



IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, C-IV

IA-383/2022 IN

CP.(IB)178/MB-IV/2021

Under Section 60(5)
of the I&B Code, 2016

In the matter of:

STCI

...Applicant

V/s

Dsk Southern Projects Private Limited

[CIN: U74900MH2003PTC143364]

...Respondent

Order Dated: 28.04.2023

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant(s) :

Mr. Aniruth Purusothaman, Adv.

For the Respondent(s) :

Mr. M. S. Bhardwaj, Adv.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. The instant Interlocutory Application is being filed by the Applicant, the Mr. Manoj Kumar Agarwal, the then Resolution Professional of M/s DSK Southern Projects Private Limited, the Corporate Debtor. The Applicant submits that CIRP in this case commenced on 09.12.2021 and the Resolution



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Plan in case of said Corporate Debtor was approved under Section 31(1) of the Insolvency and Bankruptcy Code, 2016 by Mumbai Bench of NCLT vide its order dated 17.02.2023.

2. The Applicant has filed this Application seeking appropriate directions against the Respondent i.e. The Deputy Director, Directorate of Enforcement, Mumbai for the release of the property of the Corporate Debtor aggregating to a value of Rs. 32,47,55,298 (Rupees Thirty-Two Crores Forty Seven Lakhs Fifty Five Thousand Two Hundred and Ninety Eight only) seized by the Respondent herein named vide surmises of provisional attachment Order (PAO) No. 2019 in File No. ECIR NO. 01/MBZO-II/2018 dated 14.02.2019.
3. The Applicant submits that the Respondent herein-named is a Law Enforcement Agency/Statutory Authority formed under the provisions of the Foreign Exchange Regulation Act. 1947, and has passed a Provisional Attachment Order no. 01/2019 in file no. ECIR No. 01/MBZO-11/2018 dated 14.02.2019 and vide the surmises of the same, has seized and attached the immovable and movable property of the Corporate Debtor having an aggregate value of Rs.32,51,10,596/- (Rupees Thirty-Two Crores Fifty-One Lakhs Ten Thousand Five Hundred Ninety-Six only).
 - 3.1. The Applicant had sent a letter dated 21.12.2021 to the Respondent stating that the Provisional Attachment of the assets of the Corporate Debtor under CIRP is in gross violation of the provisions of the Code



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which are binding on all stakeholders including statutory authorities. The Applicant further submitted that vide order dated 09.12.2021 there is moratorium imposed under section 14 of the Code which shall continue during CIRP inter alia prohibiting "transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein". Therefore, from the commencement of CIRP initiation, the property of the Corporate Debtor is protected by such moratorium. Furthermore, the Applicant has also informed the Respondent that from the day of passing of the CIRP Order, the powers of the Board of Director stand suspended and all the powers of the said Board of Directors are now vested with the Applicant. Furthermore, the Applicant vide the said letter had also requested the Respondent to provide the Applicant with Information and Documents regarding the Corporate Debtors such as bank statements, property deeds inter-alia. However, the Respondent has neither complied with the letter of the Applicant and released the attached property of the Corporate Debtor, nor has it replied to the same, thereby sufficiently clarifying that the Respondent has attempted to supersede the Jurisdiction of this Hon'ble Tribunal.

3.2. The said act of subsisting and continued attachment of the asset (movable/ immovable property) of the Corporate Debtor is in constant violation of Sections 14, 18, 20 and 32(A) of the Insolvency and



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Bankruptcy Code and against the letter and the spirit of the precedent laid down by the Hon'ble National Company Law Tribunal in the matter of **The Directorate of Enforcement V/s. Shri. Manoj Kumar Agarwal {Company Appeal (At)(Insolvency) No.575/2019}**, wherein it was held at para 42 that “*In our view, there is no conflict between PMLA and Insolvency and Bankruptcy Code,2016 and even if a property has been attached in the PMLA which is belonging to the Corporate Debtor, if CIRP is initiated, the property should become available to fulfil objects of Insolvency and Bankruptcy Code,2016 till a resolution takes place or sale of liquidation asset occurs in terms of Section 32A*”.

4. This Bench heard the Counsel(s) for the Applicant as well as Respondent and perused the material available on record.

4.1. This Bench notices that Insolvency and Bankruptcy Code,2016 was amended w.e.f. 28.12.2019 inserting therein Section 32A which provides here as under –

“32A. *Liability for prior offences, etc.—*

(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not--

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or



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(b) 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:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013 (18 of 2013), or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section.

(2) No action shall be taken against the property of the corporate debtor in relation to an 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 a 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 purposes of this sub-section, it is hereby clarified that,-

(i) an action against the property of the 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



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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.

(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.”

4.2. This Bench finds that the provisional order attaching the properties of the Corporate Debtor, subject matter of present application, came to be passed on 14.02.2019 and the Corporate Debtor was admitted to Corporate Insolvency Resolution Process under Section 9 of the Insolvency and Bankruptcy Code, 2016 from 21.12.2021 and the Corporate Debtor was resolved pursuant to order of this Bench dated 17.02.2023. The Hon'ble NCLAT in its order in the matter of **The Directorate of Enforcement V/s. Shri. Manoj Kumar Agarwal** (supra) has held that the Enforcement Directorate cannot hold or encumber the property of Corporate Debtor upon commencement of CIRP in its case. This the Hon'ble Apex Court in the matter of *Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531 held that “hydra head popping up” should be prevented and emphasized that the prospective resolution



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Applicant, who successfully takes over the business of the Corporate Debtor, should be protected from any past claim from resurging and thereby throwing the resolution applicant into uncertainty. This prompted the legislation to insert Section 32A in the Code.

4.3. This Bench held at para 17(e) of the order dated 17.02.2023 that “In so far as attachment of Corporate Debtor assets by the Enforcement Directorate is concerned, these assets are protected by the provisions contained u/s 32A (1) & 32A (2) of the Code, which provides for immunity to such assets and offence(s) after the resolution of Corporate Debtor provided such assets have been acquired prior to commencement of Corporate Insolvency Resolution Process. Accordingly, the Enforcement Directorate shall release the attachment on such assets, which have been acquired prior to commencement of Corporate Insolvency Resolution Process. The Enforcement Directorate shall also discharge the Corporate Debtor from the offences alleged to have been commissioned prior to commencement of Corporate Insolvency Resolution Process”.

4.4. The aforesaid directions at para 17(e) of the order dated 17.02.2023 were given in view of specific mandate contained in the Section 32A(2) of the Insolvency and Bankruptcy Code, 2016 which provided immunity to the properties of the Corporate Debtor forming part of Resolution Plan approved under 31 of Insolvency and Bankruptcy Code, 2016BC from



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any action by any Authority. Accordingly, we hold that the attachment of assets of Corporate Debtor consisting of bank accounts aggregating to a total of Rs. 3,55,298/- and subject flats/resolution units aggregating to a total of Rs. 324755298/- under provisional attachment Order (PAO) No. 2019 in File No. ECIR NO. 01/MBZO-II/2018 dated 14.02.2019, as forming a part order dated 05.08.2019 in original complaint (O.C.) No.1104 of 2019 cannot continue after admission of Corporate Debtor into CIRP i.e. 21.12.2021. Further, it is held the Respondents shall release the assets of the Corporate Debtor forthwith in terms of Section 32A of the Insolvency and Bankruptcy Code,2016 as such assets are covered under Resolution Plan approved by this Bench under Section 31 of the Insolvency and Bankruptcy Code,2016 vide order dated 17.02.2023.

4.5. In view of above the IA-383/2022 is **allowed** with consequential relief.

Sd/-

Prabhat Kumar
Member (Technical)

SVR/28.04.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)