

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Jay Sengupta

**WPA 4585 of 2023
Anup Kumar Singh
Vs
Union of India & others.**

For the petitioner : Mr. Jishnu Chowdhury
Mr. Saptarshi Mondal
.....Advocates

For the ED : Mr. Arijit Chakraborti
Mr. Deepak Sharma
Ms. Swati Singh
.....Advocates

Heard lastly on : 05.02.2025

Judgment on : 16.04.2025

Jay Sengupta, J:

1. This is an application praying for quashing of notices dated 30.11.2022 and 30.01.2023 issued under the provisions of the Foreign Exchange Management Act, 1999 (the FEMA, for short).

2. Learned senior counsel for the petitioner submitted as follows. Corporate insolvency resolution process (“CIRP”) of Shree Ganesh Jewellery House (I) Pvt. Ltd. (“Shree Ganesh”) commenced on 12.02.2018 pursuant to an order being passed by the National Company Law Tribunal (“NCLT”) at Kolkata under the provisions of the Insolvency and Bankruptcy Code, 2016 (“IBC”). Section 14 of the IBC prohibited the initiation of suits or continuation of pending suits or proceedings against the corporate debtor (in this case, Shree Ganesh) following the initiation of CIRP. On 14.09.2018, the NCLT directed that Shree Ganesh should be liquidated as per the provisions of the IBC. Furthermore, the writ petitioner was appointed as the liquidator by the NCLT. The writ petitioner in his capacity as an officer of the NCLT was duty bound to complete liquidation process of Shree Ganesh as per the provisions of the IBC and within the timelines which were presented under the IBC. While Section 14 of the IBC was applicable once CIRP was commenced in respect of any corporate debtor, Section 33(5) of the IBC was applicable once an order of liquidation had been passed by the NCLT. Section 33(5) stated as follows. “Subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor. Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority”. In CIRP, what was contemplated was approval of a Resolution Plan. After liquidation order, the corporate debtor might be sold as a going concern or the assets might be sold. Therefore, once CIRP was admitted, the assets of a corporate debtor

could not be attached. They would be sold in CIRP or liquidation. After resolution plan or liquidation sale, assets could not be made subject matter of attachment in view of Section 32A of the IBC. Section 32A(2) of the IBC stated as under. “No action shall be taken against the property of the corporate debtor in relation to any offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under Section 31, which results in the change in control of the corporate debtor to a person or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person who was not, i) a promoter or in the management or control of the corporate debtor or a related party of such person or ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court. Explanation - For the purpose of this sub-section, it is hereby clarified that, i) an action against the property of a corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor, ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this

Section, against whom such an action may be taken under such law as may be applicable.” Therefore, the scheme of the IBC was that once there was CIRP admission, the assets would not be subject matter of seizure or attachment. The provisions of sale and/or approval of resolution plan contemplated under the IBC were such that there could not be sale to a connected entity. Respondent No.2 had earlier issued a provisional order of attachment (POA) under the provisions of the Prevention of Money Laundering Act, 2002 (“PMLA”) in respect of the assets of Shree Ganesh on 16.04.2019, after an order of liquidation was passed in respect of Shree Ganesh, which was not confirmed and set by the Adjudicating Authority under the PMLA on 09.10.2019. The Respondent No.2 appealed against such decision. An order of status quo was passed in the said appeal proceedings on 20.09.2023. The writ petitioner was not concerned with the PMLA orders. They should dissolve upon sale in view of Section 32A of the IBC. On 30.11.2022, the writ petitioner was in receipt of an order of seizure no. 01/2022 (“Provisional Seizure Order”), which was issued by the respondent no. 2 under Section 37A of the Foreign Exchange Management Act, 1999 (“FEMA”) in respect of the assets of Shree Ganesh, the company. The issuance of the Provisional Seizure Order was in complete disregard of the moratorium prescribed by Section 33(5) of the IBC. On 31.01.2023, the writ petitioner was in receipt of a petition u/s 37A(2) of FEMA seeking confirmation of the Provisional Seizure Order from the respondent no. 3 directing him to personally appear in the proceedings (“Notice”). The issuance of the Notice was in breach of the moratorium imposed by Section 33(5) of

the IBC. Accordingly, the writ petitioner filed the instant writ petition challenging the Provisional Seizure Order and the Notice. During the pendency of the writ petition, the respondent no. 3 on 23.05.2023 confirmed the Provisional Seizure Order. The order dated 23.05.2023 was subject to the result of the writ petition and was a *lis pendens* event. The order dated 23.05.2023 was a dependant order. Upon the writ petition succeeding, the same would naturally lose its force. The writ petitioner was compelled to file an appeal from the confirmation order dated 23.05.2023 before the Appellate Tribunal at New Delhi in view of the strict limitation period, which it did mentioning about the instant writ petition challenging the Provisional Seizure Order. Anyhow, this was of no issue since when provisional seizure order was under challenge, final order passed was subject to the result of the writ petition. In *Ramsarup Industries Limited and Others v. Union of India and Another* reported at 2022 SCC Online Cal 2571, when during the pendency of a writ petition challenging provisional attachment, the Authority issued confirmatory order, the writ petition was not found to be infructuous by this Court. The provisional order and final order were both stayed when the petitioner was found to be entitled to interim reliefs. It was submitted that the provisions of the IBC would override the provisions of the FEMA. Therefore, the moratorium under the IBC would override the provisions of the FEMA. Firstly, the IBC was a later Act, which was enacted by the legislature when the FEMA was already in force. Secondly, Section 238 of the IBC clearly stated that “The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law

for the time being in force or any instrument having effect by virtue of such law.” When the legislature enacted the IBC, it was conscious of FEMA. On the other hand, the FEMA did not have any non-obstante clause. In this connection, reliance was placed on the following judgements. i) *Paschimanchal Viduyt Vitran Nigam Ltd. V. Raman Ispat Private Ltd. and Ors.* reported at (2023) 10 SCC 60. The Hon’ble Supreme Court of India held that Section 238 of the IBC would override the provisions of the Electricity Act, 2003 although the latter contained two specific provisions (Section 173 and Section 174) that had overriding effect over all other laws, ii) *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs* reported at (2023) 1 SCC 472. The Hon’ble Supreme Court of India held that the provisions of the IBC would prevail over the Customs Act, 1962 due to Section 238 of IBC, iii) *Duncans Industries Limited v. AJ Agrochem* reported at (2019) 9 SCC 725. The Hon’ble Supreme Court of India held that Section 16G of Tea Act, 1953 was overridden by Section 238 of IBC, iv) *Innovative Industries Limited v. ICICI Bank* reported at (2018) 1 SCC 407. The Hon’ble Supreme Court of India held that non-obstante clause of IBC would prevail over the Maharashtra Relief Undertaking (Special Provisions) Act, 1958, v) *Principal CIT v. Monet Ispat and Energy Limited* reported at (2018) 18 SCC 786. The Hon’ble Supreme Court of India held that non-obstante clause of IBC would prevail over the Income Tax Act, 1961, vi) *Assistant Director, Enforcement Directorate v. Raj Kumar Ralhan, Resolution Professional* reported at 2019 SCC Online NCLT 30928. The National Company Tribunal, inter alia, held that (i) moratorium declared under

Section 14 of IBC was applicable to proceedings under the FEMA, ii) the Enforcement Directorate could not proceed against the corporate debtor as long as moratorium under IBC was in force, and iii) if under the provisions of the FEMA, if any of the Directors/Officers were individually liable for any actions done prior to the commencement of CIRP, the applicant might proceed against those Directors/Officers of the corporate debtor.

3. Learned counsel for the respondent ED submitted as follows. That the petitioner as Liquidator of M/s. Shree Ganesh Jewellery House (I) Ltd. preferred the present writ petition before this Court and prayed for quashing of Notice dated 30.11.2022 and Notice dated 30.01.2023. Annexure-P3 to the writ petition was an Order of Seizure issued by the respondent no. 2 herein under Section 37A(1) of Foreign Exchange Management Act, 1999. In the present case, Accused/Corporate Debtor failed to realise export proceeds to the tune of Rs.7220,89,57,496/- and thereby contravened Section 4 of FEMA, 1999. Accordingly, under the said Annexure P3, the Respondent No.2 herein i.e. the Authorised Officer seized 39 immovable properties of Accused/Corporate Debtor, amongst total 49 immovable properties having market value of Rs.138,35,60,746 and 4 Bank Accounts, being movable properties of Accused/Corporate Debtor having balance as on 16.04.2019 of Rs.3,40,23,401/-. As the petitioner was the Liquidator of Accused/Corporate Debtor, he prima facie could not have any jurisdiction even to pray for quashing and/or setting aside whole of the Annexure P-3, which also involved seizure of immovable properties not belonging to the Accused/Corporate Debtor. Annexure-P4 was nothing but notice of personal hearing

before the Competent Authority in compliance to Section 37A (3) of FEMA, 1999 in pursuance to petition under Section 37A (2) of FEMA, 1999. The said Annexure-P4 being in compliance to statutory provision could not be questioned by the petitioner. The writ petition deserved to be dismissed on the ground of suppression of material fact that the proceeding instituted against Accused/Corporate Debtor under FEMA, 1999 vide File No. T-3/Misc./37/ KOL/2016/AD(AKS) dated 15.11.2016 had been culminated into Complaint dated 06.07.2020 for contravention of provision of Sections 3(b), 4, 7 and 8 of FEMA, 1999 read with Regulation 8 and 9 of Foreign Exchange Management (Export) of Goods and Services) Regulations, 2015 r/w Section 4 of FEMA, 1999 which attracted imposition of penalty under Section 13 of FEMA, 1999 when, in turn, the Adjudicating Authority issued Show Cause Notice dated 06.07.2020 in terms of Rule 4(1) of Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 and further fact of pendency of Appeal being No. FPA-PMLA-3332/KOL/2019 together with stay petition No. MP-PMLA-6636/KOL/2019 before the Ld. Appellate Tribunal against Order dated 09.10.2019 passed by the Adjudicating Authority under Section 8 of PMLA, 2002 in Original Complaint No. 1146 of 2019 thereby not confirming the attachment of properties of Accused/Corporate Debtor under PMLA, 2002. On the contrary, in the writ petition, the petitioner mis-stated before this Court that the Central Government was trying to attach the same properties in circuitous way and the respondent no. 2 maliciously sought to do indirectly what he could not achieve directly in the PMLA proceeding. Annexure-P3 to writ petition was nothing but an

intermediate action in order to protect the Interest of Revenue and the aggrieved person had always a right of appeal against the Order passed under Section 37A(3) of the FEMA, 1999 and from the Affidavit-in-Opposition of the respondents and Affidavit-in-Reply of the petitioner, it was evident that against the Order dated 23.05.2023 passed by the Competent Authority under Section 37A(3) of the FEMA, 1999, the petitioner had already preferred an appeal before the Appellate Tribunal under the SAFEMA at New Delhi with the prayer for setting aside of the Order dated 23.05.2023 confirming the Seizure Order dated 30.11.2022 i.e., Annexure P3 herein. The Tribunal vide Order dated 20.09.2023 ordered for maintenance of status quo with regard to properties of Accused/ Corporate Debtor i.e., respondent no. 1 there at. The petitioner failed to substantiate his suppression of facts before this Court and on the contrary, brought on-record the Order dated 20.09.2023 (supra) of the Tribunal, which further established that material facts were suppressed in the writ petition. When the petitioner herein had already availed the statutory opportunity of appeal against the Order dated 23.05.2023 passed by the Competent Authority under Section 37A(3) of the FEMA, 1999 thereby confirming the Order of Seizure dated 30.11.2022, this Court should not entertain the writ petition on merits. Section 43 of the FEMA, 1999 provided that any right/obligation/ liability in a proceeding or appeal arising in relation to the provisions of Section 13 should not abate by reason of death or insolvency of the person liable under that Section and upon such death or insolvency. Such rights and obligations should devolve on the legal representative of such person or the official receiver or the

official assignee, as the case might be. In the present case, proceeding relating to Section 13 of the FEMA, 1999 was pending against Accused/Corporate Debtor under SCN dated 06.07.2022 and as such, the legal representative or official receiver of Accused/Corporate Debtor even in case of insolvency should not be devolved from the rights and obligations arising from that proceeding. It was the case of the petitioner that Annexure P3 could not even be passed in view of Section 33(5) of the Insolvency & Bankruptcy Code, 2016. Section 33(5) of the IBC, 2016 provided that no suit or legal proceeding should be instituted by or against the corporate debtor when a liquidation order had been passed. In the present case, admittedly, Liquidation Order was passed on 14.09.2018 by the NCLT, Kolkata Bench, whereas, the proceeding against Accused/Corporate Debtor under the FEMA, 1999 was initiated on 15.11.2016 i.e., much prior to such order of liquidation and hence, no bar u/s 33(5) of the IBC, 2016 was applicable in the present case. Annexure-P3 issued u/s 37A(1) of the FEMA, 1999 was an intermediate action in the said proceeding under the FEMA, 1999 against the Accused/Corporation Debtor. Section 32A(2) of the IBC, 2016, as referred to on behalf of the petitioner, did not also debar the action of the respondent no. 2 herein in issuing the Annexure-P3 herein. Section 32A(2) ibid was disjunctive in nature with respect to the approved resolution plan and sale of liquidation assets to a person by the word 'or'. With respect to sale of liquidation of assets to a person the provision, thus, provided that no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to commencement of the corporate insolvency

resolution process of the corporate debtor, where such property was covered under a sale of liquidation asset under the provisions of Chapter 3 of Part-II of the IBC to a person who was not a promoter or in the management or control of the corporate debtor or a related party of such person or had not abetted or conspired for the commission of the offence. In other words, unless the 'property' sold to 'a person' as part of 'liquidation assets', bar under Section 32A(2) of the IBC, 2016 cannot come into play. In the present case, admittedly, the petitioner before this Hon'ble Court was the liquidator and not 'a person' to whom there was 'sale' of any 'property' of Accused/Corporate Debtor as part of 'liquidation assets' and the 'action' with respect to such 'property' of Accused/Corporate Debtor had been taken by the respondent no. 2 herein on 30.11.2022 i.e., prior to such 'sale of liquidation assets' 'to a person'. Hence, the action of respondent no. 2 herein could not be held as barred u/s 32A of the IBC, 2016.

4. I heard the learned counsels for the parties and perused the writ petitions, the affidavits and the written notes of submissions.

5. Admittedly, the CIRP for Shree Ganesh commenced on 12.02.2018 pursuant to an order passed by the NCLT at Kolkata under the provisions of the IBC. Section 14 of the IBC prohibits the initiation of suits or continuation of pending suits or proceedings against the corporate debtor following the initiation of CIRP. On 14.09.2018 the NCLT directed that Shree Ganesh should be liquidated. Furthermore, the writ petitioner was appointed as a liquidator. Incidentally, the proceeding against the corporate debtor/accused under the FEMA was initiated on 15.11.2016.

6. The mere fact that the proceeding under the FEMA was initiated in 2016 before Section 14 of the IBC came into operation in 2018 would be irrelevant as Section 14 speaks not only about the initiation, but also about the continuation of pending suits or proceedings.

7. Once an order for liquidation was passed, as in the instant case, Section 33(5) provides that subject to Section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by the liquidator on behalf of the corporate debtor with the prior approval of the Adjudicating Authority.

8. As has rightly been contended on behalf of the petitioner, what was contemplated in a CIRP was the approval of a Resolution Plan. After liquidation order, the corporate debtor might be sold as a going concern or the assets might be sold. Therefore, once CIRP was admitted, the assets on corporate debtor could not be attached. They would be sold in CIRP or in liquidation.

9. Section 32A(2) of the IBC provides for more. According to it, no action will be taken against property of the corporate debtor in relation to any offence committed prior to the commencement of the CIRP.

10. While the PMLA came into force in 2002, the IBC came into existence in 2016. In Ramsarup Industries Limited (supra) and Others, the Hon'ble Supreme Court held that the provisions of the IBC would override the provisions of the FEMA. Therefore, the moratorium under the IBC would override the provisions of the FEMA. Not only was the IBC enacted while the

FEMA was in existence, but Section 238 of the IBC also clearly provided for a non-obstante clause. On the other hand, FEMA did not have such non-obstante clause. In this regard, reliance was placed on behalf of the petitioner on Paschimanchal Viduyt Vitran Nigam Ltd. (supra), Sundaresh Bhatt, Liquidator of ABG Shipyard (supra), Duncans Industries Limited (supra), Innovative Industries Limited (supra), Principal CIT vs. Monet Ispat and Energy Limited (supra) where the IBC was permitted to override the corresponding provisions of the Electricity Act, 2003, the Customs Act, 1962, the Tea Act, 1953, the Maharashtra Relief Undertaking (Special Provisions) Act, 1958 and the Income Tax Act, 1961.

11. In Assistant Director, ED vs. Raj Kumar Ralhan, the NCLT held that moratorium declared under Section 14 of the IBC was applicable to proceedings under the FEMA. The Enforcement Directorate could not proceed against the corporate debtor as long as moratorium under the IBC was in force. If any of the Directors/Officers were individually liable for any actions done prior to the commencement of the CIRP, the applicant might proceed against those Directors/Officers.

12. As was contended on behalf of the petitioners, the issuance of the provisional seizure order was in disregard of the moratorium prescribed in Section 33(5) of the IBC. So was the issuance of the notice. It was further contended that during pendency of the writ petition, the respondent no. 3 on 23.05.2023 confirmed the provisional seizure order. Therefore, the order dated 23.05.2023 was subject to the result of the writ petition. The petitioner has also sought to explain the reason for filing an appeal before the Appellate

Tribunal stating that the same was in view of the applicable limitation period.

13. As has been held by the Hon'ble Apex Court in a catena of decisions, the provisions of the IBC would override the provisions of other Acts like the FEMA. Section 238 is very strongly worded indeed.

14. In view of the proceedings pending under the IBC and the orders passed therein, the impugned provisional seizure order and the impugned notices could not have been issued. Therefore, the impugned notices are quashed. However, a proceeding can fairly be initiated against the erstwhile Director and the Officer of the corporate debtor, if they are found to be individually liable.

15. Accordingly, the writ petition is allowed.

16. Urgent Photostat certified copy of this order, if applied for, be given to the parties, upon completion of requisite formalities.

(Jay Sengupta, J.)