NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI (COURT NO. IV)

I.A. 3058 No. /2020

IN (IB)-1205/(ND)/2019

IN THE MATTER OF INSOLVENCY AND BANKRUPTCY CODE

IN THE MATTER :

MANOHAR LAL VIJ

(RESOLUTION PROFESSIONAL)

...APPLICANT

VERSUS

THE DIRECTORATE OF ENFORCEMENT & ORS

...RESPONDENT/CORPORATE DEBTOR

M/S AZAD IMPEX PRIVATE LIMITED

...OPERATIONAL CREDITOR/APPLICANT

VERSUS

IN THE MATTER OF:

M/S SURYA MANUFACTURING PRIVATE LIMITED

...CORPORATE DEBTOR

<u>MEMO OF PARTIES</u>

MANOHAR LAL VIJ

(RESOLUTION PROFESSIONAL)

M/S Surya Manufacturing Private Limited

8/28, 3rd Floor, W.E.A. Abdul Aziz Road

Karol Bagh, New Delhi 110005

....APPLICANT

VERSUS

1. **THE DIRECTORATE OF ENFORCEMENT**

   Through Deputy Director

   Delhi Zone-I M.T.N.L Building,

   1& 2 Floor, J.L. Nehru Marg,

   New Delhi-10002

...Respondent No. 1

2. **CANARA BANK**

   (Erstwhile Syndicate Bank)

   SAMB Branch,

   Lajpat Nagar, DDA Complex

   New Delhi-110024

...Respondent No.2

Order Pronounced on: __.10.2020

For the Applicant : Mr. Aditya Dewan
Mr. SiddharthChechani
Mr. Abhishek Naik
Mr. Manohar Lal Vij

For the Respondent : Mr. Zoheb Hossain

CORAM:

DR. DEEPTI MUKESH

HON'BLE MEMBER (Judicial)

SMT. SUMITA PURKAYASTHA

HON'BLE MEMBER (Technical)

ORDER

As Per Smt. SumitaPurkayastha, Member (Technical)

1. This is an order being passed in IA.3058/ND/2020. The application has been filed by the Resolution Professional seeking the following prayers:

a) Direct for lifting of the attachment over the Subject Properties belonging to the Corporate Debtor and direct the Directorate of Enforcement to hand over the physical and real possession of the Subject Properties to the Applicant immediately;

b) Pass an ex-parte ad-interim order directing the Directorate of Enforcement to provide unhindered access/inspection to the Applicant to the Subject Properties along with the valuers;

c) Pass an ex-parte ad interim order directing the Directorate of Enforcement to grant access and had over the records of the Corporate Debtor to the Applicant lying within the Subject Properties belonging to the Corporate Debtor;

d) Pass any other order as this Hon`ble Tribunal may deem fit in the facts and circumstances of the case.

2. Before delving into the issue of this application it is pertinent to allude briefly the facts and background of the case. The Operational Creditor M/S Azad ImpexPvt. Ltd. had filed an application under Section 9 of the I&B Code and order of admission of the said application appointing the IRP was passed on 21.11.2019, appointing Mr. Manohar Lal Vij as the IRP. Pursuant to the initiation of the CIRP, a Committee of Creditors of the Corporate Debtor was constituted by the Applicant. The said CoC in its meeting held on 02.03.2020 confirmed the appointment of the Applicant herein as the Resolution Professional of the Corporate Debtor.

3. The Applicant states that pursuant to the initiation of the CIRP, the Applicant while in the process of discharging his statutory duties learnt that the immovable properties situated i) Factory Land & building vide Khewat No. 250, Khatoni No. 239 Rect No. 133, Kila No. ½ (6-16), 2(8-0), 3(8-0), 4(5-4), 10(6-16) kitte 5 land measuring 34 Kanal 16 Marlas situate at Village Barhana, Tehsil Beri, DisttJhajjar, Haryana (SSubject Property-I) and ii) Than No. 198, MouzaBaijnathpur, District, Araria, Bihar appertaining to RS Khata No. 66 and 84, R S Khata No. 105 and 108 M S Khata No. 351 M S Khasra No. 02 43 404 405 406 407 473/3543 Total area 05 Acre 33 Decimal (Subject Property II) belonging to the Corporate Debtor were in the physical and actual possession of the Directorate of Enforcement.

4. The Applicant herein sent a letter dated 24.02.2020 to the Directorate of Enforcement intimating about the commencement of the CIRP. The Directorate of Enforcement vide its letter dated 13.03.2020 has refused to release the physical and actual possession of the

immovable properties stating that the Subject Properties had been attached under Section 5 of the PMLA, 2002 vide PAO No. 9/2018 dated 30.10.2018 which was confirmed by the Adjudicating Authority vide the final attachment order dated 22.04.2019 in OC No. 1060/2018. Further the Applicant made a request vide its letter dated 04.03.2020 and 18.03.2020 for an access to records and inspection of the subject properties to which the Directorate of Enforcement vide its email dated 23.06.2020 denied the permission for valuation of the assets of the Corporate Debtor.

5. The applicant further states that the Subject Properties have an existing charge in favour of Canara Bank(erstwhile Syndicate Bank before its merger with Canara Bank) which is a member of the CoC of the Corporate Debtor, against the various credit facilities granted to the Corporate Debtor much before the initiation of the CIRP. The Corporate Debtor was sanctioned a cash credit limit of Rs. 14 crores on 24.01.2015 by the Syndicate Bank, after the Syndicate bank took over the existing loan of the Corporate Debtor from the Oriental Bank of Commerce. The said loan facility granted to the Corporate Debtor was secured inter alia by the creation of equitable mortgage over the Subject property II belonging to Corporate Debtor in respect of which the Syndicate Bank admittedly had done a due diligence and prudence check. Further the credit facilities of 14 crore was enhanced to 24 crore accepting additional security from the Corporate Debtor including creation of equitable mortgage over the Subject Property-I by the Corporate Debtor. The charge was registered with the Registrar of Companied on and also with CERSAI.

6. The applicant states that on 30.08.2017, the said cash credit limit was reviewed by Syndicate Bank in favour of the Corporate Debtor without any increase/decrease in limits and thus led to the issuance of renewal letter dated 25.10.2017. in view of the aforesaid Syndicate

Bank filed an appeal before the Appellate Tribunal under the PMLA 2002 seeking quashing/setting aside the FAO dated 22.04.2019 and taking over the possession of the subject properties by the Directorate of Enforcement on the ground that provision of SARFEASI Act, 2002 shall prevail over the possession of PMLA, 2002. Thus the subject properties cannot be "proceed of crime". The said appeal is pending adjudication before the Appellate Authority under the PMLA 2002.

7. On the account of the Directorate of Enforcement retaining the physical and actual possession of the immovable properties belonging to the Corporate Debtor, the Applicant herein as the Resolution Professional is unable to discharge his statutory duties stipulated under the I&B Code. In the absence of ED permitting the valuation of the assets of the Corporate Debtor, the registered valuers appointed as per the Regulation 27 of the CIRP Regulations are unable to determine the fair and liquidation value of the assets of the Corporate Debtor as per Regulation 35 of the CIRP regulation.

8. The Applicant has referred to the judgement of the Hon'ble Delhi High Court in the case of ***the Deputy Director, Directorate of Enforcement, Delhi vs. Axis Bank and Ors., CRL. A No. 143 of 2018 decided on April 02, 2019*** has not only held that the PMLA, RDBA, SARFAFSI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA, but has also , held that mere issuance of an order of attachment under PMLA does not ipso facto render illegal a prior charge or encumbrance of a secured creditor, the claim of the

latter for release (or restoration) from PMLA attachment being dependent on its bona fides.

9. The Directorate of Enforcement herein the Respondent had filed its reply dated 07.09.2020 states that on 19.05.2015 the CBI New Delhi registered a FIR against Green Valley Plywood Ltd and its promoters, being RCBD1/2015/00006 under section 420,467,468,471 r.w.s 120-B of IPC and under section 13(2) r.w.s 13(I)(d) of the P.C. Act. for fraud and fabrication of Perfomm invoices of various non-genuine suppliers based on which various credit facilities had been granted by the Indian Overseas Bank Branch. Thereafter on 29.09.2017 the Directorate of Enforcement recorded ECIR/10/DZ-1/2017 against Mr JagmohanKejriwal, Mrs. Anju Kejriwal, M/s Green Valley Plywood Ltd., Mr. Aditya Kejriwal, M/s Surya Manufacturing Pvt. Ltd. (hereinafter "Corporate Debtor") on the basis of the FIR filed by the CBI on 19.05.2015, for investigation into the offence money laundering. The Directorate of Enforcement in exercise of the power conferred under sub-section (1) of Section 5 of the PMLA, Act 2002 issued provisional attachment order dated 30.10.2018 of the immovable properties on a reasonable belief that the Subject Properties were involved in money laundering. The Hon`ble Adjudicating Authority vide its order dated 22.04.2019 confirmed the attachment order dated 30.10.2018.

10. The respondent submits that the present application is not maintainable on the ground that the Hon`ble NCLT does not have the jurisdiction or powers to interfere with the Provisional Attachment order passed by a competent authority under the PMLA Act, 2002 which has to be dealt with only in the manner provided in law under the PMLA. The Respondent refers the judgment of the ***Hon'ble Supreme Court in the case of Embassy Property Developments Pvt. Ltd. vs. State of Karnataka &Ors. 2019 SCC OnLine SC***

1542 *" Para 36 the only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results...*

"Para 39- If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18 f(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under, contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in Section 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about

the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". Another important aspect is that under Section 25 (2) (b) of IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings." This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage. of Section 60(5).

Para 40- Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right."

11. The Respondent submits that the Prevention of Money Laundering Act, 2002 is a special legislation aimed at dealing with the offence of money laundering, and will therefore have primacy over the Insolvency and Bankruptcy Code,2016 in proceedings relating to money laundering. The mere fact that the assets of the Corporate Debtor are subject to a resolution proceeding under the IBC, cannot be an escape route for any action under the PMLA, as it would lead to abuse of the process of law by money-launderers. The Respondent has placed reliance on the judgment of the ***Hon'ble High Court of Delhi in the case of Deputy Director, Directorate of Enforcement Delhi v. Axis Bank Ors. 2019 SCC OnLine Del 7854,*** wherein the Hon'ble High Court of Delhi was pleased to hold as follows:

"Para 146- A view to the contrary, if taken, would defeat the objective of PMLA by opening an escape route. After all, a person indulging in money-laundering cannot be permitted to avail of the proceeds of crime to get a discharge for his civil liability towards his creditors for the simple reason such assets are not lawfully his to claim.

"147. To sum up on the issue, the objective of the legislation in PMLA being distinct from the purposes of the three other enactments viz. RDBA, SARFAESI Act and Insolvency Code, the latter cannot prevail over the former. There is no inconsistency. The purpose, the text and context are different. This court thus rejects the argument of prevalence of the said laws over PMLA."

12. The Respondent further states that imposition of a moratorium period under section 14 of the Code does not take away from the powers of the ED to attach proceeds of crime in possession of the Corporate Debtor under PMLA.The respondent has placed its reliance on the judgement of the ***Hon'ble National Company Law Appellate Tribunal in the case of Varrsana Ispat Ltd vs. The Deputy Director, Directorate of Enforcement Company Appeal (AT) (Insolvency) No. 493 of 2018***, vide its judgment dated 02.05.2019, has held that section 14 of the IBC is not applicable to proceedings under the Prevention of Money laundering Act, 2002. The relevant paragraph from is extracted hereunder:

"Para 12. From the aforesaid provisions, it is clear that the 'Prevention of Money-Laundering Act, 2002' relates to 'proceeds of crime' and the offence relates to `money-laundering' resulting 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 relates to 'proceeds of crime'. we hold that Section 14 of the l&B Code' is not applicable to such proceeding."

13. The learned counsel for both the parties were present and heard. In order to deal with the issue in hand we would like to refer to the Judgement of the ***Hon'ble Supreme Court in the case of Embassy Property Developments Pvt. Ltd. vs. State of Karnataka &Ors. 2019 SCC OnLine SC 1542.*** Para 36 as reiterated *"the only provision which can probably throw light on this question would be Sub-section (5) of Section 60, as it speaks about the jurisdiction of the NCLT. Clause (c) of Sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in Clause (c) of Sub-section (5). Let us take for instance a case where a corporate debtor had suffered an order at the hands of the Income Tax Appellate Tribunal, at the time of initiation of CIRP. If Section 60(5)(c) of IBC is interpreted to include all questions of law or facts under the sky, an Interim Resolution Professional/Resolution Professional will then claim a right to challenge the order of the Income Tax Appellate Tribunal before the NCLT, instead of moving a statutory appeal under Section 260A of the Income Tax Act, 1961. Therefore the jurisdiction of the NCLT delineated in Section 60(5) cannot be stretched so far as to bring absurd results..."*

14. We would like to draw conclusion as per the ratio laid down by a larger bench of Hon'ble Supreme Court in the Embassy case. The remedy thus available to the Resolution Professional is to approach Appellate Tribunal under the PMLA, in order to challenge the Provisional Attachment Order dated 30.10.2018 having been confirmed by the Ld. Adjudicating Authority, PMLA. It is pertinent to note that the Corporate Debtor has preferred an appeal under section

26 of the PMLA, before the Hon'ble Appellate Tribunal, PMLA Appeal No. FPA-PMLA-3076/DLI/2019 dated 28.05.2019. Therefore Application No.3058/ND/2020 is rejected and disposed of in terms of the above order.

Sd/-	**Sd/-**
Sumita Purkayastha	**Dr. Deepti Mukesh**
Member (T)	**Member (J)**