

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOLKATA BENCH  
KOLKATA**

**I.A (IB) No. 74/KB/2022  
In  
C.P. (IB) No. 82/KB/2019**

**In the Matter of:**

Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of the National Company Law Tribunal Rules, 2016.

And

**In the Matter of:**

Rahul Carbon Commercials Private Limited

**....Operational Creditor**

**Versus**

Kohinoor Steel Private Limited

**.... Corporate Debtor**

And

**In the Matter of:**

Ashok Kumar Sarawagi, the Resolution Professional appointed in respect of Kohinoor Steel Private Limited, having its office at 18, Rabindra Sarani Kolkata – 700001.

**.... Applicant**

**Versus**

1. Enforcement Directorate, Government of India, CGO Complex, 3<sup>rd</sup> MSO Building, 6th Floor DF Block, Salt Lake, Kolkata- 700064
2. Deputy Director, Enforcement Directorate, Government of India, CGO Complex, 3<sup>rd</sup> MSO Building, 6th Floor DF Block, Salt Lake, Kolkata 700064

**....Respondents**

**Date of Hearing : 8.02.2022**

**Date of pronouncement : 2.03.2022**

**Coram:**

**Mr. Rohit Kapoor, Member (Judicial)**

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**Mr. Harish Chander Suri, Member (Technical)**

**Appearances (via Video Conferencing):**

For Applicant : Mr. Ratnanko Banerji, Sr. Adv.  
Mr. Shaunak Mitra, Adv.  
Mr. Debabrata Ganguly, Adv.  
Ms. Debaleena Ganguly, Adv.  
For Respondents : Mr. Phiroze Edulji, Adv.  
Ms. Anamika Pandey, Adv.

**ORDER**

***PER: Rohit Kapoor, Member (Judicial):***

1. The Court is convened by video conference today.
2. The Interlocutory Application No. 74/KB/2022 has been filed by the Applicant Ashok Kumar Sarawagi, the Resolution Professional of Kohinoor Steel Private Limited, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC), seeking the following reliefs:
  - a) *Declaration that the Provisional Attachment Order dated December 30, 2021 is null and void and not binding on the Corporate Debtor and the same be ordered to be quashed and/ or set aside;*
  - b) *Stay of operation of the Provisional Attachment Order dated December 30, 2021;*
  - c) *Order of injunction restraining the Respondents from giving any effect or further effect to and/ or taking any steps or further steps on the basis of the Provisional Attachment Order dated December 30, 2021;*
  - d) *Ad- interim orders in terms of prayers above;*
  - e) *Costs of this application be paid by the Respondents;*
  - f) *Such further orders or directions be passed as this Hon'ble Tribunal may deem fit and proper.*

***Submissions of the Applicant:***

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3. The Case of the Applicant is that the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor was commenced on 20.11.2019. Presently, the CIRP is at an advance stage, with seven Resolution Plans pending before the Committee of Creditors (CoC). Due to pending litigations particularly I.A. (IB) No. 162/KB/2021, this Tribunal by order dated 31.05.2021 had directed that the period from February 3, 2021 till disposal of I.A. (IB) No. 162/KB/2021 would be excluded from the CIRP period.
  4. On 27.10.2021, the Respondents issued a letter to the Applicant informing that an investigation under the Prevention of Money Laundering Act 2002 (PMLA) was being conducted against the Corporate Debtor and its directors. The Applicant issued a reply to the same on 30.12.2021 stating that the respondents was not authorized to proceed against the Corporate Debtor or its properties till conclusion of the CIRP. However, on 31.12.2021, the Respondents issued a Provisional Attachment Order (PAO/Attachment Order) proceeding to attach properties of the Corporate Debtor worth Rs. 96.69 Crores.
  5. The Applicant states and submits that the PAO was issued wrongfully and in violation of IBC and is liable to be quashed. There is no proper adjudication yet that the properties are “proceeds of crime”. The net effect of the PAO is to render the CIRP infructuous since the valuable properties of the Corporate Debtor have been attached and are thus, not available for resolution until the attachment is set aside. The object of the IBC being maximization of value of assets in a time bound manner, promoting entrepreneurship and most importantly the need to balance the interests of the stakeholders, will stand totally defeated if the attachment under PMLA is allowed to continue.
  6. To this end, the attachment order is wholly contrary to the objects and provisions of IBC and is ex- facie hit by section 238 of the IBC which has overriding effect of the IBC, 2016 over all other laws. Also PMLA being an older statute, the provisions of the IBC shall prevail over PMLA 2002.

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7. Effect of the attachment order is, assets of the Corporate Debtor shall no longer be available for available for resolution and thus there would be no prospect of any resolution plan being approved and there would be no way to pay any dues of creditors. The creditors of the Corporate Debtor would be victimized for no fault on their part. If the attachment order continues, the liquidation of the Corporate Debtor will be the last resort. Even in the event of liquidation, there would be no purpose since there would be no available assets to sell.
  8. Furthermore, by the attachment, the control and custody of the Applicant over the assets in question has been wrongfully taken away. Post declaration of a section 14 moratorium, it is settled law that there cannot be any action taken to deprive the CIRP of the assets of the Corporate Debtor. The ultimate intent and result of CIRP is not to confer any benefit on the ex- promoters of the Corporate Debtor but to resolve the insolvency on a ‘clean slate theory’ with the control of the Corporate Debtor being vested with a fresh Resolution Applicant. Under section 14 of IBC, there is a complete prohibition of dealing with or attaching of any assets of the Corporate Debtor during continuation of moratorium.
  9. Ld. Senior Counsel has drawn our attention to the decision of Hon’ble National Company Law Appellate Tribunal (NCLAT) in Company Appeal (AT) (Insolvency) No. 575/2019 titled **The Directorate of Enforcement vs. Manoj Kumar Agarwal** wherein *vide* judgment dated 09.04.2021, the law has been laid down in this regard at paras 1,2,3,39,40,4,42 and 43. In this decision, it has been categorically held that there cannot be any attachment of Corporate Debtor’s assets under PMLA during continuation of CIRP
  10. Under PMLA also, the process contemplated is for attachment of “proceeds of crime” and ultimately for sale of confiscated properties under section 10(3) of PMLA. Thus, there is no special remedy contemplated even under PMLA to compensate any person who may have originally been a victim of money laundering. The assets attached will be sold to third parties. In CIRP however, direct benefit will be conferred on the creditors of the Corporate Debtor. there

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is no legal or logical justification to allow the PMLA attachment to continue in derogation of the CIRP.

11. According to Ld. Counsel for the Applicants, the Respondents have raised a point of maintainability of the present application by relying on the decision of the Hon'ble NCLAT dated January 3, 2022 passed in Company Appeal (AT) (Insolvency) No. 817/2021 titled **Kiran Shah v. The Directorate of Enforcement**, however, the said decision is *ex- facie per incuriam*, being contrary to the provisions laid down in IBC.
12. Section 60(5)(a) of IBC specifically and categorically vests the National Company Law Tribunal (NCLT) with jurisdiction to entertain and dispose of “ any application of proceeding by or against the corporate debtor or corporate person”. The ambit of Section 60(5)(a) is extremely wide and it cannot be contended that NCLT does not have jurisdiction to entertain the present application.
13. It is settled law that if a decision is passed *per incuriam*, even a lower forum is not bound to follow such *per incuriam* decision. **Case ref: (1995) 4 SCC 533 [Faqir v. Kishori] at paras 8-10, 14,18,20**
14. Furthermore, according to Ld. Counsel for the applicant the decision in **Kiran Shah** fails to take the issue to its logical conclusion and the following issues remain unanswered and not even considered in the said decision:-
  - a) CIRP is a time-bound process and cannot be kept in limbo indefinitely, awaiting final outcome of any proceedings under PMLA; which at present is at very initial stage.
  - b) Unless NCLT decides on the validity / legality of the attachment, there will be nobody to contest or pursue the proceedings on behalf of Corporate Debtor against the attachment order before any other forum, since he suspended Board has no authority to represent the Corporate Debtor and the Applicant cannot continue indefinitely and his role will also come to an end. Thus, in effect, the PMLA attachment will remain unchallenged/ uncontested on behalf of the Corporate Debtor meaning

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that the prospect of setting aside the attachment order would be bleak, if not non-existent;

- c) Assuming a situation where the matter goes before the PMLA Adjudicating Authority, even if eventually the said authority ultimately sets aside the attachment, the CIRP will be rendered nugatory in the interregnum, since the proceedings before PMLA may continue for several years. None of the aforesaid vital considerations have been considered and the same have been completely ignored in the Kiran Shah decision. On the face of it, the decision is perverse, per incuriam and ought not to be treated as a binding precedent.

15. It is strenuously emphasised and argued by Ld. Senior Counsel Shri Ratnanko Banerji appearing for the Applicant/Resolution Professional that if the order of attachment impugned dated 31/12/2021 attaching the properties of the Corporate Debtor worth Rs. 96.69 Crores is allowed to continue, the Applicants in the 7 Resolution Plans pending before CoC will not be interested to buy the assets of Corporate Debtor.

16. It is further argued that the attachment order is against the objectives of the Insolvency and Bankruptcy Code, 2016 (IBC) which contemplates as its principal objects the following-

*“ An Act to consolidate and amend the laws relating to reorganization and Insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interest of all stakeholders .....”*

The Ld. Senior Counsel on behalf of the Applicant has also argued that since the IBC provides for maximization of value of assets in a time bound manner, this object of IBC shall be completely defeated if attachment and the PMLA is allowed to continue. It is further argued that in any case, Section 238 of IBC has the overriding effect in relation to other laws including PMLA and therefore, it is the provisions of the IBC which will prevail.

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17. Since nobody would have interest in buying the assets of the Corporate Debtor which are attached by the PMLA, at the end of the CIRP period the liquidation will automatically follow as the last resort and effectively the entire CIRP proceedings under the IBC shall be rendered infructuous.
  18. It has further been argued by the Ld. Senior Counsel for the Resolution Professional that the settled law is that post declaration of moratorium under Section 14 of IBC, there cannot be any action by any authority to deprive the CIRP of the assets of the Corporate Debtor. The ultimate object of IBC is to resolve the Insolvency and to make a new beginning for successful resolution applicant on the basis of “Clean Slate Theory” possible.
  19. It is further argued on behalf of the Applicant that when the matter goes before the Adjudicating Authority and ultimately the proceedings under PMLA are set aside / quashed, the CIRP will be rendered nugatory as the interregnum between the proceedings before the PMLA may continue for several years. It is stated on behalf of the Applicant that if the attachment order by the PMLA is allowed to continue, most adversely impacted shall be the creditors of the Corporate Debtor including this workmen and employees, who will be deprived of the prospect of recovery of any dues whatsoever. Even the liquidation process which will eventually follow will be an empty and an idle formality due to the unavailability of assets being attached by the PMLA.
  20. Ld. Counsel has further read this order whereby it was found there is no conflict between PMLA and IBC and even if a property has been attached in PMLA, it is belonging to Corporate Debtor. If CIRP is initiated, the property should become available to fulfil objects of IBC till a Resolution Plan is passed or the sale of liquidation asset occurs in terms of 32A.
  21. Ld. Counsel has submitted that in view of these categorical findings of the Appellate Tribunal, the present application filed by the Resolution Professional deserves to be allowed and notice dated 30<sup>th</sup> of December, 2021 issued by the PMLA is required to be quashed as a necessary consequence.

***Submissions of the Respondents:***

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22. The Respondents contend that the Central Bureau of Investigation, New Delhi registered FIR no. RC 219 2014 E0019 dated 07.08.2014 invoking Section 120-B read with Section 420 of IPC, 1860 against M/s Kohinoor Steel Pvt. Ltd. (herein after referred to as M/s KSPL) and its promoters / Directors and others unknown persons for submitting and misrepresenting on the accounts of net worth of the company in order to bolster its chances of getting coal block allotted of Mednirai Coal Block.
23. Subsequently, the Central Bureau of Investigation, EO-I, New Delhi in the said FIR No. RC 219 2014E0019 dated 07.08.2014, filed Final Report/Charge Sheet bearing no. 20 / 2019 on 20.12.2019 in the Court of Hon'ble Special Judge, (CBI), Patiala House Courts, New Delhi against (i) M/s Kohinoor Steel Pvt. Ltd. (through its director), (ii) Shri Vijay Bothra Director of M/s Kohinoor Steel Pvt. Ltd. (Formerly known as Bijay Bothra), (iii) Shri Harish Chandra Gupta, Ex-Secretary, Ministry of Coal, Govt. of India, (iv) Shri Kuljit Singh Kropcha, Ex Joint Secretary, Ministry of Coal, Govt. of India, (v) Shri Rakesh Khare, Ex- General Manager (Resource) of M/s Kohinoor Steel Pvt. Invoking Section 120B r/w 420 of IPC and Section 13(2) r/w 13 (1) (d) of Prevention of Corruption Act.
24. It revealed from the charge sheet filed by CBI that the Ministry of Coal, (MOC) had issued an advertisement dated 09.09.2005 inviting applications for allocation of 20 Coal & 11 Lignite blocks including Mednirai Coal block located in the State of Jharkhand. In response to this advertisement, M/s KSPL among other 19 companies had applied for Mednirai Coal block. M/S KSPL in its application dated 25.10.2005 mentioned that the company is a newly incorporated on 16.02.2005 and had net worth of Rs. 1 lakh only as on 31.02.2005, however in its application dated 25.10.2005, it claimed Net worth of Rs. 56.99 Cr, including 28 group companies (21 Nepalese & 7 Indian) without submitting audited balance sheet of any of the 28 group companies. Further no document/record showing the relationship of M/S KSPL with other claimed 28 group companies was submitted along with the application form.

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25. It is further revealed that in the forwarding letter dated 25.10.2005 of the said application, Shri. Vijay Bothra, Managing Director, M/S KSPL mentioned that the company incorporated on 16.02.2005 was promoted by T.M. Group-a leading business house of Nepal and Kolkata based Bothra Group. Nowhere, it was mentioned about how these 28 group companies (including 21 based in Nepal) become the associated companies of M/s KSPL. Also, it was not clarified that how TM Group and Bothra Group were promoters of the said Applicant company. As per Memorandum of Association of M/s KSPL, the names of promoter shareholders were declared as under:
- a) Bijay Bothra – 5000 shares
  - b) Anjani Agarwal – 5000 shares
26. It is also revealed that claim of M/s KSPL on account of Net worth of Rs. 56.99 Cr. was without any material basis. The purpose of claiming the net worth of group companies was to project the better preparedness compared to other competing applicants.
27. The CBI investigation also revealed that to enjoy the net worth of the purported Group Companies, Shri Vijay Bothra, Director, M/s KSPL had manipulated the format of application form and inserted the information of “Group Company” which was not asked by the Ministry of Coal. This was done by Shri Vijay Bothra, Director M/s KSPL, with the mala fide intention to take a benefit of the net worth of claimed group companies, despite the fact that the guidelines nowhere mentioned about group companies.
28. As per the advertisement published in the newspaper “Hindustan Times” dated 09.09.2005, the Ministry of Coal intended to allocate 20 coal and 11 lignite blocks for captive mining by companies engaged in the business of generation of power, production of iron and steel or cement. Whereas, in the Application form at SI. No. 6 – Core Business of Applicant was mentioned as “Manufacturing of FMGC Product, Import and Trading of Agro Products, Automobiles and Finance & Investment”. Investigation revealed that at the time of submission of application, M/s KSPL had no existing capacity of

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generation of power, production of iron and steel or cement and thus the company was not be treated as engaged in production of Iron and Steel.

29. CBI investigation revealed that Govt. of Jharkhand vide their letter No. 571 / M.C. dated 29.08.2006 recommended the name of M/s Jharkhand State Mineral Development Corporation Ltd. (J.S.M.D.C) for Mednirai Coal block. Further, in continuation to letter no. 571 / M.C. dated 29.08.2006, the State Govt. of Jharkhand vide their letter no. 592/CS dated 20.09.2006 sent to the Ministry of Coal revised their recommendations and recommended the names of M/s J.S.M.D.C. along with M/s Rungta Mines Ltd. for Mednirai Coal Block. However, the State Gov. of Jharkhand never recommended M/s KSPL for Mednirai Coal block.
30. The CBI Investigation also revealed that Ministry of Steel vide DO No. 21(96) 2005-IDW dated 06.09.2006 had forwarded their comments to the Ministry of Coal, Govt. of India. Vide DO letter dated 06.09.2006. Ministry of Steel had placed M/s KSPL in category- II(a) as per the guidelines of the Ministry of Steel. (As per the information provided by M/s KSPL in the application form received by the Ministry of Steel from Ministry of Coal, this Company was liable to be kept in Category-VI). However, name of the company was kept in category II-(a) by Ministry of Steel in pursuance of letter dated 17.03.2006 received from M/s. KSPL. Investigation revealed that M/s KSPL, vide letter no. KS/BRO/RE/MOS/10 dated 17.03.2006 addressed to the Secretary, Ministry of Steel, Govt. of India, Udyog Bhawan, New , had informed that plant of M/s KSPL was inaugurated by lightening the 1<sup>st</sup> Kiln of their DRI Unit on 02.03.2006 and all the four Kilns were expected to be made operational for production within two months. During investigation, this fact has been found false and incorrect.
31. The CBI Investigation further revealed that the Jharkhand State Pollution Control Board (JSPCB), Ranchi vide their memo no. V-509 dated 21.09.2005 had issued No Objection Certificate (NOC) u/s 25 & 26 of the Water (Prevention and Control of Pollution) Act, 1974 and u/s 21 of the Air (Prevention and Control of Pollution), Act, 1981 to M/s Kohinoor Steel Pvt.

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Ltd. with several conditions mentioned therein for the establishment of Sponge Iron plant of the capacity of 400 MT/ day. CBI Investigation further revealed that Jharkhand State Pollution Control Board, Ranchi vide their Memo No. B-10 dated 19.08.2006 informed to M/s KSPL that consent application (both Air and Water) was rejected due to non-compliance of condition mentioned in the No Objection Certificate (Consent to Establish) issued under Section 25/26 of the Water Act, 1974 and under Section 21 of Air Act and further directed for the closure the unit under Section 31-A of the Air (Prevention and Control of Pollution) Act, 1981.

32. During the meeting before Screening Committee on 08.09.2006, M/S KSPL had misrepresented that 04 Kilns of 100 TPD had become operational, which was false and incorrect. By furnishing above mentioned false information to the Ministry of Coal and Screening Committee, accused company M/s KSPL dishonestly induced Ministry of Coal and Screening Committee to make recommendations in their favour for allotment of a coal block.
33. The letter of allocation of Mednirai Coal block was issued to M/s Rungta Mines Ltd. Jointly with M/s Kohinoor Steel Pvt. Ltd. by the Ministry of Coal, Govt. of India, New Delhi vide their letter No. 38011/11/2006-CA-I dated 28.05.2009.

**Investigation under PMLA, 2002**

34. Since, Sections 120B r/w 420 of IPC and Section 13(2) r/w 13 (1) (d) of PC Act being the scheduled offence under the PMLA, 2002, investigation were initiated under PMLA against the accused person(s) after recording brief facts of scheduled offences in ECIR No-KLZO / 02/2015 dated 09.01.2015.
35. During investigation of under PMLA, 2002, statements of various persons involved in the case and witnesses were recorded. Further several evidences were collected from different sources. The scrutiny of the same revealed that Shri Vijay Bothra the then Director of M/s KSPL in connivance with others, vide their application dated 25.10.2005 for allocation of Mednirai Coal Block and Feedback Form i.e. “ Present status of End Use Plant” submitted before 34<sup>th</sup> screening committee during the meeting held on 08.09.2006, made

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various false claims and misrepresentation such as the net worth of the company is Rs. 56.99 Crore instead of Rs. 1 lakhs; that the company is promoted by TM Group, one of the leading business house of Nepal; manipulated the format of application form and inserted the information of Group Company which was not asked by the Ministry of Coal; before Ministry of Coal, KSPL enclosed the profile of M/s Ravi Udyog Pvt. Ltd. and dishonestly claimed to be an associate company engaged in the mining and excavation activities along with the application form; M/s KSPL falsely claimed that they had obtained Environment Clearance; Soil testing for DRI, Power Plant and Steel Ingot Plants was completed and had already invested Rs. 15 Crore; M/s KSPL vide letter no. KS/BRO/RE/MOS/10 dated 17.03.2006 address to the Secretary, Ministry of Steel, Govt. of India, New Delhi falsely informed that the plant of M/s KSPL was inaugurated by lightening the 1<sup>st</sup> Kiln of DRI unit on 02.03.2006 and all four kilns were expected to be made operational for production within two months and thus induces the Ministry of Steel to Keep M/s KSPL in Category II(a) instead of category VI and during meeting before screening committee on 08.09.2006, M/s KSPL misrepresented that 04 Kilns of 100TPD had become operational.

36. In connivance with others and by furnishing the abovementioned false information to the Ministry of Coal & Screening Committee, M/s KSPL dishonestly induced Ministry of Coal and Screening Committee to recommend in their favour for allotment of coal block. Accordingly, M/s KSPL got the coal block recommended on 19.02.2007 and subsequently, allocated in their favour on 28.05.2009.
37. Pursuant to the said criminal conspiracy with others and to present the aforesaid false claim of M/s KSPL as genuine, Shri Vijay Bothra not only started to infuse his unaccounted money in M/s KSPL in the guise of share application money received by M/s KSPL through various companies under his control but also made round tripping of money among bank a/cs of M/s KSPL, Investing Companies and others in the guise of share application and

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thus, increased the net-worth of the company and utilized the same in expansion of the company to get allocated coal block.

38. That, further, in order to accommodate unaccounted money of Shri Vijay Bothra in M/s KSPL in the guise of the share application money through various companies under his control as well as round tripping of money among bank a/cs of M/s KSPL, Investing Companies and others to increase the net-worth of M/s KSPL, the authorized capital of M/s KSPL was increased from 1.00 lakhs to Rs. 20.00 Crore in a short period of 2005 to 2009 and 193.380 lakh shares were issued at Rs. 50 /- per share ( face value of Rs. 10 /- at premium Rs. 40 /-) although loss was being incurred by M/S KSPL in 2005-06 & 2006-07.
39. The Directors of some of investing companies have stated in their statements under PMLA, 2002 that their source of investment in M/s KSPL could be furnished by Shri Vijay Bothra. Further, during the statement under PMLA, 2002, Shri Vijay Bothra was asked to give the source of investment of the investing companies of M/s KSPL. He stated that he would submit the details of the source. However, he did not submit the same.
40. The newly incorporated company M/s KSPL had issued total 193.380 Lakh shares of face value of Rs. 10/- per share at a premium of Rs. 40/- during 2006-07 to 2011-12, amounting to Rs. 96.69 Crore to the Companies under the control of Shri Vijay Bothra and amount of such share application money to the tune of Rs. 96.69 Crore was utilized for the purposes of expansion of Plant of the Company, as revealed from the Balance sheets & Form No. 5 & Form 2 of the KSPL as well as statement dated 08.03.2017 & 24.08.2021 of Shri Tarun Kumar Jain, CFO of M/s Kohinoor Steel Pvt. Ltd. which was in the lines of misrepresentation made by M/s KSPL before the screening committee. This plan for expansion also gives the company an image of growing and profitable company.
41. Thus, this clearly indicate that the net-worth amounting to Rs. 96.69 Crore of M/s KSPL was increased by infusing unaccounted money of Shri Vijay Bothra as well as through round tripping of money in the guise of share

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application money through various companies under the control of Shri Vijay Bothra during 2004-05 to 2009-10 and utilized the same for business activity and expansion of company to get allocated coal block in the lines of misrepresentation made by M/s KSPL; As per definition of “property” under Section 2(1)(v) of PMLA, property the term “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences. As per definition of “proceeds of crime” under Section 2(1)(u) of PMLA, “proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. In this case, infusion of capital through companies under the control of Shri Vijay Bothra has to be treated as property intended to be used for development of end use of coal mines and creation of other associated infrastructure so as to derive or obtain benefit / business gains from “allocated coal mines” where allocation of coal block was secured through fraudulent manner. This investment was made in anticipation of undue “benefit to be derived or obtained” by M/s KSPL as a result of or consequence to criminal activity relating to a scheduled offence. The said investment, which is covered by the definition of “proceeds of crime” as per definition “property” under Section 2(1)(v) of PMLA and “proceeds of crime” under Section 2(1)(u) of PMLA, has been laundered and it was projected that the same was used for the purpose of project development related to “legally obtained Coal Block”, and therefore, not only such proceeds of crime is liable to confiscation under Section 8(5) of PMLA but all the persons, whether directly or indirectly attempted to indulge or knowingly assisted or knowingly a party or was actually involved in any process or activity connected with the proceeds of crime shall be guilty of offence of money-laundering. Thus, M/s KSPL and its promoter director Shri Vijay Bothra have committed the offence of Money Laundering as defined u/s 3 read with Section 70 of PMLA, 2002 and punishable u/s 4 of PMLA, 2002 and properties constructed/built/purchased/acquired by M/s KSPL and continued to be in possession and use of M/s KSPL, representing proceeds of

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crime derived as a result of criminal activity related to scheduled offences are Proceeds of Crime by virtue of definition given in Section 2 (1)(u) of the Prevention of Money Laundering Act, 2002:

42. During the course of investigation under PMLA, 2002, it came to this notice of this Directorate that the Company M/s KSPL has gone under CIRP. Accordingly, the Assistant Director, Kolkata Zone-1, Directorate of Enforcement, Government of India, issued a letter dated 27.10.2021 to the Resolution Professional to intimate that the Directorate of Enforcement conducting investigation under the provisions of the Prevention of Money Laundering Act, 2002 against Kohinoor Steel Private Limited and its creditors for illegal allocation of Coal Blocks and for approximate Proceeds of Crime to the tune of Rs. 96.69 Crores and requested to protect the interest of the Directorate.
43. In response thereto the Applicant issued a letter dated 30.12.2021 which was received by the respondents vide email dated 01.01.2022 (after issuance of Provisional Attachment Order dated 30.12.2021 by the Directorate) , inter alia, stating that:
- a) A Moratorium has been declared in respect of the Corporate Debtor prohibiting “the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgments, decree or order in any court of law, tribunal, arbitration panel or other proceedings”; and as such investigation against the company under PMLA, 2002 should be kept in abeyance.
  - b) Investigation under PMLA being judicial proceedings is prohibited and / or barred in respect of the company.
  - c) ED cannot take steps unless and until the CIRP culminates in a resolution or otherwise.
  - d) And; that if ED has any claims against the Corporate Debtor it should follow the guidelines given in IBC, 2016 for filling the claim.
44. It was argued by Ld. Counsel appearing for the Directorate of Enforcement that the properties which are subject matter of the CIRP process have been

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purchased out of the proceeds of the crime and after proper investigation, it came to the notice of the Directorate of Enforcement, Govt. of India that the company M/s KSPL has gone under CIRP. Accordingly, the Additional Director, Calcutta Zone – (I) Directorate of Enforcement Govt. of India issued a letter dated 27<sup>th</sup> of October, 2021 to the Resolution Professional to intimate the Directorate of Enforcement conducting investigations under the provision of Prevention of Money Laundering Act, 2002 against Kohinoor Steel Pvt. Ltd. and its creditors for illegal allocation of Coal Blocks and approximate proceeds of crime to the tune of Rs. 96.69 Crores.

45. It is further argued that the provisional attachment order was issued on 30<sup>th</sup> of December, 2021 by the Directorate of Enforcement which has been challenged in the present application. It has been further stated by the Ld. Counsel appearing for the Directorate of Enforcement that a moratorium does not effect either initiation or continuation of investigation under the provision of PMLA 2002 which is special statute. To support this argument, the Ld. Counsel for the Enforcement Directorate has relied upon an order passed by NCLAT in Company Appeal (AT) (Insolvency No. 493 of 2018) titled **Varrsana Ispat Limited. Vs. Deputy Director of Enforcement** which was similar in facts and circumstances as in the present case.
46. The Ld. Counsel while reading out this order passed on 3<sup>rd</sup> of January 2022, has drawn our attention to Paragraph 102 to 112. It has been pointed out by the Ld. Counsel that the case of **Directorate of Enforcement Vs. Manoj Kumar Aggrawal and Ors.** cited on behalf of the Applicant, as noted above was before the Hon'ble NCLAT when it passed its order dated 3<sup>rd</sup> of January, 2022 and a reference to this effect has been made in Para 109 of this order passed by the NCLAT which is reproduced herein below.

*In so far as the decision in the Manoj Kumar Aggarwal case is concerned (reported in 2021 SCC Online NCLAT 121), this Tribunal is of the considered opinion that the said decision runs contra to the 'Principle of Stare Decisis'.*

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47. Ld. Counsel pointed out that this subsequent order of Hon'ble NCLAT was passed on 3<sup>rd</sup> of January, 2022 by a bench consisting of three Hon'ble members whereas the earlier order dated 9-04-2021 in the matter of Directorate of Enforcement Vs. Manoj Kumar Aggrawal and Ors. was passed by two Hon'ble Members of the Hon'ble Appellate Tribunal and therefore the subsequent decision dated 3<sup>rd</sup> of January, 2022 which specifically took note of the earlier decision by 2 Members of the Bench of Hon'ble NCLAT will prevail in view of Paragraph 109 reproduced hereinabove.
48. In this order dated 3<sup>rd</sup> of January, 2022 it has been held that the Adjudicating Authority (NCLT) is not empowered to deal with matters falling under the purview of another authority under PMLA and therefore, the application filed by IRP was found to be not maintainable. It was further observed in this order dated 3<sup>rd</sup> of January, 2022 that the proper course for the aggrieved person is to approach the Appellate Authority under Prevention of Money Laundering Act, 2002 (PMLA) and according to the Enforcement Directorate this Authority was very much functional as on the date of attachment order.
49. The Ld. Counsel further stated that the present application is liable to be dismissed in view of the fact that the remedy of Appeal has not been exhausted by the Applicant seeking release of the properties attached in terms of the order impugned.
50. The Ld. Counsel appearing for the Enforcement Directorate has also referred to the order dated 2<sup>nd</sup> of May, 2019 passed by the National Company Law Appellate Tribunal in Company Appeal (AT) (Insolvency No. 493 of 2019) titled **Varrsana Ispat Limited Vs. Deputy Director of Enforcement** passed on 2<sup>nd</sup> of May, 2019 wherein it was held that "it is clear that the 'Prevention of Money-Laundering Act, 2002' relates to 'proceeds of crime' and the offence relates to 'money-laundering' resulting in confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto. Thus, as the 'Prevention of Money Laundering Act, 2002' or provisions therein relate to 'proceeds of crime', we hold that Section 14 of the IBC is not applicable to such proceeding".

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51. It is further stated by the Ld. Counsel that a Civil Appeal No. 5546 of 2019 was preferred against this Order before the Hon'ble Supreme Court of India and the Apex Court dismissed the said appeal on 22<sup>nd</sup> of July, 2019.
52. We have heard the Ld. Counsel for both the parties and perused the record available before this Adjudicating Authority.
- We are of the view that this Adjudicating Authority, with utmost regard to the order relied upon by the Applicant, is bound by the order dated 3<sup>rd</sup> of January, 2022 passed by Hon'ble 3 Member Bench of NCLAT which took the view that NCLT is not empowered to deal with the matters falling under PMLA. In the present case since notice impugned has been issued under the Prevention of Money Laundering Act, 2002 therefore, this application is not maintainable and the same is hereby rejected.
53. **I.A. No. 74/KB/2022** is hereby dismissed.
54. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
55. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

**Harish Chander Suri**  
**Member (Technical)**

**Rohit Kapoor**  
**Member (Judicial)**

Order Pronounced on **2/03/2022**.

Zia(Steno)/SM(LRA)