A Study on Section 238 of IBC, 2016

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Abstract

There is a huge debate going on whether Insolvency and Bankruptcy Code shall override the provisions of any other legislations or not? This article is an attempt to solve this debate by mentioning recent Supreme court judgments. The article apart from dealing with Section 238 and judgment will also look at what amendment should be come to avoid the conflicting situations. The article is divided into different parts. Part I deals with Introduction, Part II examines the provisions of Section 238 of IBC, and further it gives a detailed view of report submitted by Committee, Part III submits the landmark judgment and Part IV deals in Harmonious Construction. And at last Part V presents the Conclusion of the Article.

I. Introduction

Insolvency and Bankruptcy Code is a new legislation which has been brought up to deal with delaying situation which companies has to face earlier. Earlier the laws were scattered into different Legislations such as Sick Industrial Companies Act, 1985, Provincial Insolvency Act, 1920, Presidency Towns Insolvency Act, 1929, Companies Act, 2013. But with the enactment of IBC, now everything is consolidated. The Insolvency and Bankruptcy Code herein for the purpose of this Research paper shall be referred to as “IBC code”. IBC has been referred to as Code instead of an Act because it is a combination of Acts and Code has been made to avoid confusion which entities have to face earlier. Earlier companies used to be confused that where should they initiate the proceedings. As there were lots of different legislations such as Provincial Insolvency Act, 1920, Sick Industrial Companies Act, 1985 etc. and apart from these several legislations, we used to have different tribunals and forums as well. Hence, earlier everything was mismanaged and ineffective. But now the issue has been solved with the enactment of this Code. This code has been proved to be a useful legislation so far.

II. Examining Section 238 of IBC

A. Section 238:

Section 238 of IBC Code, 2016 is also referred to as “non-obstante clause”. Section 238 of IBC reads as “Provisions of this Code to override other Laws, which states that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such Law”[1]
By this section, one can assert that the section has an overriding effect over provisions of other Act. The drafters of IBC code wanted that IBC should prevail over other law. That is why they enacted Section 238.

B. Committee Report:
The committee has submitted the report in which it deals with conflict of IBC with other law. The committee submits that “From a constitutional perspective, a parliamentary law on insolvency and bankruptcy can override other laws on this subject matter. However, there are two points of specific concern. First, certain categories of secured creditors and tax authorities have special powers granted to them under extant laws. Second, the number of adjudicating authorities under the various laws is large and appears to be growing. The adjudicating authority under the Code needs to have the requisite jurisdiction to deal with conflicts that may arise due to this”.[2]

III. Position of Insolvency and Bankruptcy Code vis-à-vis other Statutes through Supreme Court Judgments

The Supreme Court of India has interpreted Section 238 of IBC in various Landmark judgment in which it has specially deal with the same section and has pronounced various judgments, which are mentioned and stated below. There are various situations in which this situation of overriding has come up.

“It was held that IBC Code shall override anything inconsistent contained in any other enactment, including the Income-Tax Act. Court further added that Income tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors who are private persons”.[3]

Further at another instance, the same issue was dealt in this case which states that “Section 238 of IBC which is a subsequent Act of Tea Act, 1953 is applicable and the provisions of IBC shall have an overriding effect over Tea Act, 1953.”[4]

Further, it was held that “When it comes to any clash between MHADA Act and the Insolvency Code, on the plain terms of Section 238 of Insolvency Code, the Code must prevail”.[5]

But a broad and wider interpretation was seen in the case of Macquarie in which it was held that “A non-obstante clause contained in Section 238 of 2016 Code will not override Advocates Act as there is no inconsistency between Section 9 of the 2016 code read with Adjudicating Authority Rules and Forms referred and Advocates Act. Thus, further it was stated that there should be a clear inconsistency between the enactments before giving overriding effect to the obstante clause but when scope of the provisions of the earlier enactment is clear the same can not be cut down by resort to non-obstante clause”.[6]

The case of Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd confirmed the position that “there exists no clear disharmony between the two parliamentary statutes which cannot be resolved by harmonious interpretation”.[7]

Further, in a case it was stated that “Later non obstante clause of the Parliamentary enactment will also
prevail over the limited non obstante clause contained in Section 4 of the Maharashtra Act. For these reasons, we are of the view that Maharashtra Act cannot stand in the way of the corporate insolvency resolution process under the Code”.[8] In this case there was repugnancy between the Insolvency Code which is a Parliamentary law with the Maharashtra Relief Undertakings (Special Provisions) Act,1958 which is a state law. This case titled Innovoative Industries Limited v. ICICI Bank and another (2018) 1 SCC 407 is a case related to conflict between Section 4 of Maharashtra Undertaking (Special Provision) Act of 1958 and Section 14 of IBC.

Critical Analysis of Innovoative Industries Ltd case

If we examine the objective of the both acts then we can easily identify that both the acts serve different purpose. Objective of the Maharashtra Relief Undertakings Act of 1958 came up with the purpose to let the State Government provide loan or guarantee of certain industrial undertakings. And the aim behind this is to cater down Unemployment and to promote employment.[9] Whereas the objective of IBC was to combine all laws related to insolvency into 1 umbrella so that the insolvency process can be fasten up.

At another instance, it was stated that “IBC, 2016 will have an overriding effect over the Electricity Act, 2003 owing to the existence of an inconsistency in the prevalent circumstances, in view of Section 238.”[10] In this case it was also said that “IBC would prevail over the Electricity Act, 2003 for the reason that both the statutes are special law, the IBC being later in time would prevail over the Electricity Act”. [11]

But a different view was seen in the case of Axis Bank in which it was held that “Recovery of Debts due to banks and financial institutions Act, 1993, Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 and IBC would not prevail over PMLA,2002. Further the court stated the reason that there existed no inconsistency between the PMLA, 2002 and IBC, 2016 as the object, purpose, text and the context of both these legislations are different from each other.”[12]

Another different approach can be seen in Pioneer Urban Land case in which Supreme Court stated that “Both RERA and Code are special statutes and operate in completely different spheres. They provide the home buyers with parallel remedies-while they can choose RERA if they are interested in getting their flat constructed or claiming compensation for the same, recourse to IBC, 2016 can be taken if they wish to replace management of the Corporate debtor” Further the Supreme Court also expressly mentioned in detail that “IBC, 2016 is a later enactment containing a non-obstante clause, and in the event of an inconsistency the provisions of IBC, 2016 would prevail. However, attempts should always be made to interpret the tho harmoniously so that they can peacefully co-exist”. [13]

A same situation also came in this case in which it was held that in para 46 “It is a settled law that when there are 2 enactments passed by the Parliament and if there is any provision contained in such acts which is repugnant to another, the provisions contained in the act which is later in point of time shall prevail”. [14]
IV. Section 238?: Harmonious Construction

Harmonious Construction is another Constitutional provision in Interpretation of Statutes. The doctrine of Harmonious Construction states that "Whenever there is a case of conflict between two or more statutes or between two or more parts or provision of a statute, then the statute has to be interpreted upon harmonious construction. It signifies that in case of inconsistencies, proper harmonization is to be done between the conflicting parts so that one part does not defeat the purpose of another".\[15]\n
The rules of interpretation are:

- "When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the later law repeals the earlier law. The rule making authority while making the later rule is deemed to know the existing law on the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule.

- When two provisions of law- one being a general law and the other being special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect.

- If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law will prevail over the prior special law.

- Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law".\[16]\n
V. Conclusion

Therefore, the position of law on this point till now is that if provisions of other act or statutes are inconsistent or derogatory, then the provisions of the IBC code would have an overriding effect over them. But this is not be considered a Thumb rule. With the help of the present Article, the position is that if there is any inconsistency between the provisions of two statutes only then the overriding effect should take place and care should be taken to adopt section 238 of IBC to be used only as a last resort.

Reference

[1] Sec. 238, Insolvency and Bankruptcy Code, 2016, Act no.31
[7] Supra
[10] ICICI Bank Ltd. v. ABG Shipyard Ltd. (2017) SCC Online
[14] KSL & Industries Ltd vs. M/S Arihant Thread Ltd. & Ors.