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## Dichotomy Between Admiralty Proceedings and Insolvency and Bankruptcy Code, 2016 (IBC)- Raj Shipping Agencies

Mr. Shreyas Jayasimha, Counsel, Arbitrator, Aarna Law LLP, Simha Law

Mr. Srikanth Navale, Counsel, Arbitrator, Simha Law

Mr. Brendon Pereira, Lawyer, Aarna Law LLP

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### (I) INTRODUCTION

The Hon'ble Bombay High Court (hereinafter referred to as the "**High Court**") passed a landmark judgement in the case of *Raj Shipping Agencies v. Barge Madhwa and Anr., CHS No. 66 of 2018 in ADMS 6 of 2015*.

The Court took into account many cases relating to *in rem* proceedings under the admiralty jurisdiction, wherein there was an apparent overlap of the provisions of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereinafter referred to as the "**Admiralty Act**") and the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**") and the Companies Act, 1956 (hereinafter referred to as the "**Companies Act**"); issues pertaining to commencement or continuation of the admiralty proceedings during the on-going moratorium period; and finally issues relating to the necessity to seek leave of the Company Court, were in question.

The apparent discord between these two special jurisdictions i.e., the IBC and the Admiralty jurisdiction were put to test wherein the High Court passed a reasoned judgment in an attempt to provide useful clarity on the foregoing issues.

For the sake of convenience and better understanding of this article we wish to briefly dwell on relevant provisions of the IBC and Companies Act referred to in the High Court judgement.

- Section 14 of the IBC broadly deals with moratorium granted by the National Company Law Tribunal ("**NCLT**") under the provisions of the IBC which basically bars the initiation and continuation of pending suits or proceedings against the corporate debtor.
- Section 33 (5), of the IBC states that when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

- Section 446 of the Companies Act states that a when a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceedings shall be commenced or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court.

## (II) BRIEF FACTS OF THE CASE

Several admiralty suits were initiated in the High Court against Owners who unfortunately went insolvent. The High Court passed a winding up order against one of the ship owners under the Companies Act. Concurrently, proceedings against other ship owners had commenced under the IBC and accordingly the NCLT declared moratorium i.e., staying the continuation or commencement of all proceedings against the Owner and its assets (in any jurisdiction in India before any Court) in accordance with the IBC.

### (i) NCLT- IBC

In the insolvency proceedings before the NCLT against another vessel owner, the claimants argued that the moratorium would not act as a bar to the ongoing admiralty proceedings in the High Court as the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, is a special Act enacted by the Government to adjudicate maritime claims.

### (ii) High Court-Companies Act

In the winding up proceedings before the High Court (Company Court), the liquidator objected to the initiation and/or on-going admiralty proceedings without the leave of the Company Court as in accordance with Section 446 of the Companies Act.

## (III) QUESTIONS OF LAW

The aforesaid discordance across these forums i.e., the High Court which was dealing with the Admiralty Suits and Winding up petitions and the NCLT which were adjudicating the insolvency proceedings, led to mainly two questions of law which were eventually addressed by the High Court.

- (i) Is there a conflict between actions *in rem* filed under the Admiralty Act 2017 and the provisions of the IBC and if so, how can this conflict be cured? ("**Admiralty Act Vs IBC**")
- (ii) Whether leave under Section 446(1) of the Companies Act is required for continuation or commencement of an Admiralty proceeding where a winding up

order has been made or the Official Liquidator has been appointed? (***"If the Leave of the Company Court Required?"***)

### **Admiralty Act Vs IBC**

Upon conclusion of several hearings before the High Court, it was observed that both Acts had to be read in a harmonious manner in order to give effect to both statutes and to avoid any further conflict. The High Court closely analysed the difference between an action *in rem* under the Admiralty Act and an action *in personam* under the IBC. This was evaluated after taking into consideration various decisions passed by the Indian as well as foreign Courts wherein it was observed that *in rem* admiralty proceedings are against the vessel and not against the owner of the vessel. The vessel is considered a juristic entity in itself *dehors* the Owner.

In order to avoid a head-on collision between the two jurisdictions, the High Court observed that an admiralty action *in rem* can be initiated under the admiralty jurisdiction of a High Court but cannot be continued. The reason being, if the proceedings were to continue it would defeat the very purpose of the moratorium and insolvency process under the IBC. The Court held that a maritime claimant had a statutory right *in rem* that could not be subordinated to the IBC, which entitled it to arrest the ship, but not to continue proceedings, so as to give the corporate debtor the time and opportunity to be rehabilitated. It also clarified that claimants who have obtained an arrest from the Court will be classified as secured creditors for purposes of the insolvency proceedings in the NCLT. The moment a ship is arrested, the arrestor becomes a secured creditor *qua* the vessel and not against its owner or the assets of the owners.

In addition to maritime claimants being treated as a secured creditor, they should also be entitled to the entire value of their claim and the determination of priorities under the Admiralty Act 2017 should be adopted in the resolution plan. The High Court also ruled that vessels arrested before moratorium granted by the NCLT can only be released by the admiralty court i.e., High Court upon full payment of security.

Similarly, the High Court held that Section 33(5) of the IBC which bars commencement or continuation proceedings once moratorium is granted under the IBC, would not apply to an action *in rem* under the Admiralty Act for arrest of the Vessel as the claim is against the res and not against the corporate debtor.

### **If the Leave of the Company Court Required?**

The questions the High Court had to consider were –

- Whether the Companies Act is a general legislation relating to companies and whether the Admiralty Act 2017 is a special legislation dealing with admiralty jurisdiction and actions *in rem*, such that, the latter being a special legislation enacted later in time, prevails over the former.

- Further, whether a Company Court would be entitled to exercise admiralty jurisdiction *in rem* and entertain and dispose of a suit *in rem* by virtue of Section 446(2) of the Companies Act.

The Court after considering various decisions of the Supreme Court of India, held that “*the Admiralty Act is a Special Act and a later Act whereas the Companies Act is a general Act. The Admiralty Act is also a consolidating Act and a complete code as regards admiralty jurisdiction, arrest of ships, maritime claims, sale of ships and determination of priorities*”.

The Court was of the view that the Admiralty Act 2017 synthesizes the laws relating to maritime claims, legal proceedings in connection with the arrest and release of vessels, detention, claims, judicial sale of ships and other connected matters including determination of priorities. The admiralty courts have a distinctive jurisdiction over regular civil courts. Judicial sale of a vessel by an admiralty court vide public auction is free from all liens and encumbrances and the purchaser at the auction acquires a clean title free from any maritime liens, claims or encumbrances. As the Admiralty Act 2017 is a later and a special legislation, the priorities set out therein with respect to distribution of sale proceeds would apply. The High Court accordingly held that no leave of the Company court was required as the Admiralty Act 2017 being a special enactment, would prevail over the Companies Act.

#### **(IV) CONCLUSION**

The Court’s observation of an action *in rem* being independent of the personal liability of the vessel owner, appears to be contrary to Section 5 of the Admiralty Act 2017, which allows for a vessel to be arrested only if the owner is liable for the maritime claim. This interpretation of the High Court appears to be with a view to avoid the rigors of the moratorium under the IBC such as the abandonment of the ships by secured creditors and their failure to protect the ships and the rights of the crew members that stay on board to look after the ships.

Section 14 of the IBC bars the commencement or continuation of proceedings against the corporate debtor and its assets. The judgement, by permitting maritime claimants to arrest a vessel, during the moratorium and the insistence on full security to be furnished for vessels arrested before the commencement of the moratorium, alters the scheme of priorities under insolvency law - such claimants would not normally be regarded as secured creditors under the IBC. There are also difficulties with the Court’s reasoning that an admiralty action *in rem* is not a ‘suit’ or an ‘action’ whose continuation is barred under Section 14 of the IBC. For instance, the Supreme Court of India in the case of *VSNL v. Kapitan Kud*, (1996) 7 SCC 127 (“**Kapitan Kud**”) also referred to the English case of *The Moschanthy* [1971] Lloyd Rep 37, where it was held that an admiralty action should be stayed only when the hopelessness of the Plaintiff’s claim is beyond doubt. If it is not beyond doubt but on the contrary the Plaintiff has an arguable albeit difficult case in law, the action would be allowed to proceed to trial. Thus, the Indian Court has to see whether the Plaintiff has an arguable case; and if it does, then even though it may be a

difficult case even in law, the action should be allowed to proceed to trial and the Plaintiff must be given an opportunity to prove its case at trial on evidence.

Financial institutions such as banks may see this judgment as an obstacle to their rights under IBC and may therefore proceed to commence admiralty actions for realization of their security. That said, their right to sale proceeds would be after that of maritime lien holders but before that of other maritime claimants.

Apart from the aforesaid concerns, the judgment irons out most of the creases by reconciling two fields of law which have for long been perceived to be at loggerheads with each other.

### **Authors/Contributors**

#### **Mr. Shreyas Jayasimha**

*shreyas.jayasimha@aarnalaw.com*  
Counsel, Arbitrator  
Aarna Law LLP  
Bengaluru | Mumbai | New Delhi  
Simha Law  
Singapore

#### **Mr. Srikanth Navale**

*srikanth.navale@simhalaw.sg*  
Counsel, Arbitrator  
Simha Law  
#02-24, Maxwell Chambers Suites  
Singapore 069120

#### **Mr. Brendon Pereira**

*brendon.pereira@aarnalaw.com*  
Lawyer  
Aarna Law LLP  
Bengaluru | Mumbai | New Delhi

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