THE WAR OF LAWS OF INSOLVENCY AND ADMIRALTY

1. INTRODUCTION

The evolution of the Indian legislative regime, especially in the last decade, has not only eradicated some of the obsolete enactments but has also given birth to several new legislations and amended various existing legislations with an aim to make it more viable and effective. There has been a paradigm shift in the policies of the nation resultantly bringing about a change on the legislative front, as well. The country has witnessed the advent of some very ambitious legislations in the form of the Commercial Courts Act, 2015, Insolvency and Bankruptcy Code, 2016, Central Goods and Services Tax Act, 2017 and the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. Although these legislations have been brought with an aim to streamline the jurisprudence on these subjects of law, these have also given rise to conflicts and questions of law.

In this article, we have dealt with one such issue, which is the conflict between the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("**Admiralty Act**").

The IBC was introduced with the main aim to facilitate a corporate faltering in its debt obligations and to protect the interests of all the stakeholders with equity,[1] and the Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016, was introduced with the intent to consolidate the existing laws on civil matters of admiralty jurisdiction of courts, admiralty proceedings on maritime claims, and arrest of ships.[2] It may seem that there is no probability of any conflict between the two enactments as they are on entirely different subjects of law with hardly any perceivable overlap. However, that is not true. The conflict arises when a shipping company, being the owner of the vessel, becomes insolvent and goes into liquidation under the IBC.

The IBC is, in many ways, different from the winding up proceedings under the Companies Act, 1956, and the Companies Act, 2013. One key difference is the introduction of the Corporate Insolvency Resolution Process ("**CIRP**") under the IBC. Unlike the old regime under the Companies Act, 1956, and the Companies Act, 2013, the debtor, under the IBC, is first made to go through the compulsory process of resolution and the creditors are empowered to decide whether the debtor can be revived or is required to be liquidated. For this purpose, the IBC has stipulated a period of protection in the form of a moratorium which primarily operates for a period of 180 days, extendable from time to time under the IBC. However, if at any time after the 180 days and/or during the extended period, the creditors feel that the debtor company cannot be revived

[1] MS Sahoo, "A Code of Balances", *The Financial Express*, 1st November 2017.
[2] Discussion on the motion for consideration of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Bill, 2016, available at http://164.100.47.194/Loksabha/Debates/Result16.aspx?dbsl=10122, last accessed on 2nd April 2020.

or it is not viable to revive the debtor company, the creditors may choose to pass a resolution for liquidating the debtor.

For a maritime claim including maritime lien under the Admiralty Act, the High Court is vested with the jurisdiction to hear such cases and on satisfaction of the conditions laid down under Section 5 of the Admiralty Act, an order for arrest of the vessel is usually passed. Thereafter, based on the merits and facts of the case, the vessel is sold off and the monies are disbursed in accordance with Section 10 read with Section 9 of the Admiralty Act. The proceedings therein are *in rem* until the ship owner/ demise charterer enters appearance and deposits security.

The conflict arises when the ship owner is subject to the jurisdiction of both the Admiralty Court as well as the National Company Law Tribunal under the IBC. The vessel is the subject matter under both the proceedings, as an offender under the Admiralty Act and as an asset under the IBC. In such a scenario, it becomes imperative to ascertain as to which Court or Tribunal would exercise its jurisdiction over the vessel and under which law. The issue of whether the IBC prevails over the Admiralty Act or *vice versa* has been decided by the High Court of Bombay in *Atlantic Shipping Pvt. Ltd. v. Barge Madhwa and Anr.*[3] by an order passed on May 19, 2020. In this article, the authors elaborate and deal with the principles based on which the jurisdiction over the vessel can be determined. It is pertinent to mention that the outcome may vary depending on the facts and circumstances of each case; however, this article primarily deals with the basic principles that govern the issue of overlapping jurisdiction of the IBC and the Admiralty Act and deliberate on the judgment of *Barge Madhwa* (*Supra*).

2. THE GUIDING LIGHT: PRINCLIPLES OF INTERPRETATION OF STATUTES

The conflict between laws is not a new phenomenon and the general principles which are usually resorted to for determining the prevalence of one law over the other are two-fold:

a. *leges posteriores priores conterarias abrogant (later laws abrogate earlier contrary laws).*
b. *generalia specialibus non derogant (a general provision does not derogate from a special one.)*[4]

The first principle stipulates that the later law will prevail over an earlier law in case of any inconsistency. The IBC came into force on 1st December 2016 whereas the Admiralty Act came into force on 1st April 2018. The Admiralty Act, therefore, is the later law. However, this principle is not absolute. To determine the prevalence of one law over the other, courts have to analyse whether the legislature intended that the later law will prevail over the earlier law and for this, courts usually consider the provisions of the enactments, its objective and certain specific clauses such as the non-obstante clauses. Interestingly, the Admiralty Act neither contains a non-obstante clause giving it an overriding effect nor does it stipulate any clause specifying that it will be in addition to, and not in derogation of, the laws for the time being in force. Therefore, from a plain reading of the provisions of the Admiralty Act, the intention of the legislature in this regard is unclear.

[3] Notice of Motion (Suits) No. 1162 of 2015 in Admiralty Suits No. 1 of 2015.
[4] *Essa and Ors. vs. The State of Maharashtra, through STF, CBI Mumbai and Ors.,* 2013 (3) SCALE 1.

Contrary to the above, Section 238 of the IBC provides that the provisions of the IBC 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. It is important to note that the phrase "for the time being in force" has been interpreted to mean laws in force from time to time and not laws in force only at a fixed point of time[5], which gives the IBC an overriding effect over almost all conflicting laws in force.

In view of Section 238 of the IBC and in the absence of an analogous provision in the Admiralty Act, it appears that, on applying the first principle and the jurisprudence thereof, the legislature did not intend that the provisions of the Admiralty Act would override the provisions of the IBC.

The second principle of *generalia specialibus non derogant* stipulates that a general provision or statute shall yield to a special one. Justice V.R. Krishna Iyer in *Life Insurance Corporation of India and Ors. vs. D.J. Bahadur and Ors.*[6] laid the path for determining the nature of statutes and noted that "*[i]n determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity not absolutes-so too in life.*" The purpose of law and the context, therefore, are of paramount importance to ascertain the nature of a statute.

One of the important objectives of the IBC is to bring the insolvency law in India under a single unified umbrella with the object of speeding up the insolvency process.[7] The IBC deals with a proceeding *in rem* in which the focus is the rehabilitation of the corporate debtor.[8] The Admiralty Act, on the other hand, consolidates the former British era laws on civil matters of admiralty jurisdiction of courts, admiralty proceedings on maritime claims, arrest of vessels and related issues in line with modern trends in the maritime sector, and in uniformity with prevalent international practices. The Admiralty Act provides for both, *in rem* and *in personam* proceedings, for the purpose of recovering and enforcing the maritime claims. The claimant has a right *in rem* to proceed against the ship or cargo as distinguished from a right *in personam* to proceed against the owner.[9]

Both the enactments evidently operate in different spheres and are essentially special laws. However, regarding the particular aspect of liquidation, it may be argued that, while IBC is a general law dealing with liquidation of all assets and distribution of proceeds to all creditors, the Admiralty Act is a special law dealing with the liquidation and sale of the vessel and disbursement of proceeds to parties having maritime lien or claim over the vessel. However, in our view, such an argument may be faulty as it does not consider the principle subject matter of the laws as is required to be considered under the second principle.

Since both the laws are special in their own respect, the second principle cannot be applied to the present conflict between these two enactments. Hence, based on the first principle, it appears that

[5] *Management of MCD vs. Prem Chand Gupta and Ors.* AIR 2000 SC 454; *See also J. Parthiban and Ors. vs. State of Tamil Nadu and Ors.* AIR 2008 Mad 203.
[6](1981) 1 SCC 315.
[7] *Innoventive Industries Ltd. vs. ICICI Bank and Ors.,* (2018) 1 SCC 407.
[8] *Pioneer Urban Land and Infrastructure Limited and Ors. vs. Union of India (UOI) and Ors.,* (2019) 8 SCC 416.
[9]*M.V. Elisabeth and Ors. vs. Harwan Investment and Trading Pvt. Ltd. and Ors.*, AIR 1993 SC 1014.

in case of an inconsistency, the provisions of the IBC will prevail. However, it is yet to be tested whether harmonious construction is possible or whether, under all circumstances, the Admiralty Act will have to yield to the IBC and give in to its overriding effect.

3. THE DARK HORSE: HARMONIOUS CONSTRUCTION

It is a settled rule of interpretation that, if one construction leads to a conflict, whereas on another construction two legislations can be harmoniously construed, then the latter must be adopted.[10] It is, therefore, essential to ascertain whether on a harmonious construction of law, a vessel can be arrested and sold under the Admiralty Act, when the Adjudicating Authority is also vested with jurisdiction under the IBC over the same subject matter. This issue primarily arises in view of Section 33(5) of the IBC which provides that subject to Section 52 of the IBC, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor.

Where the ship owner company has gone into liquidation, the result would vary based on the nature of the claim, that is to say, the yardstick for a maritime lien in insolvency proceedings is distinct from that of a mere maritime claim.

3.1. Maritime Lien:

There are two attributes to maritime lien: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by, that property.[11] A maritime lien adheres to the ship from the time of the happening of the events which gave rise to the maritime lien, and then continues to be binding on the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way by which, under law, it may be discharged.[12] It survives the change of ownership, registration or flag.[13]

The holder of maritime lien ranks as a secured creditor under the insolvency legislation.[14] This is evident from Section 9(4) of the Admiralty Act which deals with the exception to maritime lien, where the terminology used is "*No maritime lien shall attach to a vessel to secure a claim which arises out of or results from […]*". It is, therefore, apparent that, except the circumstances enlisted under Section 9(4) of the Admiralty Act, maritime lien, upon its commencement, attaches itself to a vessel to secure a claim. Section 3(24) of the IBC stipulates that a secured creditor is a creditor in favour of whom security interest[15] is created. Therefore,

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[10] *KSL & Industries Ltd. vs. Arihant Threads Ltd.* (2015) 1 SCC 166.
[11] *M.V. Al Quamar v. Tsavliris Salvage (International) Ltd. and Ors.*, AIR 2000 SC 2826.
[12] *O. Konavalov vs. Commander, Coast Guard Region and Ors.,* (2006) 4 SCC 620.
[13] Section 9(2) of the Admiralty Act.
[14] *In Re: Aro Co. Ltd.*, [1980] 1 WLR 453.
[15] As per Section 3(31) of IBC "security interest" means right, title or interest or a claim to 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.

on a conjoint reading of the provisions of the Admiralty Act and the IBC, it can be said that by operation of law, a maritime lien holder qualifies as a secured creditor under the IBC.

Consequently, when a corporate debtor goes into liquidation, the maritime lien holder has the benefit of choice as stipulated under Section 52 of the IBC. It can choose to either opt out of the liquidation estate in accordance with Section 52 of the IBC and enforce the security under Admiralty Act[16], or it can choose to relinquish the security and accept the waterfall mechanism of distribution as stipulated under the IBC. Further, as mentioned later in this article, an *in rem* action against the vessel for the enforcement of maritime lien cannot be equated to proceedings against the corporate debtor and, hence, the bar under Section 33(5) of the IBC will not apply.

3.2. Maritime Claim:

As opposed to maritime lien holders, general maritime claimants only possess a bare right to commence proceedings *in rem* to invoke the admiralty jurisdiction of the court, and nothing more.[17] It is on the commencement of the action and thereafter upon arrest of the ship, that the maritime claimant acquires the status of a secured creditor. The England and Wales Court of Appeal in the case of *In Re: Aro Co. Ltd.*[18] had asserted that upon institution of the suit, the maritime claimant acquires the right to arrest the ship and, therefore, can be treated as a secured creditor. However, the law prevalent then was that the ship owner at the time when the claim arose and at the time when the suit was instituted, had to be the same. Therefore, merely upon the institution of a suit, the maritime claimant was said to have encumbered the vessel so as to be treated as a secured creditor.

The law, as it stands today, in view of the Admiralty Act and the International Convention on the Arrest of Ships, 1999, is different. Under the new regime, (i) arrest is only permissible of any ship if a maritime claim is asserted against the person who owned the ship at a time when the maritime claim arose for which the owner is liable, and (ii) the same ship owner should be the owner of the ship when the arrest is effected.[19] In light of this, a maritime claimant, as against a maritime lien holder, would be treated as a secured creditor only upon the arrest and not merely on the institution of a suit. This argument is further reinforced by Section 5 of the Admiralty Act which stipulates that the arrest is for the purpose of providing security against a maritime claim. Owing to this, where the general maritime claimant has obtained an arrest order prior to the Adjudicating Authority assuming jurisdiction under Section 33 of the IBC, such a claimant ought to be treated as a secured creditor and would have the right to proceed against the vessel in terms of the provisions of Section 52 of the IBC. Needless to mention, where such a claimant fails to get the vessel arrested, it shall be

[16] *Hero Fincorp Limited v. Liquidator of Tag Offshore Private Limited*, M. A. No. 3656 of 2019 in C. P. No. 54/I&B/2019.
[17] The Honourable Judge of Appeal Steven Chong Supreme Court of Singapore (2018), "When Worlds Collide: The interaction between insolvency and maritime law", Keynote address at the 2nd meeting of the Judicial Insolvency Network, available at < http://jin-global.org/content/jin/pdf/2018-sept-jin-keynote-address-new-york.pdf>, last accessed on 20th May 2020.
[18] *Supra* note 14.
[19] *Chrisomar Corporation vs. MJR Steels Private Limited and Ors.*, (2018) 16 SCC 117.

treated as an unsecured creditor and the claim of such a claimant would be *pari passu* with all other unsecured creditors under the insolvency proceedings.

From the above, it is apparent that on a harmonious construction of both the IBC and the Admiralty Act, the maritime lien holders and the general maritime claimant acquire the status of secured creditors upon the happening of certain events. In such a scenario, proceedings under the Admiralty Act, even where the Adjudicating Authority under the IBC has assumed jurisdiction, would not give rise to any inconsistency and such an interpretation ought to be upheld.

4. NOT THE END: ISSUE OF APPLICABILITY OF MORATORIUM

Since the statutory framework of the IBC is a departure from the framework under the Companies Act, 1956 or Companies Act, 2013, the conflict is not limited to the sale of the vessel when the ship owner goes into liquidation. Rather, one important question which arises is whether such proceedings under the Admiralty Act can be instituted and continued once the moratorium under Section 14 of the IBC is in operation.

Under the Companies Act, the claimants/plaintiffs claiming against the debtor could initiate suits or proceedings under the maritime laws, even after a winding up order was passed or the liquidator was appointed. The only requirement was of seeking permission of the court under Section 446 of the Companies Act, 1956 or Section 279 of the Companies Act, 2013. The Division Bench of High Court of Madras had, under the earlier regime, taken a view that even post the initiation of winding up proceedings against the company which is the owner of the ship, neither can any stay be granted under Section 446(2) of the Companies Act, 1956 nor is any leave required to be obtained where *in rem* proceedings are initiated against the vessel.[20] The primary reason behind such a judgement by the Court was the second principle i.e., *generalia specialibus non derogant*. The High Court of Bombay, while dealing with an application of impleadment of a sister vessel as an obiter, had noted that if a suit cannot be commenced or proceeded with unless leave is obtained of the Company Court under Section 446 of the Companies Act, 1956, then it is equally necessary that such leave be obtained before seeking to implead sister ships or their sale proceeds in the suit for the purpose of obtaining a decree.[21] Thereby, implying that leave under Section 446 of the Companies Act, 1956 ought to be obtained before initiating an action under the admiralty laws.

The issue of applicability of Section 446 of the Companies Act, 1956 or Section 279 of the Companies Act, 2013 had initially garnered conflicting stands from the different Courts, which has now been resolved in view of *Barge Madhwa* (*Supra*).

However, unlike under the Companies Act, under the IBC, there is no provision for obtaining any leave for filing or proceeding with a suit. Instead, by virtue of Section 14 of the IBC, there is an absolute prohibition from instituting or proceeding with suits against the corporate debtor

[20] *Pratibha Shipping Company Limited vs. Praxis Energy Agents S.A. and Ors.*, 2019 (5) CTC 450.
[21] *Praxis Energy Agents SA vs. M.T. Pratibha Neera,* 2018 (5) Bom CR 154.

during the subsistence of the moratorium, which starts to run from the insolvency commencement date[22].

To understand why such an embargo, under Section 14 of the IBC, may have a prejudicial impact on maritime laws, it is necessary to delve into the jurisprudence of admiralty law. Merchant ships of different nationalities travel from one port to the other port carrying goods or passengers, and they incur liabilities in the course of their voyage and subject themselves to the jurisdiction of foreign States when they enter the waters of those States.[23] These ships are, therefore, owned and traded internationally, and unless a claimant can gain immediate security for a claim, he may never have the opportunity effectively to pursue it.[24]

However, Section 14(1)(a) of the IBC prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority. The High Court of Delhi has held that moratorium under Section 14(1)(a) of the IBC is intended to prohibit debt recovery actions against the assets of a corporate debtor.[25] However, it is pertinent to note that, in an *in rem* proceeding, the vessel is clothed with a juridical personality[26] and she losses its character as the asset of the company. Wherein, in case of maritime lien, the liability of the vessel is independent of the ship owners' liability which survives change of ownership, registration or flag.[27] This means that, in case of maritime lien, the vessel is a separate and independent juridical entity. In view of this, moratorium shall not operate against the initiation or continuation of *in rem* proceedings against the vessel in case of maritime lien.

The Admiralty Act, in case of general maritime claims, requires a connection to be established between the ship owner/ demise charterer at the time the claim arose and at the time the arrest is effected.[28] To that end and extent, the liability of the vessel runs parallel to the liability of the ship owner/ demise charterer. However, the plaintiff can still initiate the proceeding merely against the vessel without making such ship owner/ demise charterer a party. In view of the purpose of the Admiralty Act and to ensure that the vessel does not sail away, it is essential that such *in rem* actions should not be prohibited from being instituted. Therefore, in our opinion, even in case of maritime claims, the initiation and continuation of *in rem* proceedings for the purpose of securing arrest should be allowed.

To the extent *in personam* proceedings under Sections 6 and 7 of the Admiralty Act are concerned, the moratorium will operate.

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[22] As per Section 5(12) of IBC "insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.
[23] *Supra* note 9.
[24] *Supra* note 14.
[25] *Power Grid Corporation of India Ltd. vs. Jyoti Structures Ltd*., 246 (2018) DLT 485.
[26] *Supra* note 9.
[27] *Supra* note 13.
[28] Section 5(1)(a) and (b) of Admiralty Act.

5. THE DECIDER: *ATLANTIC SHIPPING PVT. LTD. VS. BARGE MADHWA & ANR.*

While the authors were still deliberating on the issue of overlap between the Admiralty Act and IBC, this conflict has been put to rest by the decision of the High Court of Bombay in *Barge Madhwa* (*Supra*) decided on May 19, 2020. In the said judgment, the Court has dealt with various issues and put to rest the controversies thereof:

5.1. Finding in conflict:

The High Court had held that both, the Admiralty Act and the IBC, are special enactments. In case of a conflict between two special laws, where one contains a non-obstante provision and bars the jurisdiction of the Civil Court and the other does not contain a non-obstante provision, the clear legal position is that in the event of conflict, the former legislation will prevail.

The High Court further held that the principle of the later legislation overriding the earlier one is not be applicable in this case as it applies only where both special acts contain a non-obstante provision and there is a conflict.

Conclusively, the non-obstante clause under Section 238 of the IBC gives overriding effect to the provisions of the IBC only when there is an inconsistency between the two laws. Therefore, it is first required to attempt a harmonious construction and only in the event there is a conflict and the conflict cannot be resolved, will the IBC prevail.

5.2. Harmonious construction:

Applying this principle, the High Court has attempted to resolve the conflict between admiralty law and insolvency law.

Emphasis was placed on the distinction between an action *in rem* against a vessel and an action *in personam*. It was noted that once this distinction is recognized, whereby the vessel is a separate and distinct entity dehors its owner, it is easy to resolve the apparent conflict between admiralty and insolvency proceedings. Hence, it was held that an action *in rem* against the ship is neither an action against the owner of the ship who may be the corporate debtor as defined under the IBC nor a proceeding against the asset of corporate debtor. It is a proceeding against the ship to recover the claim from the ship, whereby an action *in rem* continues as an action *in rem*, notwithstanding that the owner may have entered appearance, if security is not furnished for the release of the vessel.

Relying on *In Re: Aro Co. Ltd.* it was stated that once a ship is arrested in respect of a maritime lien or a maritime claim, the claimant becomes a secured creditor *qua* that arrested vessel and the vessel is effectually encumbered with the plaintiff's claim. It was further noted that the claimant is not a secured creditor of the owner but only that of the particular ship and to the extent of the value of the ship. This also meets with the definition of "*secured creditor*" as per Section 3(30) and "*security interest*" as per Section 3(31) of the IBC.

Therefore, on understanding the salient features of admiralty law, it becomes apparent that there is no conflict between the Admiralty Act and the IBC, and both can be construed harmoniously.

5.3. Moratorium and ancillary provisions:

Upon a harmonious construction of both the laws, it was held that an action *in rem* filed under the Admiralty Act for the arrest of the ship would neither amount to an institution of a suit against a corporate debtor as defined under the IBC nor would the continuation of an action *in rem* amount to the continuation of a suit against the corporate debtor. Consequently, the declaration of moratorium under Section 14 of the IBC will not prohibit the institution of an action *in rem* or continuation of a pending action *in rem*.

However, to give effect to the purpose of the IBC, it was held by the Court that in the event a moratorium is declared under Section 14 of the IBC, then an action *in rem,* if instituted prior to the declaration of the moratorium, will not be continued during the CIRP, as this would defeat the very purpose of insolvency resolution under the IBC. Moreover, the institution of an action *in rem* even after a moratorium is declared would also be permitted since the action *in rem* is not against the corporate debtor, provided that such an action would not be allowed to be proceeded with after the arrest of the ship, so that the resolution process can be effective.

As regards the bar under Section 33(5) of IBC, when the ship owner goes into liquidation, it was held that such a bar would not operate, given that the action *in rem* is against the ship and not the corporate debtor. Further, Section 33(5) of the IBC is subject to Section 52 of the IBC whereby the secured creditor can realise the security interest in terms of the provisions of the section. On proceeding with admiralty action, the determination of priorities will be in accordance with the Admiralty Act.

The High Court, in this matter, has analysed various scenarios that may arise in terms of timelines of the initiation of actions. The High Court also clarified that the interpretation in *Barge Madhwa* (*Supra*)is only applicable to *in rem* actions against the vessel and not to *in personam* action against the owner.

5.4. Whether leave is required under Section 446(1) of the Companies Act for commencing a suit under the Admiralty Act:

It was noted that admiralty courts have exclusive jurisdiction in terms of Section 2(1)(e) of the Admiralty Act. Therefore, it was held that the Company Court does not have jurisdiction to entertain and adjudicate upon any matter which the High Court vested with admiralty jurisdiction is empowered to decide or determine under the Admiralty Act. Therefore, leave under Section 446(1) of the Companies Act, 1956 is not required to be obtained. It was further held that the Admiralty Act is a special Act and it prevails over the Companies Act being a general Act.

Further, it was analysed that on a reading of Sections 446(1) and 446(2) of the Companies Act, 1956, it is required to be ascertained whether the Company Court would have jurisdiction to entertain or dispose of an action *in rem* filed in a court vested with admiralty jurisdiction. Since the ship is held to be an independent legal entity distinct from the owner, the issue was answered in the negative.

The High Court further held that the maritime claimants are on an entirely different footing as against the general secured creditors of the company when the subject matter is the vessel and the sale proceeds thereof. With respect to the priorities of claim, it was held that Section 10 of the Admiralty Act will prevail over Sections 529 and 529A of the Companies Act, 1956. Lastly, it was held that since no leave is required under Section 446(1) of the Companies Act, 1956, then Section 537 of the Companies Act, 1956 will also not be applicable and the sale of the vessel by the Admiralty Court cannot be treated as void.

6. CONCLUSION

In the judgment of *Barge Madhwa* (*Supra*), the High Court of Bombay has dealt in detail with the issues involved and put to rest this war of laws by applying the golden rule of harmonious construction. It is pertinent to note that the High Court of Bombay, while dealing with the various aspects of the interaction between the Admiralty Act and the IBC, has not distinguished between maritime lien holders and other general maritime claimants as set out in this article. Rather, it has held that since the action *in rem* is against the vessel, the bar under Section 33(5) of the IBC will not operate even though the general maritime claimants failed to obtain arrest prior to the order of liquidation. Nonetheless, the underlying principle which is pertinent for the determination of issues is that an attempt must be made to harmoniously construe the laws and, in case of an inconsistency, the IBC will prevail.

However, the jurisprudence in relation to the interaction and interplay of admiralty law and insolvency law is far from fully developed, and several issues still remain unanswered, for instance, the issue of the initiation of admiralty action in case of cross-border insolvency. In an admiralty action, jurisdiction may be exercised irrespective of the nationality of the ship or that of its owners, or the place of business, domicile or residence of its owners, or the place where the cause of action arose wholly or in part.[29] In such a scenario, situations arise where the ship owner of a vessel is incorporated outside India and is subject to insolvency proceedings in the respective country. Since the IBC has not yet adopted the United Nations Commission on International Trade Law Model Law on cross-border insolvency, the initiation of admiralty actions in case of cross-border insolvency is still a matter which requires further deliberation.

Another interesting aspect which arises is in view of the Section 29A of the IBC and the judgement of the National Company Law Appellate Tribunal ("**NCLAT**") in *State Bank of India v. Anuj Bajpai (Liquidator)*[30]. Section 29A of the IBC stipulates provisions regarding the ineligibility of a person to be a resolution applicant whereby it prevents promoters and such other persons from making

[29] *Supra* note 9.
[30] Company Appeal (AT) (Insolvency) No. 509 of 2019.

a backdoor entry. However, the Admiralty Act does not contain any analogous provision. Even though, on harmonious construction, the maritime lien holder and claimant can now proceed as secured creditors under Section 52 of the IBC, the question that arises is whether the Admiralty Court will be bound by the provisions of Section 29A of the IBC. As per the NCLAT, as held in *Anuj Bajpai* (*Supra*), the provisions of Section 29A of the IBC are applicable to the 'secured creditor', who opts out of Section 53 of the IBC to realise the claim in terms of Section 52(1)(b) read with Section 52(4) of the IBC. The legislature has further amended Regulation 37 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, to extend the bar under Section 29A of the IBC to sale by a secured creditor with the exceptions of enforcement of security pursuant to the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or the Recovery of Debts and Bankruptcy Act, 1993. Whether the bar on the sale or transfer by secured creditors can be said to extend to the bar on sale by the court under admiralty jurisdiction is yet to be analysed by the Admiralty Courts in India.

Therefore, even though *Barge Madhwa* (*Supra*) has laid a strong foundation for the interaction between the Admiralty Act and the IBC along with the Companies Act, the law in this respect is still evolving and in view of the anomalies still subsisting, it will be interesting to witness the interpretation and application of the principles of law in times to come.

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