

## Who will take cognizance of insolvency offences: by Rakesh Kumar Singh

Insolvency and Bankruptcy Code, 2016 has created several special offences. It has provided for trial of these offences by special mechanism. Section-236 reads as under:

“236. Trial of offences by Special Court.- (1) Notwithstanding anything in the Code of Criminal Procedure, 1973 (2 of 1974), offences under this Code **shall be tried** by the Special Court established under Chapter XXVIII of the Companies Act, 2013 (18 of 2013).

(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial”.

2. The aforesaid clearly says that only the special court which has been established under the Companies Act can try the offences. Special court under Companies Act is constituted by virtue of Section-435 which reads as under:

“435. Establishment of Special Courts. (1) The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of two years or more], by notification, establish or designate as many Special Courts as may be necessary: Provided that all other offences shall be tried, as the case may be, by a

Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge”.

3. The section clearly gives a discretion to the Central Government to establish or designate a special court. Now, unless such special court is established or designated by the central government under the Companies Act, there will be no court which can try an offence punishable under the Insolvency and Bankruptcy Code, 2016.

4. Section-236 has used the expression “shall be tried” thereby clearly indicating a mandate that the offences have to be tried by a special court and not by any other court. Can we say that if special court is not constituted, the normal jurisdictional court can try an offence under the Code? One may argue that in the absence of any prohibition, provision of CrPC will apply and therefore the normal jurisdictional court will be entitled to try the offences in case special court is not constituted. In support, it may be argued that only due to inaction of executive in creating special court, an offender cannot be left without punishment.

5. The argument may sound attractive but hardly holds ground. Section-4 and 5 of CrPC and Section-238 of Insolvency and Bankruptcy Code, 2016 are required to be considered at this stage and therefore they are reproduced as under:

“4. Trial of offences under the Indian Penal Code and other laws.- (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

238. Provisions of this Code to override other laws.- 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”.

6. One thing immediately becomes clear i.e. applicability of provisions of CrPC is subject to any enactment providing the manner and further that CrPC shall not affect any special law. Insolvency and Bankruptcy Code, 2016 is special law and therefore it cannot be affected by CrPC and even provisions of CrPC will be subject to this special law. Further Insolvency and Bankruptcy Code, 2016 itself overrides any other inconsistent law. Now, if the Insolvency and Bankruptcy Code, 2016 says that the offences shall be triable by Special Court, it will override the general provisions in CrPC which says that offences can be tried by normal jurisdictional court. Any activity of executive cannot have supremacy over the legislative enactment.

7. It is at this stage that we may note the source of power of the normal jurisdictional courts. There cannot be any dispute that even normal jurisdictional courts are creature of CrPC and their powers are available in the same. Section-26 CrPC reads as under:

“26. Courts by which offences are triable.- Subject to the other provisions of this Code,-

(a) any offence under the Indian Penal Code (45 of 1860) may be tried by

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable: Provided that any offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) shall be tried as far as practicable by a Court presided over by a woman.

(b) any offence under any other law **shall, when any Court is mentioned** in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by-

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable”.

8. What is interesting is to note that it is Section-26 which really empowers different courts to try offences. Clause-(b) deals with offences under other law. It clearly says that offence under other law shall be triable by the court mentioned in such law. Only when no court is mentioned in such law that we need to further read the provision which clarifies that in such situation the offence may be tried by the High Court or the court indicated in the Schedule. Meaning thereby that if the law mentions a court for trial of its offences, then there cannot be any deviation from the same. It provides for normal jurisdictional court only “**when no Court is so mentioned**”. It cannot be equated with “when no court is notified by executive authority”. Reason is obvious. Mentioning of anything in law is a legislative function whereas implementation of the same is executive function. As such, whether any special court is established or not is immaterial for the purpose of Section-26(b) of CrPC as mentioning of court in the special law is relevant. Section-236 of Insolvency and Bankruptcy Code, 2016 has mentioned that special court shall try the offences. As such, it is only that court which can try the offences and not any other normal jurisdictional court.

9. It is at this stage, we need to consider the effect of a judgment of Hon’ble Supreme Court in **Atiq-Ur-Rehman vs MCD** AIR 1996 SC 956. In terms of DMC Act, a Municipal Magistrate was required to deal with the offences therein but the Government had not appointed any such Municipal Magistrate. It was held therein that even Metropolitan Magistrate could have dealt with the offences if Municipal Magistrate was not appointed. If the said judgment applies, the normal jurisdictional court can deal with the offences under Insolvency and Bankruptcy Code, 2016. Before however doing that, we need to note some distinctive features. Firstly, unlike DMC Act, the present

Code provides for an overriding provision. Secondly, in the said case, the specific provision of Section-26 CrPC dealing with offences under other law was not noticed which empowers normal jurisdictional court only when no court is mentioned in such other law. Thirdly, in the said case, the shifting was only between magistracy to magistracy whereas in the present Code, the feasibility of trial would be between Magistracy to Sessions Court based on punishments, if normal jurisdictional court is taken as empowered to deal with the offences. It is therefore clear that the judgment aforesaid cannot be applicable to Insolvency and Bankruptcy Code, 2016.

10. However, another important ratio of the case is very useful even for the present purpose. The relevant portion of the judgment reads as *“Keeping in view the scheme of the Act and the relevant provisions of the Code of Criminal Procedure it emerges that the Government has an obligation under Section 469 of the Act to appoint Municipal Magistrates for trial of offences under the Act, rules, regulations or bye-laws made thereunder. The use of the word "may" in Section 469 of the Act only indicates that the Government has the discretion to appoint one or more Municipal Magistrates but it certainly does not relieve the Government of its obligation to appoint Municipal Magistrates”*. This clearly indicates towards the obligation of the Government. It can therefore be said that the Government has to establish/specify Special Courts under the Companies Act which shall have the powers to try cases also under Insolvency and Bankruptcy Code, 2016.

11. Now, suppose the Central government constitutes special courts under the Companies Act. The next issue would be related to cognizance. Section-236 does not talk about the authority which can take cognizance. It also does not say that other provisions of Companies Act related to procedure for offences shall be applicable. Section-236 is rather limited to the naming of the court, in contradiction to the general scheme, which shall try the offences.

12. Now, Section-236(3) becomes very significant. It reads as under:

(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

13. It does not say that provisions of CrPC will apply to the offences. It simply says that provisions will apply to the proceedings before the Special Court. Meaning thereby that there

should be a special court and also there should be some proceeding before it. Then the provisions of CrPC will apply to that proceeding. Simple. The Section then says that for the purpose of those provisions, the special court shall by a deeming fiction be treated as a court of sessions.

14. The Act contemplates only the trial to be conducted by the Special Court. Thus the Court of Session is specified to conduct a trial and no other court can conduct the trial of offences under the Act. Why the Parliament provided that only a Court of session can be specified as a Special Court? Evidently the legislature wanted the Special Court to be Court of Session. Hence the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. The trial in such a court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for “Trial before a Court of Session”.

15. We know that cognizance taking power of Sessions Court is provided in Section-193 CrPC and therefore unless the case falls within this provision, the Court of Sessions cannot take cognizance. Section-193 of the CrPC has to be understood in the aforesaid backdrop. The section imposes an interdict on all Courts of Session against taking cognizance of any offence as a court of original jurisdiction. It can take cognizance only if “the case has been committed to it by a magistrate”, as provided in the Code. Two segments have been indicated in Section-193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word “expressly” which is employed in Section-193 denoting to those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a magistrate. Neither in the CrPC nor in the Act there is any provision whatsoever, not even by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a court of original jurisdiction without the case being committed to it by a magistrate. If that be so, there is no reason to think that the charge-sheet or a complaint can straightway be filed before such Special Court for offences under the Act. It can be discerned from the hierarchical settings of criminal courts that the Court of Session is given a superior and special status. Hence it can be safely that the legislature would have thoughtfully relieved the Court of Session from the work of performing all the

preliminary formalities which magistrates have to do until the case is committed to the Court of session.

16. It is contextually relevant to notice that Special Courts created under certain other enactments have been specially empowered to take cognizance of the offence without the accused being committed to it for trial, (e.g. Section-36A of the NDPS Act, Section-33 of POCSO Act). It is significant that there is no similar provision in the Insolvency and Bankruptcy Code, 2016.

17. It seems that there has been some drafting omissions. In Section-236, the law maker taken care to introduce the concept that special court constituted under Companies Act will try the offences but seemingly they failed to note that there was another provision in the Companies Act dealing with procedure related to the offences. It was Section-436 reading as under:

“436. Offences triable by Special Courts.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), (a) all offences specified under sub-section (1) of section 435 shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

(b) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) in relation to an accused person who has been forwarded to him under that section; and

(d) a Special Court may, upon perusal of the police report of the facts constituting **an offence under this Act** or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years: Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed: Provided further that when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial”.

18. A bare look at the provision goes to show that the Special Court has been given power to directly take cognizance of offences even in the absence of any committal. What is however clear is that the said power applies only to “**an offence under this Act**” means an offence punishable under the Companies Act. One may tend to say (by referring to clause-2 of Section-436) that Special

Court may try any other offence. However, on a bare reading of the provision, it will become clear that such power is available only when the Special Court is trying an offence under the Companies Act and not otherwise. As such, the Special Court cannot stretch its power to take cognizance of offence punishable under any other law including Insolvency and Bankruptcy Code, 2016. It is at this stage that the law makers appear to have failed to notice the necessity of providing special powers of cognizance.

19. Procedural status of offences under Insolvency and Bankruptcy Code, 2016 is same as was the case with the offences under the unamended SC/ST Act where trial was to be before Special Court but process of cognizance was not provided therein and therefore in several judgments the Hon'ble Supreme Court held that Special Court was not empowered to take cognizance and that the matter was required to be committed to it. Clearly, similar would be the position with the offences under Insolvency and Bankruptcy Code, 2016.

20. **Conclusion:**

- All cases for offences punishable under Insolvency and Bankruptcy Code, 2016 have to firstly filed before a Magisterial Court;
- The Magisterial Court then will take cognizance and will commit the case to the Special Court;
- Special Court will then be able to try the case;
- Special Court cannot directly take cognizance for offences under Insolvency and Bankruptcy Code, 2016;
- Even remand proceedings have to be done by the Magistrate like other normal offences;
- Special Court has no power to grant remand during investigation;
- Government cannot avoid constituting Special Court under Companies Act which has a clear bearing on the offences under Insolvency and Bankruptcy Code, 2016;
- If Special Court is not constituted, there would arise a clear problem for institution of proceedings;

- However, non-constitution of Special Court will have no bearing on the investigation of offences;
- Special Court dealing with only the offences under Insolvency and Bankruptcy Code, 2016 cannot exercise its power available under the Companies Act;
- Special Court if is dealing primarily with offences under the Companies Act, can also deal with any other offence by virtue of its power available therein and such other offence may include offences under Insolvency and Bankruptcy Code, 2016.

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