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Role of Insolvency in Money Laundering cases: Legal Complexities and Challenges

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ABSTRACT

Insolvency and money laundering create gross challenges to the entire financial integrity, regulation enforcement, and economic stability at the same time. Being unable to satisfy all its financial commitments means that any entity is insolvent (or more firmly "insolvent"). In principle, it represents the most important vehicle for the maintenance of market confidence and risk sharing. However, the intersection with money laundering-the legitimizing process of illicit funds-makes it a very complex legal and regulatory conundrum. The paper, thus, examines various risks emerging from the intersection of insolvency and money laundering, including asset concealment, false claims and many other forms of professional malpractices, as well as regulatory loopholes causing financial criminals to exploit insolvency proceedings. The reflections stated in the paper, therefore, analyze the role of the Insolvency and Bankruptcy Code (IBC), 2016, and the Prevention of Money Laundering Act (PMLA), 2002 on such issues. The moratoriums by IBC under its different provisions conflict with

the provisions on asset seizure and enforcement by the PMLA authorities; thus this leads to inconsistent judgments as evident in cases like *DSK Southern Projects Private Limited*, among several others. It elaborates further on the roles of insolvency practitioners, financial institutions, and regulators in mitigating money laundering risks through better due diligence and cross-agency coordination. This study presents discontent and proposes an analysis of legal frameworks, case studies, and regulatory responses which raise the status of the harmonized approach to insolvency and anti-money laundering regulations. Most important steps towards combating established financial crimes and keeping the economy stable include strong oversight mechanisms, ensuring transparency in the processes of insolvency, and mutual support in cooperation between financial regulators and law enforcement agencies.

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INTRODUCTION

In the complex web of financial systems, the intersection of insolvency and money laundering emerges as a battleground where the stakes are nothing short of the economy's integrity. The essence of insolvency procedures transcends mere technicalities; it serves as the bedrock for fostering unwavering confidence and trust, not just in the short term, but as a cornerstone for sustained economic growth. By meticulously redistributing risks among the market's diverse players, insolvency mechanisms promote an equitable and transparent environment where businesses can thrive. Considering the pivotal relationship between creditor and debtor a dynamic where insolvency proceedings initiated by the creditor do more than just recover debts. They act as a powerful catalyst, mitigating lending risks and thereby unlocking the doors to greater credit availability. This, in turn, fuels investment with newfound vigour, allowing stakeholders to engage in financial ventures with a boldness that would be unthinkable in the absence of such safeguards. The ripple effect is profound, ultimately driving the economy forward in a balanced and sustainable manner.

What is insolvency?

Insolvency is a situation or a state where any individual or any entity is not able to meet the ends of the debts which are due to exceeding the assets of the company then there, legal proceedings arise insolvency proceedings, liquidation or bankruptcy. In this world of trade, where fate is volatile just as the market, fortunes are made and lost in the blink of an eye, there are times when a company is unable to meet its debts and perhaps the reason could be default while selling off the assets on time or when the company has a court order pending against it for the default in paying the debts, or when there is a demand for the payment recovery of the payment in the form of debts. This is the point where insolvency rears its ugly head, signalling that an individual or entity can no longer keep up with the crushing weight of what they owe[1]. Insolvency isn't just a financial hiccup it's the flashing red light that something has gone wrong. Whatever the cause, the result is the same: a descent into the labyrinth of legal proceedings that can end in insolvency proceedings, liquidation, or even the dreaded bankruptcy[2]. It's a harsh reminder that in the ruthless business world if you're not careful, the debts can come back to collect with interest. There are regulations provided under the Companies Act 2013[3] about insolvency and the immunity to solve any disputes arising within the company or outside is thereby taken up by the NCLT (National Company Law Tribunal and Appellate Tribunal), In this regard, the High Court and the law board, board of industrial and financial reconstruction are granted the immunity for enforcement of the powers in case of any dispute arises. *There are provisions under* the *Companies Act, 2013 which are said to be relevant to the* winding-up *procedure. Part II of Chapter XX which provides for the provisions for voluntary winding up under* the *Companies Act, 2013* was *removed and* is *now dealt* with *by the Insolvency and Bankruptcy Code, 2016 which was established with the evolution of the Company law.* The Insolvency and Bankruptcy code, 2016[4] was enforced in the month of December 2016 followed by president’s approval before 6 months of the approval and was passed by the Rajyasabha on May 11, 2016 and in Lok Sabha on May 05, 2016. This Act was enforced to expand the dimensions of the existing provisions regarding insolvency and bring more preciseness and clarity to it. There are situations where individuals other than those of the company when unable to pay the debts that they are liable to pay for and are more than the assets they hold which is thereby termed as bankruptcy. So How does insolvency work? Here when an individual or any entity is unable to pay the outstanding debts where assets may be liquidated to pay off the debts, the legal action arises, here the IRP is filed by the entity or the financial and operational creditors. NCLT initiates the whole procedure by putting the company's assets on hold restricting it from any sales or transfers implementing a moratorium period of 6 months on the assets of the company while restructuring, debt settlement or liquidation of assets by inspecting the financial status of the company accordingly assessing the optimal solution that deems fit

and suitable which further helps to bring business back on track which helps in outlining the interests of all of those involved in it.

What is money laundering?

Imagine a businessman who runs a small business involving money earned from illicit activities such as corruption, gambling, trafficking, sex work, embezzlement, etc with that of his business's earnings which has fewer customers and thereby claims to make a large profit from his business to make it seem as legally appropriate. The above-mentioned earnings could be black money or any illegal fund referred to as "Money" and the procedure to make it look legal is called "launders" where the money is circulated through different ways and ultimately reaches a financial institution or bank[5]. There are companies with malicious intentions which are established abroad or in other countries that get involved in these money laundering activities other than that of individuals these are often called "shell companies", or ghost companies and which has no true functions and more often are formed to evade taxes which is illegitimate. Let's say for instance that the majority of the countries have no such laws administering the incorporation of limited liability companies where it is easier for the companies to get away with the verification and inspection process as in revealing the owners of the company, or their real identities to the regulatory authorities hampering the stability of the economy and growth of the country such as: damaging the reputation of the nation, escalating the rate of crimes and corruption, erosion of the faith and trust of the investor in the market, disrupting the balance between the financial arena of the country and banking establishments. Now delving into history, In the year of 1998, the bill of Prevention of Money Laundering Act was introduced before the parliament where it was forwarded to the Standing Committee. In 1999, the recommendations were submitted by the Standing Committee to the parliament[6]. In the year 1999, the parliament introduced the bill in a refurnished form where all the recommendations of the standing committee were included in the draft. The bill got passed in both houses and attained the assent of the President and it was notified as the Prevention of Money Laundering Act, 2002. The Act officially became enforceable on July 1, 2005. So the main motive of carrying out such operations is to increase the profit percentage illegally. For example, there are certain transactions of hard cash and not some online transactions or NEFT in order to avoid any further tracking footprint which can be against them. The IBC plays a crucial role in the economy of India

ensuring to strengthening and imposition of stringent regulations which handle the failure of the business by maximizing the value of the assets which would protect the company from any further repercussions.

RELATION BETWEEN INSOLVENCY AND MONEY LAUNDERING

The juncture between the Prevention of Money Laundering Act has made the legal structure incomprehensive in India. As we know IBC is aimed at disposal regarding litigation arising from corporate insolvency. The PMLA is enforced to prevent the rising disputes regarding money laundering activities and terror financing. PMLA is a powerful tool and it ensures the significance of the steps regarding the assets pledged to the banks and thereby a part of the insolvency procedure under IBC taken by the authorities in a more practical manner which would ensure a safety and security management in the bank, thus boosting up the confidence among the investors strengthening the economic welfare[7]. The tension emerges when the secured creditors (who have provided some financial support to the company related to the assets in dispute and are said to have legal rights on the assets of the company claim the recovery of the money that the company owes to them) and the PMLA enforcement agencies (which helps to mitigate the issue arising due to the money laundering which restricts the assets for further sales and transfers if the assets are earned from illicit ways or indulged in illegitimate activities which are not lawful) who has interest upon the same assets gaining legal rights on it gets into a conflict. The matters get more sophisticated when a shield is evolved around a corporate debtor during the Corporate insolvency resolution process (CIRP) by the provision of the moratorium under IBC in *Section 14 of the IBC which speaks about the imposition of the moratorium or restrictions backed by legal support on the assets of the company while the continuation of the insolvency proceedings which ensures to prevent the assets to not get into any other legal conflicts.* Section *32A of the IBC piles up a fresh fragment of the complicatedness by creating a protecting layer around the corporate debtors during the Corporate insolvency resolution process (CIRP*[8]*) which* raises *a conflict between the PMLA's aim and that of money laundering.* The courts and tribunals have pronounced contrasting rulings either in support of IBC and sometimes against it or in favour of ED (functioning under PMLA) supporting their claims or against it that has created tussles and clashes between the Insolvency and Bankruptcy Code, 2016 and PMLA 2002. In the case of DSK Southern Projects Private Limited, the Bombay High Court in pertinent to section 32A of IBC on 1st March 2024 directed the ED to discharge the assets or the properties of DSK Southern Projects Private Limited which led to upgradation in the legal arena. In certain circumstances the Court and tribunals in its rulings have

pronounced varying judgments sometimes in favour of the ED (which functions under PMLA) and against it, or sometimes in support of the claims made by IBC and fewer times opposing it. As aforementioned in the case of DSK Southern Projects Private Limited the Court directed ED to discharge the assets that it had held during the Corporate Insolvency Resolution Process (CIRP) and further stated that the assets won't be preserved under the shield of IBC making it non-applicable where the assets are transferred to the central government, attaching it before the CIRP begins, which has unfolded an entire new legal landscape[9]. In simpler terms, it explains that section 18 and section 25 of the IBC speak about the duties of the IRP (interim resolution professional) and the Duties of a resolution professional such as taking control of the assets and protecting them, and representing the debtors, rising the finance, appointing professionals etc. does not attract those abovementioned assets which are transferred to central government before the commencement of the CIRP procedure and any such assets thus will remain valid and assuming the conditions provided under section 32A, if after the approval of the resolution procedure of the NCLT, the ED takes any actions will stand thereby null and void. So section 32A states the liability of a corporate debtor for an offence committed before the commencement of the thereby ensuring that the previous operations and assets of the corporate debtor are no longer valid once the ownership changes through the new resolution approved by the NCLT, subsequently safeguarding the fresh operation followed by the new resolution which focuses on attracting more potential investors as the insolvency resolution process becomes more efficient and smoother under the section 32A of IBC[10]. So let me put it forward in simpler terms. Let's say for instance a company gets involved in some money laundering practices in the past, so its assets which are confiscated by the authorities of PMLA become risky making the investors quite reluctant while investing as they think that the liability might get imposed on them for the records of the company who was involved into the illicit activities which are not lawful in the eyes of law. Section 32A of the IBC evolves a shield and safeguards the interest of the investors ensuring that the previous liabilities of the company and the past criminal records such as money laundering practices by the company don't stand against the interest of the new owners and the investors once the fresh resolution is passed. ED plays a crucial role in seizing the assets under PMLA, So there are cases where the company earns through illicit and illegitimate mediums as stated above in the definition of "Money laundering". So the earnings from such means can be confiscated by the ED which provides legal protection to the investors and others who have an interest in the assets of the company. The NCLT (National Company Law Tribunal) while pronouncing judgements stated that Section 14 which explains the moratorium (certain against a corporate debtor is prohibited during the CIRP) is not meant to be implemented during the PMLA proceedings as it is more

civil. The main objective of the IBC is to strengthen the economy of the company which helps in maximizing the profit ensuring a seamless resolution process. It creates a smooth operation within the company which secures the company's future so that it would overcome the upcoming unforeseen circumstances. So the only way to stabilise the struggling business that needs a rise is only alleviate the tension between IBC and PMLA by accessing the potential resolution process.

RISKS AND CHALLENGES

The aspects of insolvency and money laundering meet when the individual persons or businesses which are involved in illicit activities become insolvent. Thus, it leads to a rise of concerns about the integrity of insolvency process.

Insolvent entities which are indulged in money laundering can make an attempt to conceal their assets from creditors by transferring it to the shell companies which are also known as off shore companies[11]. These kind of actions help the financial criminals to escape by making the insolvency process complicated. Generally, asset concealment means to place the assets in such a way which would be beyond the reach of the revenue department and financial regulators. It can also be done by wrong disclosure of financial information, misrepresentation of information, etc. The proceedings of insolvency can be manipulated by the money launderers by submitting fraudulent claims in order to recover the illicit funds. It is also done in order to dilute the origins of those funds which would lead to a negative impact on the investigation. It can lead to unfair distributions and a dilution in legitimate claims. In a broader sense, a fraudulent claim is a request for financial compensation or benefits which is dishonest and deceitful in nature. It leads to loss to businesses or insurers.

Various insolvency practitioners which includes lawyers and accountants can be involved in the illicit activities of money laundering. This situation will arise if due diligence is not thoroughly conducted. The illicit use of professional services can undermine the credibility of the insolvency process. It can happen through the misuse of client accounts where the professional money launderers can mis-utilized the accounts of clients in order to transfer those funds to third parties. Solicitors can be used for setting up corporate structures for moving illicit funds and hiding the ownership. Properties can also be used for storing the value and realising those proceeds of illicit activities[12]. This can even occur when the lawyers don't meet the regulatory requirements. It leads to a creation of opportunities for third parties for transfer of illegitimate funds for committing money laundering.

The regulations of insolvency and anti money laundering are very complex in nature. It also involves multiple jurisdictions. Due to lack of coordination between the regulatory structures, a vacuum is created which can be used by the money launderers as a loophole.

LEGAL AND REGULATORY RESPONSES

In order to mitigate the problem of intersection of money laundering and insolvency, a need of evolution in legal and regulatory framework is arising. A thorough due diligence is needed to be conducted by the insolvency practitioners regarding the financial history through their records of transactions of the insolvent parties. It also includes the disclosure of any information related to money laundering, such as uncommon transactions and connections with criminal bodies[13]. One noticeable case study where due diligence had played a keen role in identifying money laundering is the ***case of Deutsche Bank.*** *Deutsche Bank was a major global financial institution which was found to be involved in a money laundering scandal known as the "Mirror Trading Scandal." In 2016, financial regulatory institutions in from USA and the United Kingdom began to investigate Deutsche Bank's activities. They found that the Moscow branch of the bank was conducting trades in a manner which appeared to be a method of money laundering. The bank was involved in mirror trading, where large amounts of Russian rubles were converted into U.S. dollars through the medium in the bank's London branch. Mirror trading includes buying a security in a market and selling the same or a similar security in another market which creates a mirror image of the trades. In this case, Deutsche Bank was buying blue-chip stocks in rubles and then selling the same stocks in dollars, within a short period which helps the clients move large sums of money internationally. Due diligence procedure of Deutsche Bank includes internal compliance checks and monitoring systems for detecting suspicious trading patterns. But, these systems were insufficient or not properly utilized in this case. The deficiencies included inadequate monitoring under which bank's surveillance systems have failed to identify the unusual trading patterns and the volume of transactions. There were discrepancies in the internal control mechanisms which were supposed to regulate such transactions. Even if any suspicious transactions were identified, a lack of proper investigation is seen into the purpose of the trades. In 2017, Deutsche Bank had to pay a heavy fine of $630 million to U.S. and UK in order to dispose charges related to the mirror trading scandal*[14]. *The fine was made due to the failure of maintaining of proper monitoring system for identifying a money laundering and not conducting sufficient due diligence to prevent illicit transactions. This case*

highlights several key points about the importance of due diligence in detecting and preventing money laundering. Financial institutions must formulate unusual transaction monitoring systems to identify complex and large-scale money laundering activities.

There is an inherent need of close collaboration between the regulatory bodies which include financial intelligence units (FIU), regulators of insolvency and the enforcement of law. Disclosure of information and coordination of efforts can help for identifying and resolving money laundering activities in those proceedings for insolvency. ***A remarkable example of cross agency collaboration is JSC BTA Bank from Kazakhstan.*** *When the bank got nationalised in 2009, it was revealed that the former chairman had embezzled billions of dollars from the bank through a complex web of offshore companies. In order to trace the illicit transactions, financial intelligence units (FIUs) of various countries such as UK, Switzerland and the British Virgin Islands (BVI), have worked together with proper coordination. These agencies have efficiently shared the intelligence input regarding this case. When the bank went into insolvency, various insolvent practitioners were appointed for the recovery process. These practitioners had worked with numerous national authorities which lead to Serious Fraud Office (SFO) from UK in order to retain the money laundering*[15]. Other than this, various law enforcement agencies such as Interpol have actively collaborated for the arrest of the former chairman, Ablyszov. Special teams were established in order to recover the assets. Even the agencies from various countries have collaborated for resolving this case which is a great example of cross border collaboration.

If the nature of money laundering is taken into consideration then, the need of international cooperation is having a paramount importance. Nations should harmonize the laws of insolvency and anti-money laundering laws in order to prevent money launderers from exploiting jurisdictional differences. This aspect can be seen ***in the insolvency proceedings of Bank of Credit and Commerce International (BCCI) scandal.*** *In the early 1990s, this bank was under increased scrutiny and various fraudulent transactions were discovered which lead to its closure in 1991. After its fraudulent transactions came into realisation, the insolvency proceedings were initiated. Insolvency practitioners were appointed who belonged to various countries such as United States and United Kingdom who worked together for investigating the aspect of money laundering. International cooperation between various financial intelligence units had played a key role in unceiling BCCI's money laundering activities. Agencies such as Office of the Comptroller of the Currency (OCC), with UK's Serious Fraud Office (SFO), etc. Various joint investigative teams and international task forces which included the financial regulators of U.S.A and United Kingdom*[16]. *A judicial coordination was also seen when insolvency proceedings*

seemed to be complicated during the disposal of the case. Authorities from Switzerland and Luxembourg, have seized the assets for recovery. Whereas the courts of U.S and U.K have worked in collaboration on the legal action against BCCI. A need of training and awareness in the insolvency practitioners is arising which would help them in recognising money laundering and to mitigate the risk. A real life example where the importance of training and awareness is underlined is the ***insolvency proceedings of Lehman Brothers. The bankruptcy of Lehman Brothers***[17] *is one of the largest insolvencies in history. With the onset of global financial crisis, the British authorities have introduced a series of training and awareness initiatives. Agencies such as Insolvency Service and the National Crime Agency (NCA) have started to offer specialised training regarding the identification of money laundering within insolvency proceedings. The Insolvency Practitioners Association (IPA) have introduced a compulsory anti money laundering training for insolvency practitioners. Whereas joint workshops between insolvency proceedings, law professionals, etc,. were held to enhance coordination and improve skills in identifying suspicious activities.*

There are a lot of judicial pronouncements regarding the juncture of money laundering and insolvency. The judgment of Delhi High Court ***in the case of Rajiv Chakraborty RP of EIEL Vs. Directorate of Enforcement*** *has given a broader understanding of the Prevention of Money Laundering Act (PMLA), and the Insolvency and Bankruptcy Act (IBC). Whereas in the case of Nitin Jain Liquidator PSL Ltd. Vs. Directorate of Enforcement, it was stated that no action can be pronounced against the corporate debtor's properties on the offences which were done before the initiation of corporate insolvency resolution process (CIRP). Once, the resolution plan has been introduced for approval or the sale of liquidation starts taking place, the process should be continued undisturbed*[18].

In the case of Biswanath Bhattacharya Vs. Union of India, *the Supreme Court had held that powers of the attachment which are attested under the sections 5, 6 and 8 are a comprehensive form of civil forfeiture. The intention of the legislature was that the perpetrators are prevented from enjoying the fruits thereof. In the judgment of Directorate of Enforcement Vs. Axis Bank, it was held that no conflict is existent between the provisions of IBC and PMLA.*

CONCLUSION

Intersection of money laundering and insolvency has put forth significant challenges which requires a coordinated and a diverse response. As new methods of money laundering are being emerged by the financial criminals, it is pertinent that the insolvency practitioners and the legal system to remain

vigilant. Enhancing due diligence, promotion of cross agency and international cooperation, resolving of money laundering can be done. The evolution in the legal scenario has to address these challenges in order to protect the investors in order to maintain the rule of law and prevent the misuse of insolvency as a tool for financial crime. If the laws of both the matters are taken into consideration then, it is seen that the law regarding money laundering which is Prevention of Money laundering act,2002 (PMLA) was enforced to prevent money laundering and for confiscating the properties which were involved in money laundering or its other ancillary activities. Whereas the Insolvency and Bankruptcy Code, 2016 (IBC) was enforced in order to make a consolidation and amend the laws which are related to restructuring and resolution of insolvency of corporate persons in a particular time span, which would lead to an increment in the assets and ultimately it would lead to promotion of entrepreneurship. It would also lead to credit availability and balance of the interests of the investors. Money laundering in insolvency proceedings has given a significant challenge to the legal and financial systems. The insolvency proceedings can be misused by persons and entities which are willing to hide the origins of the illegitimate funds by channelizing those funds to the origins of legitimate funds. This kind of misuse has decreased the credibility of both insolvency processes and financial regulations on a broader sense. In order to ensure an effective prevention, a need of stricter anti money laundering (AML) norms and regulations is arising. It can be attained through financial audits and a thorough coordination between the regulatory authorities with the insolvency practitioners. Making the regulatory framework more strong, enhancing more transparency, and a need of vigilance in the oversight are very crucial for detecting and addressing the money laundering risks.

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