
ANALYSIS OF OVERRIDING EFFECT OF S. 14 & S. 238 OF IBC, 2016 ON S. 28A OF SEBI ACT, 1992

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ABSTRACT

SEBI is a statutory regulatory body that governs the capital market incorporated for the purpose to protect the interest; that of the investors. IBC is a time bound process, intended to protect the interest of all stakeholders by maximizing the assets value of; that of the debtor and NCLT is a quasi-judicial body that adjudicate matters related to the Indian companies. Under this present case of SEBI (Appellant) vs. KHFL (Respondent), on the basis of reference from NHB and examination conducted by SEBI into the alleged money mobilization, in 2017 it was concluded that KHFL raised capital from public through issuances of securities to more than 50 people thus violating various provisions of the CA 1956 and 2013/SEBI Rules 2009 and ITA 1961 in respect of issuances of equity shares, non-convertible debentures and preference shares, hence SEBI directed KHFL (corporate debtor-CD) to remit the amount within 6 months with 15% PA but they failed to do so in stipulated time and hence, initiated Recovery proceeding in accordance with Sec. 28A of SEBI Act. However, CD filed a counter-appeal in SAT though it upheld the order of SEBI by prohibiting the CD from selling and disposing all movable and immovable property held by them. After that CIRP was initiated under IBC, 2016 in NCLT. But SEBI challenged it on various grounds one being that NCLT had no jurisdiction to entertain CIRP. However, the tribunal framed the issue of overlapping effect of Sec. 14 and 238 of IBC on the provision of Sec.28A of SEBI Act when it is maintained under Sec7, 9 or 10 of IBC and concluded till moratorium period continues the opposition cannot recover or sell the assets, both the central Act have similar objective. It is to note that however SEBI can file an appeal to the SC challenging the same. Thus, this research paper Aims to focuses on issues pertaining to the overlapping effect of IBC as decided by NCLT in this matter

Keywords: Overlapping effect, SEBI Act 1992, IBC 2016

CHAPTER-I

PRELIMINARY

REVIEW OF LITERATURE

Various readings from articles, reports, statutes, precedents lay different view on the interpretation of provisions and its effects on the counter statute implications in question. Few case laws provide the interpretation of non-obstacle clause and how SEBI cannot recover amounts while other explains the moratorium effect. On the basis of Reports from committee dated Feb. 2020 decodes the importance and recommended various amendments to Sec.14(1)(a) IBC. The interpretation from some of the foreign statutes about exemption to regulatory authority from moratorium states why Indian Courts should adopt the same approach. One of the articles discuss about the adverse interface between SEBI law and IBC code. Thus, various case laws and opinions based on various authors are further discussed in detailed in this research paper.

STATEMENT OF PROBLEM

As IBC being the new-fangled enactment the powers of its, on operations of certain statutes like SEBI act has an adverse effect on reliving its implementation. The present case study intended to focus upon the issues pertaining to moratorium effect and non-obstacle clause against the regulatory body for recovery of amounts by selling the assets to protect the interest of the investors which the CD owed to them. The study also endeavoured to locate the views of the certain committee, precedents opposing the interpretation of such provisions under IBC while examining the recent Acts and rules applicable thereof.

OBJECTIVE

1. To outline the relevant legal provisions of the SEBI and IBC Act
2. To examine the averments made by the party thereof.
3. To analyse the issue pertaining to overriding effect of Sec 14, 238 of IBC on Sec.28A of SEBI Act.
4. To study other precedents opposing the view of overriding effect thereof.

HYPOTHESIS

1. Due to IBC,2016 being a complete code in itself and was enacted after considering all parameters by the parliaments Sec.14 (1) (a) and S. 238 would precede over Sec.28A of SEBI.
2. However certain courts view- if the operation of law being different and also if there does not exist any inconsistency over the subject matter between two independent statutory legislation then under such circumstances stated Sec. of IBC cannot be invoked against SEBI.
3. Due to SEBI being a statutory regulatory performing its sovereign functions the CIRP of IBC cannot be initiated against SEBI.

CHAPTER-II

RELEVANT ACTS AND REGULATIONS SPECIFIED

INSOLVENCY AND BANKRUPTCY CODE

A single law was created for dealing with insolvency and bankruptcy of the corporate person partnership firms/ individuals in a time bound manner which came into effect in 2016 with the sole purpose of protecting the interests of small investors such as creditors and debtors and thus making the process of doing business more effective. Relevant sections of this Act

1st AMENDMENT 2020—

Under Sec 7 following were inserted via Sec.3 Minimum No. not less than 100 such class of creditors or not less than 10% is required for filing of CIRP jointly if debt is in the form of securities or deposits.

Under Sec. 14 (1) (a) following explanation was included via Sec.5 - Provided that during the moratorium period notwithstanding anything, if any right or grant given by C.G, S.G, L.A or sectoral regulator under any other law for time being in force will be terminated or suspended on the grounds of insolvency if there is default in payment of current dues arising for the use or continuation of such right or grant. .¹

¹ The Insolvency and Bankruptcy Code,2020, S.7 and S.14(1)(a), No.1, Acts of Parliament,2020 (India).

IBC 2016—

*The law provides for- **Sec. 5(8) (a)(c)** financial debt: debt disbursed against the consideration for time value of money along with interest which includes borrowed money, money raised via note purchase facility/issue of bonds/ debentures/loan stock or similar instrument.*

***Sec.7** Initiation of Corporate insolvency resolution process by Financial creditor: on the basis of default by CD it can be initiated with relevant documents as prescribed and with no pending disciplinary proceeding as of such if only then. Within 14 days, upon satisfactory the authority can either reject or accept the same.*

***Sec.9** Application for Initiation of CIRP by Operational Creditor: After 10 days upon expiry of demand notice payment/dispute notice and failure by CD to refund money with relevant documents prescribed therein stating absence of default with affidavit and after that within 14 days upon satisfactory the authority can either reject or accept the same.*

***Sec.10** Initiation of CIRP by Corporate applicant: on the basis of default with relevant documents with related to book of accounts/ approval for filing applications from shareholders of CD within 14 days after that the authority can either reject/approve.*

***Sec.14 (1) (a)** Moratorium During this period the adjudicating officer can prohibits institution of new suits/proceeding /continuation of pending suits against CD including decree/order/judgement before any authority.*

***Sec.17 (2) (e)** Management of affairs of the CD By IRP: acting on CD behalf with subject to certain restrictions specified by the board and in compliance of any other law for time being in force, shall have access to his/her electronic records including accounts statements/finance documents with other necessary viability with any government authorities as well.*

***Sec. 238** provisions to override other laws: non withstanding anything inconsistent therewith in any other law/instrument for time being then this code would have the effect.²*

² The Insolvency and Bankruptcy Code, 2016 S.7, 9, 1 and S.14(1)(a), No.31, Acts of Parliament, 2016 (India).

COMPANIES ACT

This Act amended the CA,1956. It regulates the Indian companies and provides provisions from its incorporation till dissolution. A public company should have paid up capital of min. 5 lakh Rs. or more, has limited liability and offers shares to general public.

ACT, 2020 (28th Sept)

Under **Sec. 40** following was replaced with “in case of default penalty of 5 lakh exceeding 50 lakhs with fine from not less than 50k to 3 lakhs.”³

ACT, 2013—

*The law provides for- **Sec. 2(70)** prospectus: notice /circular etc inviting offers from public for purchase or subscribing the securities including red-hearing and shelf prospectus*

***Sec.33(1)** issue of application form for securities: application form be accompanied with prospectus for the purchase of securities of company, 50k fine for each default as penalty and in contravention. **Sec. 40** dealing with the securities of stock exchange: every company making a public offer has to obtain permission or provide application form from/in stock exchange with other conditions specified therein, in case of default penalty not less 5 lakhs exceeding 50 lakhs, 1 year imprisonment or with fine not less than 50k to exceeding 3 lakhs or more⁴*

ACT, 1956—

***Sec. 56(1)** matters and reports to be stated /set out in prospectus by the company or on its behalf or person interested in formation of company as per scheduled II and III*

***Sec.56(3)** no form of application in issuance for shares or debentures unless attached with memorandum containing its main features.*

***Sec. 60** registrations of prospectus **Sec. 73** shares and debentures allotment to be dealt with in SE⁵*

³ The Companies Act,2020, S.40, No.29, Acts of Parliament,2020 (India).

⁴ The Companies Act,2013, S.2(70), S.33(1), S.40, No.18, Acts of Parliament,2013(India).

⁵The Companies Act,1956, S.56(1), S.56(3), S.60, S.73, No.18, Acts of Parliament,2013(India).

SECURITIES AND EXCHANGE BOARD OF INDIA (ISSUE OF CAPITAL AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2009 (ICDR RULES)

In compliance with powers under Sec.30 of SEBI,1992 to make regulations ICDR rules were enacted. *R 107 covered under chapter XI listing of securities on SE, in principle approval of recognised stock exchange to be obtained in case of initial public offer/issuances of securities of listed/unlisted/specified securities.*⁶

SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 AND 2014 ACT.

It is a legal independent statutory body under central legislation which performs its own sovereign functions with a sole purpose of protecting the interests of the investors in securities and capital market as being a regulator. Relevant sections of this Act are as follows:

*The law provides for- **Sec.28A** Recovery of amounts: upon failure to pay penalty fine/due fee/incompliance with directions to refund monies or order under 11B, then RO can draw a certificate to recover such amount under his signature by following any one or more mode: attachment and sale of persons movable-immovable property/ bank accounts/arrest and detention/appointing a receiver for managing properties. Provisions of ITA, 1961 and Rules 1962 will be applicable as per modifications. (And clause 3) provides that non-obstacle clause for recovery of unpaid amount would precede over any other claim against such person.*

Sec.20A: bar of jurisdiction exclusively lies with SEBI and its authority.

Sec.11(1) duty to protect investors interest in securities/ promote development/regulate securities market etc. **Sec. 11(4)** without prejudice can suspend/restrain/impound/ attach pertaining to securities issuances, trading, transactions etc with respect to the provisions of Sec.28A.

Sec. 11A Board to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities. **Sec.11B** power to issue directions and penalties.⁷

⁶ Securities and Exchange Board of India (ICDR)Regulations,2009, R-107, No.15, Acts of Parliament,2009(India).

⁷ Securities and Exchange Board of India,2014, S.28A, S.20A, S.11(1), S.11(4), S.11A, S.11B, No.27, Acts of Parliament,2014 (India).

NATIONAL HOUSING BANK ACT,1987

It is an apex financial organization for housing and a govt. owned unit with sole responsibility to promote housing finance at both regional/local level. Relevant sections of this Act are as follows: *Sec 29A (6) conditions to cancel CoC.*⁸

INCOME TAX ACT, 1961

It deals with penalties, administration, collection and recovery of income tax. Relevant sections of this Act are as follows:

the law provides for- Sec. 48 attachment: of immoveable property of defaulter by prohibiting from transferring/charging therein or to take any benefits from thereupon.

Sec. 226 other modes of recovery: in the absence and presence of certificate under sec.222 by drawing certificate to tax recovery officer of the Act.

Sec. 229 recovery of penalties/fine/interest/ other sums.

*Sec.232 recovery by suit or under law not affected and Sec. 220 to 227*⁹

CHAPTER-III

BACKGROUND OF THE CASE

PARTIES TO THE CASE

Securities and Exchange Board of India (APPLICANT) vs. Kerala Housing Finance Limited (RESPONDENT)-- (SEBI vs. KHFL).

The parties were represented by its Manager Mr. Javed Zaman TS and By Interim Resolution Professional (IRP) and ten others respectively in both the Interlocutory Application (IA) filed before NCLT, kochi Bench The order was dismissed in the favour of KHFL on 12th march 2020.

⁸ National Housing Bank,1987, S.29A (6), No.53, Acts of Parliament,1987 (India).

⁹ Income Tax Act,1961, S.48, S.226, S.229, S.232, No.---, Acts of Parliament,1961 (India).

RELEVANT FACTS OF THE CASE

1. 5th march 1992 KHFL was incorporated as public unlisted non-govt. company in Thiruvananthapuram with Ernakulam registrar under CA,1956 and on 12th June 2001, KHFL applied for CoR of Housing Finance Company (HFC) under Sec. 29A of NHB Act, 1987 and on 17th April 2006 CoR No. 02.0064.06 was granted to the company and carried the business of Housing Finance.
2. From 2006 to 2017 the KHFL was in contravention of various provisions of the NHB Act, Income Tax Act etc and the same Reference was provided to SEBI that they raised Capital from Public with in contravention of Sec.56(1),56(3), 60 & 73 CA, 1956 (without public offer or prospectus) read with Sec.2(70),33(1) and 40 CA,2013 and in contravention of right of issuances of Securities under SEBI Rules 2009 and hence investigation was initiated into the alleged money mobilization.
3. 31st July 2015 and 20th Nov. 2015, SEBI issued two Interim orders (IO) under sections 11(1), 11(4), 11A and 11B of Act,1992 // R 107 of ICDR 2009, Disclosure and Investment Protection (DIP) Guidelines, 2000 in respect of deemed public issue of Equity Shares (ES), Non-Convertible Debentures (NCD) and Preference Shares (PS) respectively.
4. On 13th June 2017 the NHB cancelled the CoR and on 10th sept. 2017 the examination concluded that KHFL i.e., Corporate Debtor (CD) as being a public listed company not complied with Public issue norms in Respect of ES, NCD's and PS.
5. 10th Aug. 2017, SEBI by its final order in respect of two IO directed the CD/directors jointly and Severally to return the monies collected from the investors within 6 months with 15% interest P.A, and upon failure would take legal action.
6. Dated 20th May 2019 the CD and its directors filed two Appeal No. 262/2017 and No.5/2018 before Securities Appellate Tribunal (SAT) respectively and on 20th May 2019 SAT dismissed both the appeal for want of prosecution and after that Recovery Proceeding (RP) was initiated under Sec.28A of the SEBI Act,1992
7. 26th June 2019 as per 28A,11 r/w Sec. 226 and schedule-II of ITA, 1961 demand notice with Recovery Certificate No. 2280 together attached their Bank/demat account and mutual fund folis was issued in Chennai amounting Rs. 261,35,50,640/- against defaulters to pay within 15 days.
8. 26th July 2019 RO directed Banks to remit the amount available + redeem the units of mutual funds folis to SEBI. And on 2nd Aug. 2019 the RO under its power with s.48 S-II ITA,1961 r/w

Sec 28A SEBI Act prohibited the defaulters from disposing, transferring, alienating, rating charge or availing benefits from/on all their movable and immovable properties.

9. 18th Sept 2019 SAT directed for the commencement of Corporate Insolvency Resolution Process (CIRP) of IBC by appointing an Interim Resolution Professional (IRP).
10. 27th Nov 2019 SAT ordered SEBI that the recovered remittance amount of Rs. 44,24,570 from Mr. P. Parameswaran account be refunded to other appellant mentioned in no.5/2018 appeal.
11. On 12th March 2020 under the coram of Judicial and Technical Member of NCLT the order in IA's No.3/KOB/2020 in TIBA/10/KOB/2019 and No.4/KOB/2020 in TIBA/31/KOB/2019 was decided which SEBI filed.¹⁰

AVERMENTS FROM COUNSEL OF SEBI

1. SEBI is an independent statutory body under central legislation which performs all the regulatory functions that being executive, legislative and quasi-judicial and its objective is to protect the investors and it is different from that of the IBC objectives i.e., particularly works for the benefits of OC/FC (creditors/debtors' issues) and hence initiated the RP so that all investors get refunds of total 261 crores from defaulters who only made claims of few lakhs.
2. NCLT possesses no jurisdiction to give order in conflict of SEBI as also, the investors who subscribed cannot be termed as FC/OC hence it is not inconsistent or in contravention of it and the Sec.238 cannot be invoked.
3. SEBI is not arrayed as the party respondent. 10 writ petitions are pending before Kerala HC filed by the investors for refunds of the monies they lost hence, SEBI is well within its right to perform the function therein and prayed for the modification of the order for not maintaining CIRP.
4. In the Counter written statement filed and connoted therein: The CD/directors suppressed facts and without impleading obtain an order for appointing the IRP.
5. They referred the following case laws
Clariant International Ltd and another Vs. Securities and Exchange Board of India, (1004) 8 SCC 425, A.B.Krishna and others Vs. State of Karnataka and others, 1998 KHC 866: 1998(3) SCC 495 S.P.Chengalvaraya Naidu V. Jagannath and others – 1994(1) SCC 1¹¹

¹⁰ Securities and Exchange Board of India v. Kerala Housing Finance Limited AIR 2020 NCLT IA 3&4

¹¹ Id. at 4

AVERMENTS FROM COUNSEL OF CORPORATE DEBTOR

The IRP filed a written statement in respect of the IA's

1. NCD's issued by the CD falls within the ambient of Financial debt under sec. 5(8) (a)(c) of IBC.
2. no overriding effect connation made therein was not accepted as it related to the recovery of amounts with the provisions of ITA,1961 and CP Rules, 1962 of IT in force from time to time.
3. Sec. 28A is in contravention of Sec.14(1) (a).
4. They relied on: Innoventive Industries. Vs. ICICI Bank and others reported in (2019) SC 1 SCC 407:

Bohar Singh Dhillon Vs. Mr.Rohit Sehgal (IRP) and others in CAAT(Insolvency) No.65 of 2018 dated 9th May, 2019 NCLAT¹²

AVERMENTS FROM FINANCIAL CREDITORS

1. CIRP is for the benefits of FC to recover amounts who falls under the financial debt category and Parliament was well aware when they created IBC so as per Sec.238, SEBI is in direct conflict therefore its order should be in-operational.
2. Reason for the ineffectiveness of SEBI from the fact of absence of mechanism to recover debts. Despite of RP passed in 2015, CD/ directors still continued to cheat the public and failed to-stop these malpractices/ to proceed with the recovery of the assets of the CD who lent to public with/without securities whereas IBC allows to initiate CIRP for amount recovery, or sell of the loans lent in form of assets hence their success is evident from that.¹³

QUESTIONS OF LAW RAISED

1. Whether sec.14 and 238 of ibc 2016 have an overriding effect on the provision of sec. 28 of Sebi Act?
2. Whether it is right to initiate the CIRP under IBC against Sebi, 1992?

¹² Id. at 6

¹³ Id. at 8

CHAPTER-IV

ANALYSIS OF QUESTION OF LAW

WHETHER S.14 AND S. 238 OF IBC 2016 HAVE AN OVERRIDING EFFECT ON THE PROVISION OF SEC. 28 OF SEBI ACT? [3.6.1]

After referring the averments from all the parties, the NCLT by not modifying the order concluded that:

Due to IBC being a new complete code in itself to have a faster resolution process with the sole purpose to maximization of value of assets with balancing the interests to all stakeholders among other things with also after considering various prevailing laws including the SEBI and its implications connected therewith to CD and its operations; who was only given a board mandate for protection therefore, Sec. 14, 238 of the IBC, 2016 would have precedence over Sec. 28A of SEBI Act when CIRP is maintained under Sec. 7, 9, 10 of the code. In this case all the case laws presented by the appellant was outdated and was that of before of IBC hence, it was not of much relevance. Also, NCLT stated that SEBI failed to protect the investors as CD kept reaping the benefits. The tribunal further stated that due to similar objective of both the central acts it won't be apt. to cling on to supremacy, and suggested RO to cooperate with IRP for finding quicker solution and protecting the interest of the investors with involving in the CoC meeting as an observer for assets maximization of the CD. The SEBI is also not barred from taking action against CD key personnel/shareholders/directors.¹⁴

To support the above- mentioned claim following case laws were presented:

In **Innoventive industries vs. ICICI (supra)** SC it clearly states that due to non-obstacle clause under Sec. 238 any right of CD under any other law cannot come in the way of IBC.¹⁵

In **Bohar Singh vs. Mr. Roghit Sehgal (supra)** : As long as moratorium continues SEBI cannot sell assets or recover amounts from CD. Sec. 7 is maintainable.¹⁶

¹⁴ Id. at 13

¹⁵ *Innoventive Industries. Vs. ICICI Bank and others* AIR 2019 1 SCC 407 (Supreme Court of India).

¹⁶ *Bohar Singh Dhillon Vs. Mr. Roghit Sehgal (IRP) and others in CA(AT(Insolvency) AIR 2018 NCLAT 65 (National Company Law Appellate Tribunal)*

From **Ms. Anju Agarwal v. Bombay Stock Exchange AIR 2019 NCLAT 734** it held that sec.14 by virtue of 238 would prevail over Sec.28A of SEBI Act.¹⁷

However certain courts/tribunal did not adopt the view of this interpretation of law of the overlapping effect.

In **Shobha Ltd. Vs. Pancard clubs AIR 2017 NCLAT 162** it held that as long as inconsistency does not exist between the two statutes sec 14 cannot be invoked because the objective of SEBI governs relationship between investors and company whereas IBC governs the relationship between creditor and debtor therefore the objective is not similar but somehow different. Also, it should not be presumed that IBC has been enacted to replace SEBI hence Sec.238 would not have an overriding effect on SEBI Act.¹⁸

In **Kishorebhai Khamanchand Goyal V. State of Gujarat AIR 2003 SC** it was held that for the IBC to prevail over SEBI there has to exist a conflict of the subject matter with the statute of the special legislation between the two and for that the true meaning of the terms and their effect are to be analysed until and unless that is not done the possibility of the conflict existence cannot be ruled out.¹⁹

In **Harshad Govardhan Sondagar V. International Assets Reconstruction Co. Ltd 2014 6 SCC 1**: matter was pertaining to Sec.13 SARFAESI and Sec.65A of TPA it was held that though assets are governed by same statute, but the operation of the law being different in implementation therefore the non-obstacle clause cannot be enforceable.²⁰

Matter pertaining to the Sec.14 effect of IBC over SEBI Act.

In **Power Grid Corporation of India Ltd V. Jyoti Structures Ltd AIR 2017 HC 397**: it was held that Sec.14 is only applicable for Debt recovery actions against the CD and not in

¹⁷ Ms. Anju Agarwal v. Bombay Stock Exchange AIR 2019 NCLAT 734 (National Company Law Appellate Tribunal).

¹⁸ Sara Jain, analysing the overlapping effect of the Insolvency and Bankruptcy Code, 2016, 13 NUJS L. Rev. 39, 53, 40-62 (2020)

¹⁹ Hitoshi Sarkar and Yash More, Demystifying the Interface between securities law and the IBC, Nov. 2020, <https://indiacorplaw.in/2020/06/demystifying-the-interface-between-securities-law-and-the-ibc.html/amp>, Jan 11th 2021.

²⁰ Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd AIR 2014 6 SCC

those under which the CD has violated various other provisions of the enactments such as SEBI Act.²¹

In **Bohar Singh vs. Mr. Roghit Sehgal (supra)**: it also held that IRP to Act in accordance with Sec.17 (2) (e) of the code for complying with the SEBI Act, rules and Guidelines requirements. SEBI can take actions against individual including former director/shareholders of CD.

While comparing various legislative and judiciary perspectives across the world it can be noted that statutory regulatory agencies are exempted from moratorium provisions in their bankruptcy statutes In **US bankruptcy code Sec. 3629(b) (4)** exempts regulatory powers of a government component from this sphere.²² Thus, Indian Courts should adopt the similar stance for better effectiveness of the its all independent authorities so as to not impair the justice system.

Also, Sec 20A of SEBI Act provides jurisdiction Bar: it ultimately/exclusively resides with SEBI and adjudicating authority to pass any order which it is so well empowered to do so by the Act and no appeal /injunction against such order shall lie before civil court or any other authority in respect of action taken in that reference.²³

Therefore, it can now be concluded that if there is a regulatory default of dues by the CD before any authority other than IBC, as per Sec 17(2) (e) necessity of compliance of IRP with other Acts and Sec.20A jurisdiction under such situation it is not barred by Sec.14. hence, SEBI is not barred by the IBC and can further direct to recover the amounts from CD in order to protect the interest of the investors.

WHETHER IT IS RIGHT TO INITIATE THE CIRP UNDER IBC AGAINST SEBI, 1992?

In **Hindustan Construction Company Limited & Anr. Vs. Union of India & Ors. AIR 2019 SC 1074**: It was held that CIRP can be started against government owned company as they fall within the ambit of *Sec.3(7): corporate person meaning a company incorporated under sec.2(20) of CA, a limited liability partnership under 2008 Act or any with limited liability but*

²¹ Supra Note 19

²² Supra Note 19.

²³ Securities and Exchange Board of India, 1992, S.20A, No.15, Acts of Parliament, 1992 (India).

does not include financial service provider of the IBC but if it's a statutory authority performing its sovereign functions as the case was in this, then the objective of the Act has to be referred to prove the same and upon satisfaction it can be said that IBC is non-operational against such bodies as no RP or private individual can operate such function on its owns.²⁴

Thus, in this present case it can be said that the CIRP initiated under such sections cannot be maintainable against the regulatory independent body as SEBI which explicitly stated in its averments that is not arrayed as a party to respondent and hence SEBI can move to SC for the same.

CHAPTER-V

REPORTS OF IBC AND SEBI

IBC on Feb 2020

Under chapter-1 part 8 it discussed the intention behind the means and importance of the applicability of Sec.14. the main purpose of is to keep the assets of CD for successful resolution. Therefore, it does not bar all actions specially those concerning with public policy as even in some jurisdictions law allows to take regulatory claims during moratorium period. If there is a non-insolvency reason for which the grants given to CD is terminated, then under such cases it would not be barred by Sec.14.²⁵

Hence, on 13th march 2020 by the way of **IBC (1st amendment)2020-** Sec.5 was inserted to amended sec.14(1) and provide explanation thereof that sec.14 does not bar any proceeding on the liability determination of CD pertaining to any regulatory authorities/governments.²⁶

SEBI on 16th June 2020

Under "Measures for Strengthening the Enforcement Mechanism of the Board and Incidental Issues" Part B recoveries of monies SEBI proposed changes to Sec.28A for recovery of

²⁴ IBC Laws, <https://ibclaw.in/persons-who-may-initiate-cirp-against-corporate-debtor/>, Jan 15th 2021.

²⁵ Insolvency and Bankruptcy Board of India, <https://www.ibbi.gov.in/resources/reports>, Jan 15th 2021.

²⁶ Supra Note 1.

amount among others changes due in line with the provisions of the ITA, 1961 for better enforceability of the power conferred there under.²⁷

CHAPTER-VI

CONCLUSIONS AND SUGGESTIONS

KHFL violated various provisions of the NHB Act till 2017 with also averting non-compliance with the provisions of Companies, Income Tax Act and rules therein in respect of public issue norms under SEBI Regulations. Recovery proceeding were initiated under Sec.28A of the SEBI Act for remittance of the amount available with CD which was due to the Investors whom he duped and kept profiting. However, alternative proceeding CIRP was initiated in NCLT where by in the interlocutory application tribunal was of the view that Sec.14(1)(a) and S.238 of IBC have an over-riding effect on S.28A of SEBI act due to the Non-obstacle clause and period of moratorium wherein no action of recovery of default can be done against CD as the complete code of IBC has precedence over the SEBI Act given the reason for its enactment thereby and hence derived the order in favour of CD. But from the following counter-view it can be noted that IBC is not here to replace the SEBI, also for the prevalence of it there has to exist some form of conflict of interest pertaining to the subject matter between two independent statutes only then Sec.14 and S.238 can be invoked. Here, both the objective of operation of law being different for protection there can be no doubt of inconsistency. Apart from that Sec.17(2)(e) makes the compliance of IRP mandatory with other authority of law for time being in force. Sec 20A and 28A (3) of the SEBI Act provides exclusive jurisdiction right to it for deciding issues/concern arising from the matter therewith which would precede over other law in force, therefore it is right within its ambit to recover the claim from CD to protect the interest of the investors whereby IBC governs the relationship between creditor and debtor. As per the new amendment of IBC 2020 Sec.14(1) explanation provides that no bar exists for the liability determination against the CD. As stated by SEBI in its averments the reference can be drawn that since 10 writs petition are pending before the Kerala High Court and from the fact that it performs its own sovereign function of regulator the CIRP in first instance should not be maintainable because Sec.7 of IBC too states that there has to be no pending disciplinary proceeding before any court of law for the Initiation as of such. Therefore, it can be said that

²⁷ Securities and Exchange Board of India,
<https://www.sebi.gov.in/sebiweb/home/HomeAction.do?doListing=yes&sid=4&ssid=38&smid=35> ,Jan 15th 2021.

SEBI is well within its right to recover the claim of investors for their protection under the powers conferred thereof and that Sec.14 and 238 should not precede over the SEBI Act. Also, Indian laws and courts should adopt the similar stance in matter pertaining to moratorium as that of the US code for the better effectiveness of enforcement and implementation of laws for which very purpose they are built with.

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