no intersection of comparison whatsoever. Accordingly, any solution to this conflict that blanketly prioritises one stakeholder's rights over another, does not even attempt to balance the interests of the parties.

B. Consideration of Public Interest

In addition to the prevention of money laundering, PMLA directly works towards curbing pertinent issues of national concern. The globally recognised concerns of narcotics distribution and terror financing are all effectuated with the aid of channels of laundering money.[53] All from the garb of shell companies to Hawala channels of narco-financing, comprise the robust frameworks that allow such cross-border crimes to sustain.[54] Cases involving money laundering

[51]Jyoti Trehan*, 'Crime and Money Laundering: The Indian Perspective'* (Oxford India 2004).
[52]United Nations General Assembly, 'RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY Political Declaration', UNGA S-20/2 (10 June 1998) A/RES/S-20/2.
[53]*Jyoti Trehan* (n 51)
[54]Ayjaz Wani and Sameer Patil, 'Narcoterrorism Challenge to India's National Security' <https://www.orfonline.org/research/the-narcoterrorism-challenge-to-india-s-national-security> accessed 10 December 2024.

and confiscation of proceeds of crime, often arise from larger systems of narcotics distribution and terror financing and PMLA entails attachment of proceeds of crime of such predicate offences as well.[55]

In contrast, the IBC aims to protect the rights of individual stakeholders affected by obstructions to the resolution process. The rights and interests of innocent corporate debtors and other stakeholders, albeit legally recognised and valid, do not justify their complete prioritisation over the security of the nation at large. Especially considering that the nation and world today, are plagued by the destruction caused by distribution and consumption of narcotics, as well as terror and Naxal financing among others.

While the individuals impacted by the lack of timely resolution appear before courts and seek remedies, this does not justify a complete lack of consideration for the larger public interest and security that is heavily impacted by the sustenance of networks of terror and narco financing. Further, a blanket exemption goes on to show a clear favour towards protecting commercial goals of promoting entrepreneurship, over protecting the interests of public security, hampered by the establishments sustaining channels of money laundering.

C. Insolvency Moratorium and Amnesty Route

The pertinent issue flagged by the imposition of the moratorium is the potential abuse of the law by providing an escape route to offenders through insolvency.[56] Moratorium under S.14 in concordance with

[55]Financial Action Task Force, Mutual Evaluation Report: Anti-Money Laundering and Counter-Terrorist Financing Measures – India (September 2024) <https://www.fatf-gafi.org/content/dam/fatf-gafi/mer/India-MER-2024.pdf> accessed 29 March 2025.

[56]Prachi Gupta, 'Supreme Court Widens Scope of Moratorium on Criminal Proceedings' (*IndiaCorpLaw,* 17 April 2021)

S.32 IBC renders a stay of proceedings against the corporator debtor. In the *Axis Bank case*[57], *the* court emphasized that through a moratorium enforced in terms of Section 14 of IBC, a person indulging in money laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason that such assets are not lawfully his to claim. Allowing this, would defeat the objective of PMLA by opening an escape route.

IV. GLOBAL INSIGHTS: COMPARATIVE ANALYSIS OF INSOLVENCY AND MONEY LAUNDERING REGIMES OF USA, CANADA AND UK

This section extrapolates alternatives to moratorium and clean slate protection under IBC. These alternatives are based on the cross-jurisdiction analysis of the United States of America, Canada and the United Kingdom. The choice of jurisdiction stems from multiple facets. The US Bankruptcy Code and IBC present a parallel structure, especially with respect to the moratorium.[58] On the other hand, Canada's provisions pertaining to Good Faith stipulate a means to preserve the bankruptcy code from becoming an escape route. Lastly, the United Kingdom prioritizes public security over the rights of corporate debtors and allows for judicial discretion in cases where the contrary is prevalent. The analysis highlights the standpoint of constructing reasonable exemptions to IBC protections balancing larger public interest vis-a-vis the objectives of insolvency tailored as per the Indian context.

<https://indiacorplaw.in/2021/04/supreme-court-widens-scope-of-moratorium-on-criminal-proceedings.html> accessed 11 July 2024.

[57] *Deputy Director Directorate of Enforcement Delhi v Axis Bank Ors* (2019) SCC OnLine Del 7854 (DHC).

[58] Jason D. Woodard, 'Racing to Resolution: A Preliminary Study of India's New Bankruptcy Code' (2020) 52 Geo Wash Int'l L Rev 393.

The reliance on these jurisdictions is grounded in multiple legal and historical considerations. Firstly, India shares a common law heritage with the United Kingdom, and its legal system has been significantly influenced by British jurisprudence. Many foundational principles of Indian corporate and financial law have their roots in English law, making the UK a relevant comparator.[59] Secondly, Indian legislators have historically drawn upon US and UK legal frameworks when drafting laws and adopting regulatory models in emerging areas of legal jurisprudence. This influence is evident in various aspects of Indian corporate and financial regulation, including insolvency and anti-money laundering laws. Thirdly, these jurisdictions provide nuanced approaches to balancing insolvency protections with the imperatives of anti-money laundering. Unlike India's blanket primacy of insolvency over money laundering, these jurisdictions employ a selective, case-specific approach where courts analyze the facts to determine whether economic security (protected by anti – money laundering laws) or creditor rights (safeguarded by insolvency mechanisms) should prevail in a given case. This flexible approach offers a more balanced framework, making these jurisdictions highly relevant for comparative analysis.

A. USA

The United States bankruptcy regime is governed by The *United States Code - Title 11 Bankruptcy*[60] . One of the salient features of the code is the automatic stay established under section 362.[61] On filing of a

[59]Umakanth Varottil, 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' (2015) National University of Singapore <https://law.nus.edu.sg/wp-content/uploads/2020/04/001_2015_Umakanth_Varottil.pdf> accessed 29 March 2025.
[60]United States Code Title 11 Bankruptcy, 1978.
[61]United States Code Title 11 Bankruptcy 1978, s 362.

bankruptcy petition, the automatic stay is triggered such that it prohibits any entity from commencing or continuing any proceeding against the debtor.[62] The stay gives the debtor a breathing spell from his creditors as it stops all collection efforts, harassment and foreclosure actions[63]

The code instead of barring all proceedings offers exceptions to automatic stay. Section 362(b)(4) recognises police or regulatory power exemption. It permits an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power[64]. Thereby, it strikes a critical balance between protecting the public interest, on the one hand, and promoting the needs of debtors and creditors in the bankruptcy process, on the other hand.

The determination of police or regulatory power exemption is based on satisfying the public interest test and pecuniary interest test. The public interest test requires the court to examine the purpose of the law that the state seeks to enforce. A proceeding that effectuates public policy is excepted from the stay.[65] The pecuniary interest determines whether the government's proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property and not to matters of public policy.[66] If the government is really protecting its

[62]David P. Strokes, 'The Extraterritorial Reach of Bankruptcy Code's Automatic Stay: Theory vs. Practice' (2007) 33(1) BJIL <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1225&context=bjil> accessed 11 July 2024.
[63]United States Code Title 11 Bankruptcy, 1978 s 362.
[64]United States Code Title 11 Bankruptcy, 1978 s 362 (b)(4).
[65]Linda Attreed, 'Police or Regulatory Power Exception to Automatic Stay' (2012) 4(3) JBRL<https://www.stjohns.edu/sites/default/files/uploads/bank-research2012-no-03.pdf> accessed 1 July 2024.
[66]Rafael Ignacio Pardo, 'Bankruptcy Court Jurisdiction and Agency Action: Resolving the Nextwave of Conflict' (2001) 76 NYULR <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-76-3-Pardo.pdf> accessed 3 July 2024.

pecuniary interest. Therefore, the exception to the automatic bankruptcy stay would not apply.[67]

Incorporation of police power exception under IBC will sine qua non serve in harmonizing the coexistence of IBC and PMLA. Presently, section 32A of IBC proscribes any proceedings against the debtor's assets leading to the exclusion of the state's claims against assets connected to proceeds of crime. The police power exception subjected to time-bound proceedings shall scrutinize state action based on public interest tests and pecuniary tests. Subsequently, only state actions upholding the objective of public interest will be mandated as an exception to IBC provisions.

B. Canada

The Canadian insolvency is governed by the Bankruptcy and Insolvency Act (hereinafter, referred to as BIA) and the Companies Creditors Arrangement Act (hereinafter referred to as CCAA). Good faith action is a notable theme stemming from Section 4.2 of BIA[68] and 11.02(2) of CCAA respectively[69]. The provisions codify obligations for the principal parties in insolvency proceedings to act in good faith.[70]

[67]Douglas L. Hayes, 'Police and Regulatory Power vs. Pecuniary Interests: The Bankrupt Hazardous Waste Site Owner Faces the Music. United States v. Nicolet, INC., 857 F.2d 202 (3d Cir. 1988)' 1990 30(2) NRJ <https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=2046&context=nrj>accessed 11 July 2024.
[68]The Bankruptcy and Insolvency Act, 1985 c. B-3 s 4.2.
[69]The Companies' Creditors Arrangement Act, 1993 C-36 s 11.02(2).
[70]Linc A. Rogers, David Sieradzki and Matthew Kanter, 'What Does ''Good Faith" Mean in Insolvency Proceedings?' (2015) 4 JIIC <https://www.ksvadvisory.com/docs/default-source/articles/03_what-does-good-faith-mean-in-insolvency-proceedings-co-authored-by-david-sieradzki-published-in-the-journal-of-insolvency-institute-of-canada-septem.pdf?sfvrsn=1f184fd_6> accessed 25 July 2024.

BIA states that interested persons under BIA proceedings shall act in good faith and if the interested person fails to act in good faith the court is empowered to make appropriate orders.[71] CCAA on the other hand mandates that to obtain a stay extension from the commencement of any proceeding against the company other than initial application. The applicant is required to satisfy the two-fold burden of proof specified under S.11.02(3). It includes (a) circumstances that make such an order appropriate; and (b) the applicant has acted, and is acting, in good faith and with due diligence.[72]

In the Indian context, drawing inspiration from Canadian law the author argues for the inclusion of the good faith test during the initial insolvency proceedings. The test shall endow duty upon the debtor to establish the legitimacy of the bankruptcy petition based on the standards of honesty, good faith and reasonableness. Subsequently, the court shall examine whether the petition is licit or to seek an amnesty route through a moratorium. This applicability will pave the way to dispose of the possible frivolous petition filed with the improper purpose and amnesty route.

C. United Kingdom

In the United Kingdom, the insolvency regime is governed by the Insolvency Act, 1986, which, similar to IBC, includes procedures for liquidation, and administration of insolvency proceedings.[73] The entire process of insolvency and resolution is governed by the insolvency practitioner, the precursor to the resolution professional in IBC.[74] Additionally, cases pertaining to potential involvement of proceeds of crime are adjudicated under the Proceeds of Crime Act, 2002, which

[71] The Bankruptcy and Insolvency Act, 1985 c. B-3 s 4.2.
[72]The Companies' Creditors Arrangement Act, 1993 C-36 s 11.02(3).
[73]The Insolvency Act, 1986 C-45.
[74]The Insolvency Act, 1986 C-85 ss 59, 60, 165, 167.

allows for restraint, freezing and confiscation of such assets.[75] Within the same, enforcement authorities are enabled to secure a form of restraint order to freeze the property of an individual or corporate debtor, to prevent their dissipation, which may later be subjected to confiscation.[76]

Conflict arises in matters where assets that are proceeds of crime, belong to a corporate debtor initiating the insolvency management process. The issue pertains to the question of priority of conflicting claims, one of the adjudicating authorities for recovery of assets and the other of the individuals with bona fide claim to the property. The broader underlying national objectives, on one hand, are those of preventing money laundering and as a consequence ensuring public order, and on the other hand promoting entrepreneurship and financial security for corporate entities.[77]

The UK government, as their legislative objective, prioritises the ability of the state to seize assets involved in criminal activities, and consequently curbing the social parasites of narcotics distribution, terror financing, etc. POCA, within itself, allows for adjudicating authority to seize assets even when there lie competing interests of creditors undergoing insolvency management.[78] Thus, the two statutes within themselves allow for clarity as to the overriding effect of one legislation over the other.

In addition to the legislative primacy of money laundering laws in the UK, there is judicial discretion as to the ultimate priority of competing claims. Thus, courts in the UK have the jurisdiction to balance such competing claims in favour of the corporate debtor and other corporate

[75]The Proceeds of Crime Act, 2002 C-29 ss 35, 41.
[76]The Proceeds of Crime Act, 2002 C-29 s 6,7.
[77]The Proceeds of Crime Act, 2002 objective clause; Insolvency Act 1986, objective clause.
[78]The Proceeds of Crime Act, 2002 ss 71, 306; Proceeds of Crime Act 2002, sch 11.

entities, wherever deemed necessary.[79] Some of the reasons for the confiscation of assets being prioritised have been, the return of proceeds of crime to victims, instead of its distribution to creditors, and of promotion public order and security over the rights of corporate entities.[80] Overall, the individual rights of corporate debtors have been considered secondary to the state's interest in recovering criminal proceeds.

D. Incorporating Global Approaches: A Selective Framework for Balancing IBC And PMLA

Rather than enforcing a blanket rule on the primacy of either statute, a more nuanced approach is necessary. Each case should be assessed based on its unique circumstances, considering factors such as the nature of the financial misconduct, the economic implications of insolvency resolution, and the broader public interest. Lessons can be drawn from international frameworks like the USA's public interest test, Canada's good faith assessment, and the UK's discretionary approach. By ensuring a balanced adjudicatory framework, courts can uphold both the economic imperatives of IBC and the regulatory objectives of PMLA, thereby fostering a legal landscape that accommodates both corporate revival and financial integrity.

Ultimately, resolving the conflict between insolvency and anti-money laundering laws requires a departure from rigid prioritization in favor of a structured, discretionary approach. When the public interest strongly supports preventing money laundering, claims under PMLA should be prioritized. On the other hand, if the resolution and revival of the corporate debtor contribute to economic stability and protect creditor rights, IBC should take precedence. A flexible, case-specific approach would enable Indian jurisprudence to strike a more equitable

[79] *Re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391.
[80] *Re Stanford International Bank Ltd* (2011) EWCA Civ 280.

balance between these competing legal objectives. The proposed reforms, while feasible, necessitate significant legislative refinement, inter-institutional coordination, and procedural clarity. Moving forward, a harmonized legal framework that accommodates both regulatory objectives—preventing financial crimes while facilitating insolvency resolution—is imperative to ensuring a just and efficient adjudicatory process.

V. SOLUTIONS FOR HARMONIZING IBC AND PMLA

A. Inter – Agency Coordination Mechanism

The establishment of an inter-agency coordination mechanism in tandem with amending existing systems to reduce inefficiencies will facilitate incorporating public interest exemptions to the IBC regime specifically focusing on PMLA adjudication. Against this backdrop, the present section proposes a three-pronged solution. Firstly, incorporating a structuralist approach for settling competing claims, secondly, establishing a common database lastly, enhancing procedural efficacy through standardization of Show Cause Notice issued under PMLA section 8.

B. A Structuralist Approach: Adjudication of Competing Claims

Apex Court has an advanced teleological/ purposive interpretation approach for realizing harmonious construction between IBC and PMLA yet it overlooks the doctrine of *in omnibus quidem, maxime tamen in iure aequitas spectanda est* equity must be considered in all things, but especially in law. Since courts and tribunals have repeatedly affirmed the primacy of IBC this subsequently undermines the application of equity as the objectives of PMLA are compromised and further, this discounts the practical implications on public policy. The absence of statutory guidelines aggravates the issue and the court's

dicta for co-existence and non-derogation of the competing statutes is unable to see an intelligible synthesis in the real world.

In this context, the author proposes a structuralist approach for adjudicating the competing claims of PMLA authorities and CD in insolvency proceedings. This approach propounds a three-tier framework. Firstly, settlement of jurisdiction upholds the statutory integrity of the institutions. Determining whether the petition is maintainable before the authority under the PMLA act or NCLT based on the timeline of the order of attachment of assets with respect to insolvency proceedings pre- or post-CIRP. Secondly, establishing an asset management framework for the classification of claims. Segregation of assets categorized as tainted, untainted and mixed assets. This categorization is based on mitigating factors including value segregation of assets based on taint percentage, integration of tainted assets with clean business operations, preservation of third-party rights and creditors stakes, and effect on public policy objectives under PMLA. Lastly, setting up an escrow account should be set up to preserve mixed assets till the case is sub-judice, along with the adherence to procedural timelines of the case.

C. Common Database as Solution

Presently, the Enforcement Directorate issues notices to parties for the attachment of assets, irrespective of whether the properties are involved in the resolution process.[81] This only adds to the pending litigation for cases pertaining to insolvency and money laundering. Further, the facts and circumstances pertaining to the property being involved in the resolution process, only come to light once such claims are raised before court. This adds to the hassle that the parties have to go through

[81] *Ashok Kumar Sarawagi v Enforcement of Directorate* (2022) SCC OnLine NCLAT 3453 (NCLAT).

for their rights to be exercised, in addition to the burden on courts as well as the professionals involved.

Further, once the issue of conflicting claims is brought to the court's attention, the parties then go on to advocate for the primacy of their interests. The additional steps of the issue first being represented before the courts, only after issuance of attachment notice by ED, may be negated with transparent communication and exchange of information between adjudicating authorities. In this regard, other jurisdictions too have adopted common databases of properties that are potentially proceeds of crime, or involved in the resolution process. These are, the Bankruptcy and Insolvency Register, for the UK,[82] the Asset Forfeiture Tracking System (AFTS) in the United States,[83] Insolvency Registers Interconnection, and the European Criminal Records Information System in the European Union.[84] Such databases allow for the authorities to track the previous claims over certain assets. While these are not directly utilised for cases with the intersection of money laundering and insolvency, they may be utilised in India.

Within the Indian context, the persisting concern of the pendency of cases requires urgent attention, and the same can be addressed to a great extent in the realm of insolvency and money laundering. A common database, which tracks the properties involved in the resolution

[82]Government of United Kingdom, 'Bankruptcy and Insolvency Register' <https://www.gov.uk/search-bankruptcy-insolvency-register#:~:text=You%20can%20search%20for%20details,from%20being%20a%20company%20director> accessed 10 September 2024.

[83]Government of United States of America, 'Asset Forfeiture Tracking System' <https://www.forfeiture.gov/> accessed 10 September 2024.

[84]European Union, 'Insolvency Registers Interconnection' <https://e-justice.europa.eu/110/EN/bankruptcy_and_insolvency_registers?CROATIA&member=1#:~:text=The%20National%20Insolvency%20Register%20is,insolvency%20proceedings%20from%20being%20launched> accessed 10 September 2024; European Union, 'European Criminal Records Information System' <https://ecris.eu/> accessed 10 September 2024.

process, or are considered potential proceeds of crime, would allow for such information to be available to the ED, and resolution professionals, right when their involvement is initiated. In this regard, ensuring communication at the very first step of interaction with competing authorities will expedite the process of exercise of rights for all stakeholders involved. This is especially pertinent as such conflicts may be resolved to a great extent without the involvement of judicial adjudication when the concerned authorities have the proper information at the initial stage of interaction itself.

D. Step towards procedural efficacy

Incorporating procedural standardization shall improve inter-agency coordination bridging the gaps between the agencies. The author proposes standardization of the Show Cause Notice (hereinafter referred to as SCN) format issued under section 8 that will effectively curb the delay in adjudication and provide clarity in proceedings. Thus, it assuages the apprehension of prolonging litigation and hindrance in the insolvency proceedings.

PMLA under section 5 read in consonance with section 8 warrants the attachment of property involved in money laundering. Section 8 PMLA expresses the procedure for decreeing the attachment of properties. It stipulates that the AA may serve an SCN of not less than 30 days to the aggrieved person.[85] Upon receiving SCN the noticee has to produce evidence indicating the sources of his income, or assets or by means of which he has acquired the property attached under Section 5(1) of the 2002 Act. Additionally, to show cause why the property "should not be declared to be the properties involved in money laundering and confiscated by the Central Government".[86]

[85]The Prevention of Money Laundering Act, 2002 s 8.
[86]*Vijay Madanlal Choudhary v Union of India* [2022] INSC 757, [2022] SCC Online SC 929.

Following a particular SCN format shall improve efficiency in adjudication, consistency, transparency, and coordination of respective claims between the aggrieved person and AA. The following indicative parameters are proposed to be considered included in the SCN.

1. **Necessity:** Mentioning the 'reasons to believe' that the person has committed an offence. Furthermore, stating the reasons justifying the necessity for the confirmation of provisional orders.
2. **Claims of authorities:** Indicating the valuation of attached properties accompanied by the methodology used to determine such valuation under the attachment orders.
3. **Notification of Rights and Safeguards:** Mandatorily elucidating safeguards such as the right to appeal under PMLA. If any person aggrieved from AA attachment orders as per Section 26(1)[87] of PMLA they can prefer to appeal against the AA orders before the Appellate Tribunal.
4. **Compliance Instructions:** Instructions substantiating requirements mentioned under section 8(1) PMLA are to be produced along with any additional prerequisite information essential to furnish in the reply to SCN by the aggrieved person.

VI. CONCLUSION

The legislature, in its creation of IBC and PMLA, as two specialised acts, has been clear in its priority of objectives for the two acts, albeit in their separate realm. The legal quandary arises when matters of money laundering and corporate insolvency overlap, leading to conflicting claims over assets. Contrary to other jurisdictions, the Indian acts governing these matters, do not provide for a priority of

[87]The Prevention of Money Laundering Act, 2002 s 26.

claims within the acts. Through judicial interpretation, the courts have come to the conclusion that the claims of corporate debtors apply to those of adjudicating authority within PMLA. This entails that the exemption from attachment guaranteed within IBC applies even when properties are potential proceeds of crimes.

The priority of claims of corporate debtors for resolution of assets, and that of adjudicating authorities for attachment of assets, have created their due share of a legal conundrum. While courts have aimed to tackle the blanket exemption from attachment for assets involved in the resolution process, with harmonious construction of the two statutes, there lies significant scope for a more balanced approach. The conclusive primacy of IBC over PMLA, as argued by the author, undermines the legislative objective of PMLA, the greater goal of public security, and provides for a potential amnesty route to corporate debtors involved in criminal activities. While being contrary to the legislative object of PMLA, the blanket exemption granted by IBC, also contravenes judicial dicta of aiming for a harmonious construction of the two statutes.

Considering the lack of a concrete solution within Indian jurisprudence, the author has placed reliance on jurisdictions such as those of the USA, Canada and the UK, for reasons mentioned herein. Such a cross-jurisdictional analysis showcases that countries have adopted a discretionary or selective approach when deciding on the primacy of a set of claims over properties. While the factors considered in deciding the primacy of claims are varied for the three jurisdictions, they intersect in their balancing of the objectives of the two acts. Alongside the interests of corporate debtors, USA considers public interest, Canada considers good faith and the UK considers public order, and all of the jurisdictions aim for a balancing of interests.

Through such a jurisdictional analysis, the author offers alternatives to the blanket exemption, as guaranteed by IBC. Accordingly, in cases where public interest overwhelmingly favors the prevention of money laundering, PMLA claims should take precedence. Conversely, where resolution and revival of the corporate debtor align with economic stability and creditor rights, IBC should prevail. By adopting a flexible, context-driven approach, Indian jurisprudence can achieve a more balanced reconciliation of competing statutory objectives.

In addition, the current pendency of cases specifically in the realm of IBC and PMLA, necessitates transparent intergovernmental communication and exchange of information, which may be facilitated through a common database for properties undergoing insolvency, or attachment due to claims of money laundering. Such a system has already been utilised by a myriad of jurisdictions such as, USA, UK and EU. Implementing such a system in India would require inter-agency coordination, legal backing, and significant technological infrastructure. However, its potential to streamline asset tracking and minimize litigation delays makes it a worthwhile reform.

Furthering this communication, the author also argues for a system of proper sharing of information by the concerned stakeholders, reflecting the factors of public interest and rights of creditors, in case competing claims arise over properties. These solutions aim to, first, balance the rights of all impacted stakeholders, second, duly consider the objectives of both PMLA and IBC and ensure that the complex meshwork of the facts and circumstances of each case is given its due consideration in adjudication over conflicting claims.

GIG WORKERS IN INDIA: BRIDGING LEGAL GAPS AND ENSURING SUSTAINABILITY

Anuj Kumar[*] *and Shivam Shani* [**]

ABSTRACT

India is the fifth largest gig economy in the world and is bound to be the third by 2030. Moreover, the Gig economy is going to lead economic growth and reduce unemployment. With the rise of platform-based employment, gig workers have become an essential part of India's labour market. However, they continue to face issues such as job insecurity, lack of social protection, and inadequate legal safeguards. This paper examines the current status and gaps in India's existing labour laws, highlighting the absence of comprehensive legislation. It also examines the court interpretation on various issues related to gig workers and the difficulty of classifying gig workers as employees through direction and control test. Moreover, a nuanced and balanced approach has been taken keeping the

[*]Anuj Kumar is a second-year student at Christ (deemed to be University). The author may be reached at anuj.kumar@law.christuniversity.in.
[**]Shivam Shani is a second-year student at Christ (deemed to be University). The author may be reached at shivam.shani@law.christuniversity.in.

aggregator platforms in mind, to devise a solution.

Additionally, the paper draws comparisons with international legal frameworks governing gig work in other countries, examining how nations such as the United States, and the United Kingdom, and developing countries like Brazil have approached the regulation of the gig economy, looking into the classification of employees, workers and independent contractors. By analyzing global trends and best practices, the paper identifies potential policy reforms that could be implemented in India to ensure a balance between aggregator platforms and gig workers, ensuring workers are afforded better social security, fair wages, and access to essential benefits, while platforms remain sustainable. By addressing these challenges, the paper proposes a more balanced and sustainable gig economy that benefits workers as well as the companies and in turn the nation's overall economic growth.

Keywords: *Insolvency The Code on Social Security, 2020, Gig economy, Gig worker, Platform worker, Aggregator platforms, Social Security.*

I. INTRODUCTION

Since time the landscape of work and employment has been changing from the primitive society to an industrial era which requires workers

to engage in hazardous working environment and to tackle these, various industrial laws has been created to resolve those issues but with the introduction of technology the way of working has also changed and the laws are becoming obsolete day by day, failing to tackle modern-day issues. This introduction of modern technology has enabled people to no longer engage in traditional ways of employment, instead aggregator platforms like Uber and Zomato has enabled people to work for different platforms at the same time. These people are generally regarded as gig workers.

The European Commission defines the gig economy as an economy in which digital technologies enable teams to be assembled around a given project, and often across borders, while platforms seamlessly connect buyers with sellers.[1] In India, section 2(35) of the Code on Social Security, 2020 ("**CSS**") defines "gig worker" as "a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship".[2] These gig workers participate through different online platforms like Uber, Zomato, Zepto etc. Section 60 of the code defines "platform work" as a form of work arrangement outside of a traditional employer-employee relationship where organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment.[3] Section 61 further defines a "platform worker" as a person who is engaged in or undertakes such platform-based work.[4]

[1]'Gig Economy European Foundation for the Improvement of Living and Working Conditions' (www.eurofound.europa.eu, 23 March 2018) <https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/gig-economy> accessed 3 January 2025.
[2]The Code on Social Security 2020 (36 of 2020).
[3]The Code on Social Security 2020 (36 of 2020) s 60.
[4]The Code on Social Security 2020 (36 of 2020) s 61.

The gig economy market is expected to grow at a compounded annual growth rate (CAGR) of 17% to reach a gross volume of $455 billion by 2024, according to a white paper by the Forum for Progressive Gig Workers.[5] As per NITI Aayog, number of gig workers could increase to 23.5 million by 2029–30.[6] With this huge growing thing, it has become more imperative to look into the rights of workers associated with the gig economy and safeguard them.

The paper looks at the current framework of regulating gig workers in India, issues with various proposed legislations, courts interpretation regarding status and lack of coherence, comparative view of various countries, critical analysis of the issue and solutions which can be incorporated.

II. PRESENT LEGAL FRAMEWORK OF GIG WORKERS IN INDIA

Labour welfare and social security is a part of the concurrent list under Schedule VII of the Indian Constitution. In recent years, states like Karnataka and Rajasthan have introduced legislation concerning gig workers and the gig economy, along with the Union government's Code on Social Security, 2020.[7] However, these legislations are either draft or passed without supporting rules to ensure proper implementation.

[5]Peerzada Abrar, 'India's gig economy may add 90 million jobs, contribute 1.25% to GDP' (*Business Standard*, 28 November 2024) <https://www.business-standard.com/economy/news/india-s-gig-economy-could-add-90-mn-jobs-enabled-by-large-multinationals-124112800721_1.html> accessed 2 January 2025.

[6]'India's Booming Gig and Platform Economy Perspectives and Recommendations on the Future of Work' <https://www.niti.gov.in/sites/default/files/2023-02/25th_June_Final_Report_27062022.pdf> accessed 2 January 2025.

[7]Kingshuk Sarkar, 'Karnataka and Rajasthan Legislations on Gig Work' (2024) 59 (42) Economic & Political Weekly 13 <https://www.epw.in/journal/2024/42/commentary/karnataka-and-rajasthan-legislations-gig-work.html> accessed 2 January 2025.

A. Code on Social Security, 2020

The recent labour codes put gig workers within the ambit of labour law for the first time. The definition of employee under section 2(k) of Code on Wages, 2019 has been made very wide.[8] It could be said that it includes all sorts of work under its definition of "employee" including gig worker.

Under the Social Security Code, "gig workers" have been distinguished from "employees" under sections 2(35) and 2(26) of the Code respectively.

Chapter IX provides social security schemes for gig workers, platform workers, etc. However, the whole availability and working of the schemes such as life and disability cover, accident insurance, health and maternity benefits, etc. is dependent on the notification of the Government and would be subject to change.[9] Moreover, Section 6 provides for the National Security Board, which would recommend the central government for framing schemes for unorganised, gig and platform workers.

Section 45 allows the Central Government to extend and expand the benefits of Chapter IV to gig workers.[10] Section 141 states that the Social Security Fund can be established by the central government. Moreover, Section 114(7) provides that the government may provide exceptions based on the turnover of the company.[11] Though this looks fine, it has a fatal flaw in that it is relatively easier for companies to manipulate data on turnover, and in such a scenario where the word "turnover" has not been clearly defined.

[8]The Code on Wages, 2019 (29 of 2019).
[9]The Code on Social Security, 2020 (36 of 2020) s 114.
[10]The Code on Social Security, 2020 (36 of 2020) s 45.
[11]The Code on Social Security, 2020 (36 of 2020) s 114.

B. Karnataka Gig Workers (Conditions of Service and Welfare) Bill, 2024

The bill is still in the recommendation stage, this bill very aptly covers all the definitions like gig worker, platform and aggregators etc. The bill talks about the establishment of welfare board and registration of gig workers as well as their aggregators. Section 6 of the bill lays importance about the engagement with workers associations.[12] Section 12[13] takes a progressive approach by ensuring an obligation to enter into a fair contract, which is unlikely because of domination of power and it is given that the language of mentioned contracts must be in Kannada and English along with languages listed in the eighth schedule in the constitution. The bill focuses on increasing transparency by including measures like auditing, laying down the grounds for termination,[14] providing a human contact for enquiries and setting up a redressal committee.[15] The fund can be collected by levying a percentage on the transactions done in the app or annual state specific turnover. The former method is easier to monitor by both the govt and gig workers. Certain areas still need additional focus and consideration, like female gig workers currently lack clear protection against sexual harassment, leaving them vulnerable in workplace without appropriate redress. Additionally, there is no provision mandating compensation for gig workers in the event of death, disability, or loss of pay caused during work.

[12]The Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill, 2024 cl 6.
[13]The Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill, 2024cl 12.
[14]The Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill, 2024 cl 15.
[15]The Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill, 2024 cl 19.

There is also ambiguity around what constitutes a 'safe' and 'risk-free' working environment, which aggregators must provide. Creating clear standards and industry-specific occupational health and safety regulations would help to address this gap. Moreover, any significant changes to platform algorithms that impact workers should be communicated at least 14 days prior to implementation, ensuring transparency and fair adaptation.[16]

C. *The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023*[17]

This bill passed in July 2023, can be seen to extend the benefits of social security and Code on Social Security, 2020[18] to the state of Rajasthan. The Act provides for establishment of a welfare board which will register and administer welfare cess. Moreover, the act also makes it mandatory to register employees, gig workers and aggregators and imposes requirements of data sharing by aggregators.[19] The Act also mandates a transaction fee as decided by the State government on each gig-related transaction, of 1-2% per transaction.

This Act went a step further by imposing huge penalties for non-compliance, such as imposing fines of up to Rupees 5 Lakh for first instance of violation, which would extend to Rupees 50 Lakhs subsequently. However, despite being passed more than a year ago, no subsequent rules have been passed to enable implementation of the Act, to that extent the rules are still at draft stage.

[16]The Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill, 2024, cl 23, 24.
[17]The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 (29 of 2023).
[18]*Social Security* (n 2).
[19]The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 (29 of 2023) s 8, 9.

Even though the Centre and several states have proposed drafts recognizing the status of gig workers, their implementation remains uncertain. These drafts still contain several gaps that need to be addressed. As of now, there are no clear rules on how these laws will be enforced in a way that protects gig workers' interests without placing an excessive burden on platforms.

III. COURT'S INTERPRETATION

A. Indian Federation of App-Based Transport Workers v UOI[20]

This current case was filed in the supreme court through a writ petition under Article 32 of the constitution, seeking recognition of gig workers as 'unorganised workers' under the Unorganised Worker's Social Welfare Security Act, 2008[21] as they are not recognised in any of the legislations and are in a precarious situation. This recognition would entitle them to social security benefits. The petition argues that the denial of such benefits violates their fundamental rights under Articles 14 (right to equality), 21 (right to livelihood and decent working conditions), and 23 (protection against forced labour).

This ongoing case contains the evolving legal landscape concerning the rights and social security of gig workers in India. The Supreme Court's forthcoming decision is anticipated to have significant implications for the classification and welfare of gig workers nationwide.

[20] *The Indian Federation of App Based Transport Workers (IFAT) v Union of India* WP (C) 1068/2021.
[21] The Unorganised Workers Social Security Act, 2008 (33 of 2008).

B. Ms. X v. ANI Technologies Private Limited 2019[22]

In In this case, through a petition in the Karnataka High Court by a female passenger against Ola (ANI Technologies Pvt. Ltd.) after facing sexual harassment by an Ola driver. The Internal Complaints Committee ("ICC") of Ola refused to investigate the complaint, arguing that the driver was not an "employee" but an independent contractor.

The court stated that the definition of "employee" under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter "POSH Act")[23] is broad and inclusive, covering individuals engaged in work under various forms of contracts. The court reasoned that while Ola drivers may be labelled as independent contractors, the nature of Ola's control over their work, such as mandating compliance with platform policies, monitoring driver ratings, and the ability to deactivate drivers, indicated a significant degree of employer-like authority. This level of operational control, blurred the distinction between independent contractors and employees, thereby justifying the application of the POSH Act.[24] The court rejected Ola's claim of driver swapping as a reason to escape liability by mentioning that POSH Act includes the persons employed "with or without the knowledge of the principal employer".[25]

The court acknowledged the ambiguity regarding the classification of gig workers, noting that traditional labour laws were not designed to resolve the gig economy's nuances. However, it emphasized that in situations involving passenger safety and workplace harassment, a

[22]*Ms. X v Internal Complaints Committee, ANI Technologies Private Limited* WP No 8127 of 2019.
[23]The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013).
[24]ibid.
[25]*Ms. X v Internal Complaints Committee, ANI Technologies Private Limited* 2024 WP No 8127 of 2019.

purposive interpretation of the law was necessary to protect vulnerable individuals. By focusing on the functional relationship between Ola and the driver, rather than the formal contract terms, the court aimed to prevent companies from evading statutory obligations through technical classifications.

The ruling reflects a shift towards expanding protection for gig workers but leaves room for ambiguity. While the court's decision applies POSH Act protections, it does not conclusively classify all gig workers as employees across different contexts. [26]

C. Direction and Control Test

Generally, the Supreme Court employs three types of tests to check whether the employer has employed the services of an employee or an independent contractor - Control Test, Integration Test and Multi-factor test.[27] Moreover, this question is necessary as companies tend to disguise employees as independent contractor. The first precedence of control test can be seen in the case of *Dharangadhara Chemicals case,*[28] the court dealt with determining the status of workman under the ID Act,[29] and had to decide the status of employee. The test given by court depends on the degree of control and supervision exercised by the employer over the work performed. The essential test to determine the relationship is the existence of the right to control and supervise the manner in which the work is performed. The test which is uniformly applied to determine the relationship of master and servant is the existence of a right of control in respect of the manner in which the

[26] *POSH* (n 23).
[27] MP Ram Mohan and Sai Muralidhar K, to Determine Employer-Employee Relationships in India: Looking towards the Future? (2024) 8 Indian Law Review 354.
[28] *Dharangadhra Chemical Works Ltd v State of Saurashtra* AIR 1957 SC 264.
[29] The Industrial Disputes Act, 1947 (14 of 1947).

work is to be done. The test of control is universal applicable though nature and extent varies.[30]

The *PNB v. Ghulam Dastagir case,*[31] involved a driver hired by bank and paid from its allowance. Court followed its precedence in *Dharangadhara Chemical case,*[32] and held that since the bank had not much supervision/control over driver. Hence, the driver was held not to be an employee of the bank.

Now with evolving times, in modern stage courts found it difficult to apply solely control test to ascertain employer-employee relationship. Hence an integration approach could be seen in the below case.

In *Silver Jubilee Tailoring House case,*[33] control test proved difficult, as this case involved a worker in a tailoring job. The worker now had skills unlike earlier in the *Dharangadhara Chemicals Case.*[34] This made it difficult to judge the employee relationship just be control over the work. Hence SC looked at whether the employer had the right to reject the work of employee, and it was found to be so in this case.

The integration test applied above looks at the degree of intervention in the work done by the employees and the level of commitment with employer's organization. The higher level of integration would result in the worker to be considered as an employee. A combination of the control and integration tests helps establish professional workers as employees, notwithstanding a lack of control by employers over the manner in which the work is performed. [35]

[30]SC Srivastava, 'Status of Digital Platform Workers Approaches of Apex', (2024) LIX No 9 Economic & Political Weekly 42.
[31]*Punjab National Bank v Ghulam Dastagir* (1978) 2 SCC 358.
[32]*MP Ram Mohan* (n 27).
[33]*Silver Jubilee Tailoring House and Ors v. Chief Inspector of Shops and Establishments* (1974) 3 SCC 498.
[34]*MP Ram Mohan* (n 27).
[35]ibid.

The case of *Hussainbhai case,*[36] has seen the application of integration test along with control test. The court held that the workers were an integral part of the employer's business. Also, the court stated the test of "economic reality."

In the case of *The Officer In-charge, Sub-Regional Provident Fund Office and Ors. vs. Godavari Garments Limited,*[37] the court had to decide whether the women workers engaged in remote stitching work came under definition of Section 2(f) of the Employees Provident Funds and Miscellaneous Provisions Act 1952 (hereinafter "the EPF Act").[38] The court followed the precedent of the *Silver Jubilee Tailoring House case* and held that where employer has a right to reject the end product if it did not conform to the instruction of the employer and direct the worker to redo it, the element of control and supervision is present.

In *Ram Singh v Union Territory, Chandigarh,* the Supreme Court held that though "control" is one of the important tests in determining employer–employee relationship but it is not the sole test. The Court held that whether a particular relationship between employers and employees is genuine, or not, through the mode of a contractor, is a question of fact to be determined on the basis of (i) the features of the relationship, (ii) the written terms of the employment, if any, and (iii) the actual nature of employment, and these questions could be raised and proved only before an industrial adjudicator.[39]

[36]*Hussainbhai v. Alath Factory Thezhilali Union* (1978) 4 SCC 257.
[37]*The Officer In-charge, Sub-Regional Provident Fund Office v Godavari Garments Limited* (2019) 8 SCC 149.
[38]The Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952).
[39]*Srivastava* (n 30).

One of the recent cases for determining the difference between contract of service and contract for service is *Sushilaben Indravadan Gandhi case,*[40] the court had to decide whether the petitioner came under definition of employee for the purpose of insurance by employer. Court stated that all the applicable tests taken on the totality of the facts in a given case would in a complex hybrid situation, decide whether the contract to be viewed as a 'contract of service' or a 'contract for service'. Though in this case, it was decided to be a contract for service from the contract.

The status of gig workers in India remains unclear and inconsistent. Courts sometimes recognize them as employees for specific protections, like in the Karnataka High Court's application of the POSH Act[41] to Ola drivers. However, in most cases, gig workers are classified as independent contractors, which means they do not receive benefits or security under traditional labour laws. The "direction and control test, "often used to determine employee status, plays a key role in this debate. If platforms like Ola or Uber exercise significant control over how, when, and where drivers work, such as monitoring rides, setting fares, and deactivating drivers, they may meet the criteria of an employer. However, gig workers' flexibility to choose their working hours and operate across multiple platforms often weakens the argument for employee status. Ongoing cases like *Indian Federation of App-Based Transport Workers v. Union of India*[42] show how gig workers are fighting for recognition and social security, arguing that the lack of protection violates their basic rights. Courts have tried to expand protections where possible, but without clear laws, gig workers remain vulnerable. The mixed application of control and integration tests adds to the uncertainty, making it difficult to establish a uniform

[40]*Sushilaben Indravadan Gandhi v The New India Assurance Company Limited* (2021) 7 SCC 151.
[41]The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (14 of 2013).
[42]The Indian Federation of App Based Transport Workers (n 20).

standard. This inconsistency highlights the urgent need for new legal frameworks that reflect the unique nature of gig work, ensuring fair treatment and security without overburdening platforms..

IV. COMPARATIVE ANALYSIS

A. United Kingdom

The gig economy in the United Kingdom ("**UK**") has experienced massive growth, with approximately 1 in 6 adults engaging in gig work at least once a week, contributing around £20 billion to the UK economy.[43] In 2016, Uber drivers filed a suit against Uber, claiming that they were workers under UK employment law, rather than independent contractors. They sought entitlements such as the minimum wage and paid leaves etc. 2021, the UK Supreme Court unanimously upheld earlier tribunal decisions, affirming that Uber drivers qualify as workers. The tribunal and Supreme Court's reasoning emphasized several factors:

Control by Uber – Uber set the fares, enforced strict contractual terms, tracked driver performance through customer ratings, and limited direct communication between drivers and passengers.
Limited Independence – Drivers had little opportunity to boost their earnings through personal initiative or entrepreneurial efforts, reinforcing their dependence on Uber.

The Court concluded that drivers are considered working from the moment they switch on the Uber app, within their authorized territory, and are ready to accept trips. Following the ruling, Uber announced that its UK drivers would receive entitlements such as the minimum wage, holiday pay, and pension contributions. But the court didn't rule

[43]RootDigital, 'Gig Economy Statistics UK | 2024 Industry Report' (14 May 2021) <https://standout-cv.com/stats/gig-economy-statistics-uk> accessed 4 January 2025.

that all of the gig workers are workers and will receive benefits from their employers.[44]

However, in *Deliveroo Case,*[45] the UK Supreme Court held that Deliveroo riders are independent contractors, not workers, primarily because they can delegate tasks to substitutes and are not obligated to accept work.[46] In contrast to the uber case where they cannot delegate and has higher degree of control.

The *Uber BV v. Aslam*[47] case has become an important example for deciding if gig workers are workers. It has made companies rethink how they treat workers to follow the law. However, disagreements persist, and the legal status of gig workers remains a topic of ongoing debate, with varying outcomes reflecting the diverse nature of gig work.

B. United States

However, In the United States of America ("**U.S.**"), the classification of workers as either independent contractors or employees plays a crucial role in determining their access to key labour rights, such as minimum wage, overtime pay, health insurance, and unemployment benefits. Under U.S. federal law, including the Fair Labour Standards Act (hereinafter "FLSA"), many labour protections apply only to employees, excluding independent contractors from such safeguards. Historically, courts have applied the common law control test and the economic realities test to assess worker classification. These tests

[44]LLP HM, 'Uber and Continuing Consequences for the Gig Economy' (Harper Macleod LLP) <https://www.harpermacleod.co.uk/insights/uber-and-continuing-consequences-for-the-gig-economy/> accessed 4 January 2025.
[45]*Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43.
[46]'Gig Economy: UK Supreme Court Adds to Developing Case Law with Deliveroo Collective Bargaining Ruling' <https://www.ibanet.org/Gig-economy-UK-Supreme-Court-developing-case-law-with-Deliveroo> accessed 4 January 2025.
[47]*Uber BV v Aslam* [2021] UKSC 5.

evaluate factors like the degree of control the employer exerts over the worker, the permanence of the working relationship, and the worker's ability to influence their earnings.[48] However, this test contains many loopholes which companies like Grubhub has used to avoid classifying their workers as employees and instead label them as independent contractors.

In 2018, the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*[49] marked a significant shift by introducing the *ABC test* for determining employee status under California wage orders. This test presumes workers are employees unless the hiring entity can prove:

1. The worker is free from the company's control.
2. The worker performs tasks outside the company's regular business.
3. The worker operates an independently established trade or business.

This stringent test posed challenges for platform companies, leading to significant legal and legislative responses. So as per this test gig workers in genera like uber can be considered as employees.

a) State-Level Responses and Proposition 22

California's Assembly Bill 5 ("AB 5"), enacted in 2019, codified the ABC test across various labour protections, but its broad scope prompted backlash. App-based platforms lobbied for an exemption, resulting in *Proposition 22 (2020).* This ballot initiative allowed gig

[48]Francis J. Mootz III, 'The Legal Backdrop: A Maze of Confusion' (2023) 54 U Pac L Rev 1.
[49]*Dynamex Operations West, Inc. v Superior Court of Los Angeles County* 416 P.3d 1.

companies to classify drivers as independent contractors while offering limited benefits, such as a minimum earnings guarantee and health insurance stipends.[50] This proposition was also challenged in court but ultimately met the court asset and upheld constitutional.[51]

C. Brazil

Brazil has a system of Social Security under which most employees are registered in the Regimes Próprios de Previdência Social ("RPPS") and Instituto Nacional do Serviço Social ("INSS") tax, which guides the pension and social security benefits by taxing the amount.[52]

Moreover, individual gig workers can contribute under Microentrepreneur Individual ("MEI") scheme at a contribution rate of 5% of the minimum wage which provides access to basic benefits like maternity leave and sickness allowance.

Due to these challenges, Brazil came up with Simplified Social Security Plan ("PSPS"), under which self-employed workers can contribute 11% of remuneration (prior rate was 20%) to get age-based retirement benefits under General Scheme.[53]

[50]Francis J. Mootz III, 'The Legal Backdrop: A Maze of Confusion' (2023) 54 U Pac L Rev 1.
[51]Uber, 'Proposition 22 Upheld: A Victory for Drivers and Democracy' (Uber Newsroom, 25 July 2024) <https://www.uber.com/newsroom/prop-22-upheld/> accessed 4 January 2025.
[52]Felipe dos Santos Martins and others, 'An Overview of The Social Protection of Workers In The Gig Economy of the Transport Sector In Brazil' (2023) 74 Revista do Serviço Público (RSP), Brasília 802 <http://repositorio.enap.gov.br/handle/1/7828> accessed 2 January 2025.
[53]Brazilian Good Practices in Social Security (2013 edn, International Labour Organisation) <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@americas/@ro-lima/@ilo-brasilia/documents/publication/wcms_561251.pdf> accessed 2 January 2025.

The gig economy in Brazil, particularly in the transport sector, has witnessed significant growth. By the third quarter of 2022, there were approximately 1.7 million workers in the transport sector, however only 23% of them are covered under social security.

The *Superior Court of Brazil ("STF")* has held that gig workers are not employees but independent contractors because a formal employer-employee relationship cannot be established due to factors such as subordination, exclusivity, and fixed working hours, which are necessary to establish such a relationship.[54]

V. CRITICAL ANALYSIS

A. Criticisms

Although different legislations have recognized the gig workers and provides some safeguards to protect their interest and provide them some stability in the form of social security. It still lacks comprehensive legal framework that recognize their distinct work patterns and vulnerabilities. The proposed legislations are somewhat similar to international labour models which pose challenges, as the informal and fragmented nature of India's gig economy differs significantly from western labour markets. Policies that work in structured environments often fail to address India's diverse and unregulated gig workforce.

In Karnataka, the case of *Ms. X v. ANI Technologies Private Limited (2019)*[55] highlighted the inconsistency in how gig workers are classified under different laws. When an Ola driver was accused of sexual harassment, the Karnataka High Court ruled that he could be tried under the POSH Act, as the Act's broad definition of "employee" included gig workers. The court emphasized that platforms like Ola

[54]*Srivastava* (n 30).
[55]*Ms X* (n 22).

exert significant control over drivers, justifying their classification as employees for the purposes of workplace harassment protections. However, this recognition does not extend to other areas of labour law. When it comes to providing social security, insurance, or other employee benefits, gig workers are typically classified as independent contractors, excluding them from such protections. This creates a legal paradox i.e., gig workers are considered employees when held accountable for misconduct, yet denied the same status when seeking rights and benefits. This ambiguity underscores the pressing need for a cohesive legal framework that addresses the complexities of gig work in India and the proposed legislation lacks these nuances.

Despite the proposed legislation aimed at securing rights for gig workers, the lack of implementation continues to pose significant challenges. The Social Security Code, 2020, though enacted, remains without rules to implement it, delaying its enforcement. The absence of accompanying rules has further stalled its operationalization. Similarly, Rajasthan's Platform-Based Gig Workers Act, while published in the gazette, awaits the formulation of rules necessary for its execution, leaving gig workers without the anticipated protections. In Karnataka, the situation is even less clear, with relevant bills still in the proposal stage and no concrete roadmap for implementation. There is also uncertainty about how state-level laws, once enforced, will align with national legislation if the Social Security Code is eventually operationalized. This gap between policy and practice raises concerns about lobbying or administrative inertia, leaving gig workers in a state of limbo without access to essential social security benefits.

B. Economic Analysis

Gig platforms like Zomato, Swiggy are very competitive and thus has low profit margins. So, even if many users are using these platforms, the platforms itself face losses. Some reasons for growing losses can

be attributed to customer acquisition and heavy discounts.[56] Despite the widespread popularity, many of these platforms operate at a loss. Swiggy reported a loss of Rs. 2,350 crores in FY 24.[57]

Moreover, the proposed legislations will add more costs, additional regulatory burden to extend social security to gig workers. Benefits such as health insurance, welfare funds, maternity benefit, at costs on platforms. This cycle adds to the financial burden of the platforms. And in a market with high competition and low profits, does not look sustainable. Moreover, the Code mandates the platforms to contribute 1-2% of their annual turnover to social security fund.[58] For a company like Zomato with a revenue of Rs 12,114 crore, this would mean a contribution of 121-242 crore.[59]

As seen above, these platforms operate on Capital Intensive business model, which raises questions on its sustainability. This is proven as these platforms have been diversifying their business to mitigate losses, like Ola ventured in EV segment, and Zomato's acquisition of Blinkit. India is the fifth largest gig economy in the world and bound to be the third by 2030. It stands at 7 million workers in 2020-21, and projected to grow to 23.5 million by 2030, making up nearly 4.1% of the total workforce.[60] Moreover, Gig economy is going to lead economic

[56]Arghya Ray and others, 'Do People Use Food Delivery Apps (FDA)? A Uses and Gratification Theory' (2019) 51 Journal of Retailing and Consumer Services 221.

[57]'Swiggy Narrows Gap with Zomato on Revenue, Food Delivery Business Grew 36% to Rs 11,247 Crore in FY24' (*Moneycontrol*, 4 September 2024) <https://www.moneycontrol.com/news/business/startup/swiggy-narrows-gap-with-zomato-on-revenue-food-delivery-business-grew-36-to-rs-11247-crore-in-fy24-12814599.html> accessed 5 January 2025.

[58]The Code on Social Security, 2020 (36 of 2020) s 114(4).

[59]'Zomato Logs Fourth Straight Quarter of Profit at Rs 175 Crore' (*The Economic Times*, 13 May 2024) <https://economictimes.indiatimes.com/tech/startups/zomato-logs-fourth-straight-quarter-of-profit-at-rs-175-crore/articleshow/110092800.cms> accessed 2 January 2025.

[60]'Expansion of the Gig and Platform Economy in India' (*International Labour Organization*, 4 April 2024) <https://www.ilo.org/sites/default/files/2024-04/ILO%20Platform%20workers%20and%20EBMOs%20India%20Report_3%20April%20%28LIGHT%20PDF%29.pdf> accessed 2 January 2025.

growth and reduce unemployment.[61] Though there are also concerns about increasing income gap due to gig work.[62]

VI. SOLUTION

There is a dichotomy between the reliance on gig platforms in western countries and India. In the West, gig work is often a secondary source of income, allowing individuals to supplement their primary earnings. Most gig workers engage in platform-based jobs for flexibility or additional financial support rather than as their sole means of livelihood. However, in India, gig work frequently serves as the primary source of income for a large segment of workers, making them heavily dependent on platforms like Ola, Uber, and Swiggy for their survival. As these platforms continue to expand and generate more jobs, the livelihoods of many Indians are directly tied to their functioning and stability.

There are multiple ways to redress the challenges associated with gig work. India as a developing country can learn from developed countries' models like the UK, USA, or take the path of developing countries like Brazil.

The UK model utilises two categories for gig workers - worker and independent contractor. So, we can see a new category of workers apart from employees and independent contractors.

[61] 'India's gig economy may add 90 million jobs, contribute 1.25% to GDP' (Business Standard, 28 November 2024) <https://www.business-standard.com/economy/news/india-s-gig-economy-could-add-90-mn-jobs-enabled-by-large-multinationals-124112800721_1.html> accessed 4 January 2025.

[62] 'The Insecure World of the Gig Economy and Improving Workers' Rights by Riz Hussain' <https://www.amnesty.org.uk/blogs/human-rights-are-answer/insecure-world-gig-economy-and-improving-workers-rights-riz-hussain> accessed 5 January 2025.

The USA does not have any national level categorisation but California sees gig workers as independent contractors. Brazil has a strong social security system, however gig workers come under the ambit of independent contractors. However, gig workers can avail social security benefits by paying 5% of remuneration towards contribution.

The better way for India would be to limit burden on the aggregator platforms, towards contribution of welfare funds. Instead, the government could make the welfare fund as part of Corporate Social Responsibility ("CSR"),[63] as an alternative to the turnover based contribution as mandated in the Social Security Code. This would help alleviate burden on companies and reduce their cost and would focus on its profitability.

Moreover, only having aggregator platforms contribute to the fund would not be sustainable, hence the workers and government should also be a contributor to the fund. By using Brazil's approach, India could introduce a scheme under which gig workers can contribute a percentage of their income to the fund, in exchange of the social security benefits. Also, the government could fill in the deficiency.

Now, the question remains whether gig workers should come under employees or independent contractors. The issue with this approach is that if the gig workers are categorized as employees, then they lose their flexibility and has to work exclusively with one platform. However, gig workers, generally, utilise multiple platforms and flexible working hours to suit their needs. For example, a food delivery agent who works for Swiggy would also be registered with Zomato, Uber Eats, etc. Similarly, an Ola driver would also use Uber, Rapido, and other platforms to make ends meet. Losing this advantage is tremendously disadvantageous for gig workers. Hence, India could

[63]The Companies Act, 2013 (18 of 2013) s 135.

create a separate category for platform workers called "workers" or "platform workers" and provide the social security specific to that.

Apart from a different category and welfare fund. Platforms should be mandated to provide for a basic pay. In other words, it is the minimum incentive platforms should provide workers who have worked for a certain period on the platform.

The legislation should include specific provisions to support vulnerable groups, like women and disabled workers, who depend on gig platforms for their livelihood. For disabled workers, the laws should ensure accessibility and accommodations, such as user-friendly interfaces and flexible work options, to make platform work more inclusive. Additionally, there should be clear provisions for maternity leave to support women workers during crucial times.

The legislation should have adequate redressal mechanisms that should be fair and ensure that gig workers have a voice in the process, particularly through representation in committees that address issues like arbitrarily deboarding from platforms and change in commission rate and other grievances. Additionally, gig worker unions should be officially recognized to empower workers, allowing them to collectively advocate for their rights and better working conditions. This would help create a more balanced system for resolving disputes and improving the overall gig economy.

To effectively implement the proposed solutions, India should enact a dedicated "Platform Worker Welfare Act" that legally classifies gig workers as "platform workers" with unique protections. The legislation should be inclusive taking view of all the above-mentioned suggestions.

A regulatory body can be created to oversee compliance, penalize violations, and handle disputes. Additionally, gig worker unions should be allowed to negotiate collective agreements. A phased implementation with pilot programs and digital interfaces for contributions and claims can ensure smooth enforcement.

VII. CONCLUSION

While the role of the gig economy in the development of the country is clear by now, a downward trend can be seen in the standard of living of gig workers. Although the government through a series of legislations has tried to recognize gig workers with central legislation and various States have proposed similar bills in the State assembly. But there seems to be an apathy regarding the implementation as no efforts can be seen for framing rules for their implementation of the proposed bills, because of which uncertainty exists. The ambiguity can also be seen in court's interpretation of gig worker's rights and duties as in some cases the court have considered them employees and held them liable while in the other have not even recognized them, leaving them vulnerable. This should be seen in context that day by day more people are becoming gig workers to earn their living. Through a global perspective it is seen that various countries have tried to recognize gig workers and labelled them as independent contractors, like the US (although it is not the same for every state) and Brazil (with some govt. scheme to protect gig worker's interest) while the UK has adopted some test to classify them as workers or independent contractor. India at present severely lacks in this regard keeping in view how dire situation most of these workers are. The proposed bills seem an inadequate and haphazard attempt to tackle the situation without considering the voices of gig workers.

Ultimately, the proposed bills need to be comprehensive to develop a balanced approach, incorporating legal safeguards, social security, and

fair labour practices, which will help secure a brighter and more just future for all gig workers in India, enabling them to thrive in a rapidly evolving labour market.

CASE COMMENT: TARSEM LAL v. DIRECTORATE OF ENFORCEMENT CRIMINAL APPEAL NO.2608 OF 2024

Shubhangi Agarwal[*] *and Anushree Malviya*[**]

ABSTRACT

'Tarsem Lal v. Directorate of Enforcement' concerns itself with the intricacies of an Anticipatory Bail in a case under the Prevention of Money Laundering Act, 2002 (PMLA). The anticipatory bail filed by the accused herein, for allegations under Section 44(1)(b) of the PMLA, was rejected by both the Special Court and the High Court. The case deals with significant questions with regards to judicial powers and procedures when dealing with economic offences, especially under the stringent PMLA.

The Appellants herein failed to appear before the Court after summons and hence warrants were issued against them under Sections 200 to 205 CrPC, to ensure their presence.

[*]Shubhangi Agarwal is an Advocate at the Supreme Court of India. The author may be reached at shubhangi.agarwal03@outlook.com.
[**]Anushree Malviya is a PHD Scholar at the Dr. Ram Manohar Lohiya National Law University, Lucknow. The author may be reached at malviya.anushree15@gmail.com.

Consequently, their anticipatory bail applications were rejected. The Supreme Court addressed the limitation of the Directorate of Enforcement (ED) in arresting individuals once cognizance is taken in a case barring situations where custodial interrogation is explicitly justified and approved by the court.

This judgment emphasizes the necessity for a strict compliance with the conditions of bail in Section 45(1) of the PMLA when considering anticipatory bail in money laundering cases. The authors through this case comment shall examine the balance between individual liberty provided under Article 21 of the Constitution of India and the State's efforts to combat financial crimes. They shall further critically examine the reasoning behind this decision, the procedural safeguards for individuals under PMLA and the future implications of this judgment.

This case thus serves as a critical reference point for understanding the balance between personal liberty and the regulatory measures of the Indian legal framework.

***Keywords**: Anticipatory Bail, Prevention of Money Laundering Act (PMLA), Directorate of Enforcement (ED), Personal Liberty, Article 21, Special Court, Economic Offences.*

I. INTRODUCTION

As on May 16, 2024, the division bench of the Hon'ble Supreme Court (hereinafter 'SC') delivered a judgment namely '*Tarsem Lal v. Directorate of Enforcement, Jalandhar Zonal Office'* bearing Criminal Appeal No. 2608 of 2024 which considered the perplexing legal intricacies vis-a-vis anticipatory bail in offences under the Prevention of Money Laundering Act, 2002 (hereinafter 'PMLA'). This case is crucial to understand the limitations placed on the Directorate of Enforcement (hereinafter 'ED') in regards to taking individuals into custody, especially when the court has taken cognizance of the same; barring cases where such custody has been justified by the prosecution and approved by the court. This case thus, is a bedrock for interpreting the interplay between the waxing and waning of the individual liberty and the regulatory enforcement in the Indian legal system.[1] Through this case comment, the authors seek to analyse the judgement by examining the background and material facts of the case. The authors also explain the legal issues involved and the potential future implications of this judgement.

A. Background

PMLA was enacted by the Indian Parliament in 2002, with the prime objective of preventing money laundering, narcotics trade and terror financing. The PMLA grants the enforcement authority i.e. the ED the power to confiscate property and/or assets earned through illegal sources and money laundering. The ED is responsible for investigating

[1]Kapil Arora and Pravar Misra, 'Tarsem Lal v Directorate of Enforcement: Supreme Court further clarifies PMLA framework' (*CAM*, 30 May 2024) < https://disputeresolution.cyrilamarchandblogs.com/2024/05/tarsem-lal-v-directorate-of-enforcement-supreme-court-further-clarifies-pmla-framework/> accessed 20 January 2025.

offences under the PMLA[2], and the Financial Intelligence Unit – India (hereinafter 'FIU-IND') is the "national agency that receives, processes, analyzes, and disseminates information related to suspect financial transactions"[3]. Under the PMLA, various actions can be taken against an individual that is found guilty of money laundering like, the property acquired through the proceeds of crime may be frozen, seized or attached[4] and rigorous imprisonment for three to seven years, and/or a fine may be awarded to the accused. [5]. If the Money laundering offence is under the Narcotic Drugs and Psychotropic Substances Act of 1985, it would carry rigorous 10-year imprisonment and a fine.[6]

But the PMLA has also been dubbed to be "the most draconian statute that has ever seen the light of day in the country"[7]. PMLA has seen a shocking increase in the number of cases registered under it in the recent decade, rather the increase in cases is reflected from the 195 cases registered in the year 2018-19 to 579 cases in the first two months of 2022 itself[8]. The Act is adorned by stringent provisions for investigation and bail particularly since with the number of amendments it has gone through, in today's day and time, it has meant shifting all the offences from Part B of the Act to Part A, diluting the commitment to 'serious crime' while also introducing severe implications in cases of arrest and bail in even 'minor crimes' by

[2]'What we do' (Directorate of Enforcement) <https://enforcementdirectorate.gov.in/> accessed 4 August 2024.
[3]'Overview' (Financial Intelligence Unit- India) <https://fiuindia.gov.in/files/About_FIU-IND/About_FIUIND.html> accessed 4 August 2024.
[4]The Prevention of Money Laundering Act, 2002 (15 of 2003) s 60.
[5]Prevention of Money Laundering Act 2002 (15 of 2003) s 4.
[6]ibid.
[7]Awstika Das, 'PMLA Most Draconian Statute Ever in The Country: Kapil Sibal Urges Supreme Court to Reconsider 'Vijay Madanlal Choudhary' Judgment' (*Live Law,* 10 April 2023) <https://www.livelaw.in/top-stories/prevention-of-money-laundering-act-draconian-kapil-sibal-pvijay-madanlal-choudhary-judgmentenforcement-directorate-supreme-court-225950> accessed 7 August 2024.
[8]Government of India, Ministry of Finance, Department of Revenue, Lok Sabha Un-Starred Question No. 4346, 27 March 2023.

averring that all money laundering is grave, something which the SC too has accepted in its decision in *Vijay Madanlal Choudhary v. Union of India*[9]. Now, an individual charged under this offence would not be entitled to bail unless they can show reasonable grounds that they are not guilty of the offense. Thus, it arbitrarily makes the principle to be 'guilty until proven innocent' even though it should be the opposite to uphold the cornerstone of justice.

The transformation of PMLA has been gradual, driven by international pressures. But this does not justify the decisions made in the process, particularly when the Indian regime has been aggressively coercive in achieving its objective. The securing of the crime proceeds does not necessitate making it impossible for the person alleged to be released on bail, especially when the case against him is yet to begin.[10]

The present case similarly, deals with the following questions of law:

- "Does PMLA have an overriding effect over CrPC?
- Is an accused considered to be in custody after a Special Court issues a summons order?
- Is it mandatory for an accused to file a bail application under Section 45 after a summons warrant is issued by a Special Court?
- Can a bond application filed by the accused under Section 88 of the CrPC be construed as a bail application?

[9] *Vijay Madanlal Choudhary and Ors. v Union of India and Ors.* (2022) SCC OnLine SC 929.

[10] Abhinav Sekhri, 'PMLA: From Prosecuting Drug Lords to Going after Critics and Farmers?' (*Supreme Court Observer,* 25 January 2024) < https://www.scobserver.in/journal/pmla-from-prosecuting-drug-lords-to-going-after-critics-and-farmers/> accessed 4 August 2024.

- Can the ED arrest an accused after a Special Court takes cognizance of the offence of money laundering under Section 44(1)(b) of the PMLA?" [11]

Thus, serving as an important precedent for this stringent, unreasonably harsh, and disproportionate regime under the PMLA which has transformed a trial under the Act to that of punishment especially, making the pre-trial stage purely punitive in nature.

B. Brief material facts of the case

In this case, the woes of the Petitioner commenced when Tarsem Lal was accused of (among other offences) money laundering under Section 4 of PMLA. He was implicated in a purported conspiracy in which he was unjustly given "shamlat" lands, which is essentially a common village land, owned by multiple landowners, contributed by them for the common good of the village, , even though he was ineligible for receiving the same. This resulted in him being accused of misusing government machinery for obtaining large amounts of money from property dealers. The ED became involved when one of the offences for which he was allegedly accused of, fell under the ambit of "predicate offences" in the Part B of the Schedule of the PMLA. After the Enforcement Case Information Report (hereinafter 'ECIR') was filed by the ED, a Special Court took cognizance of the case under PMLA[12]. Tarsem Lal was not arrested after the filing of the ECIR but

[11]'Enforcement Directorate's power to arrest under PMLA after Special Court's cognisance' (*Supreme Court Observer,* 30 June 2024) <https://www.scobserver.in/cases/enforcement-directorates-power-to-arrest-under-pmla-after-special-courts-cognisance-tarsem-lal-v-directorate-of-enforcement/> accessed 2 August 2024.

[12]'Enforcement Directorate's power to arrest under PMLA after Special Court's cognizance: Tarsem Lal v Directorate of Enforcement, Jalandhar Zonal Office' (*Supreme Court Observer*, 30 June 2024) <https://www.scobserver.in/cases/enforcement-directorates-power-to-arrest-under-pmla-after-special-courts-cognisance-tarsem-lal-v-directorate-of-enforcement/> accessed 6 August 2024.

later he failed to appear before the Court when summons was issued. As a result, the Court issued warrants to assure his presence, in response to which he applied for an anticipatory bail under Section 438 of the CrPC. Upon dismissals and several appeals, climbing the hierarchy of the Courts, the case reached the Division Bench of Hon'ble Justice A.S. Oka and Hon'ble Justice Ujjal Bhuyan through the Criminal Appeal No. 2608 of 2024.

The appellants submitted that after the Special Court takes cognizance of the offence under Section 4 of PMLA, ED officers cannot exercise their power of arrest under Section 19 of PMLA. They contended that if the accused appears in response to the summons issued by the Special Court, there is no need for an arrest warrant or custody. They submitted that if cognizance is based on a complaint, then in cases where the prosecution did not seek custody of the accused during the investigation, there is no requirement to arrest the accused after the Court takes cognizance. If custody of the accused is needed for further investigation or to file a supplementary complaint, the officers of the ED must request the Special Court for custody.

The Additional Solicitor General's (hereinafter 'ASG') appearing on behalf the ED submitted that an accused person is considered to be in the Special Court's custody once he or she appears before it. Once cognizance is taken, the conditions of Section 45(1) of the PMLA will apply to the accused's bail application which he argued has not been met and hence, the appellants aren't eligible to receive anticipatory bail. He further submitted that money laundering is an offence against the country. Consequently, considering the seriousness and severity of the PMLA offence, obligatory adherence to Section 45(1) requirements has to be guaranteed at all times. Section 45 requires the adherence of the 'twin conditions'[13] i.e. that there are reasonable grounds for

[13] *Vijay Madanlal Chaudhary v Union of India* (2023) 12 SCC 1.

believing that the accused is not guilty of such offence and that the accused is not likely to commit an offence while out on bail.

After considering the submissions, the SC set aside the dismissal to the grant of anticipatory bail. It also cancelled the warrants issued by the Special Courts against the accused, subject to the conditions that the accused shall furnish a bond under Section 88[14] and give an undertaking as per Section 205[15] that they will appear before the Court punctually and regularly. Once the warrant issued against the accused stood cancelled, the prayer for grant of anticipatory bail held no ground and hence, were not considered.

II. ANALYSIS OF THE JUDGMENT

A. In-Depth Analysis of the Legal Issues in the Case

a) PMLA v. CrPC: Overriding Effect

It is firstly important to note that the Special Court can take cognizance of an offence under Sections 3 and 4 of the PMLA when a complaint is preferred before them by the authorized authority. Secondly, as per Section 46 of the PMLA, the provisions of the CrPC, including those related to bail and bonds shall apply to proceedings under the PMLA in the Special Court[16] and the Special Court shall be deemed to be a Court of Sessions (as under the provisions of CrPC).

Once the complaint is filed, Sections 200 and 204 of the CrPC shall apply on the case during the trial before the Special Court.[17] No PMLA

[14]The Code of Criminal Procedure Code 1973 (2 of 1974) s 88.
[15]The Code of Criminal Procedure Code 1973 (2 of 1974) s 205.
[16]The Prevention of Money Laundering Act 2002 (15 of 2003) s 46.
[17]*Yash Tuteja & Anr. v Union of India & Ors.* (2024) INSC 301.

provision overrides the same, thus the exception clause[18] that indicates PMLA takes precedence over the CrPC would not apply in such cases. The Special Court shall then determine if *prima facie* the offence is made out or not. If the offence is not made out under Section 3 of the PMLA, then the complaint shall be dismissed as per Section 203 of the CrPC. If the offence is made out under Section 3 of the PMLA, then the Special Court shall take recourse to Section 204 of the CrPC.[19]

As the present case concerns itself with punishment under Section 4 of the PMLA, wherein the punishment exceeds 3 years, it should be treated as a warrant case[20] under the CrPC[21]. Though the Special Court has a discretion under Section 204(1)(b) of the CrPC to either issue summons and/or warrants at the stage of cognizance, the SC has had, to some extent, already guided the exercise of such discretion in the case of *Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors.*[22] The Court in the said case held that as a general rule, summons should be issued first with the exception of the crime being a heinous crime and /or there being a fear of tampering with evidence and evading law.

Elaborating more on the same, the Court laid down the following steps:

A. To serve summons along with the complaint copy;

B. If the accused avoids the summons, then issue a bailable warrant;

C. If avoidance continues, only then issue a non-bailable warrant.

This is because as per the Supreme Court, personal liberty of an individual should take prime precedence and thus, there needs to be

[18]Prevention of Money Laundering Act 2002 (15 of 2003) s 46 (1).
[19]*Yash* (n 17).
[20]The Code of Criminal Procedure Code 1973 (2 of 1974) s 2 (x).
[21]The Code of Criminal Procedure Code 1973 (2 of 1974) s 204(1) (b).
[22]*Inder Mohan Goswami & Anr. v State of Uttaranchal & Ors* (2007) 12 SCC 1.

caution exercised when issuing warrants, especially non-bailable warrants.

As was the case herein, the accused was not taken into custody/arrested till the complaint was filed and hence, at the stage of taking cognizance of the complaint under Section 44(1)(b) of the PMLA, the Special Court should have ideally issued the summons first.

Section 44(1)(d) of the PMLA mandates that the trial for the scheduled offences or other offences under the PMLA, be as per the CrPC, with the same provisions as applicable to a Court of Session. The Special Court, that deals with cases as the present case, is appointed under Section 43(1) of the PMLA and is considered to be the Court of Sessions. Section 437 of the CrPC, on the other hand, that defines when bail may be taken in cases of non-bailable offences, does not apply when the accused appears before the Special Court in response to a summon issued on a complaint under Section 44(1)(b) of the PMLA. b) Determining status of custody after summons issued by Special Court.

Section 61 of the CrPC specifies the form of the summons, that is prescribed in Form No. 1 in the 2nd Schedule of the CrPC. A cursory review of the prescribed form reveals that the primary purpose of summons is to ensure the accused's presence in Court to answer the charges. If the accused appears before the Court in response to the summons issued, it is deemed that the accused has complied sufficiently. The summons are not meant to be issued with an intent to take the accused into custody, as was also argued by the Petitioner's counsel. Thus, the Court dismissed the Ld. ASG's argument that an accused shall be deemed to be in custody upon appearing in Court in compliance of the summons. The primary objective behind issuance of summons is to assure the accused's presence and not to take him into custody. Thus, the misconception that the accused should apply for bail

under Section 437(1) of the CrPC once he appears before the Special Court, was corrected by the SC. The SC confirmed that the term 'issue of summons' does not mean that the accused is in custody or that he needs to apply for bail. It further clarified that Section 437(1) of the CrPC does not apply when the accused appears or is brought before the High Court or the Court of Sessions.

The Court observes that there are many provisions in the CrPC, which state that an accused who appears before the Special Court under a summon pertaining to a complaint will not be presumed to be in custody. Firstly, the Section 205[23] – which is consistent with the provisions of the PMLA in matters of complaint proceedings- describes when a magistrate may dispense with the personal attendance of the accused upon issuance of the summons. If the argument that the appearance of an accused upon issuance of a summon is treated at par with him being taken into custody is assumed correct, there would have been no need for the Court to dispense with the personal attendance of the accused, thereby rendering the discretion provided to the Court under Section 205 of the CrPC otiose. Secondly, as it is not inconsistent with PMLA, Section 88 applies to all the complaints under Section 44(1)(b). Section 88 is an enabling provision which provides courts the discretion to direct the accused to furnish bonds for their regular appearance, as per the facts and circumstances of the case. It is applicable in both pre and post summons. The objective behind Section 88 is to assure a person's regular appearance via summons by empowering the court to mandate a bond for appearance from the person present before it. Thus, if an accused offers to submit bond in terms of Section 88 upon appearing in the Court, then the Court should execute the bonds as an assurance of his presence during the trial.

[23]The Code of Criminal Procedure Code 1973 (2 of 1974) s 205.

There are majorly two scenarios of an accused not appearing despite summons:

a) Firstly, that the accused appears on the returnable date of the summon but then does not appear in the subsequent dates.

b) Secondly, that he does not appear at all after the service of the summons.

In these cases, Section 89 of the CrPC empowers the Court to issue a warrant be it bailable or non-bailable, to ensure the accused's presence[24]. The warrant is thus issued solely for ensuring the accused's appearance before the Court. Thus, a warrant in such contingencies would not necessarily require the accused to apply for bail. The court issuing it also has the power to cancel the warrant.[25] So if a bailable warrant is issued to the accused due to non-appearance, the accused is required to be released on bail "as a matter of right" when he appears before the Court[26]. There is no need for him to apply for the cancellation of the warrant.

The Special Court has the authority to cancel a warrant based on the accused's conduct. The court can further require an undertaking from the accused to ensure his appearance on all subsequent dates, unless specifically exempted. The Supreme Court thus says that if the ED has not taken the accused into custody during the investigation, the Special Court should cancel the warrant, as is standard practice, without detaining the accused provided that the accused undertakes to appear before the Court whenever required.

b) Requirement of filing a Bail Application under Section 45 following Issuance of Summons Warrant

[24]The Code of Criminal Procedure Code 1973 (2 of 1974) s 70 (1).
[25]The Code of Criminal Procedure Code 1973 (2 of 1974) s 70 (2).
[26]*Satender Kumar Antil v Central Bureau of Investigation* (2021) 10 SCC 773.

The Supreme Court has very categorically held that when handling an application for cancellation of a warrant, as aforementioned, the Special Court is not handling a bail application. Therefore, Section 45(1) of the PMLA would not apply in this case. The SC referred to the pivotal precedent of the *Satender Kumar Antil v. CBI case*[27], wherein a two-judge bench of the Supreme Court emphatically underlined the principle of presumption of innocence being inherent, and held in addition to many other principles that warrants are exceptions and the Courts must uphold liberty. The Court clarified that there is no need for a bail application to be considered under Section 88 (take a bond for appearance), 170(produced by a police officer before a magistrate), 204 (issue of process) and 209(when it appears to the Magistrate that the offence is to be tried by the Court of Sessions exclusively) of CrPC. The Special Law applies only when the accused has already been arrested. But if the accused is either not arrested or arrested and later released on bail, the Court need not order further arrest. A provision in the Special Law analogous provision to Section 167(2) CrPC grants the accused the right to default bail,[28] subject to the satisfaction of Section 440 of the CrPC.

The court has opined that the object of both a summons and a warrant is to ensure the presence of the accused in the court at the stipulated time. As a rule, the court should first issue a summons, then a bailable warrant, and then a non-bailable warrant.[29] If a warrant is issued by the court, it is to ensure that the accused appears before the court in furtherance of investigation. Once the accused appears before the court, and the court is satisfied that the accused will cooperate in the said investigation, the court has the power to cancel the warrants so issued.

[27]*Satender Kumar Antil v Central Bureau of Investigation* (2022) 10 SCC 51.
[28]Ridhi Setha and Lakshya Bhatiab, 'How do courts react to the disrepute of summons?' (2022) 2(1) JCLJ 863.
[29]Ibid.

So, it is not necessary for the accused to file a bail application in such a case. It is also pertinent to note that if the accused has not been arrested prior to the filing of the complaint under Section 19 of the PMLA, he cannot be arrested by the ED at the stage of cognizance, until it specially approaches the Special Court for custody and a fair hearing is given to both of the parties by the Special Court before deciding accordingly.

The Supreme Court noticed that the practice nowadays by the Lower Court is to arrest the accused as soon as they answer the respond to the court.[30] A warrant is issued against the accused irrespective of whether they answer the summons. This leads accused individuals to preemptively seek anticipatory bail out of fear of arrest. As a result, the purpose of such warrants shifts from ensuring the accused's appearance in court to securing their custody. This has made anticipatory bail applications a common practice, even when not needed, including in cases under Section 45.

c) Distinguishing between Bond Application under section 88 and Bail Applications

To understand whether or not a bond application under Section 88 of CrPC can be construed as a bail application, the SC considered the claim of the ASG as to whether the accused can be deemed to be in custody as soon as they appear before the court in response to the summons. The court relied on the case of *Inder Mohan,*[31] in which it was held that generally, unless the accused is charged with a heinous crime and there is a risk of tampering with or destruction of evidence,

[30]'Supreme Court Questions Practice of Some Trial Courts to Remand Accused the Moment They Appear in Response to Summons' (*LiveLaw News Network*, 21 March 2023) <https://www.livelaw.in/top-stories/supreme-court-questions-practice-of-some-trial-courts-to-remand-accused-the-moment-they-appear-in-response-to-summons-224396> accessed 7 August 2024.
[31]*Inder* (n 22).

or efforts to evade the legal process, summons are issued as a rule. Since in the present case, there was no reason to believe in the above apprehensions on the ground that the accused was being thoroughly cooperative in the investigation, there was no need to issue a warrant. It was further held, that if the accused avoided the summons, a bailable warrant should be issued first; and then if the Court is satisfied that the accused is intentionally avoiding the court's proceedings, a non-bailable warrant may be issued. This whole process should be followed, without skipping any steps, because "personal liberty is paramount".[32] The SC in this case observed that this process will even apply in cases governed by Section 44(1) of the PMLA. In the present case, the accused avoided the first summons, upon which a non-bailable warrant was issued against them. The middle step of issuance of a bailable warrant, was skipped.

Upon reading the Form no. 1 in the Second Schedule as prescribed under Section 61 of CrPC, the court concluded that summons is only issued to secure the presence of the accused before the court and not his custody. Its compliance can be fulfilled with or without the person being in custody. The court even stated that there are several provisions, like Section 205 of CrPC where it is clear that the person on whom summons is issued is not in deemed custody. Hence, the claim that on cognizance of offence in the court, the person would be deemed to be in custody does not arise.

Therefore, since the question of the accused being in custody does not arise, the question of the accused being granted bail does not arise either. There was no need for the accused to apply for an anticipatory bail in this case. Furnishing bonds under Section 88 to appear in court regularly would have been enough distinguishing it from an application of bail, which are relevant when custody or arrest in involved.

[32]ibid.

Thus, there is a clear distinction between bond applications under Section 88 and bail applications.

d) Arrest by the Enforcement Directorate after Special Court takes Cognizance

The SC sets a clear legal limitation on the power of the ED and other authorities in situations where the arrest of the accused is concerned especially once the Special Court has taken cognizance of the case under the PMLA. Once the Special Court takes the cognizance of the case under Section 4 of the PMLA, it takes control over the matter meaning thereby that the ED or any other investigative authority empowered under the act, loses its authority to arrest the accused under Section 19 of the Act. This is because the accused now falls under the jurisdiction of the Special Court handling the case i.e. the jurisdiction shifts from the ED to the Special Court.

As the ED loses its authority to arrest the accused under Section 19 of the Act, there should similarly be no placement of fear or apprehension of arrest on the accused in the light of the same. But the practice of some Special Courts raises concerns, especially with regard to arresting the accused after they appear in court for an offence under the PMLA.[33]. In the case of *Pankaj Jain vs Union Of India*[34], the SC had held that Section 88 does not grant any right to a person present in Court. Rather it gives the Court discretionary power to ensure the person's presence in further dates. It held that this discretionary power is designed to assure a person's appearance and the word 'may' in the Section 88 allows the Court to exercise this power as needed. In the

[33]Debbie Jain, 'PMLA Accused Can't Be Arrested After Special Court Has Taken Cognizance of Complaint: Supreme Court Expresses Prima Facie View' (*LiveLaw News Network,* 4 March 2024) <https://www.livelaw.in/top-stories/ex-cji-js-khehar-awarded-padma-vibhushan-senior-adv-cs-vaidyanathan-awarded-padma-bhushan-282010> accessed 8 January, 2025.

[34]*Pankaj Jain v Union of India & Anr.* (2018) 5 SCC 743.

present case, however, the SC observed that this discretionary power was given by the SC in cases where bail maybe taken in cases of non-bailable offence in courts other than the Court of Session and the High Court i.e. Section 437 of the CrPC. However, the Special Courts have made it a practice of arresting the accused after they appear in Court in response to the summons issued in the complaint, regardless of applicability of Section 437. The court deemed this practice to be illegal, as it pushes an accused to seek bail or anticipatory bail out of the fear of being arrested during appearance.

Such a practice, violates Article 21[35] of the accused i.e. the right to liberty. It would be completely unacceptable to arrest a person, who was not arrested before the filing of the complaint by the authorized authority under PMLA, to be taken into custody simply for complying with a court's order of summons. If PMLA requires custodial interrogation then it must follow proper procedure of filing an application in the Special Court providing reasons requiring custody of the accused, which the Court shall give a hearing to, along with hearing the accused, and then decide accordingly. The custodial interrogation shall be allowed, after cognizance, only when the Court is convinced that the same is required now, even though the accused was not arrested before this stage under Section 19 of the PMLA.

The SC also allowed the ED to arrest other people, not necessarily named as accused in the complaint, required in the case, only if, the conditions of Section 19 of PMLA is fulfilled.

B. Implications of the Detailed Analysis on the Present Case

Once a complaint is filed under Section 44(1)(b) of the PMLA, Sections 200 to 205 of the CrPC shall apply, as they are consistent with

[35]The Constitution of India, 1950 art 21.

the special law of the PMLA. If the accused was not arrested by the ED before this complaint was filed, summons shall be issued to the accused when taking cognizance of the case. In the present case, the accused did not appear before the Special Court after receiving the summons, resulting into warrants under Section 70 being issued against him.[36] Initially, the warrants to be issued should be bailable in nature and then non-bailable warrants can be issued. The purpose of these summons was purely to have the accused appear before the court. Now as the accused persons are not considered to be in custody when they appear in response to the summons, there is no need to apply for bail however they may need to furnish bonds under Section 88[37]. But herein, summons was ignored by the accused and warrants were issued. The accused could have applied for the cancellation of warrants, as the court cannot treat the same as a bail matter under the stringent conditions of Section 45(1) of the PMLA but can also not release the accused simply on the furnishing of a bond. In the present case the Petitioner prefers an application for anticipatory bail, due to the prevalent practice of the Special Courts, arresting the accused in offences under the PMLA when they merely appear in court in response to the summons/warrants issued against them. This case has set a significant precedence for the Lower Courts to appreciate the cooperation of an accused with the investigation and to refrain from unnecessary arrests. The Court's decision to cancel the warrants issued against the accused on the condition that they shall provide an undertaking to the Special Court that they shall regularly and punctually attend the subsequent dates of the trial, unless they are exempted under Section 205 of the CrPC demonstrates a progressive step towards safeguarding personal liberty under Article 21 of the Constitution of India. This ruling emphasizes the importance of judicial discretion in ensuring compliance without infringing on an individual's rights, thereby setting a new course for

[36]The Code of Criminal Procedure Code 1973 (2 of 1974) s 70.
[37]The Code of Criminal Procedure Code 1973 (2 of 1974) s 88.

legal principles regarding anticipatory bail and the treatment of accused persons in non-bailable offenses.

It is pertinent to note that the court held that the ED lost its jurisdiction to the Special Court in the present case, once the court took cognizance of the complaint under Section 44(1)(b) and thus, also lost its power to arrest the accused under Section 19 of the PMLA. If they want custody of the accused, they would have to follow the procedure and apply to the Special Court for his custody. Since the issuance of summons and warrants is not the court taking custody of the accused, there was no need to file an application of bail under Section 439 of the CrPC as argued by the ASG. There was also no need to file an anticipatory bail under Section 437[38] as there should have been no fear of arrest on the mere issuance of summons and warrants to ensure the accused's presence. This way, this case enforces a more humane approach in the Courts, when following due process and ensuring that the cooperation and the concurrent respect for the legal proceedings by the accused does not get met with punitive actions. This case, can thus become a pivotal reference in addressing the SCs continuously highlighted problem with the lower judiciary, of dealing with similar cases by insisting on arrest of an accused as a pre-requisite formality[39]

As the warrants in the present case were cancelled, the Court set aside the refusal of the grant of anticipatory bail, but did not provide the same to the accused either. The Court held that as with cancellation of warrant there is no threat of arrest anymore it is unnecessary to consider

[38]The Code of Criminal Procedure Code 1973 (2 of 1974) s 437.
[39]'Supreme Court Directs That Its Two Judgments On Bail & Arrest Guidelines Be Made Part Of Curriculum In Judicial Academies' (*LiveLaw News Network,* 3 February 2023) <https://www.livelaw.in/top-stories/supreme-court-directs-that-its-two-judgments-on-bail-arrest-guidelines-be-made-part-of-curriculum-in-judicial-academies-220605?fromIpLogin=96525.0839484242"> accessed 8 January 2025.

the question of anticipatory bail, thus, reinforcing the protection of personal liberty to be the guiding principle while deciding such cases.

III. PROPOSITIONS THAT WILL ARISE IN FUTURE

As acknowledged by the SC, the common practice in the Special Court is to take the accused into custody once they comply with the summons or warrants issued. The failure to address the issue of anticipatory bail leaves a large gap between the actual practice of lower courts and the principles established in the present case. The fear of granting bail in cases involving an authority like the ED, would always loom over the lower courts. in such a situation addressing the issue of anticipatory bail becomes paramount. As seen in this case, such applications may continue to be filed till the SC instead of being properly addressed by the lower courts themselves.

IV. CONCLUSION

A stringent framework, with appropriate departures from the accepted standards of criminal procedures may be accepted in some cases but money laundering in India is considered to be a by-product of both grave and minor offences, as defined in the schedules of PMLA. Though, as per the objective of the act, these scheduled/predicate offences should have been limited to grave offences such as terrorism, narcotics smuggling, corruption and serious forms of evasion of taxes and duties but in practice it includes offences such as fraud, forgery, cheating, kidnapping and even copyright and trademark infringements irrespective of the fact that there is slight money changing hands.[40] This grants the ED an unrestricted authority to apply the harsh provisions of

[40]'Narrow view: On the Supreme Court's PMLA verdict' (*The Hindu,* 29 July 2022) <https://www.thehindu.com/opinion/editorial/narrow-view-the-hindu-editorial-on-the-supreme-courts-verdict-on-the-prevention-of-money-laundering-act/article65695526.ece> accessed 7 August 2024.

PMLA on anyone it deems fit, without clear limitations. Currently, ED is conducting money laundering investigations in a way that exposes ordinary citizens to arbitrary searches, seizures, and arrests at the discretion of executive overreach.

On the other hand, the bail provisions of the PMLA impose such strict conditions, that it puts a reverse burden of proof on the accused to prove his innocence. The statements recorded by the officials under Section 50 of the PMLA are admissible in court unlike the statements given to the police and the ED authorities are not even required to share the copy of the ECIR (as is required in the FIR) with the necessary persons.[41] PMLA hence, gives one agency outrageous power to harass any section of the Indian populace with the help of its provisions, which it uses to turn the entire criminal jurisprudence of this country on its head, simply because the officials of the agency considered filing a complaint against an individual. Today out of the 5000 cases being investigated by the ED, only 40 have seen convictions.[42] This data further highlights that PMLA is being used to badger any individual, despite the seriousness of crime, simply on the basis of one complaint.

The same was true in this case also. The ED filed a complaint with the Special Court against the accused, and sought to use summons and warrants to take the individual into custody, despite the fact that he had been cooperative throughout the investigation and the ED had never required his custody before filing the complaint.

[41]Ashish Tripathi, 'ECIR not FIR, presenting copy to accused is not mandatory: Supreme Court' (*Deccan Herald*, 27 July 2022) <https://www.deccanherald.com/india/ecir-not-fir-presenting-copy-to-accused-is-not-mandatory-supreme-court-1130696.html> accessed 8 January 2025.

[42]Debaran Roy, 'Supreme Court highlights low conviction rate under PMLA, questions ED on quality of prosecution' (Bar & Bench, *07 Aug 2024*) <https://www.barandbench.com/news/supreme-court-highlights-low-conviction-rate-pmla-questions-ed-quality-prosecution> accessed 7 August 2024.

This form of harassment and misconstrued practice of using summons as a mode to take the accused into custody under the Special law, even though the only objective of summons and warrants is to make sure that the accused is present before the court when required during the trial, was correctly hammered on its head by the SC in this case. This case is thus, a welcome precedent in the spew of an authoritarian acceptance of this special law being openly used to harass different individuals. This case, will hopefully, serve as a means for the lower courts to show some fortitude before authorities like ED and not bow down to their wishes of taking an individual into custody as and how they want, until required by valid reason.